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COMPRISING ALL THE CURRENT DECISIONS OF THE
SUPREME AND APPELLATE COURTS OF ARKANSAS
KENTUCKY, MISSOURI, TENNESSEE
AND TEXAS

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHWESTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

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CHAPTER IV

THE CITY OF BOSTON

The city of Boston, situated on the eastern shore of Massachusetts Bay, is one of the most important and most populous cities in the United States. It is the seat of government for the Commonwealth of Massachusetts, and is the center of commerce and industry for the entire New England region.

The city is bounded on the north by the city of Cambridge, on the east by the city of Roxbury, and on the south by the city of Dorchester. It is situated on a peninsula, with the harbor of Boston to the east and the city of Cambridge to the north.

The city is divided into several wards, each of which is governed by a ward committee. The wards are: North, South, East, West, and Center. The city is also divided into several districts, each of which is governed by a district committee.

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THE SOUTHWESTERN REPORTER VOLUME 184

GATTON v. FISCAL COURT OF DAVIESS COUNTY et al.

(Court of Appeals of Kentucky. March 24, 1916.)

1. CONSTITUTIONAL LAW §12 — COUNTIES §151 — STATUTES §230 — HIGHWAY BONDS—CONSTRUCTION.

Const. § 157, limits the tax rate for counties and taxing districts to 50 cents on the \$100, and declares that no county shall become indebted for any purpose to an amount exceeding its income and revenue for that year without the assent of two-thirds of the voters voting at an election to be held for that purpose. Section 157a authorizes the pledging of the credit of the commonwealth to any county for public road purposes, and authorizes counties to incur an indebtedness not in excess of 5 per cent. of the value of the taxable property therein for such purposes, provided the indebtedness is submitted to the voters for their ratification in such manner as provided for by law, and that when such indebtedness is incurred, the county may levy an amount not exceeding 20 cents on the \$100 in addition to the rate allowed by section 157. Section 158 limits the indebtedness of counties to 2 per cent. of the value of the taxable property. Section 157a was an amendment to the Constitution adopted in 1909, 18 years after the adoption of the Constitution. *Held*, that as an amendment to a constitution or statute is not to be construed as if it had been part of the original, but as having the same effect as a codicil to a will, section 157 of the Constitution requiring ratification by two-thirds of the electors of a county to the incurring of indebtedness, has no application to the incurring of indebtedness for road purposes under section 157a, such section clearly not requiring more than a majority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. §12; Counties, Cent. Dig. §§ 166, 218; Dec. Dig. §151; Statutes, Cent. Dig. § 311; Dec. Dig. §230.]

2. ELECTIONS §237—RESULT—APPROVAL BY MAJORITY.

In the absence of some statutory requirement to the contrary, the result of an election is determined by the majority of the electors.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 210-215; Dec. Dig. §237.]

Turner, J., dissenting.

Appeal from Circuit Court, Daviess County.

Suit by Henry Gatton, suing for himself and others, against the Fiscal Court of Daviess County and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Albert B. Oberst, of Owensboro, for appellant. James J. Sweeney, H. A. Birkhead, and W. P. Sandidge, all of Owensboro, for appellees.

MILLER, C. J. A special election was regularly called, and held in Daviess county on June 22, 1915, upon a proposition to issue bonds of the par value of \$600,000, for the purpose of building roads and bridges, in that county. The election commissioners canvassed the vote and reported to the county court that 4,373 votes were cast for the proposition, and 2,445 against it. It will thus be seen that the proposition to issue bonds obtained the assent of a majority, but not of two-thirds of the electors who voted at said election. Conceiving that under the Constitution and the laws of the state of Kentucky it required the consent of two-thirds of the participating voters to carry the bond proposition, the appellant, Gatton, acting for himself and on behalf of the other taxpayers of Daviess county, filed this suit on December 30, 1915, against the fiscal court of Daviess county and its individual members, seeking to enjoin them from issuing bonds pursuant to the election. It is conceded by all parties that all the necessary preliminary steps relating to the calling and holding the election, canvassing and reporting the result thereof, were regular, and satisfied the statute in every respect, and that the only question for decision relates to the proportion of the total vote cast that is necessary to authorize the issuance of bonds for road purposes; the plaintiff contending that it required a two-thirds vote, while the defendants insist that the majority vote obtained was sufficient. The circuit court accepted the view of the defendants, and dismissed the petition and from that ruling the plaintiff appeals.

The determination of this controversy depends upon the interpretation that is to be placed upon section 157a of the Constitution, when read in connection with sections 157 and 158 of that instrument. Those three sections read as follows:

"157. The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz.: For all towns or cities having a population of fifteen thousand or more, one dollar and fifty cents on the hundred dollars; for all towns or cities having less than fifteen thousand and not less than ten thousand, one dollar on the hundred dollars; for all towns or cities having less than ten thousand, seventy-five cents on the hundred dollars; and for counties and taxing districts, fifty

cents on the hundred dollars; unless it should be necessary to enable such city, town, county, or taxing district to pay the interest on, and provide a sinking fund for the extinction of indebtedness contracted before the adoption of this Constitution. No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same.

"157a. The credit of the commonwealth may be given, pledged or loaned to any county of the commonwealth for public road purposes, and any county may be permitted to incur an indebtedness in any amount fixed by the county, not in excess of five per centum of the value of the taxable property therein, for public road purposes in said county, provided said additional indebtedness is submitted to the voters of the county for their ratification or rejection at a special election held for said purpose, in such manner as may be provided by law and when any such indebtedness is incurred by any county said county may levy, in addition to the tax rate allowed under section 157 of the Constitution of Kentucky, an amount not exceeding twenty cents on the one hundred dollars of the assessed valuation of said county for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of said indebtedness.

"158. The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.: Cities of the first and second classes, and of the third class having a population exceeding fifteen thousand, ten per centum; cities of the third class having a population of less than fifteen thousand, and cities and towns of the fourth class, five per centum; cities and towns of the fifth and sixth classes, three per centum; and counties, taxing districts and other municipalities, two per centum: Provided, any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution: And provided further, if, at the time of the adoption of this Constitution, the aggregate indebtedness, bonded or floating, of any city, town, county, taxing district or other municipality, including that which it has been or may be authorized to contract as herein provided, shall exceed the limit herein prescribed, then no such city or town shall be authorized or permitted to increase its indebtedness in an amount exceeding two per centum, and no such county, taxing district or other municipality, in an amount exceeding one per centum, in the aggregate upon the value of the taxable property therein, to be ascertained as herein provided, until the aggregate of its indebtedness shall have been reduced below the limit herein fixed, and thereafter it shall not exceed the limit, unless in case of emergency, the public health or safety should so require. Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating

indebtedness of any city, town, county, taxing district or other municipality."

Sections 157 and 158, supra, were parts of the present Constitution of Kentucky, adopted in 1891; while section 157a is an amendment to the Constitution, and was adopted by the people in 1909. Previous to this amendment, the maximum indebtedness which any county could incur for all purposes was limited, by section 158 of the Constitution, to an aggregate sum not exceeding 2 per cent. of the assessed value of the property in the county; and by section 157, supra, it was further provided that the tax rate of a county, to be levied for all purposes other than school purposes, should not, at any time, except to pay pre-existing debts, exceed 50 cents on each \$100 of the assessed value of the property in the county; and no county had authority to become indebted, in any manner or for any purpose, in excess of the income and revenue for the year, "without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose"; and, any indebtedness contracted in violation of section 157, should be void.

[1] So, to state it briefly, the tax rate of a county, except for school purposes, was limited to 50 cents on each \$100 of taxable property; and the indebtedness of a county for any year was limited to its income for that year, unless two-thirds of the participating voters thereof should consent to exceed the prescribed limit. And the extent of the possible indebtedness of a county was further restricted to 2 per centum of its taxable property.

It was found from experience, however, that these constitutional restrictions prevented many counties in the state from constructing and maintaining adequate roads, because of the difficulty encountered in obtaining the assent of two-thirds of the electors voting upon that proposition. Furthermore, it may fairly be inferred from the adoption of section 157a that the public had, from nearly 20 years' experience, reached the conclusion that the construction of public roads in the state was manifestly of so great and urgent importance as to place an indebtedness created for that purpose upon a footing different from ordinary debts, created and restricted under sections 157 and 158 of the Constitution.

Appellant contends, however, that section 157a should be considered merely as an amendment to section 157, and read in connection with it, and that, when so read, the limitation of section 157, requiring a two-thirds vote should be applied to section 157a, because section 157a makes no express attempt to change that feature of section 157. Evidently, however, in adopting section 157a, the people intended to make more than minor changes concerning the creation of debts for road purposes. Section 157a is radical

in its nature. By contrasting section 157 with section 157a, it will be noticed: (1) That the latter section contains the new provision that the credit of the commonwealth may be given, pledged, or loaned to the counties of the commonwealth for public road purposes; (2) that the amount of indebtedness which any county was permitted to incur was raised from 2 per centum upon the taxable property of the county as provided by section 158, to 5 per centum of the value of the taxable property of the county; (3) that instead of requiring an indebtedness of that amount to be authorized by a vote of two-thirds of the electors of the county voting on the question at a general election, section 157a provides that such additional indebtedness may be incurred when it was submitted to the "voters of the county" for their ratification or rejection; (4) at a special election held for that purpose, in such manner as may be provided by law; and (5) that when the assent of the voters of the county was so obtained, the county might levy, "in addition to the tax rate allowed under section 157 of the Constitution," an amount not exceeding 20 cents on the \$100 of the assessed valuation of the property of the county. These constitute radical changes, widely departing from the scheme provided by sections 157 and 158 of the Constitution. The rule for construing constitutional amendments is stated in 8 Cyc. 749, as follows:

"Amendments to Constitutions or statutes are not regarded as if they had been parts of the original instruments, but are considered rather in the nature of codicils or second instruments, altering or rescinding the originals to the extent to which they are in conflict, and of course are to be treated as having a force superior to the originals to the extent of such conflict. If a constitutional amendment does not, in terms, expressly repeal a constitutional provision, yet if it covers the same subject provided for in such provision, the amendment will be regarded as a substitute for it and as suspending it; and the same rule applies to statutes."

Applying this rule of construction to the case before us, we must give to section 157a a superior force wherever it conflicts with section 157 of the Constitution. This result necessarily follows, since the purpose in adopting the amendment was to change the original instrument, and the changes intended are shown by the conflicting provisions between the old and the new constitutional provisions. This idea was aptly expressed by this court in the following extract from the opinion in *Mitchell v. Knox County Fiscal Court*, 165 Ky. 550, 177 S. W. 279:

"It is further insisted, however, that the levy and donation of this tax to the counties for public road purposes violates that portion of section 177 of the Constitution which forbids the commonwealth from constructing a railroad or other highway. This objection overlooks the amendment to the Constitution (section 157a), which expressly permits the commonwealth to give its credit and resources to its counties in aid of their public roads, even though it should be conceded, for the sake of the argument, that the acts of the state, in this respect, amount to the

construction of a highway. Section 157a, being an amendment to the Constitution, necessarily annuls any and all former provisions of that instrument which conflict with it; and since it permits the state to give its aid to the building of county roads, it cannot be said to violate section 177, which was intended to be changed in this respect."

And, in the later case of *Bowman v. Fayette County*, 168 Ky. 529, 182 S. W. 633, we further said:

"The manner provided by the legislative authority to carry into effect the provisions of section 157a, supra, is section 4307, Kentucky Statutes, Carroll, 1915, and the requirements of this section seem to have been literally followed by the people and officials of Fayette county in obtaining the authority to incur the proposed indebtedness, and to issue and sell the bonds sought to be enjoined. Section 4307, supra, provides for the holding of an election 'on some day named in said petition not earlier than sixty days after said application is lodged with the judge of said court.' It further provides that at said election every legal voter of the county shall be authorized to vote. It will be observed that neither the constitutional provision nor the statute adopted to carry into effect its provisions requires more than a majority of those voting at the election to give their assent in order to authorize the indebtedness to be incurred."

Constitutional amendments being in the nature of codicils to wills, or second instruments, their sole purpose is to change the instrument they attempt to amend; otherwise there would be no reason for the amendment. We must therefore look to the language of section 157a for its meaning on every subject of which it treats. The text of section 157 being explicit in requiring the assent of two-thirds of the voters in creating an indebtedness for any purpose, how can it be said that the text of section 157a is any less explicit when it provides that an indebtedness for public road purposes may be created upon its submission to and approval by "the voters of the county"? So, the question recurs: May the assent of the voters of the county be expressed by a majority of such voters, or is a greater proportion required?

[2] It is an elementary proposition in American law that, in the absence of some statutory requirement to the contrary, the result of an election is determined by a majority of the electors. In most states, where there are more than two candidates, a plurality of votes is sufficient to elect, in the absence of some constitutional requirement upon the subject. When, therefore, section 157a made at least four other radical changes, when compared with section 157, we see no reason to assume that the language providing for the assent of the voters was not also intentionally changed in its application to the subject of public roads. To hold otherwise, we would have to assume that it was not intended to give to the words there used their ordinary and legal significance. We are clearly of the opinion, therefore, that under section 157a of the Constitution an indebtedness for public road purposes may be authorized by a majority of the voters of the

county who participate in an election upon that question.

Judgment affirmed; the whole court sitting.

TURNER, J., dissenting.

CLEARY, County Judge, et al. v. PIEPER.
(Court of Appeals of Kentucky. March 24, 1918.)

1. COUNTIES \S 151—BONDS—ELECTION.

Under Const. \S 157a, an indebtedness for road purposes may be created by a majority of the voters of a county who participate in an election on that subject.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 166, 218; Dec. Dig. \S 151.]

2. HIGHWAYS \S 125—TAXATION—LIMIT.

As Const. \S 157a, authorizes for road taxes a levy not exceeding 20 cents on each \$100, Ky. St. \S 4308, authorizing a levy of 30 cents, is invalid in so far as it authorizes a levy in excess of the Constitution, though it is valid in so far as the 20-cent levy is authorized.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 382; Dec. Dig. \S 125.]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Fred Pieper for writ of mandamus against Walter Cleary, County Judge, and the Fiscal Court of Kenton County. From a judgment for plaintiff, respondents appeal. Reversed, with directions.

F. J. Hanlon, of Covington, for appellants. S. D. Rouse, R. C. Simmons, and H. B. Mackoy, all of Covington, for appellees.

MILLER, C. J. At a special election held November 3, 1914, in Kenton county, upon a proposition to issue county bonds of the par value of \$150,000, for the purpose of building roads and bridges, there were 5,204 votes for the proposition, and 3,527 against it. While the proposition secured a majority of the votes cast at the election, it did not secure two-thirds of them. On March 6, 1916, the appellee Fred Pieper, filed this action against Cleary, the county judge, and the fiscal court of Kenton county, seeking to compel the appellants, by mandamus, to issue the bonds which he claimed they were authorized to issue by virtue of the election. The circuit court granted the relief asked, and the defendants appeal.

[1] We considered the question here presented at some length in the case of Gatton v. Fiscal Court of Daviess County, this day decided and reported in 169 Ky. 425, 184 S. W. 1, wherein we held that under section 157a of the Constitution an indebtedness for public road purposes may be created by a majority of the voters of the county who participate in the election upon that question. It follows, therefore, that the fiscal court of Kenton County was authorized, by the election, to issue the bonds in question.

[2] 2. In entering its judgment, however,

the circuit court went too far when it required the fiscal court to levy a tax of 30 cents on each \$100 of taxable property in the county, to pay the interest and principal of the bonds which they had been directed to issue. While it is true that section 4308 of the Kentucky Statutes attempts to authorize a levy of 30 cents on each \$100 of taxable property for the purpose of paying the interest and principal of county road bonds, it is clear that this statute violates section 157a of the Constitution to the extent that it authorizes any levy exceeding 20 cents on each \$100 of taxable property, for the purposes indicated. It was so expressly decided in Mitchell v. Knox County Fiscal Court, 165 Ky. 543, 177 S. W. 279. Section 4308 is a valid statute, however, to the extent that it authorizes a levy for the purposes indicated to an amount not exceeding 20 cents on each \$100 of taxable property in the county.

For this error, the judgment is reversed for further proceedings consistent with this opinion.

ARMSTRONG v. FISCAL COURT OF CARTER COUNTY.

(Court of Appeals of Kentucky. March 24, 1918.)

COUNTIES \S 151—BONDS—ISSUANCE.

Under Const. \S 157a, highway bonds may be issued and ratified by a majority of those voting at an election for issuance.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 166, 218; Dec. Dig. \S 151.]

Appeal from Circuit Court, Carter County.

Action by George W. Armstrong against the Fiscal Court of Carter County. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 162 Ky. 564, 172 S. W. 972.

Theobald & Theobald, of Grayson, for appellant. Thos. S. Yates, of Grayson, for appellee.

MILLER, C. J. At an election held in Carter county, on April 17, 1915, upon a proposition to issue county bonds of the par value of \$150,000, for the purpose of building public roads and bridges, there were 1,631 votes for the proposition and 1,284 votes against it. All the preliminary proceedings, including the canvass of the vote and the certification of the result by the county election commissioners, were regular. On March 9, 1916, this suit was filed by George W. Armstrong against the fiscal court of Carter county and the members thereof, seeking to enjoin the fiscal court from issuing the bonds pursuant to the election. Appellant's contention is that since the proposition did not receive the assent of two-thirds of the voters who participated in the election, the fiscal court was without authority, under

section 157a of the Constitution, to issue the bonds in question. The court dismissed Armstrong's petition, and he appeals. This court has, however, this day decided this precise question contrary to the contention of the appellant Armstrong, in the case of Gatton v. Fiscal Court of Daviess County, 169 Ky. 425, 184 S. W. 1. Under the showing made by this record, the fiscal court of Carter county was fully authorized to issue the bonds in question.

Judgment affirmed.

HAMILTON NAT. BANK v. AMSTER et al. (Supreme Court of Tennessee. March 14, 1916.)

1. STATUTES \Leftrightarrow 113(3)—SUBJECTS AND TITLES OF ACTS—CONSTITUTIONAL RESTRICTIONS.

Pub. Acts 1905, c. 480, entitled "An act to provide for the organization, admission and regulation of fraternal beneficiary associations, transacting the business of life insurance and to repeal all laws in conflict with the provisions of this act," does not violate Const. art. 2, § 17, which provides that, "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title," since the subject of the act is single, providing for "fraternal beneficiary associations transacting the business of life insurance" and the words, "organization, admission or regulation" used in the title, do not express the object, but are provisions incidental to the single object and the means necessary to be incorporated into the body of the act in order to effectuate the single object expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 144; Dec. Dig. \Leftrightarrow 113(3).]

2. CONSTITUTIONAL LAW \Leftrightarrow 205(6), 296(1)—INSURANCE \Leftrightarrow 689—DISCRIMINATION—DISCRIMINATION AGAINST PARTICULAR CLASSES OF CORPORATIONS.

Pub. Acts 1905, c. 480, § 12, provides that benefits to be paid by any association organized under the act shall not be liable to attachment or other process, and shall not be applied by any legal or equitable process or operation of law, for any liability of a certificate holder or beneficiary, and that such associations are declared to be charitable institutions, and all lodge property and funds are exempt from taxation. Const. art. 1, § 8, provides that no man shall be deprived of life, liberty, or property but by the judgment of his peers or the law of the land. Const. art. 11, § 8, provides that the Legislature shall have no power to suspend general laws or by any law grant exemptions or privileges to any individual which are not extended to any person able to bring himself within its provisions, and that corporations shall be created only by general laws. Held, that this section is not unconstitutional as arbitrary, unreasonable, or capricious in discriminating in favor of certificate holders under this act by conferring privileges not accorded to certificate holders of other beneficiary associations and ordinary life companies, since the associations provided for under the act are declared to be charitable institutions, as the law applies to all associations of this kind, and since contracts of insurance are sufficiently distinctive in character to bear a classification separating them from other contracts and as between themselves, it not being necessary for the reason for classification to be disclosed on the face of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-829, 836-838, 840-846; Dec. Dig. \Leftrightarrow 205(6), 296(1); Insurance, Cent. Dig. § 1827; Dec. Dig. \Leftrightarrow 689.]

3. CONSTITUTIONAL LAW \Leftrightarrow 205(6), 296(1)—CLASS LEGISLATION—DISCRIMINATION AGAINST PARTICULAR CLASSES OF CORPORATIONS.

Such provision is not unconstitutional as class legislation in discriminating in favor of associations falling under provisions of the act by permitting them to offer advantages to members which are denied to ordinary life companies, as it is a general act, and all of the rights, privileges, immunities, or exemptions allowed by it may be enjoyed by any ordinary life company which shall organize under the act and comply with its terms.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-829, 836-838, 840-846; Dec. Dig. \Leftrightarrow 205(6), 296(1).]

4. EXEMPTIONS \Leftrightarrow 3—PUBLIC POLICY—FRATERNAL BENEFIT ASSOCIATIONS—CREDITORS.

It is within the power of the Legislature to exempt the property of a fraternal beneficiary association from the claims of creditors of its policy holders or beneficiaries on the ground of public policy.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 2, 3; Dec. Dig. \Leftrightarrow 3.]

5. CONSTITUTIONAL LAW \Leftrightarrow 208(13)—SPECIAL PRIVILEGES—DISCRIMINATION AGAINST PARTICULAR CLASSES OF CORPORATIONS.

Such provision is not unconstitutional as discriminating against other associations of the same class; as it grants the same privileges to all associations falling within the terms of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 664; Dec. Dig. \Leftrightarrow 208(13).]

6. CONSTITUTIONAL LAW \Leftrightarrow 208(13)—INSURANCE \Leftrightarrow 689—CLASS LEGISLATION—DISCRIMINATION AGAINST PARTICULAR CLASSES OF CORPORATIONS.

Pub. Acts 1905, c. 480, § 32, provides in part that nothing contained therein shall be construed to affect local lodges of an association then doing business in the state, with death benefit not exceeding \$300 or disability benefit not exceeding \$300 in any one year or both. Const. art. 1, § 8, provides that no man shall be deprived of life, liberty, or property by the judgment of his peers or the law of the land. Const. art. 11, § 8, provides that the Legislature shall have no power to suspend general laws or by any law grant exemption of privileges to any individual which are not extended to any person able to bring himself within its provisions, and that corporations shall be created only by general laws. Held, that this section is not unconstitutional as arbitrary, unreasonable, or capricious, since, in view of the limited amount of business done by such associations, it was a proper exercise of the legislative power to classify so as to free them from the obligations of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 664; Dec. Dig. \Leftrightarrow 208(13); Insurance, Cent. Dig. § 1827; Dec. Dig. \Leftrightarrow 689.]

Appeal from Chancery Court, Hamilton County; W. L. Frierson, Special Chancellor.

Suit by the Hamilton National Bank against Sam Amster and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Meacham & McGaughy, of Chattanooga, for appellant. Sizer, Chambliss & Chambliss and J. L. Levine, all of Chattanooga, for appellees.

BUCHANAN, J. On December 17, 1914, the bank filed its original bill against Sam Amster and the Supreme Council of the Royal Arcanum. The bill averred that the last-named defendant was "a fraternal insurance corporation organized under the laws of the state of Massachusetts," and that it had "complied with the laws of Tennessee, and had been admitted to do the business of fraternal insurance in this state," etc.

The purpose of the bill was to subject a fund amounting to \$2,300.50 averred to be in the hands of Amster's codefendant to the payment of a money decree in favor of the bank against Amster, rendered by the chancery court of Hamilton county in July, 1914, and affirmed on appeal to this court at its Knoxville term, 1914.

The predicate for the relief sought is that Amster is insolvent, and determined to collect the fund from his codefendant, and thereafter to appropriate the same to his own use, leaving the bank without remedy under its decree; that Amster's codefendant will co-operate with him to such end; that defendants rely on section 12 of chapter 480 of the Public Acts of 1905. This act the bill assails as unconstitutional and void, on grounds to be considered later.

Each of defendants demurred separately, but on identical grounds, and the learned chancellor sustained the demurrer and dismissed the bill at complainant's cost, and the latter has appealed to this court and assigned errors.

The controlling question is the validity of the act of 1905. Subsequent to the appeal the bank caused an execution to issue from this court, based on the decree in its favor against Sam Amster. This execution was directed to the sheriff of Hamilton county, where Amster resided. After a nulla bona return on this execution another was issued directed to the sheriff of Davidson county, which was served by garnishment of Amster's codefendant. This service was made upon the insurance commissioner. The garnishee filed its answer in this court on August 4, 1915. Upon motion of the bank its appeal and the garnishment proceeding have been consolidated for hearing, and will be disposed of as one cause, the two matters depending, at least in part, on a common question.

[1] The first assault on the act is that it violates that part of section 17, art. 2, of the Constitution, which provides:

"No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The title of the act is:

"An act to provide for the organization, admission, and regulation of fraternal beneficiary associations transacting the business of life insurance; and to repeal all laws in conflict with the provisions of this act."

The subject of this act is single. It is expressed in the title, and it is expressed in the body of the act. It is the single subject

of the body of the act, and it is "to provide for fraternal beneficiary associations, transacting the business of life insurance." The words "organization, admission, and regulation," as used in the title of the act, do not express the single dominant object of the act, and provisions in the body of the act for "organization," for "admission," and for "regulation" are not provisions for separate purposes, but they are on the contrary provisions incidental to the single object of the act. They are agencies, means, and instrumentalities necessary to be incorporated into the body of the act in order to effectuate the single object expressed in the title, and expressed in the body of the act when both the title and the body are correctly read and understood.

As the title to the act indicates, there are to be found in the body of the act provisions for the organization of such associations as are to fall under the operation of the act; also there are found in the body of the act provisions for admission to the operation of the act of such associations as fall under its operation, and these include both domestic and foreign associations. See closing sentence of section 37 of the act. As indicated by the caption, there are also provisions in the body of the act for the regulation of such associations as fall under its operation; but, as already pointed out, all these provisions are merely incidental to the general object of the act. They are each and all clearly germane to the general object, and therefore, in so far as they relate either to section 12 of the act or to section 32 of the act, the insistence that they are not germane to the general object of the act is unsound, and must be rejected.

[2] We now pass to the question of classification. Section 12 of the act is as follows:

"Be it further enacted, that the money or other benefits, charity, relief, or aid to be paid, provided, or rendered by any association authorized to do business under this act, shall neither before nor after being paid, be liable to attachment, garnishment, or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or of any person who may have any right thereunder; such associations are hereby declared to be charitable institutions, and the property held and used for lodge purposes and the funds of such associations shall be exempt from taxation under the general tax or revenue laws of the state."

One insistence made is that section 12 violates section 8 of article 1 and section 8 of article 11 of our state Constitution, in that the classification made by section 12 is arbitrary, unreasonable, and capricious. For specification it is said that this section discriminates in favor of the certificate holders and beneficiaries falling under the operation of the act by conferring on them privileges which are not accorded the holders of certificates or policies of other associations of a similar character, viz., ordinary life compa-

nies and other beneficial associations. Replying to this assault in detail, we will discuss section 12 in respect of its relation to ordinary life companies.

We find in the latter part of section 12 the legislative declaration that such associations as fall under the operation of the act are charitable institutions, and their lodge property and funds are by express words made exempt from taxation under the general revenue law of the state. This provision demonstrates the width of the gulf in the legislative mind between such associations as the Legislature intended to fall under the operation of this act and ordinary life insurance companies. And here is the explanation of the exemption from liability under "attachment, garnishment, or other process," legal or equitable, to pay any debt or liability of a certificate holder, or of a beneficiary named in a certificate, or of any person who may have any right thereunder, which provisions are to be found in the first part of section 12. The General Assembly, in enacting the provisions of section 12, understood that it was dealing with charitable associations, and, as already noted, expressly so declares in that section, and indeed this fact stands out on the face of the entire act. One illustration of it may be found in the definition of a fraternal beneficiary association in section 1 of the act, supplemented by sections 2 and 3. Another illustration is in section 4, which cleaves a clear line between associations falling under the operation of the act and "all provisions of the insurance laws of this state, not only in governmental relations with the state but for every other purpose," and this section closes with the emphatic declaration, "and no law hereafter passed shall apply to them [meaning fraternal benefit associations], unless they be expressly designated therein." Another illustration of the clear distinction drawn in the legislative mind between associations falling under the operation of this act and ordinary life companies may be found in section 6 of the act, which shows the narrow limits to which death benefits are confined, and in section 7, which discloses the limitations on beneficial membership imposed by that section on associations falling within the operation of the act. The legislative department of the state in the passage of this act was dealing with any corporation, society, or order, or voluntary association without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provisions for the payment of death benefits, and which may make provisions for the payment of disability benefits, or both (see section 1 of the act), and such associations as it was dealing with in the passage of this act were confined in their ac-

tivities by sections 6 and 7 of the act. Death benefits under section 6 are confined to the wife, husband, family, relatives by blood, marriage, or legal adoption, affianced husband, or affianced wife, or to any person or persons dependent on the member, subject to the limitation and control of the association as to the designation of beneficiaries within said classes. Under section 7 the activities of such associations were confined to the admission to beneficial membership of persons more than 16 and under 60 years of age, etc.

What has been said suffices to show the class of fraternal beneficiary associations which the lawmakers intended to fall within the operation of this act. Now, it is manifest that many points of difference exist between the business of life insurance transacted by such associations and the business of life insurance conducted by ordinary life insurance companies. It is unnecessary to undertake to enumerate these points of difference. Perhaps the fundamental one is the motive which underlies each business. Charity is the underlying motive of the association covered by the provisions of this act. Such an association enters into the business of life insurance to the end that it may dispense a charity. It has no capital stock, and does no business for profit. Its form of government and system of conducting its business are as stated *supra*. On the other hand, the underlying motive in the business of ordinary life insurance is not charity at all, but profit. It is moved to enter into the business of life insurance by a wholly different consideration. Our legislation prior to the act in question has recognized the difference. This court, and other courts of last resort, have long been in agreement upon the point that contracts of insurance are proper subjects of classification in matters of legislation. Such contracts are sufficiently distinctive in character to bear a classification separating them from other contracts; and, more than this, they are sufficiently distinctive in character to bear a classification as between themselves. *Insurance Co. v. Whitaker*, 112 Tenn. (4 Cates) 155, and cases cited at page 173, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916; *Farmers' & Merchants' Insurance Co. v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821; *State v. Webber*, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983; *Brown v. Balfour*, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373; *Lodge v. Johnson*, 98 Tex. 1, 81 S. W. 18; *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383. In our own case of *Insurance Co. v. Whitaker*, *supra*, it was said that:

"The rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other."

In *Brown v. Balfour*, *supra*, the Supreme Court of Minnesota construed a statute which

provided that a benefit by a fraternal beneficiary association should be exempt from execution, and under no circumstance seized, taken, or appropriated by any legal process to pay any debt of such deceased member. The court held the fund to be exempt from appropriation or seizure by a creditor of the beneficiary as well as of the member, saying:

"From the language used in the statute under consideration it is not only evident that the law-makers took special care to protect the fund created and set apart in these associations and societies from demands which might be asserted by creditors of deceased members, but that they intended to and did go further in the matter of protection and exemption. Having in mind the worthy and benevolent design made so prominent in organizations of this character, realizing that the fund accumulated by assessment upon the living was for the relief and assistance of the families of deceased members, not for the benefit of creditors, and appreciating, undoubtedly, the unwisdom of prohibiting the use of money in payment of debts contracted by members, and at the same time allowing it to be seized by the creditor of a beneficiary in payment of his debt, or otherwise allowing it to be diverted from coming into the hands of those for whom it was designed and created, the legislators expressly enacted that it should be exempt from execution, in addition to providing that no part should go to the creditors of the member. The object which seems to have been kept in view and to have been accomplished by the use of words which prevent the interposition of legal process whereby the money may be turned aside from a benevolent channel and placed in the hands of a creditor of a member, or of one of his family, a beneficiary, or even of a creditor of the association, was the relief and assistance, when most needed, of those for whom the fund was designed and created, the complete immunity of the fund itself from the process of the courts. Obviously the amount due upon the decease of a member has been placed beyond seizure for the debt of a member, or a beneficiary, or of the association itself."

In *Fisher v. Donovan*, supra, the Supreme Court of Nebraska said:

"The laws of this state governing such societies preclude creditors of a member from participation in the fund so created. * * * These fraternal beneficiary societies, in their present form, are comparatively recent creations. They respond to a popular demand for protection to dependents at reasonable cost. They provide what is often called the 'poor man's insurance.' In most, if not all, the primary object is to provide substantial benefits, in case of the death of the member, to the widow, orphans, or dependents of such member, to provide means for the family when the main support is gone. Their purposes are laudable. They provide means to maintain the widow, and feed, clothe, and educate the orphans, and thereby relieve the state of burdens which otherwise might fall upon it. The provisions for the creation and payment of these sacred funds to the properly designated beneficiaries should receive such liberal construction that the widow, the orphan, or other dependent may receive the intended benefit. In determining who is entitled to receive the benefits of the provisions of societies of this kind, it is the duty of the court to construe the statute and their rules and regulations liberally, and in such manner as to carry out the beneficent purposes sought to be accomplished."

In view of what has been said it is very clear that as between ordinary life companies and the associations intended to be covered by the provisions of the act in question the classification is not capricious, unreason-

able, or arbitrary. But it is said that such is the character of the classification as between such associations and other beneficial associations. In reply to this point we quote what was said by this court in *Condon v. Maloney*, 108 Tenn. (24 Pick.) 82-93, 65 S. W. 871, 874:

"But, while the courts frequently find and assign reason for legislative classification, yet it is by no means uniformly so. And it does not follow, because the reason for the classification is not disclosed in the face of the act, that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the lawmaking body which do not appear upon the face of a statute, and for the courts to strike it down because not readily perceptible might well be criticized as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action."

[3] It is next insisted that section 12 unlawfully discriminates in favor of associations falling under the provisions of the act by permitting them to offer advantages to members which are denied to ordinary life companies, and to associations not organized under this act. The manifest answer, however, to this attack is that the act in question is a general act, and all of the rights, privileges, immunities, or exemptions allowed under it may be enjoyed by any ordinary life company, or any association not organized under the act in question which will abandon its former organization and do an insurance business by organization under the act in question and compliance with its terms, and therefore in this respect the act in question does not violate section 8 of article 11 or section 8 of article 1 of our Constitution.

[4] It is next insisted that the act does not afford creditors the same measure of relief which they are afforded under other statutes. The answer to this point is that in the scheme of this act the creditor finds no place; he is not named; his possible existence is recognized by section 12, but his most effective means of making his existence felt, to wit, "attachment, garnishment, or other process, legal or equitable," are paralyzed by the legislative department of the government on the high ground of public policy; that department of the government recognized in the business of insurance conducted by a fraternal benefit association, a charity so beneficial to the state as to demand, not only that the hand of the creditor be stayed, but that the sovereign state should also forego its power to tax the lodge property and funds of a charity so benign in its influence. Akin to this legislation is section 4030, Shan. Code, which provides:

"A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors."

See, also, section 4231, Shan. Code, which provides:

"Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise."

No doubt can exist as to the legislative power to treat the creditor with the scant consideration of which complaint is made in respect of section 12.

[5] The next insistence is that by section 12 privileges are granted to associations falling under the operation of the act in question which are not accorded to all associations and corporations of the same class. This is a misconception of the effect of the act in question. It grants the same privileges to all associations which fall within the terms of the act. It does not purport to cover each and every kind of insurance business, but it does cover all insurance business conducted in this state by associations of the class falling within the terms of the act.

[6] Passing now to certain questions which are based upon the provisions of section 32 of the act in question, that section provides:

"That nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows, or Knights of Pythias (exclusive of the insurance branch of the Supreme Lodge Knights of Pythias) or to similar orders which do not issue insurance certificates, nor to local lodges of an association now doing business in this state, that provide death benefits not exceeding three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to domestic associations which limit their membership to the employes of a particular city or town, designated firm, business house, or corporation; the insurance commissioner may require from any association such information as will enable him to determine whether such association is exempt from the provisions of this act. No association which is exempt by the provisions of this section from the requirements of this act shall give or allow, or promise to give or allow, to any person any compensation for procuring new members."

There is nothing on the face of the act from which we can say that Masons, Odd Fellows, or Knights of Pythias lodges, or similar orders which do not issue insurance certificates, would fall within the operation of the act, even if section 32 had not been incorporated therein. Nor can we say that the provisions of the act would have applied to domestic associations which limit their membership to the employes of a particular city or town, designated firm, business house, or corporation; indeed, we are inclined to the opinion that to such as these the act would not have applied if section 32 had not been incorporated therein, and therefore their exclusion would be innocuous; but, as concerns the exclusion by this section of "local lodges of an association now doing business in this state, that provide death benefits not exceeding three hundred dollars to any person, or disability benefits not ex-

ceeding three hundred dollars in any one year to any one person, or both," we think the exclusion may rest upon a sound and reasonable basis under the doctrine of classification purely upon the ground that on account of the limited amount of business done by such associations it was a proper exercise of the legislative power to classify so as to free such associations from the operations of the act, and the burdens and expense incidental thereto. Certainly there is nothing appearing upon the face of the act to show that the exclusion of these small associations was arbitrary, unreasonable, or capricious classification, and therefore, under the doctrine of the excerpt quoted supra from *Condon v. Maloney*, we think there is no merit in the insistence of appellant in respect of any question made upon the provisions of section 32 of the act in question.

We have discussed all of the questions which were of sufficient merit to warrant it. We have considered all the questions made. We overrule all assignments of error made by the bank, and it results that the decree of the chancellor is affirmed, and the garnishment proceeding is dismissed at the cost of the bank.

NASHVILLE, C. & ST. L. RY. v. BOLTON.
(Supreme Court of Tennessee. March 25, 1916.)

1. LIMITATION OF ACTIONS \S 130(1) — COMMENCEMENT OF ACTION—NEW ACTION—STATUTE—CONSTRUCTION.

Shannon's Code, \S 4446, providing that, if an action is commenced within the time limited, but judgment is rendered against the plaintiff on any ground not concluding his right of action, or where the judgment is rendered for the plaintiff and is arrested or reversed on appeal, plaintiff may commence a new action within one year, is remedial, and should be liberally construed in furtherance of its purpose.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. $\S\S$ 545, 553, 560; Dec. Dig. \S 130(1).]

2. LIMITATION OF ACTIONS \S 130(5) — NON-SUIT—STATUTE.

Under such statute, the taking of a voluntary nonsuit entitles a plaintiff to the year in which to begin a second suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 557; Dec. Dig. \S 130(5).]

3. LIMITATION OF ACTIONS \S 130(5) — DISMISSAL—NEW SUIT—STATUTE.

Such statute applies to actions in equity as well as to actions at law, and the plaintiff's failure to file a declaration which results in a dismissal of a suit does not prevent the bringing of a new suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 557; Dec. Dig. \S 130(5).]

4. LIMITATION OF ACTIONS \S 130(5)—VOLUNTARY NONSUIT — NEW ACTION — STATUTE — "REVERSED."

Under such statute, plaintiff, who obtained a judgment which was reversed and remanded, and who after remand took a voluntary nonsuit, might commence a new action within the year following the nonsuit, and was not required to commence such action within one year from reversal, as the word "reversed" means a reversal

of the judgment nisi that terminates in the appellate court, the suit without an adjudication of the merits, and not a reversal with a remand for a new trial.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 557; Dec. Dig. § 130(5).]

For other definitions, see Words and Phrases, First and Second Series, Reversal.]

Certiorari to Court of Civil Appeals.

Action by Julia E. Bolton against the Nashville, Chattanooga & St. Louis Railway. From a judgment of the Court of Civil Appeals reversing a judgment for plaintiff, plaintiff brings certiorari. Writ granted, and judgment below modified and affirmed.

Claude Waller, of Nashville, W. B. Lamb, of Fayetteville, and Frank Slemons, of Nashville, for plaintiff in error. W. H. Washington and Jno. B. Daniel, both of Nashville, for defendant in error.

WILLIAMS, J. This action was brought in the circuit court of Davidson county by the defendant in error, the widow of William H. Bolton, to recover damages for the alleged wrongful death of the husband who was an engineer in the employ of the railway company.

An earlier suit on the same cause of action had been commenced and prosecuted by the widow in the circuit court of Grundy county. At one stage in the history of that first suit a judgment was recovered by her; the railway company appealed to this court, where the judgment was reversed and the cause remanded to the circuit court of Grundy county. After remand, the widow, as plaintiff, took a voluntary nonsuit, and within one year thereafter began the present suit in Davidson county.

The railway company interposed as a defense, the general statute of limitation of one year in relation to actions for wrongful death.

The circuit judge held against this defense, and rendered judgment on a verdict of the jury against the railway company. The Court of Civil Appeals (Judge Higgins not sitting and Judge Hall dissenting) reversed this ruling, on an appeal to that court by the defendant in the court below.

The widow by petition for certiorari seeks a reversal of the ruling at our hands.

The position of the defendant railway for affirmance is that the new action must have been commenced within one year from the date of the reversal of the judgment in this court, and that since more than a year had elapsed before the present action was brought the suit is barred, notwithstanding it was begun within the year next following the voluntary nonsuit.

[1] The statute providing for such new action is section 4446 of Code (Shannon), which reads as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judg-

ment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest."

Counsel of both parties and the Court of Civil Appeals say that the question thus presented is one of first impression in this state, and our investigation demonstrates the correctness of the statement.

The statute is remedial, and should be liberally construed in furtherance of its purpose. The decisions of this court have given a liberal construction to the statute, from almost every angle questions have been presented.

[2, 3] Differing from the courts of some other jurisdictions, it has been held that the taking of a voluntary nonsuit entitles a plaintiff to the year in which to begin a second suit. *Memphis, etc., R. Co. v. Pillow*, 9 Helsk. (56 Tenn.) 248; *Hooper v. Atlanta, etc., R. Co.*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931. So differing, this court has held that the statute applies to actions in equity as well as to actions at law, and that plaintiff's failure to file a declaration, which results in a dismissal of his suit, does not prevent the bringing of a new suit. *La Follyette Coal, etc., Co. v. Minton*, 117 Tenn. 415, 101 S. W. 178, 11 L. R. A. (N. S.) 478.

[4] Passing to a consideration of the immediate question: Is the one year allowed for the bringing of a new suit to be computed from the date of such a reversal or from the date of the nonsuit?

Statutes, similar in terms to ours, are in effect in several other states, and the decisions therein, while comparatively few in number on the point, are in opposition to the contention of the defendant company.

The position of the railway company is supported by a dictum incorporated in the opinion of the court in *Arnett v. Coffey*, 5 Colo. App. 560, 39 Pac. 894. It there appeared that suit had been brought by the appellee against the appellants to set aside a conveyance of real estate for fraud. It was averred in the complaint that the fraud first came to plaintiff's knowledge in November, 1888. A judgment was entered in favor of plaintiff, defendants appealed, and in the appellate court there was a reversal and remand. In the lower court plaintiff dismissed his suit, and a second judgment was rendered in his favor. On appeal therefrom it was said by the court:

"Section 2180 is as follows: 'If in any action duly commenced within the time herein limited, and allowed therefor, * * * after a verdict for the plaintiff, the judgment shall be arrested; or if the judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein.' * * * It was barred by the provisions of section 2180, even if we concede that the latter section has

any application to the case. It is only where the plaintiff's judgment is reversed on a writ of error that the additional year is allowed him, but this was not a reversal on a writ of error. If, however, we were at liberty to construe the statute as comprehending cases of appeal, the plaintiff's position is no better, because he did not bring his new action within one year after the reversal. It is true that the first suit was not at an end until its dismissal in the lower court in April, 1892; and counsel seem to think that the year allowed the plaintiff within which to renew his action commenced then, but the statute does not so read. In no possible aspect of the case was this suit brought in time."

This dictum has been incorporated, erroneously as we believe, in the text of the article on Limitation of Actions in 25 Cyc. 1323, and the Colorado case alone cited as authority.

The better doctrine is that the word "reversed" in the above, and in similar statutes in other jurisdictions, should be construed to mean a reversal of a judgment nisi that terminates, in the appellate court, the suit without an adjudication of the merits, and not to apply in instances of reversal with award of remand for new trial.

In Illinois it has been held that the statute did not apply to a case where an appellate court, not only reversed the judgment entered by the lower court, but also awarded a venire facias de novo; and that it applied only to cases in which judgments were reversed on nonconcluding grounds and the cause not remanded. *Hutter v. Paige Iron Works*, 127 Ill. App. 177.

In Missouri the principle is recognized in that the rule appears to be that the reversal referred to in the statute is one in which the merits of the cause have not been adjudicated and in which there is no remand. *Lawrence v. Shreve*, 26 Mo. 492; *Strottman v. St. Louis, etc., R. Co.*, 228 Mo. 154, 128 S. W. 187, 30 L. R. A. (N. S.) 377, 388.

In *Carroll v. Alabama, etc., R. Co.* (C. C.) 60 Fed. 549, the nature of the reversal provided for in the Alabama statute was under discussion. It appeared that plaintiff had brought an action in the state court, and recovered a judgment which was appealed from. The Supreme Court of Alabama reversed the judgment and remanded the cause. Plaintiff then dismissed his action in the lower court, and brought a second action in the federal court. The statute of limitation was pleaded by the defendant company. The court said:

"In the case of *Napier v. Foster*, 80 Ala. 379, *Stone, C. J.*, speaking of this statute (section 2623 of the Code), says, in the opinion of the court, that:

"It is only in cases where some error, mistake, or oversight is fatal to the right to maintain the action in the form in which it is first brought that it can ever become necessary to invoke the provisions of the statute; that the statute was intended to relieve parties of the consequences of some error, mistake, or oversight in bringing or prosecuting the first suit."

"It seems to me, then, that the test by which we are to determine the issue now before the court on the pleadings is whether the judgment of reversal was fatal to the plaintiff's right to

maintain the action in the form in which it was first brought, or, in short, whether the judgment of reversal rendered necessary the dismissal of the first suit, the suit in the city court of Birmingham. Now, was the dismissal of that suit rendered necessary by the reversal of the Supreme Court? It does not appear that it was. It does not appear that the effect of the reversal was to prevent the plaintiff from recovering in that suit. The Supreme Court held that the plaintiff could not recover in the case made on the record then before it, and that the lower court erred in not so instructing the jury. But it did not follow that on another trial the plaintiff might not be able to make a stronger or better case in the same action. The reversal of the case by the Supreme Court did not have the effect of defeating the plaintiff's right to continue the suit, and recover in it. The reversal did not render necessary the dismissal of that suit. It was a voluntary dismissal. While the case at bar may come within the letter of the statute, is it not manifestly opposed to the spirit of it? * * *

"It seems to me that the application of the statute here sought to be made would be very unreasonable. It would be unreasonable to hold that the Legislature intended to except from the operation of the statute of limitations a person who voluntarily dismisses his suit because of some adverse ruling of the Supreme Court in it, which did not render the dismissal necessary, but which had the effect only of declaring that on the facts of the case, as shown by the record before it, the plaintiff was not entitled to recover, and that the case should be remanded for another trial, wherein the plaintiff could have an opportunity of making a better case, if within his power to do so."

It is worthy of observation that in the case of *Stuber v. Railroad*, 118 Tenn. 805, 87 S. W. 411, the facts gave opportunity for the raising of the question; but able counsel of the railroad company in that case did not do so. See, also, *Railroad v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. Rep. 763.

Going now from a review of the precedents to a consideration of the principle and policy involved:

The statute has not merely letter but a spirit. That spirit is manifested in the history of the statute, which is the outgrowth of St. James I, c. 16, § 4, North Carolina Act 1715, c. 27, § 6, and Tenn. Act 1819, c. 28, § 3, liberalized by our Code of 1858, § 2755. It is that a plaintiff shall not be finally cast out by the force of any judgment or decree whatsoever, not concluding his right of action, without an opportunity to sue again within the brief period limited. Further, that the judgment itself must be one that brings to a rest or conclusion the action as then pitched and prosecuted, whether by dismissal, arrest, or reversal. A reversal with remand is not such a conclusion. It is but a temporary check in the progress of the same suit.

The argument in behalf of the railway company also proceeds in disregard of the fact that a reversal with remand often has back of it, as a reason or unexpressed purpose on the part of the appellate court, the allowance of opportunity to the plaintiff to take a nonsuit, if so advised; and the plain-

tiff should have the right to take such course in the circuit court before the latter could properly enter a judgment concluding him. Why a remand at all if the plaintiff is not to be left to handle his cause de novo in the particular respect?

At the base of the statute is the thought that a plaintiff who has not been supine or dilatory does not deserve to be barred by the general statute of limitation which is directed at supineness and dilatoriness.

Believing the ruling of the Court of Civil Appeals on the point to be without basis on sound principle, the writ of certiorari is granted. Its judgment is modified because of this error, and, as modified, affirmed.

PHILLIPS et al. v. ROOKER et al.

(Supreme Court of Tennessee. March 25, 1916.)

1. ELECTION OF REMEDIES ¶7(1)—ACTS CONSTITUTING ELECTION.

An election of remedies is the adoption by an unequivocal act of one of two existing alternative remedial rights, inconsistent and not reconcilable with each other, the effect of which is to preclude a resort by the plaintiff or creditor to the other.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. ¶7(1).]

For other definitions, see Words and Phrases, First and Second Series, Election.]

2. ELECTION OF REMEDIES ¶15—ACTS CONSTITUTING.

Where the plaintiffs took a decree against the defendants B. and C., who, as agents of the defendant company, had orally assumed a contract for timber rights on behalf of the defendant R., there being but one credit extended and one liability, the plaintiffs could not proceed later against the company as principal, since, where both the agent and the principal are sued together and, with full knowledge, the creditor takes judgment against the agent, there is a decisive act of election, although it does not result in satisfaction of the debt, and his case against the principal for later judgment must fail, although the principal, and not the agent, received the benefit of the transaction.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 17; Dec. Dig. ¶15.]

3. ELECTION OF REMEDIES ¶1 — EFFECT — CHANGE OF POSITION BY THE OTHER PARTY — "ESTOPPEL IN PAIS."

An "election" differs from an "estoppel in pais" in that in order to be effective it need not be acted upon by the other party by way of a detrimental change of his position, provided the election is a decisive one.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 1; Dec. Dig. ¶1.]

For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

Appeal from Chancery Court, Overton County; A. H. Roberts, Chancellor.

Action by one Phillips and another, administrators, against W. A. Rooker and others. There was a decree against the named defendant and defendants J. U. Brown and J. K. Carpenter reserving the question of the liability of the defendant Blue Ridge Tie Company. From a disallowance of an exception to an order and final decree against the

defendant Blue Ridge Tie Company, and on its motion to dismiss the bill of complaint or for a decree notwithstanding a verdict of the jury, it appeals. Reversed, and decree rendered in favor of the defendant Blue Ridge Tie Company.

W. R. Officer, C. J. Cullom, and Conatser & Roberts, all of Livingston, for plaintiffs. Lucky & Andrews, of Knoxville, and O. K. Holladay, of Cookeville, for defendant Rooker.

WILLIAMS, J. The bill of complaint was filed against W. A. Rooker and others to recover a personal judgment on a series of notes executed by Rooker to the intestate of complainants for certain timber rights, and to enforce a lien retained in the contract of conveyance to secure their payment.

Among the defendants were the Blue Ridge Tie Company, a body corporate, J. U. Brown and J. K. Carpenter, as well as W. A. Rooker, who was the grantee in the instrument conveying the timber rights.

It was alleged that the Blue Ridge Tie Company was liable on the notes because of an assumption of the payment thereof by that corporation, and that defendants Brown and Carpenter undertook to represent, as agents, the company in the transaction; and it was sought to hold the corporation and these two agents of the corporation liable. A further allegation was the following:

"The respondents Brown and Carpenter took charge of said timber and contract, and assumed to be representing the Blue Ridge Tie Company as agents, but, if it should turn out that they were not so representing said company in taking possession of the original contract from Rooker, and in manufacturing and cutting the timber into lumber and ties, and in making the payment on said notes, then complainants allege that they assumed the payment of the said notes, and took charge of the whole matter in the room and stead of the said Rooker, and are responsible for the amount of the said notes with interest and attorney's fees."

The prayer of complainants for relief incorporated the following clause:

"That a decree be entered against the said Blue Ridge Tie Company, J. U. Brown and J. K. Carpenter, and W. A. Rooker, holding them liable for said contract and notes sued on, they having assumed the payment of the same."

The tie company answered, denying that it had assumed the timber contracts or the payment of the notes. Rooker, Brown, and Carpenter failed to make defense, and an order pro confesso was duly taken against them.

Later the cause came on to be heard before the chancellor upon the above pro confesso, when it was decreed by the court, among other things:

"That the complainants have and recover of W. A. Rooker, J. U. Brown, and J. K. Carpenter the said sum of \$2,815.59, together with all the costs of this case, and that the same be declared a lien on the timber set out herein standing and growing on the lands herein described."

The question whether the Blue Ridge Tie Company assumed the payment of the notes executed by Rooker and the liability of that company thereon was in the above decree expressly reserved for later determination, and the cause was continued by consent until the next term of the court. This decree was entered January 20, 1914.

On August 28, 1914, a further and final decree was entered which recited that the corporation acquired the timber contract from Rooker and agreed to carry the same out as Rooker had contracted to do, and that the corporation was liable on the notes in question.

To that decree exception was saved by the tie company on the ground that the record showed that complainant administrators had at a former term of the court taken judgment against Brown and Carpenter for the full amount sued for, which act was inconsistent with any right to recover against the corporation, and that complainants thereby waived any right they might have had to recover against the exceptant. The same ground was made the subject-matter of a motion to dismiss the bill of complaint, or for a decree notwithstanding a verdict of the jury which had been returned upon certain issues of fact presented.

The exception and motion were disallowed. The tie company prayed an appeal, and has here assigned, among other errors, the position above advanced; that is, that the complainants by taking judgment against the acting agents of the corporation elected to hold them liable, and could not later take a decree against the corporation as their principal on the same alleged contract of assumption of the payment of the notes.

Doubtless the agents, Brown and Carpenter, were made defendants because of a fear on the part of the complainants that the action of the agents might not be sufficient in fact or law to bind their principal, and on a theory that agents may be liable on contracts to which they fail to bind their corporate principals, or else that the agents, while intending to bind the corporation, in the oral negotiations used apt words to bind themselves.

We have for determination, not whether either theory is sustainable, but whether, since complainants had recovered on the alleged contract against the agents, they may later recover judgment thereon against the principal also, or whether they are bound by their election claimed to be evidenced by the successful suit against the agents.

The record discloses that the alleged contract of assumption, on whomsoever binding, was a parol one, and, further, that it purported to have been made for and on the credit of the tie company as one of the contracting parties. It is no part of the theory of complainants that the contract was a joint or joint and several one, or that the agents

added to the obligation of the corporation their own as one collateral to the corporate obligation. The contract is, under the pleadings, to be deemed one contract, with one credit extended and one liability. If the agents are to be held, it is to be done not in addition to, but instead of, the company. Such a liability is deemed an alternative one. It is that of the corporation, or it is that of the two agents who may have failed to bind it. Complainants have no right to pursue both sets of parties as upon two distinct obligations; that would allow them more than they allege, as well as more than their intestate had in contemplation in any event.

Why, then, does not the doctrine of election apply?

[1] "Election of remedies" may be defined to be the adoption, by an unequivocal act, of one of two existing alternative remedial rights, inconsistent and not reconcilable with each other, the effect of which is to preclude a resort by the plaintiff or creditor to the other.

[2] If the obligation be a thing single, it seems inconsistent to allow complainants to hold two such distinct persons or set of persons liable as their contractees. A remedy against the agents must be assumed to exist only on the basis of the nonliability of the corporation.

"Which one shall be held? The answer ordinarily given is that the other party may 'elect' between them. As a corollary to this, it is said that the other party has but one choice; that when he has made his election his determination is final, and he cannot afterwards make a new choice." 2 Mechem on Agency, § 1750.

We have not been cited, and we have not on search found, a case where the doctrine of election has been applied to facts similar to those here presented.

We are of opinion that a close analogy is presented by those cases which involve the liability of the principal, disclosed to the creditor or third person complaining at the outset or prior to suit, and of his agent, on obligations where each is liable in the alternative, though the contract is not made in the name of the principal, as it is claimed to have been the case in the instant suit. 1 Mechem on Agency, §§ 1424, 1712, 1716, 1750, et seq.

In the one case the agent, as negotiator, appears to be the person bound on the face of the contract. Here the person appearing to be bound on the obligation is the principal. If the doctrine of election is applicable in the one case, it seems that it should be in the other. In one instance the agent can be held because he made the contract in his own name, or the principal can be held because it is in law deemed to be his contract; while here we may assume that the corporate principal could have been held, but that the complainants have rendered the agents liable,

and, as seen, on the necessary assumption of the corporation's nonliability.

As has been noted, either the principal or the agent is to be held liable, but not both. It is the duty of the creditor to elect which of the two he will compel to carry out the contract negotiated by the agent, and if, with full knowledge, he elects to hold the agent, he thereby discharges the liability of the principal, and conversely. *Tuthill v. Wilson*, 90 N. Y. 423; *Murphy v. Hutchinson*, 93 Miss. 643, 48 South. 178, 21 L. R. A. (N. S.) 785, and note, 11 Ann. Cas. 611; 31 Cyc. 1578.

That a plaintiff or complainant may properly join in an action such agent and his principal, as defendants liable in the alternative, has been held. *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742, and note.

The duty to elect implies, as a prerequisite, knowledge, or its equivalent, on the part of the creditor of the facts material to his rights; and the rule therefore is that the act of bringing suit against the principal or the agent, as the case may be, or both together, does not constitute an election, especially where there is no attachment of property. But clearly, when both the agent and the principal are sued together, as in this case, and a full view of the premises afforded, and the creditor then takes a judgment against the agent, that is a decisive act of election and his case against the principal for later judgment in the same or in a subsequent suit must fail. *Kingsley v. Davis*, 104 Mass. 178; *Sessions v. Block*, 40 Mo. App. 569; *Tew v. Wolfshon*, 77 App. Div. 454, 79 N. Y. Supp. 286; *Coles v. McKenna*, 80 N. J. Law, 48, 76 Atl. 344; *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024, and notes.

There is a slight conflict of authority on the question as to whether a judgment, without satisfaction, is sufficient to constitute a conclusive election as to either principal or agent in such case; but the early cases of *Priesly v. Fernie*, 3 H. & C. (Exch.) 977, and *Kendall v. Hamilton*, L. R. 4 App. Cas. 504, 1 Eng. Rul. C. 175, announced the rule now generally adopted that the plaintiff is concluded, "although the judgment does not result in satisfaction of the debt." This court, in *Ahrens v. Cobb*, 9 Humph. (28 Tenn.) 643, is in accord in its holding that, when a judgment is taken against an agent, the creditor cannot later hold the principal, disclosed to be such at the outset, although he and not the agent received the benefit of the transaction. It was said:

"The fact that nothing was realized upon said judgment does not affect the question; neither does the fact that the plaintiff in error derived benefit from the lumber. The case rests upon the fixed principle of law that the party is concluded by his own voluntary election to treat the agent as principal and sole debtor." *Id.*;

Calder v. Matthews (K. B.) 6 C. P. 486, 2 Eng. Rul. C. 456; *Cross v. Matthews* (K. B.) 91 Law T. Rep. 500; 31 Cyc. 1580.

When, therefore, the complainants saw fit to take a decree for the amount of the notes against agents Brown and Carpenter, they could not proceed in the later decree to add a further remedy against their principal, the tie company, likewise disclosed in the negotiations. The two remedies are wholly inconsistent—logically irreconcilable. The grant of one demonstrates the falsity of the claim to the other.

"A party may not take contradictory positions; and where he has the right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, 62, quoting *Thompson v. Howard*, 31 Mich. 309.

And see *Fowler v. Bowery Savings Bank*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479, and notes; *Clark v. Rivers*, L. R. 5 Eq. 91, 37 L. J. Ch. (N. S.) 70.

[3] The doctrine of election differs from that of estoppel in this, in that an election in order to effectiveness need not be acted on by the other party by way of a detrimental change of his position, provided the election is a decisive one. *Flynn-Harris-Bulard Co. v. Hampton* (Fla.) 70 South. 335; 9 R. O. L. 961, and cases cited.

What is said and ruled above is, of course, meant to be applicable to contractual obligations; actions against tort-feasors are not referred to.

The chancellor in holding to the contrary erred.

Reversed, with decree here for appellant.

DENNY v. SUMNER COUNTY et al.

(Supreme Court of Tennessee. March 11, 1916.)

1. TAXATION \Leftrightarrow 254—PERSONAL PROPERTY—DOMICILE.

For the purposes of taxation of personal property one must have a domicile fixed in some particular county and municipal corporation or civil district of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 419-426; Dec. Dig. \Leftrightarrow 254.]

2. TAXATION \Leftrightarrow 254—"DOMICILE" DISTINGUISHED FROM "RESIDENCE."

"Domicile" and "residence" are not synonymous in the law relating to situs for taxation; "domicile" importing a legal relation existing between a person and a particular place, based on actual residence, plus a concurrent intention to remain there as at a fixed abiding place. One may have but one domicile or legal residence, but he may have two or more residences, and he may not actually abide at his legal residence at all, but his actual residence must be his abiding place.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 419-426; Dec. Dig. \Leftrightarrow 254.]

For other definitions, see Words and Phrases, First and Second Series, Domicile; Residence.]

3. DOMICILE \Leftrightarrow 5—OPERATION OF LAW.

The law will, from facts and circumstances, fix a legal residence for one unless he voluntarily fixes it himself.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 24-35; Dec. Dig. \Leftrightarrow 5.]

4. DOMICILE \Leftrightarrow 4(2)—“CHANGE OF DOMICILE”—REQUISITES.

To constitute a change from a domicile to another domicile of choice, it is requisite that there be actual residence in the other or new place, an intention to abandon the old domicile, and an intention of acquiring a new one at the other place.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 9, 22; Dec. Dig. \Leftrightarrow 4(2).]

For other definitions, see Words and Phrases, First and Second Series, Change.]

5. DOMICILE \Leftrightarrow 4(1)—CHANGE TO DOMICILE OF ORIGIN.

There is in this state an exception to the rule that a domicile once fixed remains until another is actually acquired, arising in the event of a change from a domicile of choice to that of origin, so that, if the removal be with intent to resume the domicile of origin, it is re-acquired before it is reached, or even while the person is in itinere, for it reverts the moment the other is given up; but such exception is limited to changes from one country to another or from one state of the Union to another.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-8, 10-23; Dec. Dig. \Leftrightarrow 4(1).]

6. DOMICILE \Leftrightarrow 4(2)—“CHANGE”—INTENT.

The mere intention to acquire a new domicile without the fact of an actual removal and residence avails nothing; neither does the fact of an actual removal without such intent; and a mere change in the place of abode, though more than temporary, is not sufficient unless the intent concur.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 9, 22; Dec. Dig. \Leftrightarrow 4(2).]

7. TAXATION \Leftrightarrow 254—PERSONAL PROPERTY—DOMICILE.

Complainant, who had acquired a domicile of choice in T. county, who in 1913 sold his farm in that county and most of his personal property, who removed to S. county, intending to make a legal residence there conditional on his finding a farm there that was satisfactory and to remain only until his son's preparatory school course was finished, and who, though he bought a farm in S. county as an investment, continued to vote in T. county and to pay taxes on personalty there, was, for the purposes of taxing his personal property, domiciled in T. county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 418-426; Dec. Dig. \Leftrightarrow 254.]

Appeal from Chancery Court, Sumner County; J. W. Stout, Chancellor.

Bill for injunction by W. R. Denny against Sumner County and another. Decree for defendants, and complainant appeals. Reversed, with decree for complainant.

Ed T. Seay, of Nashville, for appellant.
Geo. W. Boddie, of Gallatin, for appellees.

WILLIAMS, J. The bill of complaint was filed by Denny to enjoin the county of Sumner and the board of equalization of that county from making an assessment of complainant's personal estate and to prevent collection of taxes based on any such assessment. The preliminary steps had been taken

to assess complainant's holdings of personal property in that county at \$40,000 for the year 1915, and the tax authorities of Trousdale county also made an assessment of the property for that year in the same amount, claiming that situs for taxation was in the latter county.

Denny was born in Smith county, Tenn., in 1867, and had his domicile there until 1902, when he removed to Trousdale county, in this state.

In 1913 he sold his farms in Trousdale and Smith counties, and also his personal property, with only a few exceptions. He was at that time, and has since remained, a widower; he and a son 15 years of age constituting his family.

Not finding the school advantages of Trousdale county adequate, as he thought, he considered going to Lebanon, Willson county, or to Gallatin, Sumner county, for the purpose of placing his son in school. He was persuaded by a close personal friend who lived in Gallatin to choose the latter place, and he went there early in 1914 and placed his son at once in a boys' training school. At first he rented a house and 21 acres of land that surrounded it. Later, finding that this place was on the market at \$10,000, he purchased it at about \$8,000, but as an investment. The acreage was located in the suburbs of Gallatin and he was persuaded by his friend that it was or would become valuable for subdivision purposes.

Before going to Gallatin Denny had this friend to ascertain from a leading attorney of the Gallatin bar whether his going to that place for the purpose of educating his son would operate to change his domicile; his desire being to retain his legal residence in Trousdale county. He was assured that it would not. He took up his abode, along with his son, in Gallatin for the purpose indicated, and, as he testifies, with the intent not to make it his permanent home. The proof discloses his intention to be: To purchase a farm in some county of this state when one could be found that was satisfactory, and to make his permanent residence at the place where it was purchased; to place his son later on in Vanderbilt University, at Nashville, and to go there and abide (if a farm had not been purchased at the time) while his son was going through a college course; and, if a farm had not been found elsewhere, to go back to Trousdale county and purchase one there when his son was through school. He was a farmer, and purposed bringing up his son as a farmer after the education of the latter was completed.

Complainant made unsuccessful efforts to buy farms in Sumner, Williamson, and Maury counties; and, as stated, he testifies that he had no intention of residing permanently in Gallatin, or in Sumner county, unless he should succeed in making the purchase of a farm there. The other proofs as to his

contemporaneous declarations are to the effect that his intention was to retain domicile in Trousdale county; that he had no purpose to remain in Gallatin permanently, but to use it as a base for educating his son and for finding a farm in some Tennessee county; no particular county being in mind.

Denny has continued all along to vote in Trousdale county and to pay taxes on personalty there.

In this state we seem to have no reported case dealing with the subject of domicile in respect of the place of taxation of personal effects. However, we have cases in which domicile has been defined when the same had relation to other subject-matters. Some of these cases are pertinent to the one in hand. Thus *Allen v. Thomason*, 11 Humph. (30 Tenn.) 536, 54 Am. Dec. 55, and *Kellar v. Baird*, 5 Helsk. (52 Tenn.) 39 (relating to succession); *Layne v. Pardee*, 2 Swan (32 Tenn.) 232 (marital rights); *Pearce v. State*, 1 Sneed (33 Tenn.) 66, 60 Am. Dec. 135 (elective franchise); *White v. White*, 8 Head (40 Tenn.) 405; *Williams v. Saunders*, 5 Cold. (45 Tenn.) 60 (forum for probate of will) and *Keelin v. Graves*, 129 Tenn. 103, 165 S. W. 232, L. R. A. 1915A, 421, and *Hascall v. Hafford*, 107 Tenn. 355, 85 S. W. 423, 89 Am. St. Rep. 952 (exemptions). See, also, other cases discussing domicile in relations that do not furnish so close an analogy. *Foster v. Hall*, 4 Humph. (23 Tenn.) 346, and *Stratton v. Brigham*, 2 Sneed (34 Tenn.) 420 (residence for attachment purposes); *Sparks v. Sparks*, 114 Tenn. 666, 88 S. W. 173 (residence for divorce); and *Laue v. Grand Fraternity*, 132 Tenn. 235, 177 S. W. 941, L. R. A. 1915F, 1056 (forfeiture of life insurance).

[1] For purposes of taxation of personal property one must, of course, have a domicile fixed in some particular county and municipal corporation or civil district of the state.

[2, 3] "Domicile" and "residence" are not synonymous in the law relating to situs for taxation, "domicile" importing a legal relation existing between a person and a particular place based on actual residence, plus a concurrent intention there to remain, as at a fixed abiding place.

A man may have two or more residences, but only one domicile or legal residence. He must have a domicile somewhere; he can have only one; therefore, "in order to lose one, he must acquire another."

The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself, and, when his legal residence is once fixed, it requires both fact and intention to change it. As contradistinguished from his legal residence, he may have an actual residence in another state or county. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purpose indicated, may be merely ideal, but his actual residence must be substantive. He may not actually abide

at his legal residence at all, but his actual residence must be his abiding place. *Tipton v. Tipton*, 87 Ky. 245, 8 S. W. 440; *Long v. Ryan*, 30 Grat. (Va.) 718.

[4] To constitute a change from a domicile to another domicile of choice, as is claimed in the instant case, three things are essential: (a) Actual residence in the other or new place; (b) an intention to abandon the old domicile; and (c) an intention of acquiring a new one at the other place. *Sparks v. Sparks*, supra; *Foster v. Hall*, supra.

The definition of "domicile" approved by the Supreme Court of the United States in the recent cases of *Williamson v. Osenton*, 232 U. S. 619, 624, 34 Sup. Ct. 442, 58 L. Ed. 758, 761 (domicile for divorce), and *Gilbert v. David*, 235 U. S. 561, 35 Sup. Ct. 164, 59 L. Ed. 360 (domicile for federal jurisdiction), is that given by Dicey in his *Conflict of Laws* (2d Ed.) p. 111. This definition is in negative form, and a change of domicile is said to be effected where there is a change of abode and "the absence of any present intention to not reside permanently or indefinitely in the new abode." The same essential factors, as we conceive, appear in the definition when thus phrased:

"As some writers express it, there must be an *animus non revertendi* and an *animus manendi* or *animus et factum*. *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706; *Hayes v. Hayes*, 74 Ill. 312, 316; *Jopp v. Wood*, 34 L. J. Ch. N. S. 212; *Moorhouse v. Lord*, 10 H. L. Cas. 272. The *factum* is the transfer of the bodily presence, and the *animus* is the intention of residing permanently, or for an indefinite period. A change of domicile therefore involves a question of fact and intent. The fact is easily proved because it is shown by the mere transfer of the bodily presence from the old to the new place of abode, but the intent with which the change is made is to be determined from the character of the residence, its object and purpose, in connection with the other evidence in the case. Residence in a particular place is a fact obvious to the senses, and cannot be easily mistaken, but its value in fixing domicile is unimportant unless accompanied with an intent of remaining permanently or indefinitely, or, as it is sometimes said, with no present intent of removing therefrom. Residence alone, however long continued, will not effect a change of domicile. On this point the authorities speak with practically one voice." *Pickering v. Winch*, 48 Or. 500, 87 Pac. 763, 9 L. R. A. (N. S.) 1159, and note.

[5] Reference may be made parenthetically to an exception recognized in this state to the rule that a domicile once fixed remains until another is actually acquired, arising in event of a change from a domicile of choice to that of origin. Then, if the removal be with the intention to resume his domicile of origin, the latter is reacquired before it is reached, or even while the person is in itinere, "for it reverts from the moment the other is given up." *Allen v. Thomason*, supra, citing *Story on Conflict of Laws*. The doctrine touching this exception is confined, however, to changes from one country to another, or from one state of the Union to another. *Kellar v. Baird*, supra; *Story, J.*, in *Catlin v. Gladding*, 4 Mason, 808, Fed. Cns.

No. 2520; *Udny v. Udny*, 4 L. R. H. L. Sc. App. 441, 9 Eng. R. C. 782. The exception thus recognized in this state should be held in mind to prevent confusion in the attempted application of the language used in opinions enforcing the doctrine to instances where it has no relevancy.

In the case of *Bulkley v. Williamstown*, 3 Gray (Mass.) 493, it appeared that prior to the tax test date of May 1, 1853, Bulkley, an inhabitant of Williamstown, had made preparations for removing from that town to Rock Island, Ill., and the last week of April he left Williamstown. He and his family went first to Adams, Mass., there taking rooms with board, and they were in Adams on the test date. The trial judge instructed the jury that, if plaintiff had removed from Williamstown with a bona fide intention of abandoning residence in that town from that time, and with no present intention of ever making it his home, still he had domicile there for purpose of taxation until he actually acquired one elsewhere. On appeal a verdict based on the instruction was sustained, and it was said:

"The question of domicile is often a difficult one; and it is a matter of surprise, considering the number of cases, that questions do not arise more frequently. The difficulty is intrinsic in determining, under the various combinations of circumstances, what constitutes habitancy or domicile, which, for most purposes at least, are the same. * * * The question in this case is: Where was the plaintiff's domicile on 1st day of May, 1853? Clearly not in Rock Island, Ill., for he had not taken up his abode there. But he was an inhabitant of Massachusetts for the purposes of taxation, and of some town, city, or district. * * * Whether he had left Williamstown with an intent to make Adams his place of abode was a question of fact, which was left to the jury, who decided that he had not, which appears to us to be right, according to the evidence as reported."

See, also, *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424, and cases there cited.

In the case last named it appeared that a person domiciled in Boston left for an indefinite term of absence, and on leaving he had determined never to return to reside in Boston; and before May 1, 1877, he had decided to take up his residence on his return from his travels in Connecticut, and on his return in 1879 he went to Connecticut to reside. It was held that his domicile for taxation purpose on May 1, 1877, was in Boston; the court assigning as reasons for the judgment:

"Although he might have left the commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain which he had determined upon as his future residence, and was proceeding to with due dispatch; and upon the general rule that, having had a domicile in this commonwealth, he remains an inhabitant for the purpose of taxation until he acquired a new domicile, the intention and fact had not concurred at the time when this tax was assessed."

See, also, *Ayer v. Weeks*, 65 N. H. 248, 18 Atl. 1108, 6 L. R. A. 716, 23 Am. St. Rep. 37.

[6] The mere intention to acquire a new

domicile without the fact of an actual removal and residence avails nothing; neither does the fact of an actual removal without such intention. This intent is as essential as the fact of actual residence. A mere change in the place of abode, though more than temporary, is not sufficient, unless the intent concur.

"This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the party. Thus one cannot make a permanent, fixed commercial residence with all the surroundings of a permanent home in one place and a domicile in another by a mere mental act. But a residence for mere pleasure or health is not regarded as of any great weight in determining the question of a change of domicile." *Pickering v. Winch*, supra; *Still v. Woodville*, 38 Miss. 646; *Ayer v. Weeks*, supra.

In such case he does not lose his former domicile so long as his intention remains conditional, as, for example, where he may seek employment, intending to change his permanent home only if he finds it. 9 R. C. L. 553-555; *Berry v. Wilcox*, 48 Am. St. Rep. 716, note.

In *State ex rel. v. Scott*, 171 Ind. 349, 86 N. E. 409, it was said:

"So it may be * * * said that a journey into another state or territory for inspection, accompanied with an intent permanently to remove to such other state if a satisfactory place is found, does not amount to a change of residence until an approved location had been * * * discovered and chosen," etc.

[7] We are of opinion that the chancellor held an erroneous view as to the effect of the proof. Denny's domicile remained in Trousdale county. Clearly he acquired no domicile in the town of Gallatin; his intention to remain there was not even conditional. His intention to make a legal residence in the county of Sumner may be said to have been conditional; that is, on his finding a farm there that was satisfactory. And as clearly his purpose was not to remain permanently or for an indefinite time. The limit of his purposed stay was until the preparatory school course of his son was concluded. Such a purpose falls within the spirit of the rulings above outlined. There was therefore lacking the intent that is necessary to change one's domicile.

The counsel of the county places much emphasis on his contention that the domicile in Trousdale county was abandoned, in that it is claimed that Denny left there with no fixed, absolute, and unconditional intent to return to it as his home. As we have seen, however, the case turns upon the ruling that Trousdale county was perforce his domicile until another was acquired, and such other was not acquired by a voluntary fixing of a habitation at the new place to remain conditionally or for a temporary and special purpose. 9 R. C. L. 535, § 20. Reversed, with decree here.

On Petition to Rehear.

A petition to rehear has been filed and considered, but a re-examination of the case serves only to confirm the soundness of the views already expressed.

It so happens that the Supreme Court of Georgia had under consideration the question of domicile, in a case involving succession to property by will of a testator at the time we had the pending case under review. A few days before the above opinion was handed down by us, that court filed (February 26, 1916) its opinion, in which it was ruled:

"If a person actually removes to another place, with the intention of remaining there for an indefinite time as a place fixed domicile, such a place becomes his domicile. If a person leaves the place of his domicile temporarily, or for a particular purpose, and does not take up an actual residence elsewhere with the avowed intention of making a change in his domicile, he will not be considered as having changed his domicile. *Crawford v. Wilson*, 4 Barb. (N. Y.) 506; *Rosa v. Ross*, 103 Mass. 575.

"If there be both actual residence and an intention of remaining—the *animus manendi*—then a domicile is established." *Worsham v. Ligon* (Ga.) 87 S. E. 1025.

A rehearing is denied.

STATE v. DAVIDSON.

(Supreme Court of Tennessee. April 4, 1916.)

1. ABDUCTION ⚡1 — ELEMENTS — MARRIED WOMAN.

Shannon's Code, § 6462, making it a felony to take any female from her father, mother, guardian, or other person having the legal charge of her for the purpose of prostitution, does not cover the abduction of a married woman from her husband.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. ⚡1.]

For other definitions, see Words and Phrases, First and Second Series, Abduction.]

2. ABDUCTION ⚡1—"LEGAL CHARGE."

A husband is not a person having the "legal charge" of his wife within section 6462, Shannon's Code.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. ⚡1.]

Appeal from Circuit Court, Wilson County; Jno. E. Richardson, Judge.

W. M. Davidson was indicted for abduction. From an order quashing the indictment, the State appeals. Affirmed.

Wm. H. Swiggart, Jr., Asst. Atty. Gen., for the State. Tillman & McCall, of Nashville, for appellee.

BUCHANAN, J. This case is pending on the state's appeal. The indictment in its first count charges that W. M. Davidson "heretofore, to wit, on the — day of August, 1914, in said county and state, did unlawfully and feloniously take Carrie Stokes, a female, from her husband, W. F. Jenkins, the person having legal charge of

the said Carrie Stokes Jenkins, without his consent, for the purpose of prostitution, against the peace and dignity of the state." In its second count the indictment charged a taking of the same female from the same custody, for the purpose of concubinage.

The indictment was met by a motion to quash, based on the ground that no offense under the law was charged.

His honor, the circuit judge, sustained the motion, and the state appealed.

[1] The case must turn on a construction of section 6462 of Shannon's Code, which reads:

"Any person who takes any female from her father, mother, guardian, or other person having the legal charge of her, without his or her consent, for the purpose of prostitution or concubinage, shall, upon conviction, be imprisoned in the penitentiary not less than ten nor more than twenty-one years."

The words to be construed are "any female" and "or other person having the legal charge of her," as used in the above section. This section, except as to the term of imprisonment, appeared as section 4618 of the Code of 1857-58; the term, as fixed in that Code, was not less than two nor more than ten years; but the section was amended by section 3, chapter 56, Acts of 1871, so as to read as it now appears in Shannon's Code.

The object of the Legislature in the passage of this statute has been held to be as follows:

"The object which the Legislature had in view in the passage of this very highly penal statute, was for the purpose of preventing the taking or enticing innocent and virtuous young females away from their parents, guardians, etc., for the purpose of making them prostitutes or concubines. We cannot conceive that the Legislature could have had the purpose of visiting such punishment upon a person who merely goes with a prostitute, by an arrangement which, it may be, was contrived and proposed by her, to some place where they can more conveniently indulge in illicit intercourse." *Jenkins v. State*, 83 Tenn. (15 Lea) 675.

Our subsequent cases have never disturbed the holding in the *Jenkins Case* as to the purpose of the statute.

Although the words "any female" are broad, yet when the context in which they are used is considered, it is manifest that they must be held to mean any female falling within the purview of the statute. Evidently the words do not include a woman of the age of 21 years or over unless it be that she is under the legal charge of a guardian because of mental infirmity, etc., in which event, we think she would be within the protection of the statute; but, if she be free from the charge of a guardian at the age of 21 or thereafter, she clearly is no longer in the legal charge either of her father or her mother, and therefore there could be no taking of her from the legal charge of either of her parents, although at the time of the taking she might still be residing under the parental roof.

In his chapter on "Parent and Child," Blackstone says:

"The legal power of a father, for a mother, as such, is entitled to no power, but only to reverence and respect, the power of a father, I say, over the persons of his children ceases at the age of 21, for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children, or may also delegate part of his parental authority, during his life, to the tutor or school master of his child, who is then in loco parentis, and as such a portion of the power of the parent committed to his charge, namely that of restraint and correction, as may be necessary to answer the purposes for which he is employed." Bla. vol. 1, § 453.

Under our statutes (Shannon's Code, § 4258) a father, whether himself of the age of 21 or over that age, may by deed or will dispose of the custody and tuition of any legitimate child under the age of 21 years and unmarried, whether born at the time of the father's death or afterwards, during the minority of such child, or for a less time.

Although, as we have seen, the mother at common law had no legal power over her child, but was entitled only to reverence and respect, the statute under consideration recognizes the natural right of either parent to a charge of the female child for the purposes of the statute. If the parents should be residing together and the female with them at the time of the taking, the strict legal charge would be that of the father; but if he were absent and assuming no control, then the charge of the mother would support an indictment under the statute.

The words of the statute, "or other person having the legal charge of her," include some other person standing in loco parentis, as for instance, a tutor, teacher, or testamentary guardian, and those words would include a legal substitute for a guardian having legal charge of the female under any one of the sections of Shannon's Code from section 4321 to section 4336, inclusive. We think these words last quoted from the statute apply to persons whose legal charge over the female is of the same class or kind as that of those persons specifically named in the statute, parents and guardians are specifically named, the charge of one standing in loco parentis is like or of the same class as that of a parent, and the charge of those persons who derive their authority from the sections of Shannon's Code last above named is of the same class as that of a guardian; in other words, we think the rule ejusdem generis applies. *State v. Wheeler*, 127 Tenn. (19 Cates) 58, 152 S. W. 1087, and authorities cited.

[2] No extended discussion of the legal relations between the husband and wife is necessary to demonstrate that whatever "legal charge" the husband may be said to possess

in respect of her person belongs within a class, the like of which does not exist in all the domestic relations recognized by the law. The foundation of the relation between husband and wife is the marriage contract, and the consequences of that contract are certain reciprocal rights and duties which the law imposes on the parties for their mutual benefit, for the benefit of their offspring, and for the well-being of the social order. The relation between husband and wife is wholly different from that of parent and child, and likewise from that of guardian and ward, and under the rule of construction above mentioned, to hold that the words, "or other person having the legal charge of her," were meant to include husbands, would be to go entirely beyond the two classes, to wit, parents and guardians, who are specifically mentioned by name in the preceding part of the statute, and thus violate the rule.

But passing from the foregoing rule to a more familiar canon of construction which imposes on us the duty of giving the statute that meaning which its context indicates its framers intended it to have, and bearing in mind always that the power we possess is to construe and not to legislate, we encounter first the fact that the word "husband" does not occur in the statute, while father, mother, and guardian are specifically named. Now the relation of husband and wife is the most important, the most prominent, of all domestic relations. It is the keystone of that fabric. It is so important that if the framers had intended to include it, specific mention of it would have been made, and not mere general designation. We see in the verbiage of this statute four domestic relations clearly included, and they are the four relations in order next in importance to husband and wife. They are mentioned in the statute in the order of their importance in the eye of the law: First, parent and child; second, guardian and ward; third, by general designation come those who stand in loco parentis; and, fourth, those who stand in lieu of a guardian, in their relation to the female. And so we see that there was such order in the scheme of the statute as to exclude the hypothesis that the word "husband" was left out by oversight, or was intended to be covered by general designation. Why the Legislature saw fit thus to omit the relationship of husband and wife from the operation of the act is not material. If it in fact did so, this court is without power to read that into the statute which the Legislature did not intend to include.

It is probable, however, that the Legislature considered marriage as establishing a female in a status where she would be free from the temptation of yielding to illicit intercourse under promise of marriage. The statute no doubt was considered to meet the need for protection of those unmarried fe-

males whose status might subject them to such temptation, and who, by reason of youth and inexperience, might thereby be led astray.

The Supreme Court of California, in *People v. Flores*, 160 Cal. 766, 118 Pac. 246, Ann. Cas. 1913A, 582, construed a statute similar in verbiage to our own, and reached a conclusion as to its purpose very much in accord with the view we have of our statute. Judgment affirmed.

MIDDLE TENNESSEE R. CO. v. Mc-MILLAN.

(Supreme Court of Tennessee. April 4, 1916.)

1. RAILROADS ⚡346(1)—INJURY ON CROSSING—BURDEN OF PROOF.

Plaintiff in an action at common law for injuries on a railroad crossing has the burden of showing, not only the infliction of the injury, but the negligence of the railroad.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1117; Dec. Dig. ⚡346(1).]

2. RAILROADS ⚡335(5)—INJURY ON CROSSING—CONTRIBUTORY NEGLIGENCE.

In such action the proximate contributory negligence of the party injured bars recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1028; Dec. Dig. ⚡335(5).]

3. ACTION ⚡40—PLEADING ⚡52(2)—SEPARATE STATEMENT OF CAUSES OF ACTION—JOINDER.

The common-law and the statutory causes of action for personal injury on railroad crossings may both exist in the same case, but it is required that they shall each be presented in separate counts.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 320-327; Dec. Dig. ⚡40; *Pleading*, Cent. Dig. § 118; Dec. Dig. ⚡52(2).]

4. RAILROADS ⚡344(1)—INJURY ON CROSSING—DECLARATION—STATUTORY ACTION.

In an action for personal injury on a railroad crossing, a declaration distinctly showing a collision with an object or person on the track, or that the action is based distinctly on Shannon's Code, § 1574, subsecs. 2 and 3, requiring locomotives to sound a whistle or bell at crossings, and, on approaching or leaving a city or town, to sound the whistle or bell, indicates an intent to base the action upon the statute; as the provisions are not concurrent with the common law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1107; Dec. Dig. ⚡344(1).]

5. PLEADING ⚡193(6)—DUPLICITY—STATUTORY AND COMMON LAW CAUSES OF ACTION.

The insertion in a single count of averments based upon the common law will not convert the whole declaration into a common-law pleading, but will lay it open to a demurrer for duplicity.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 434, 435; Dec. Dig. ⚡193(6).]

6. RAILROADS ⚡344(1)—INJURY ON CROSSING—CONSTRUCTION OF DECLARATION—STATUTORY ACTION.

A declaration in an action for damages for the negligent killing of plaintiff's husband, alleging that defendant operated a railroad, that it negligently and wantonly ran upon the wagon in which plaintiff's intestate was driving on a public highway across the track within the corpo-

rate limits of the town where he had the right to be, causing fatal injuries, that those in charge of defendant's engine negligently failed to sound the bell or whistle, or to keep a lookout ahead, that they did not use every possible means to prevent a collision, that the appliances of the engine and cars were defective, as known to defendant, that such negligence was the proximate cause of his death, and that plaintiff, his widow, sued as administratrix for the benefit of herself and children, stated a cause of action under the statute (Shannon's Code, § 1574, subsecs. 2, 3, and 4, and sections 1575 and 1576), requiring railroad locomotives to sound the whistle or bell on approaching or leaving a city or town, to keep a lookout ahead, and to use all possible means to prevent collision, and making a railroad negligent in such respect responsible for damages from any collision, etc.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1107; Dec. Dig. ⚡344(1).]

7. RAILROADS ⚡348(1)—INJURY ON TRACK—SUFFICIENCY OF EVIDENCE.

Evidence in such action held to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. ⚡348(1).]

8. RAILROADS ⚡346(1)—INJURY ON TRACK—NEGLECT—DEFECTIVE MACHINERY.

In such action it was the duty of the defendant railway company to show that its machinery was in proper condition.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1117; Dec. Dig. ⚡346(1).]

9. DEATH ⚡10—RIGHT OF ACTION.

The right of action under Shannon's Code, § 1574, subsecs. 2, 3, and 4, and sections 1575 and 1576, for injury from accident or collision on a railroad track, is that of the deceased.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. ⚡10.]

10. EVIDENCE ⚡236(1)—ACTION FOR PERSONAL INJURY—ADMISSIONS OF DECEDENT.

Such right of action being the right of the deceased, his admissions as to his negligence and inattention would be competent as against his widow and administratrix or those succeeding to the right of action.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 876, 881; Dec. Dig. ⚡236(1).]

11. APPEAL AND ERROR ⚡856(2)—EXCLUSION OF EVIDENCE—OBJECTIONS IN LOWER COURT.

The action of the trial court in erroneously excluding evidence will not be upheld because the court can see that it is incompetent on some other ground than that on which the objection was made; as incompetency not objected to is waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3408; Dec. Dig. ⚡856(2).]

12. EVIDENCE ⚡268—DECLARATIONS—CONDITION OF DECLARANT.

In an action by widow and administratrix for damages for the negligent killing of her deceased husband on defendant's track, the admissions of the deceased as to his negligence and inattention, made when he was fatally injured and was suffering great pain, though partly conscious, were not inadmissible on the ground of his stupefied or partially conscious condition.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1061, 1062; Dec. Dig. ⚡268.]

13. APPEAL AND ERROR ⚡1056(4)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In such action error in the exclusion of such admissions of the deceased, not presented

by any other testimony in such a strong light as that contained in the testimony of the witnesses, in view of the fact that his contributory negligence, while not barring the action, mitigated the damages, and, in view of a verdict of \$5,000, was very material, and was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4180; Dec. Dig. ☞ 1056(4).]

14. RAILROADS ☞ 351(9)—ACTION FOR DEATH—INSTRUCTIONS—NEGLIGENCE.

In a widow's action for damages for the negligent killing of her husband on defendant's crossing, brought under Shannon's Code, § 1574, subsec. 2, and 3, requiring locomotives, on approaching crossings, to sound their whistles and ring their bells for a certain distance and until the crossing is passed, and on approaching a city or town to sound the bell or whistle when one mile distant and until reaching its station, and that on leaving it the bell or whistle shall be sounded when starting and until outside the corporate limits, and subsection 4, requiring a railroad to keep a lookout on the locomotive, and, on observing any person, etc., on track, to sound an alarm whistle and put the brakes down, and use all possible means to prevent a collision, and section 1576, declaring that no railroad observing the statutory precautions shall be responsible for any damages to persons on its road, instructions based on a paragraph of the declaration attempting to state a common-law action, that it was the railroad's duty to exercise a high degree of vigilance and caution, according to the dangers of the crossing, by employing every means at its command, by ringing the bell and sounding the whistle, were erroneous, as the statute covered the ground.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1201½; Dec. Dig. ☞ 351(9).]

15. NEGLIGENCE ☞ 101—CONTRIBUTORY NEGLIGENCE.

In such action the contributory negligence of the deceased could go only to the reduction of damages, and it was the jury's duty to mitigate or lessen the damages if they should find that deceased was guilty of contributory negligence, according to the degree thereof whether slight or gross.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ☞ 101; Damages, Cent. Dig. § 371.]

16. RAILROADS ☞ 312(3)—ACTION FOR DEATH—NEGLIGENCE.

In an action for damages for the negligent killing of plaintiff's husband on defendant's track, it would not be exonerated from liability if it had obeyed all the statutory precautions after decedent's wagon appeared on the road in a position to be struck by the nearing train, if it had previously failed to sound the bell or whistle on approaching the crossing, as required by Shannon's Code, § 1574, subsec. 2, as all the precautions must be complied with.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 990; Dec. Dig. ☞ 312(3).]

17. TRIAL ☞ 260(1)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

The refusal of requested instructions was not error where the substance thereof was contained in other instructions given at the instance of the same party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ☞ 260(1).]

18. RAILROADS ☞ 350(16)—CROSSING TRACK—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

The duty to stop, look, and listen is not a positive duty in law, applicable under all circumstances, and contributory negligence in fail-

ing to stop, look, and listen must generally be left to the jury under the circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169, 1171; Dec. Dig. ☞ 350(16).]

19. TRIAL ☞ 194(17)—OPERATION—INJURIES TO PERSONS—INSTRUCTIONS—DEGREE OF CONTRIBUTORY NEGLIGENCE.

In an action for damages for the negligent killing of plaintiff's husband on defendant's track, in which his contributory negligence would not defeat a recovery, but would afford ground for mitigation or reducing the damages, an instruction that, if deceased was familiar with the crossing, but entered upon it without stopping to look or listen, without paying any attention to the railroad and without any precaution to prevent accident, he would be guilty of "gross" negligence, to be considered in mitigation of damages, was properly refused, as the degree of negligence was for the jury, and not the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ☞ 194(17).]

20. WITNESSES ☞ 388(5)—IMPEACHMENT—PREDICATE.

To contradict a witness by evidence of what he said out of court to other persons on the same subject, contradictory of what he afterwards testified in court, it is essential that he shall be first asked whether he made such statements at a fixed time and place to persons named, and that the words used or their substance be stated to him to refresh his memory and to enable him to reply intelligently.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1237; Dec. Dig. ☞ 388(5).]

Certiorari to Court of Civil Appeals.

Action by Mrs. Maggie McMillan against the Middle Tennessee Railroad Company. From a judgment of the Court of Civil Appeals affirming a judgment for plaintiff, defendant brings certiorari. Reversed and remanded.

E. H. & C. P. Hatcher, of Columbia, and J. C. Eggleston and P. E. Cox, both of Franklin, for plaintiff. Henderson & Henderson and Faw & Crockett, all of Franklin, for defendant.

NEIL, O. J. This action was brought by the defendant in error in the circuit court of Williamson county to recover damages for the alleged negligent killing of her husband, with the result that a verdict was rendered in favor of defendant in error for \$5,000 damages, on which judgment was duly rendered. On appeal the Court of Civil Appeals affirmed this judgment, and the case has reached us on the writ of certiorari.

The first question to be determined arises upon a construction of the declaration, in respect of whether it is a declaration under the common law, or under our statute prescribing certain precautions to be complied with by the railroad company.

[1, 2] The difference is important. When the right of action is based on the statute, the railway company is exonerated if it can show that before striking an object upon the road it complied with all the statutory precautions. But under this cause of action

the burden of proof is on the railway company to show such compliance, and its failure to safely carry this burden results in absolute liability; moreover, contributory negligence does not bar the action, but only mitigates the damages. On the contrary, where the action is based on the common law, the burden of proof is on the injured party to show, not only the infliction of the injury, but also the negligence or wrongdoing of the railway company, and in such an action the proximate contributory negligence of the party injured bars recovery.

Upon the proper method of setting out in the declaration the statutory and common-law rights of action some confusion seems to exist in the minds of counsel, not only in the present case, but in other cases, arising out of a misconception of our authorities upon the subject, and particularly the case of *Railroad v. Crews*, 118 Tenn. 52, 99 S. W. 368.

[3-5] It is recognized in our authorities that the two causes of action may exist in the same case, but it is required that they shall be presented in separate counts. The confusion referred to has arisen from the fact that some of the statutory precautions are identical with the requirements of the common law. We refer to those which require the railroad company to keep the engineer, fireman, or some other person upon the locomotive always upon the outlook ahead, and that, when any person, animal, or other obstruction appears upon the track, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident. These requirements having been repeatedly held in our cases to belong to the common law as well as to the statute, the difficulty is constantly presented to the minds of counsel as to whether a declaration is under the common law or under the statute. The court said in the *Crews* Case that, if the provisions above mentioned alone were referred to, there would not be enough to distinguish the action as a statutory one, that other common-law matters might be added and the whole declaration treated as under the common law, and that under such declaration no evidence of a violation of the other statutory precautions would be competent. It has been inferred from this statement of the principle, however, that although the declaration should go further and clearly show a case based on a violation of the statutory precautions, yet that the union of the common-law matters in the same declaration would reduce the whole pleading to a common-law basis. This a misconception of the *Crews* Case. When the declaration shows distinctly that there was a collision with an object or person on the road, and the injury occurred in that manner, this is sufficient to indicate an unmistakable purpose to base the action upon the statute. *Whittaker v. Railroad*, 182 Tenn. 576, 580,

581, 179 S. W. 140. The same is true if the action be based distinctly on subsections 2 or 3 of section 1574, Shan. Code (section 1166 of the Code of 1858). These provisions are not concurrent with the common law, and a declaration basing the right of action upon either one of these shows unmistakably a purpose to rest the action upon the statute. If there be also inserted in a declaration of this kind in a single count averments based upon the common law, the effect will be not to convert the whole declaration into a common-law pleading, but to lay it open to a demurrer for duplicity. It is shown in the *Crews* Case, notwithstanding our modified or code pleading, that the practice of using different counts for embodying different statements of the cause of action is still preserved, that duplicity is still reprobated, and that it is the duty of the court to see to it that the rules of pleading are substantially adhered to. Various sections of the Code are cited as authority for these provisions. 118 Tenn. 65, 99 S. W. 368.

To further illustrate these principles we set out in full the declaration in the present case, viz.:

"Plaintiff, Mrs. Maggie McMillan, as administratrix of the estate of Fred Augustus T. McMillan, deceased, sues the defendant the Middle Tennessee Railroad Company, a corporation, for \$50,000, as damages, by reason of the following facts:

"The defendant, the Middle Tennessee Railroad Company, heretofore, to wit, on the _____ day of _____, 1913, was and now is a railroad corporation chartered under the laws of the state of Tennessee for the carriage of passengers and freight for hire, owning and operating a line of railroad running from the town of Franklin, in Williamson county, to Leatherwood, in Hickman county, upon which defendant ran and operated locomotives, steam engines, and railway cars.

"On the date aforesaid plaintiff's intestate, Fred Augustus T. McMillan, was traveling in a vehicle drawn by a horse along a public highway and a street of said town of Franklin known and designated as _____ street, across the railroad track of defendant company where said railroad track crosses said public highway and street, commonly known as the Boyd's Mill turnpike, and within the corporate limits of the town of Franklin, said town of Franklin being a municipal corporation; and while upon said crossing, where plaintiff's said intestate had the right to be, defendant company, its employees, agents, and servants, negligently, carelessly, wantonly, and recklessly ran upon and against said vehicle in which plaintiff's intestate was riding with said locomotive, engine, and cars, and upon and against the body, head, neck, arms, and legs of plaintiff's intestate, inflicting serious and fatal injuries, causing to plaintiff's intestate great pain and suffering, and mental anguish, fear, and fright, from the effects of which plaintiff's intestate, after lingering and suffering as aforesaid, died, to wit, on the _____ day _____, 1913.

"Plaintiff avers that at the time and place when and where plaintiff's intestate appeared upon the railroad track of the defendant company, and when said engine and cars struck and injured and killed him as aforesaid, said engine and cars and plaintiff's intestate were within the corporate limits of the town of Franklin, a town of _____ inhabitants, and duly incorporated, and said engine and cars were passing through said corporate limits, and

said engine and cars had left the depot or station of said defendant company in Franklin, and were passing in a westerly direction towards Leatherwood.

"Plaintiff further avers that the agents, employes, and servants of defendant company who then and there had control and management of said engine and cars were guilty of carelessness, mismanagement, and gross negligence in the premises as follows:

"(1) Although said engine and cars were within the corporate limits of said town of Franklin, and had left the depot or station of defendant company some minutes later than its schedule time, yet the employes, agents, and servants of defendant company carelessly and negligently failed to sound the bell or whistle on leaving said depot or station, and at intervals until said engine and cars reached said crossing, and until they had left the corporate limits.

"(2) When plaintiff's intestate appeared upon the railroad track of defendant company at the crossing aforesaid, neither the engineer, fireman, nor any other person upon said locomotive was upon the lookout ahead; they did not sound the alarm whistle nor put down the brakes, and did not employ every possible means to stop the train and to prevent a collision.

"(3) Plaintiff further avers that at the time of said collision said employes, agents, and servants of defendant company who then and there had the control and management of said locomotive, engine, and cars had inferior and defective engine and cars, with inferior and defective brakes, and other appliances, for the control of said locomotive engine and cars, and the track of defendant company at the time and place aforesaid was in defective condition, all of which was known to defendant company.

"(4) Said crossing where said collision occurred was an exceedingly dangerous crossing, in that it was obscured by an embankment or cut made and constructed by defendant company, and by trees and other obstructions which obstructed the view of said crossing, and in approaching said crossing the employes, agents, and servants of defendant company in charge of said train and cars did not give notice of their approach thereto, and did not take the necessary precautions to warn travelers along said highway and street of the approach of said engine and cars.

"Plaintiff further avers that plaintiff's intestate was on the railroad track as aforesaid when he was struck, injured, and killed as aforesaid, as he had a right to be, without fault or negligence on his part, and that he suffered the wrong, injuries, and death aforesaid by reason of the carelessness, mismanagement, and gross negligence of said employes, agents, and servants of defendant company in and about the premises, without fault or negligence on his part, and that said carelessness, mismanagement, and negligence was the proximate cause of his injuries and death, and that defendant company was then and there a railroad company within the purview of the law.

"Plaintiff's intestate, Fred Augustus T. McMillan, left surviving him his widow, Mrs. Maggie McMillan, and the following named children, to wit, * * * all infants of tender years, for whose use and benefit this suit is brought.

"Plaintiff, Mrs. Maggie McMillan, was heretofore appointed administratrix of the estate of the said Fred Augustus T. McMillan by the county court of Williamson county, Tenn., which trust she still holds, and her letter of administration is here to the court shown.

"Plaintiff therefore avers that a right of action has accrued to her as such administratrix to have of and from said defendant company the said sum of \$50,000 above demanded, and therefore she sues and demands a jury to try this case."

[6] The whole of this declaration, down to section 4, is certainly under the statute. Section 4 is apparently under the common law, and probably supported by some intimations thrown out in one or more of our previous cases (*Railroad Co. v. Smith*, 9 Lea [77 Tenn.] 470; *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415, 58 S. W. 737), but was really inapplicable to the case as made, as subsequently shown herein in the disposition we make of assignments Nos. 8 and 9. So this paragraph of the declaration might have been wholly disregarded, but it was not disregarded; on the contrary, it was treated as setting forth a true cause of action against the plaintiff in error under the common law, and the jury were instructed from that standpoint in a manner to create confusion in their minds.

Treating section 4 as stating a common-law cause of action, its insertion in the declaration made it demurrable for duplicity, and, if this objection had been made in the court below, no doubt, the proper correction would have been effected, either by striking out that section as surplusage, or by so striking and then adding another count covering this averment. With section 4 stricken out, and the paragraph immediately following, which paragraph was mere surplusage (*Railroad v. Davis*, 104 Tenn. 442, 448, 58 S. W. 296), the declaration would have been wholly under the statute.

There was no demurrer, however, filed for duplicity, and the parties went to trial upon the declaration as it stood, treating it as stating a good statutory cause of action, and a good common-law cause of action also.

We have just said that the declaration, leaving out section 4 and the paragraph following it, is a good declaration under the statute. It is very full, and perhaps unnecessarily so, since, as held in *Railroad v. Davis*, supra, and *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415, 418, 58 S. W. 737, much less would have sufficed; but we see no objection to the fullness of the statements, omitting section 4 and the paragraph immediately following.

[7, 8] We shall now consider the first assignment of error, which is that the Court of Civil Appeals erred in not reversing the judgment because the trial judge erroneously overruled the motion for peremptory instructions, and because that court refused to sustain the assignment that there was no evidence to support the verdict. This assignment must be overruled. It is not denied that defendant in error's husband was killed while driving across the track. The statute makes it the duty of the railway company, on leaving a town or city, to sound the bell or whistle when the train starts and at short intervals until it has left the corporate limits. There is evidence to the effect that the whistle was sounded only once, and that was at a distance of from 900 to 1,137 feet from the place of the accident, and below

a curve. The distance from the depot from which the train started the morning of the accident to the place of the accident was 3,592 feet. There is evidence that the bell was not sounded at sufficiently short intervals. One witness, Wiltshire, at least, testifies that the train was coming silently as it bore down towards the place of the accident. In addition to this, there is evidence to the effect that the brakes on one of the cars was defective. It is the duty of the railway company to show that its machinery is in proper condition. 105 Tenn. 415, 423, 425, 428, 58 S. W. 737.

[9, 10] The second assignment of error is based on the action of the Court of Civil Appeals in refusing to hold that the trial judge committed error in excluding the following evidence which the plaintiff in error offered on the trial. This evidence was as now shown: The plaintiff in error offered in its defense the witness C. L. Williams, who testified that on the same day of the accident, in the afternoon, he asked the deceased how it happened that he drove on the track. Now to quote the witness:

"He said he didn't know; said he wasn't thinking about the railroad. Q. Did he make any statement as to what he was doing immediately before the accident? A. He said he didn't know what he was doing, or was thinking about. Q. Did he make any other statement to you about how the accident occurred, or what effect it had upon him? A. Why, he said—As best I remember, I asked him how come him to drive on the track; couldn't he see the train? He said he wasn't thinking about the railroad; said it all seemed blank to him."

Objection was made to this evidence by the defendant in error on the ground that it was hearsay, and hence not competent. This objection was sustained by the trial judge, and the testimony not permitted to go before the jury.

On the same objection made by defendant in error the trial judge ruled out the following evidence offered through the witness C. G. Bradley, who testified that he saw the deceased immediately after the accident:

"Q. At the time you heard Mr. McMillan [the deceased] make this statement two or three minutes after the accident, what did he say? A. Well, he said he didn't hear the whistle and the train, and wasn't paying any attention to the railroad. Q. Did he say anything else? A. Yes, sir; said he didn't hear any one hollering or see any one waving at him, or pay any attention to the railroad, or see the train in any way; if he had, he wouldn't have drove on the track. Q. Did he say, if he had been paying any attention, of course, he wouldn't have driven on the track? A. Yes, sir; he wouldn't have driven on the track if he had been paying any attention to the railroad or the train."

On the same objection made by defendant in error the trial judge ruled out the evidence of the witness D. G. Buchanan offered by the plaintiff in error, viz.:

"Mr. Buchanan, did you hear Mr. McMillan make any statement about how this accident occurred, or what he was doing after you had taken him over there? A. Yes, sir; I did. Q. What did he say? A. He made a remark to a lady there. She asked him did he see her wav-

ing at him. He said no he didn't; said he wasn't paying any attention at all to her waving, or to the railroad, or the train. Q. Did he say anything about driving upon the track? A. He said if he had knew, had saw her, and been thinking of going across the track, he wouldn't have drove upon the track."

There can be no doubt that the action of the trial judge in ruling out this testimony on the ground stated was erroneous. The right of action in cases of this character is that of the deceased. Davidson-Benedict Co. v. Severson, 1 Cates (109 Tenn.) 613-623, 72 S. W. 907; Stuber v. Railroad, 5 Cates (113 Tenn.) 305, 87 S. W. 411; Sharp v. C., N. O. & T. P. Ry. Co., 179 S. W. 377. It necessarily follows that any admission made by him would be competent against those who succeeded to the action; in this case his administratrix, who is his widow. Overton v. Hardin, 6 Cold. (46 Tenn.) 375; Walker v. Brantner, 59 Kan. 117, 52 Pac. 80, 68 Am. St. Rep. 347. And see Georgia R. Co. v. Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175; Dixon v. Union Iron Works, 90 Minn. 497, 97 N. W. 375; Smith v. Moore, 142 N. C. 289, 55 S. E. 275, 7 L. R. A. (N. S.) 684, 689, 690.

[11] It is insisted in behalf of the defendant in error that, if the court can see that the evidence is incompetent on any other ground, the action of the trial judge will be upheld, although such other ground or objection was not offered. This is a mistaken view. Incompetency not objected to is waived. Any other rule would result in setting a trap for the other side of the controversy. When objection is made to evidence, and specified, this notification may enable opposing counsel to obviate it, and thus make the evidence competent, but, if the party making an erroneous objection should be allowed to withhold a good objection and make that in the appellate court, where there can be no possibility of avoiding the difficulty by other evidence, this would give a very great advantage to the party so withholding his real objection, and result in corresponding disadvantage and injustice to the opposing litigant. 1 Thompson on Trials, §§ 693 and 698.

[12] The learned Court of Civil Appeals declined to pass upon the validity of the objection made, but held the trial judge was justified in ruling out the evidence on the ground, along with other reasons stated:

That deceased was at the time the statements were made "in a comatose or stupified condition, and either wholly or partially unconscious, and did not fully comprehend what he was saying. It was for the trial judge," continued that court, "to determine as a preliminary question whether the statements were made by the deceased at a time and under such circumstances and while he was in such condition as authorized proof of them."

The trial judge, however, did not undertake to determine this question, but acted only on the objection made by the defendant in error as to the hearsay character of the evidence. Furthermore, we are unable to ascertain from the evidence that the deceased

was in such a condition as indicated in the opinion of the Court of Civil Appeals. The three witnesses whose testimony was excluded say that he was rational at the time, and the witness Wiltshire, who testified for the defendant in error, said the same thing, and Dr. Howlett, who examined him later, being asked whether he was conscious or unconscious, answered:

"Why he was partly conscious; he was a little bit stupidified, but he was conscious when I saw him."

The evidence should have gone to the jury. Its weight, no doubt, would have been affected by the fact that Mr. McMILLAN was very desperately injured, and was suffering great pain. We have no doubt that the evidence was competent; certainly it was not incompetent on the ground of being hearsay. Indeed, the counsel for defendant in error did not advance the view in the trial court that the mind of McMILLAN was in such condition that he did not know what he was saying.

[13] It is insisted, however, in behalf of the defendant in error that there should be no reversal for the error mentioned, because the merits were reached; furthermore, because there was other evidence of the same kind as that embraced in the testimony ruled out. There was no other evidence presenting the negligence and inattention of the deceased in such a strong light as that contained in the testimony of the witnesses, Williams, Bradley, and Buchanan. Besides this, we are unable to say that a just result was reached with this evidence left out. It is true, in our view of the case on the evidence as it stands in the record, on the first assignment because of the failure to properly use the whistle or bell under the statute, and also because of the defect in the brakes on one of the cars, the defendant in error was entitled to a verdict for some amount. Nevertheless the evidence excluded was of very great importance for the purpose of enabling the jury to ascertain the amount of the damages that should be allowed. It is shown by other evidence in the record that the approach to the railroad track for the distance of 226 feet was obscured by trees and undergrowth, and that by reason of this obscuration and the sharpness of the curve the train could not have been seen until the traveler was right at the track. It also appears that there is evidence to the effect that on account of the rattling of the milk bottles in the wagon of the deceased as he approached the track the difficulty of his hearing the approaching train was greatly increased. There is likewise a lack of evidence to show that the deceased stopped his wagon, or that he listened at all, or that the negro boy who was with him listened. The negro boy testified that they looked, but, although much pressed, he never did say that they listened for the train. The negro boy testified that they looked before they went on the track; but it appears that

at this time the train was only about 75 feet away; that they did not see it until they got on the track. In view of all these facts we think that the exclusion of the evidence affected the result. If the jury believed the statements of the three witnesses whose testimony was excluded, they probably would not have allowed the amount which they did allow as damages. In this view of the case we think the error was a reversible one.

[14] In respect of the supposed common-law duty of the plaintiff in error, based on the averments of paragraph 4 of the declaration, the trial judge charged the jury, in substance, that if they found these averments true under the evidence, it was the duty of the plaintiff in error to exercise "a high degree of vigilance and caution, commensurate with the dangerous character of said crossing," by employing every means at its command, "by ringing the bell and sounding the whistle" as its train approached the crossing to warn persons traveling upon the highway in the direction of the railway track with a purpose to cross it, etc. He also charged that on approaching such a crossing it was the duty of the railway company to employ every means at its command that would most effectually warn those persons about to cross the track. The crossing in question was within the corporate limits of the city of Franklin.

It is insisted by plaintiff in error that these instructions were erroneous because the statute covered the ground, and no other precautions could be required. And so thinks the court. The statutory provisions directing what shall be done when an object or obstruction appears on the track, of course, cannot be applied to the case of a warning required to prevent persons from actually entering on the track. But subsections 2 and 3 of section 1574 of Shannon's Code (section 1166 of Code of 1858) do contain such warning provisions. Subsection 2 directs that, where a public road crossing is designated by a special warning board erected by the county authorities, the whistle or bell of the locomotives shall be sounded at the distance of one-fourth of a mile from the crossing, and at short intervals until the train has passed the crossing. Subsection 3 provides that on approaching a city or town the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals until it reaches its depot or station, and on leaving a town or city the bell or whistle shall be sounded when the train starts, and at intervals until it has left the corporate limits. Subsection 4 prescribes what shall be done when an obstruction appears on the track. Section 1575 declares that, if these precautions are not complied with, in subsections 2, 3, and 4, meaning all of these (*Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415, 419, 58 S. W. 737; *Railroad v. Gardner*, 1 Lea (69 Tenn.) 691), the railway

company shall be responsible for all damages to persons or property resulting from any accident or collision that may occur, and section 1576 declares that no railroad company that observes the statutory precautions shall be responsible for any damages to persons or property on its road. We think this latter section would preclude any common-law requirement for any additional warnings at any crossing within a city or town. The statute sets forth the full duty of the railway company, together with its reward of full indemnity for full compliance, and the resulting of full liability for any dereliction. This view is in accord with the reasoning of the court in *Graves v. Railroad*, 126 Tenn. 148, 148 S. W. 239, as well as a necessary deduction from the statute.

The foregoing matter covers assignments Nos. 8 and 9, and it is apparent they must be overruled.

[15] Assignment No. 10 is overruled, and 11 is sustained. The former complains that the trial judge instructed the jury simply that the contributory negligence of the deceased "can go only to the reduction of damages." By this it was to be understood by the jury that such contributory negligence could not, under the statute, abate the action. However, the trial judge should have given the instruction the refusal of which is complained of in No. 11. This instruction plainly told them that it was their duty to mitigate or lessen the damages if they should find that deceased was guilty of contributory negligence, and that they should measure this reduction of damages in proportion to the degree of such contributory negligence, whether slight or gross.

What has been said in disposing of assignments Nos. 8 and 9 renders it unnecessary for us to consider assignments Nos. 13, 15, 24, and 25, since all of these either directly or incidentally affect the supposed common-law feature of the case, which is now eliminated, and, no doubt, will be discarded on the new trial.

[16] Assignment No. 17 is overruled. The request was expressed in such terms as would have justified the jury in believing that the plaintiff in error should be exonerated, if it had obeyed all of the statutory precautions after the wagon appeared on the road in a position to be struck by the nearing train, although it had previously failed to comply with the requirements of subsection 2 of Shannon's Code, § 1574, referred to supra. Such an instruction would have been erroneous, since all of the precautions must be complied with.

Assignment No. 18 is overruled on the same grounds.

[17] Assignments Nos. 20, 21, and 22 are overruled, on the ground that the substance of the request for instruction to the jury contained in each was sufficiently given by an-

other instruction which the trial judge gave at the instance of the plaintiff in error.

[18, 19] Assignment No. 23 complains of the refusal of the trial judge to give in charge the following instruction offered by the plaintiff in error, viz.:

"If the deceased, Fred McMillan, was familiar with this Boyd's Mill crossing, and had been crossing it daily for several months, and knew the situation, and, notwithstanding this, he entered upon this railroad track without stopping to look or listen, and without paying any attention whatever to the railroad, without noticing it and without thinking about the railroad, or train might be approaching, and without taking any precaution himself to prevent an accident, he would be guilty of gross negligence, and such negligence should be taken into consideration by you, and should mitigate any recovery which plaintiff might otherwise be entitled to."

There was evidence on which to base the instruction, and it should have been given but for the use of the word "gross" therein. While it is true that the duty to stop, look, and listen is not a positive duty in law applicable under all circumstances, and it is furthermore true that in general it must be left to the jury to say whether under the circumstances of the given case the party was negligent in failing to stop, look, and listen (*Railroad v. Dies*, 98 Tenn. 655, 41 S. W. 860; *Wilson v. Citizens' Street Railway Co.*, 105 Tenn. 74, 58 S. W. 334; *Railroad v. Sutterwhite*, 112 Tenn. 185, 79 S. W. 106), yet no one can doubt that the facts stated in the instruction, taken altogether, made out a case of negligence in law. Yet because of the use of the word "gross" the instruction was not technically accurate, and the trial judge was justified in refusing to give it to the jury. A request for instructions must be accurate before the refusal can put the trial judge in error. The question of the degree of negligence is for the jury, and not for the court.

[20] Assignments Nos. 26 and 27 are overruled. In order to contradict a witness by evidence of what he said out of court to other persons on the same subject contradictory of what he afterwards testified in court, it is essential that the witness to be impeached shall be first asked whether he made such statements at a time and place fixed, and to a person or persons named, and the words used or their substance must be stated to him, in order to refresh his memory, and to enable him to reply intelligently in respect of the matter. *Cole v. State*, 6 Baxt. (65 Tenn.) 239. The impeaching questions referred to in these assignments do not sufficiently comply with the rule stated.

The twenty-ninth assignment is addressed to the excessiveness of the verdict. Since the judgment must be reversed, and the case remanded for a new trial on other grounds, we do not deem it proper to consider this subject.

Reverse and remand. The defendant in error will pay the costs of the appeal.

BLACK et al. v. BLACK.

(Supreme Court of Tennessee. April 4, 1916.)

EXECUTORS AND ADMINISTRATORS § 60 — INVENTORY—JURISDICTION OF COUNTY COURT.

Under Shannon's Code, § 4039, providing that any person interested in a decedent's estate may at any time before final settlement suggest to the court that the representative has not returned a complete inventory, and the articles omitted shall be debited to the representative at their value, unless he can show a sufficient legal reason for leaving them out of the inventory, and section 6027, subd. 4, conferring original jurisdiction on the county court over the settlements of executors or administrators, while the county court has no jurisdiction of a petition to require an administrator to charge himself with a sum with which he had charged himself as administrator of another estate, when considered as an independent and original action drawing into question the title to property, it has jurisdiction of such a petition as a suggestion that the administrator has not returned a complete inventory.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 318; Dec. Dig. § 60.]

Certiorari to Court of Civil Appeals.

Petition by John Black and others against James K. Black, administrator of the estate of Jennie Black. Judgment for the administrator dismissing the petition was affirmed by the Court of Civil Appeals, and the petitioners bring certiorari. Reversed and remanded, with procedendo.

Chas. Gilbert, of Nashville, for petitioners.
M. T. Bryan, of Nashville, for administrator.

BUCHANAN, J. This action originated by a petition filed in the county court by John Black et al., as heirs at law of Miss Jennie Black, who died intestate, owning certain personal property in said county, in 1913. Prior to her death she had qualified as administratrix c. t. a. of the estate of her brother, Nathaniel Black, but she died before she had filed an inventory as such personal representative. After her death James K. Black qualified as administrator c. t. a. of the estate of Nathaniel Black, and also qualified as administrator of the estate of Miss Jennie Black, and as administrator of each of these estates James K. Black, on September 27, 1913, filed in the county court an inventory. In each of these inventories he charged himself with certain personal property, the items of which were fully set out. One of the items of the inventory which he filed as administrator of the estate of Nathaniel Black is the sum of \$1,716.88. On February 2, 1914, the petition in the present action was filed against said administrator. It averred that he had fraudulently charged the above cash item against himself as administrator of Nathaniel Black, when in fact and law the cash represented by that item was no part of the estate of Nathaniel, but was part of the estate of Miss Jennie Black, and should have been charged to said administra-

tor in his inventory of her estate; that his error had been called to his attention, but he had refused to correct it. The petition also averred that Black, the administrator, had fraudulently substituted glass settings for diamond settings in several pieces of valuable jewelry, including earrings, rings, and a watch, part of the estate of Miss Jennie Black, and that certain of the jewels owned by her estate had been sold by the administrator at prices much below their value; that all this had been fraudulently done, to the prejudice of the rights of petitioners. The petition prayed for process, etc., and that the administrator be compelled to charge himself with the said \$1,716.38 in the inventory of the estate of Miss Jennie Black, etc.; that said administrator be compelled to account for said jewelry and charge himself with its true value. The petition also prayed for general relief.

The administrator, by way of defense, met this petition by a demurrer, based on the following grounds: First, that the petition was prematurely filed, under the provisions of section 4007, Shan. Code; second, that the court was without jurisdiction to entertain the petition; third, that the petition was unknown to the forms of law. The probate court sustained the demurrer and dismissed the petition, and taxed petitioners with the costs, to which action petitioners excepted and prayed an appeal to the circuit court. They were unsuccessful both in that court and in the Court of Civil Appeals, and they have brought the case to us upon petition for certiorari.

It is manifest that all the courts have fallen into error upon this matter. Each of them went off upon the idea that the county court had no jurisdiction to entertain the petition as the beginning of an independent and original action drawing into question the title to property. Viewed from that aspect the petition was not maintainable. *Linnville v. Darby*, 1 Baxt. (60 Tenn.) 307; *Dean v. Snelling*, 2 Heisk. (49 Tenn.) 484; *Walsh v. Crook*, 7 Pick. (91 Tenn.) 388, 19 S. W. 19. But the true view is that the probate court should have sustained the petition as a suggestion filed in that court under section 4039 of Shan. Code, which provides:

"Any person interested in any deceased person's estate as legatee, distributee, widow, or creditor, may, at any time before final settlement of such estate, suggest to the court and show by proof that the representative has not returned a complete inventory, and the article or articles omitted in the inventory shall be debited to the representative at the value thereof, unless he can show a sufficient legal reason for leaving the same out of the inventory."

See, also, section 3977, Shan. Code.

By section 6027 of Shan. Code, and subsection 4 thereof, original jurisdiction is conferred on that court over the settlements of executors or administrators. For provisions in the same Code regulating the rendering of

accounts and the settlement of their respective trusts by administrators and executors, see sections 4031 and 4046, Shan. Code. The section 4039 of Shan. Code is intended to confer upon any person interested in an estate of any one of the classes named in that section the right to intervene in limine in the settlement of that estate and suggest error in the very first step which the personal representative is required to take after his qualification in the execution of his trust. The purpose of the section is to enable persons so interested in the estate while looking after their interests to aid the county court and the clerk in seeing to it that the personal representative begins his accounting on a correct basis. One of the sections above referred to provides:

"When an account has been finally settled by the county court, either party may appeal from the judgment of the court to the chancery [court] or circuit court, and the appeal shall be brought before the chancellor or circuit judge at his first session in such county or district, and it shall be sufficient to take up on said appeal only so much of the record as will suffice to present the matter complained of in the decision below."

See section 4040, Shan. Code.

Section 6030 of Shan. Code, in connection with section 6027 and the fourth subdivision thereof, vests the county court with all of the power and authority necessary and proper to the exercise of the jurisdiction conferred upon it. Under section 4031 of that Code the power is given, and the duty imposed upon the clerk to take and state the accounts of an executor or administrator, and such representative is guilty of contempt of the county court if he fail to appear and settle when cited to do so. See section 4033. This legislation was construed by this court in *Taliaferro v. Wright*, where the bill was filed by the distributees and legatees within seven months after the defendant had qualified as executor. It was insisted that the executor had two years in which to settle up the estate, and that he could not be so sued until after that time; to sustain which insistence sections 4048 to 4050, inclusive, of Shan. Code, were relied on. This court said:

"We are not aware that the question has been adjudicated in this state. But it has been decided by the Supreme Court of North Carolina upon the same statute. Judge Gaston says: 'The act of assembly making it obligatory on executors to settle the estate at the end of two years after the administration shall have begun, does not authorize them to defer the settlement until that time without necessity; and it is competent for those interested to file their bill, or present their petition for such a settlement as soon as they think proper—the proceedings on such a bill or petition being under the control of the court, who can prevent a premature decision thereon and have the question of costs at their disposition.'"

This court, in the same case, said further:

"There is no reason why the persons entitled to an estate should be delayed two years when it is known there are no debts. If this be doubtful, the court will see that no injustice is done the executor by a premature decree against him,

but will hold up the case or see that he is fully secured or indemnified."

In the further course of the opinion the court makes reference to the proper course of procedure in such cases. See *Taliaferro v. Wright*, 1 Shan. Cases, 178.

The petition in the present case was not a bill in chancery filed by distributees and legatees for the purposes discussed in the case last above cited. The scope of the petition has already been indicated. The case last above cited is here mentioned merely in order to indicate the construction which this court has placed upon the legislation therein referred to. When an executor or administrator is cited to make settlement, under section 4033, Shan. Code, the parties interested are entitled to notice of the time of stating the account (see section 4034, Shan. Code); and the personal representative may be examined on oath (see section 4035, Shan. Code). For sufficient cause the settlement may be continued from time to time. See section 4036, Shan. Code. The clerk shall charge the accounting party "with all sums of money as he has received, or might have received by using due and reasonable diligence, and shall credit him with a reasonable compensation, * * * and with such disbursements as he supports by lawful vouchers." See section 4037, Shan. Code. "Any person interested in the estate may except to the account after it has been stated by the clerk, and, if dissatisfied with the clerk's decision of the exceptions, may appeal to the court, or he may except when it is presented to the court." See section 4038, Shan. Code. As has been already shown by a quotation from section 4040, Shan. Code, an appeal may be taken from the judgment of the county court to the chancery court, or the circuit court. Our statutes above referred to must be construed in *pari materia*, and they disclose the purpose of the legislation to be that parties interested in the estate of the classes mentioned are entitled to be heard in the county court in limine from the very beginning of the accounting in that forum until the final judgment is rendered on the final account of the personal representative, be he executor or be he administrator. Such personal representatives are express trustees, and are chargeable with strict fidelity to their trusts. The beneficiaries under the trusts are persons of the classes named in section 4039. The petitioners in the present case were beneficiaries of a trust in which the defendant Black, as administrator, was a trustee, and the petition was a proper suggestion to the county court within the meaning of section 4039 of Shan. Code, that the representative Black had not returned a complete inventory; moreover, the petition was specific and definite, and pointed out the respects in which the inventory was incomplete, and in which the representative had been unfaithful to his trust; therefore it was the duty of the

county court to entertain the petition, and not to dismiss it as was done at the point of the defendant's demurrer. The conduct of the defendant in demurring to such a petition did not commend him to the favorable consideration of the court. His trust was one, as we observe, which required of him the utmost good faith. The petition made charges against him of the utmost bad faith. The petition should have been met by an answer, and not by a demurrer; especially as the petition was one in which the county court had the clearest jurisdiction, and was under the clearest duty to entertain and take appropriate action upon.

We have sufficiently indicated the course of action which should be taken upon the petition as a suggestion under section 4039 of Shan. Code, upon the remand of the cause to the county court.

In various phases the legislation embodied in sections 4031 to 4046, Shan. Code, has been before this court for construction. These cases are collated and referred to under the appropriate sections, in Mr. Shannon's recent work entitled "Citations of Constitution, Code and Acts of Tennessee." See pages 119 and 120.

For reasons already indicated the judgment of the Court of Civil Appeals is reversed, and this cause is remanded to the county court of Davidson county, to be proceeded with in accord with the rights of the petitioners, as indicated in this opinion, and a copy hereof will go down with the procedendo on the remand.

DAVIDSON et al. v. GIBSON COUNTY.

(Supreme Court of Tennessee. April 1, 1916.)

1. COSTS \S 294—MAINTENANCE OF PRISONERS—LIABILITY OF STATE—STATUTE.

Under Shannon's Code, §§ 7619-7622, providing that costs in felony cases shall be paid by the state, the state is liable for the maintenance in a county jail of one convicted of felony, commutation of the sentence from imprisonment in the state penitentiary not altering the case.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1105-1108; Dec. Dig. \S 294.]

2. COSTS \S 294—MAINTENANCE OF PRISONERS—LIABILITY OF STATE—STATUTE.

Under Shannon's Code, §§ 7619-7622, providing that costs in felony cases shall be paid by the state, the state is liable for the maintenance in a county jail of one convicted of felony whose sentence has been commuted from imprisonment in the penitentiary, although the county has declared the jail building a workhouse, using it both as a jail and a workhouse, the sheriff having charge of prisoners in the jail, and the superintendent of the workhouse of those in the workhouse.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1105-1108; Dec. Dig. \S 294.]

3. COSTS \S 295—MAINTENANCE OF PRISONERS—LIABILITY OF STATE.

Misdemeanants, or felons under commutation of sentence, confined in a county jail under the jailer's care, if they are state prisoners,

must be supported by the state, as between it and the county.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1109-1123; Dec. Dig. \S 295.]

4. COSTS \S 295—MAINTENANCE OF PRISONERS—LIABILITY OF COUNTY—STATUTE.

Shannon's Code, §§ 7620-7622, including in criminal costs the maintenance of a prisoner in jail, makes payable by the county all costs of the prosecution of crimes punishable otherwise than by death or confinement in the penitentiary. Workhouse Act (Acts 1891, c. 123), establishing county workhouses, authorizes a workhouse sentence in felony cases. *Held*, that a county is liable for the maintenance in its workhouse under a superintendent of state prisoners held to hard labor on commutation of sentence.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1109-1123; Dec. Dig. \S 295.]

Appeal from Law Court at Humboldt; Thos. E. Harwood, Judge.

Action by the State and J. W. Davidson against Gibson County. From a judgment for defendant, plaintiffs appeal. Reversed, with judgment for plaintiffs.

Frank M. Thompson, Atty. Gen., and M. Hillsman Taylor, Dist. Atty. Gen., of Trenton, for appellants. Cooper & Clark, of Trenton, for appellee.

WILLIAMS, J. This case was tried in the court below upon an agreed case made up to test the liability of Gibson county to J. W. Davidson, who is the sheriff of that county, in his capacity of superintendent of its workhouse for the board of certain persons who were convicted of felonies and served at hard labor in the workhouse under commutation of their sentences from confinement in the penitentiary to confinement in the county's workhouse.

The case was heard before the circuit judge, who passed a judgment in favor of the county, reciting that the county was not liable for the board account sued on.

The circuit judge conceived that the case was in all respects similar to that ruled in *Woolen v. State ex rel*, 129 Tenn. 455, 166 S. W. 594; and therefore that he was bound by what he understood to be the holding in that case, notwithstanding his own view, which was embodied in an opinion, to the effect that the county should be held liable, were the question an open one.

The case just referred to was brought by the sheriff of Tipton county, but in his capacity of jailer to recover "a sum alleged to be due from the state for the board of certain prisoners, who were convicted of felonies, but whose sentences had been commuted by trial juries to imprisonment in jail from imprisonment in the state penitentiary." Here the action is by the superintendent of a workhouse for the board of prisoners in the workhouse, there put to hard labor under the superintendent.

Are the cases on all fours? This calls for a somewhat detailed examination of our county prison system.

Quite a change was wrought in this system when the Legislature passed Acts 1891, c. 123, establishing county workhouses. That act gave the county court the power to provide a workhouse in a building separate from the jail; and, in the alternative, provided that any county not having a separate workhouse might declare its jail a workhouse, and that after such declaration the jail should be known as, and be, the county workhouse. It was provided that in such case the workhouse should be in charge of a "superintendent."

In the case of *State ex rel. v. Cummins*, 99 Tenn. 667, 42 S. W. 880, a bill was filed by the sheriff of Hamblen county to test the constitutionality of certain provisions of the act, and it was held by this court that section 10 of the act, providing that the sheriff of a county whose jail had been declared a workhouse should deliver up the jail to such superintendent, with all prisoners therein, is unconstitutional in so far as it undertakes to deprive the sheriff of the custody of prisoners who have been committed for safe-keeping or of those awaiting trial, because plainly destructive of the functions and prerogatives incident to the constitutional office of sheriff. But it was also held that the jail building might still be declared a workhouse, and be both a jail and a workhouse; the sheriff to have charge of those there held in jail, and the superintendent of those there held in the workhouse. Of the former class, the sheriff is "jailer," but, if he happens also to be the superintendent of the workhouse, he is not "jailer" as respects those under his charge as such.

We therefore have three possible situations: (1) A separate workhouse wholly in charge of the superintendent; (2) a combined jail and workhouse, as above outlined; and (3) the jail without any workhouse, in counties which do not see fit to establish a workhouse in either of the above modes.

[1] Clearly where there is only a jail proper, as described under head (3) above, the state is not freed from and the county operated with the board, accruing after conviction, of state's prisoners. All prisoners convicted of felonies are clearly state's prisoners notwithstanding commutation to jail sentences. Code (Shannon), §§ 7619-7622; *State v. Davidson County*, 96 Tenn. 175, 180, 33 S. W. 924; *Woolen v. State ex rel.*, supra. The principles of the last-named case are then applicable.

[2] When it comes to a combination jail and workhouse, (2) above, it is equally manifest that the decision in the *Woolen Case* is apt and correct as applied to those who are held "in jail" by the sheriff as "jailer."

Code (Shannon) § 7393, provides:

"In all cases where a person is by law liable to be imprisoned in the county jail for safe-keeping or punishment, confinement in the workhouse, if one be provided, may, in the discretion of the court or justice, be substituted."

The above provision was not repealed by those of Acts 1875, c. 83, providing that misdemeanants "shall be confined in the county workhouse" (*Durham v. State*, 89 Tenn. 723, 18 S. W. 74), and it would seem that the discretion to imprison in the jail or in the workhouse is not abrogated by the terms of the present workhouse act, whether the imprisonment be of misdemeanants or felons under commutation.

[3] Whatever class may be in jail under the jailer's care, they, if they are such state prisoners, are to be supported by the state, as between the state and the county. And the provisions of the workhouse act of 1891 (Acts 1891, c. 123) do not contravene the construction we give; that is, that the state must pay for the board during the safe-keeping of its prisoners after conviction, as well as before, where they are thus kept in a jail proper, or in the jailer's custody in a jail declared to be a "workhouse," as above set forth. The term "workhouse," when used in statute or decision, may prove misleading, unless the distinction above referred to is taken in respect to it.

[4] Coming now to the classes (1) and (2), wherein state prisoners are held to hard labor on commutation of sentence in a workhouse under a superintendent: Is the board of such, after conviction and while so held, to be paid by the county or the state?

Code of 1858, § 5577 (Shannon, § 7606), defines criminal costs as follows:

"The costs which may be adjudged in criminal cases include all costs incident to the arrest and safe-keeping of the defendant before and after conviction, due and incident to the prosecution and conviction, and incident to the carrying of the judgment or sentence of the court into effect."

The Code, in section 5585 (Shannon, § 7619), provides that the state or the county, according to the nature of the offense, "pays the costs accrued in behalf of the state" in certain contingencies named.

Acts Extra Session 1891, c. 22 (Shannon's Code, §§ 7620-7622), defined more closely on which of the named contingencies the payor should be the state or the county, as between themselves, and this act again defines criminal costs as follows:

"What is meant by costs in the foregoing sections is all costs accruing under existing laws on behalf of the state or county, as the case may be, for the faithful prosecution and safe-keeping of the defendant, including the cost of the jailer."

By the last-named act the test of liability, as between the state and the county, is placed on the grade of the offense. All costs of the prosecution of crimes punishable otherwise than by death or confinement in the penitentiary are made payable by the county.

The trial judge was in error in the view he expressed that nothing should be considered as "costs" under these statutes save such items as may be adjudged against a defendant, as arising in the cause against him, or, to use his language:

"The word 'costs' in these sections should not have a different meaning when applied to the state, county, or defendant. * * * Cost of board is more in the nature of expense, incurred not in a pending case, but outside of and independent of the case itself."

The learned judge may have overlooked the fact that these sections concern the division of the burden of criminal proceedings as between state and county, and that section 7622 undertakes to define "what is meant by costs," and in so doing expressly places on the county the payment of "any cost for guarding the jail to prevent mob violence, or to prevent rescue or the prisoner's escape, or for transporting to another county for safe-keeping on any account whatever," even though it is manifest that the prisoner so protected is a state prisoner held for crime. It hardly can be claimed that such "costs" are costs taxable against a defendant or are in any true sense costs of the cause.

Adhering to the construction of the statute in that regard placed thereon in the case of *Woolen v. State ex rel.*, supra, we have to inquire how far the present workhouse act (Acts 1891, c. 123) changed the burden thus fixed on the state in respect of the board of its prisoners confined in a workhouse proper, or a workhouse joint—that is, of the class (1) or (2) above.

Treating the *Woolen Case* as applicable to jail inmates as above outlined, we have but one case brought to our attention which deals with the sections of the act referred to which bears upon the particular point.

In *State v. Davidson*, 96 Tenn. 178, 38 S. W. 924, it was held that, where a defendant was taxed with the cost of the cause accrued in his prosecution for a felony, and the state had paid the amount thereof to the clerk of the criminal court, it could not recover the same of the county, although the defendant had worked out the costs of the cause at hard labor in the county workhouse, upon allowance of credit as specified by law. The court, after quoting section 12 of the workhouse act, said:

"The claim is based upon the theory that the county, having received the benefit of his labor, must refund the costs which the state was required to pay. We cannot concur in this con-

tention. The prisoner having been convicted of a felony, and being insolvent, the state became liable for the costs, notwithstanding the sentence was commuted to imprisonment in the county workhouse. The object of the statute in authorizing a workhouse sentence in felony cases is to give the state the benefit of the county prisons for the confinement of a large class of its felony convicts, and the operation of the statute is highly beneficial to the state in relieving its main prison and in saving the cost of transportation of prisoners. It was never within the contemplation of the Legislature, in the enactment of this law, to devise a scheme by which the state should derive a revenue from the different counties of the state, by requiring them to account for the labor of these convicts, and reimburse the state for the cost of the prosecution."

In that case it is stated there was no showing that the county had derived any benefit from the prisoner's labor over and above the cost of his keeping and maintenance. The ruling was that a collection of such costs by the county by way of labor does not render it liable to account for the amount thereof to the state. This is claimed to give support to the county's contention that all costs are to be paid by the state, notwithstanding the benefit of the inmate's labor accrues to the county. Yet the court in that case said that there was no "showing that the county had derived any benefit from his labor over and above the cost of his keeping and maintenance," thus intimating that the burden of such particular costs was the county's. Such indicated construction accords in the main with the apparent equity of the situation. The county replies, however, that it is inequitable to burden it with the board of women and infirm state prisoners who are unfit for the hard labor to be encountered in a workhouse. As to such persons it is fair to assume that the court will commit them to the jail, and not to the workhouse, in the exercise of the discretion lodged in him by section 7393, supra.

While the matter is by no means free from doubt, and the equities are by no means unmixed, the court is of opinion that the intimation in *State v. Davidson*, supra, is that of the juster rule, and the county is held to pay the account herein sued on, which appears to be in no sense a claim accrued to a jailer.

Reversed, with judgment here in accord.

TOMLINSON CHAIR MFG. CO. v. JOP-PA MATTRESS CO. (No. 248.)

(Supreme Court of Arkansas. March 18, 1916.)

1. JUSTICES OF THE PEACE §150(3)—DEFECT OF PARTIES PLAINTIFF—WAIVER OF OBJECTIONS.

Under Kirby's Dig. § 6093, providing that the defendant may demur to the complaint where it appears that there is a defect of parties, and section 6096, providing that, when such defect does not appear on the face of the complaint, the objection may be taken by answer, but, if not taken by demurrer or answer, it shall be deemed waived, the failure of defendant in an action begun before a justice of the peace to object to the failure to make another party a plaintiff in the justice court or in the circuit court on appeal until the court began instructing the jury waived the objection.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 510; Dec. Dig. § 150(3).]

2. BROKERS §18—AUTHORITY—EMPLOYMENT OF SUBAGENT.

A furniture manufacturer cannot object that a broker who negotiated sales between the manufacturer and merchants on commission employed subagents to solicit business for him.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 7; Dec. Dig. § 18.]

8. BROKERS §86(8)—SUFFICIENCY OF EVIDENCE—RIGHT TO COMMISSION.

In an action for the price of certain goods against which a defendant claimed a set-off for commissions earned, evidence held sufficient to sustain a verdict finding that it was the custom between the parties that, where defendant sent an order to be shipped to another, the discount should be paid one-half to the customer and one-half to the broker if requested by the broker, so as to entitle defendant to the set-off for the amount of such discount.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 117; Dec. Dig. § 86(8).]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by the Tomlinson Chair Manufacturing Company against the Jop-pa Mattress Company. Judgment for the plaintiff for the amount tendered by defendant, and plaintiff appeals. Affirmed.

Appellant instituted this action against appellee before a justice of the peace to recover the sum of \$30, the purchase price of a shipment of furniture ordered by the latter from the former. Appellee admitted the indebtedness, but pleaded a set-off of \$28.45, being an amount alleged to be due it as commissions by appellant on account of goods sold for appellant. Appellee stated that it had tendered appellant \$1.55, the difference between the two claims. The justice of the peace found the issues in favor of appellee, and appellant filed an affidavit and bond for appeal to the circuit court. There the case was tried before a jury on the following facts:

Appellant is a corporation engaged in the manufacture and sale of chairs by wholesale in the state of North Carolina. Appellee is a corporation engaged in business in the city of Little Rock, Ark. Q. L. Porter was the

president and manager of appellee. He also did a brokerage business in the sale of furniture; that is to say, he purchased furniture in job lots from various wholesale houses, and sold it to merchants. It was understood between him and appellee that his brokerage commission should go to the latter. Porter had been dealing with appellant in this way for several years. He testified that during all this time he had subagents under him, and that he paid them 5 per cent. for making sales; that appellant knew of this fact, and also paid him a regular commission of 6 per cent. The managing officers of appellant testified that they did not know that Porter had been employing subagents and that he was paying them 5 per cent. They stated that he had no authority whatever to do this.

Madden, an agent of Porter, reported to him that he could secure an order for chairs for the Little Rock Storage & Sales Company. When a carload of chairs was purchased from appellant, a discount of 10 per cent. was allowed. Porter testified that he ordered from appellant a carload of chairs to be shipped to the Little Rock Storage & Sales Company, and that the discount marked on the order was 5 per cent.; that it was understood between him and the Little Rock Storage & Sales Company that appellee should take part of the chairs. He stated that it had been his custom to send in orders that way, and that 5 per cent. discount was allowed to the customer to whom the goods were sent, and that the remaining 5 per cent. was paid to him.

The managing officers of appellant testified that no such custom existed, and that they billed out the order as it came to it; that the order as it came in showed that the regular 10 per cent. discount was to be allowed to the customer to whom the goods were shipped. They denied that the order was changed after they received it, and claimed that Porter was not entitled to the 5 per cent. discount either by express contract with them or by any custom of trade existing between him and appellant. Other facts will be referred to in the opinion.

The jury returned a verdict for appellant in the sum of \$1.55, and the case is here on appeal.

R. M. Mann and Price Shofner, both of Little Rock, for appellant. J. H. Carmichael and Jno. F. Clifford, both of Little Rock, for appellee.

HART, J. (after stating the facts as above). [1] Counsel for appellant asked the court to instruct the jury that appellee was not entitled to recover because its claim against appellant was not assignable under our statutes, and Porter, the assignor, had not been made a party to the action. The case originated before a justice of the peace, and no objection was made in that court that Porter had not been made a party to the action.

When the case reached the circuit court, no objection was made that he was not a party until the court began to instruct the jury.

Section 6093 of Kirby's Digest provides that the defendant may demur to the complaint where it appears on its face that there is a defect of parties. Section 6096 provides that, when any of the matters enumerated in 6093 do not appear upon the face of the complaint, the objection may be taken by answer. It further provides that, if no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same.

Appellant failed to raise the objection of the defect of parties in the language pointed out by these statutes, and has therefore waived the same. *Jordan v. Muse*, 88 Ark. 587, 115 S. W. 162; *Spear Mining Co. v. Shinn*, 93 Ark. 346, 124 S. W. 1045; *Less v. English*, 75 Ark. 288, 87 S. W. 447; *St. L. S. W. Ry. Co. v. Vanderberg*, 91 Ark. 252, 120 S. W. 998. It follows the court did not err in refusing to instruct the jury as requested by counsel for appellant.

[2] According to the testimony of Porter, he was not an employé of appellant. He negotiated sales between appellant and merchants and received a compensation by way of commission. He dealt with several wholesale firms in this way, and gave his orders to the one he deemed proper. Therefore under his testimony he was a broker, and not a salesman of appellant. It could make no difference whether or not he employed subagents to solicit business for him.

[3] According to the testimony of the witnesses for appellant when it shipped out a carload of furniture, the consignee was entitled to a discount of 10 per cent. The witness stated that the order in question when received by appellant called for a discount of 10 per cent. to the consignee. The Little Rock Storage & Sales Company was the consignee, and the goods were billed to it at 10 per cent. discount.

Porter testified that it had been the custom of appellant to allow him 5 per cent. discount when he sent the order in that way; that it had been the custom to ship the goods out as directed by him. He testified that he sent in the order for 5 per cent. discount to the Little Rock Storage & Sales Company, and that, according to custom, appellant knew that he was to receive the remaining 5 per cent. This disputed question of fact was submitted to the jury under proper instructions. As we have already seen, it is undisputed that appellee owed appellant \$30 for a bill of goods, and that 5 per cent. discount on the sale in question amounted to \$28.45.

The jury returned a verdict for appellant for \$1.55. It follows from what we have said that there was sufficient testimony to support the verdict, and the judgment will be affirmed.

BUCHANAN v. FARMER. (No. 242.)

(Supreme Court of Arkansas. March 18, 1916.)

1. COUNTIES ⇐118(5) — CLAIMS AGAINST — LEGAL SERVICES.

While Kirby's Dig. § 6392, providing that each prosecuting attorney shall commence and prosecute actions both civilly and criminally in which the state or county in his circuit may be concerned, does not prevent the county in case of necessity from engaging independent legal assistance, a county was not warranted in engaging independent counsel to recover moneys paid to the circuit judge under an invalid law, where the prosecuting attorney stated suit was unnecessary, and it appeared that the independent counsel merely lobbied through the Legislature an act by which the state, which was primarily liable for the judge's salary, paid his compensation; the circuit judge then making restitution to the county pursuant to agreement.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 179; Dec. Dig. ⇐118(5).]

2. CONTRACTS ⇐126 — VALIDITY — PUBLIC POLICY.

In such case the independent counsel engaged cannot recover compensation for lobbying the bill through the Legislature, as agreements for compensation in respect to such matters are against public policy, nor can he recover expenses incurred in such lobbying.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 586-593; Dec. Dig. ⇐126.]

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

The county court of Garland county made an allowance to T. P. Farmer for legal services rendered by him in behalf of the county, and S. A. Buchanan, a taxpayer, appealed to the circuit court, which set aside the award and remanded the cause. The county court thereafter made an allowance on the quantum meruit, which was reduced on appeal to the circuit court by S. A. Buchanan, and from the judgment of the circuit court, he appeals. Reversed, and claim dismissed.

G. Witt, of Mt. Ida, for appellant. Appellee, pro se.

HART, J. This appeal involves the right of the county court to make an allowance to T. P. Farmer for legal services rendered by him in behalf of Garland county. The facts are as follows:

The General Assembly at its 1911 session passed an act creating the Eighteenth judicial circuit, composed of the counties of Garland and Montgomery. The act provided that two-thirds of the salaries of the judge and prosecuting attorney should be paid by Garland county, by order of the county court, and the remaining one-third of the salaries should be paid in the same manner as salaries of other judges and prosecuting attorneys. This court held that under our Constitution the salaries of circuit judges must be paid by the state, and the act creating the Eighteenth judicial circuit, in so far as it imposed the payment of two-thirds of the salary upon one county in the circuit, was invalid. See *Cotnam v. Coffman*, 111 Ark. 108, 163 S. W. 1183.

This opinion was delivered January 19, 1914. At that time Cotham had served as circuit judge under said act for 29 months, and had been paid \$4,866.46 by orders of the county court of Garland county.

On January 15, 1915, the county court of Garland county entered into a written contract with T. P. Farmer, an attorney of Hot Springs, in which he was employed to recover back the amount paid to Judge Cotham, and it was agreed to pay him 25 per cent. of the amount. On February 27, 1915, the claim of T. P. Farmer, based on said contract was allowed in the sum of \$1,216.61, and county warrants were issued to him for that amount. S. A. Buchanan, a citizen and taxpayer of Garland county, was allowed to become a party to the action, and appealed to the circuit court from the order of allowance. The circuit court set aside the order of allowance and remanded the cause to the county court without prejudice to Farmer filing his claim upon a quantum meruit. Thereafter the county court allowed his claim in the sum of \$750, and Buchanan again appealed to the circuit court. The circuit court allowed the claim in the sum of \$500, and from the judgment rendered, Buchanan prosecuted an appeal to this court.

The testimony of several witnesses was taken upon the question of whether or not the amount allowed Farmer was a reasonable compensation for the legal services rendered by him, but the views we shall hereinafter express renders it unnecessary for us to abstract the testimony on this point. After his contract of employment with the county court, Farmer went to see Judge Cotham about the matter. Judge Cotham stated to him that, if the state would make an appropriation for the salary already earned by him, he would pay back the amount received from Garland county; otherwise that he would not do so without suit.

An appropriation bill was introduced and passed by the Legislature appropriating the sum of \$4,866.46 to the payment of the salary of Judge Cotham in lieu of what had been paid him by Garland county. Farmer testified that he procured the passage of this bill, or, as he expressed it, lobbied it through the Legislature at a cost of \$125 to himself. He said that the amount expended by him was for legitimate expenses. After Judge Cotham received the money from the state he paid back to Garland county the amount he had received from it as before stated.

[1] The prosecuting attorney resided in the city of Hot Springs, but was not asked to represent the county in the matter, and did not do so. He was not asked to represent the county in the matter, but said that, in his opinion, no suit against Judge Cotham was necessary. It may be fairly inferred from the record that the prosecuting attorney had time to have brought the suit had he been requested by the county court to do so.

Section 6392 of Kirby's Digest provides that each prosecuting attorney shall commence and prosecute actions both civilly and criminally in which the state or any county in his circuit may be concerned. Notwithstanding this statute makes it the duty of the prosecuting attorney to represent the county, we have recognized that there are circumstances under which the interest of the county might be neglected or even sacrificed unless the county court has authority to employ other counsel then the prosecuting attorney. The prosecuting attorney might neglect or refuse to perform the duties required of him by the statute, or the press of other duties might prevent him from representing the county. In case where he is unable to attend to the business of the county, or in case where the interests of the county in some particular suit is of such magnitude and importance as to demand of the county court, in the exercise of such foresight and care as prudent business men bestow upon important matters, we have recognized the power of the county court to employ additional counsel. *Oglesby v. Ft. Smith Dist. of Sebastian County*, 179 S. W. 178, 1199; *Spence & Dudley v. Clay County*, 182 S. W. 573. The presumption is that the county court will not put the county to the expense of extra counsel unless such service is needed, but the action of the court in this regard is a matter in which its judgment and discretion is open to review of the appellate courts.

In the case before us it was not shown that the prosecuting attorney was unable or refused to attend to the litigation in question. On the other hand, it was shown that he lived in the same town in which the county court was held, and was not asked to represent the county or even consulted about it. He gave it as his opinion that no suit was necessary about the matter. The suit was not one of such magnitude and importance as to require the service of extra counsel. Any one competent to perform the ordinary duties of a prosecuting attorney could have attended to the matter. It does not appear that there was any necessity whatever for the employment of extra counsel. There is no reason why, in the judgment of prudent men, additional counsel should have been employed, and we think, under the particular circumstances of this case, the county court abused its discretion in entering into the contract in question, and no allowance should have been made in payment.

[2] In reaching this conclusion we have not overlooked the fact that Mr. Farmer said he spent \$125 in procuring the passage of a bill carrying an appropriation for the salary of Judge Cotham already paid by Garland county. Such action contravenes public policy and was void.

In *Harris v. Roof's Ex'rs*, 10 Barb. (N. Y.) 489, the court held that no action will lie

for services as a lobby agent in attending to a claim against the State before the Legislature, and that agreements in respect to such services are against public policy, and are prejudicial to sound legislation. To the same effect are *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519.

From the views we have expressed it follows that the judgment must be reversed, and inasmuch as the case seems to have been fully developed, the claim of appellee against the county will be dismissed here.

M. C. BROWN & CO. v. BENNETT.

(No. 246.)

(Supreme Court of Arkansas. March 13, 1916.)

1. ANIMALS ⇨83—ACTION—DISEASES.

Where defendants stabled their mules in plaintiff's barn and plaintiff's horses contracted a disease from the mules, defendants are not liable unless they knew, or had notice, of facts charging them with knowledge of the diseased condition of their mules and the liability of the disease being communicated to other stock.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 83-92; Dec. Dig. ⇨33.]

2. PRINCIPAL AND AGENT ⇨177(3)—KNOWLEDGE OF AGENT—CONSTRUCTIVE KNOWLEDGE.

Where the driver who had charge of the mules of a firm had knowledge of their diseased condition and the liability of such disease being communicated to other animals, the partners are charged with the agent's knowledge.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 673-675, 677; Dec. Dig. ⇨177(3).]

3. APPEAL AND ERROR ⇨1052(5)—REVIEW—HARMLESS ERROR.

In an action for damages resulting to plaintiff's horses to which defendant's mules carried an infectious disease, the erroneous admission of evidence of an offer for one of the horses that died is harmless, where the jury fixed the value of the animal at a much less amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4175; Dec. Dig. ⇨1052(5).]

Appeal from Circuit Court, Logan County; Jas. Cochran, Judge.

Action by W. H. Bennett against M. C. Brown & Co., a partnership. From a judgment for plaintiff, defendants appeal. Affirmed.

Appellee brought this suit against appellants for damages resulting to his horses from an infectious disease negligently communicated to them. The complaint alleges that a pair of mules kept by defendants and driven by their agent, Parker, employed in the service of the firm in driving a poultry wagon, were allowed to be kept in his barn at the request of defendants; that they were kept in the barn while they were infected and diseased with a contagious disease, distemper, and known to be so by defendants, who did not disclose to plaintiffs that they were so diseased; that his horses were kept

in the barn at the time and immediately after defendants took away their mules and before same was disinfected, and that the disease was communicated to his horses. It further alleged damage to the horses, two of them dying therefrom, and prayed judgment in the sum of \$505. The answer admitted that the mules were kept in the barn, alleged that they were free from any disease or any form of distemper, and that other animals were kept in the barn besides theirs, and if the disease was communicated to plaintiff's stock, it was from other infected animals being stabled therein, and alleged specifically that a horse, the property of D. E. Johnson, infected with distemper was stabled in the barn some time prior to plaintiff keeping his horses there. It appears from the testimony that the plaintiffs were the owners of the mules used in the poultry wagon sent out in the country by them in charge of the driver, Parker; that the mules were infected with distemper at the time they were being stabled in the barn of appellee when they were in town between trips; that appellant's horses, after they were put in the barn where the mules had been kept, took the distemper, and one mare and colt died from the disease, and the other mare recovered, but was considerably damaged thereby and was less valuable thereafter. Several witnesses testified as to the character of the disease and its indications, some stating positively that the mules were infected with it and known to be so by the driver, Parker, who had them in charge, and whose business it was to drive the wagon about through the country and take care of the team. One witness testified that a member of the firm told him he knew that the mules had distemper and intended to tell the appellee about it, but forgot to do so. Several witnesses testified about the value of the animals and the cost of medicine and care for them during the time they had the disease. The court instructed the jury, giving over appellants' objection instruction numbered 5, as follows:

"I charge you that while defendants, before they could be held liable for damages for the injury complained of, must have known these mules were infected with a contagious and infectious disease, yet if you find from a preponderance of the testimony that the defendants' agent who had said mules in charge knew that said mules were so infected with a contagious and infectious disease known as distemper, then the defendants are held in law to have known this fact, as knowledge of the agent is in law knowledge of the principal."

From the judgment on the verdict against them, appellants prosecute this appeal.

Sam R. Chew, of Van Buren, for appellants. D. E. Johnson and Robt. J. White, both of Paris, for appellee.

KIRBY, J. (after stating the facts as above). [1] The court properly instructed the jury that the plaintiff would not be enti-

tled to recover unless they found from a preponderance of the testimony that defendants knew, or had notice, of such facts as would make them chargeable with knowledge that their mules were infected with the disease while they were kept in the defendants' barn and liable to communicate it to other stock. *Railway v. Goolsby*, 58 Ark. 401, 24 S. W. 1071; *Railway v. Henderson*, 57 Ark. 402, 21 S. W. 878.

[2] We do not think the court erred in giving instruction numbered 5 complained of, since Parker, the driver of appellants' mules, engaged in their service, was charged with the duty of looking after and taking care of them, and, being their agent, his knowledge of the condition of the mules was their own. There was testimony sufficient to show that the mules were infected with distemper at the time they were kept in the barn, and that it was an infectious disease, known to be so, and liable to be communicated to other stock, and that the horses of appellee took distemper after being stabled in the barn where the mules were kept, without having been informed by appellants of the fact that their mules had been infected with the disease while kept therein.

[3] From the testimony relative to the value of the animals, and the damage thereto, the jury could have found for a larger amount than they did, and the testimony of an offer from a particular individual of a certain price for one of the animals that died, if it was incompetent, as contended by appellant, was not prejudicial, since the jury fixed the value at a much less amount in rendering their verdict.

We do not think any of the instructions are open to the objections that they assumed facts not proven, nor permitted the jury to find the value and damage to the animals without regard to the testimony. The case appears to have been submitted to the jury upon instructions properly defining the issues, and the testimony is sufficient to support the verdict.

We find no prejudicial error in the record, and the judgment is affirmed.

FISHER et al. v. RICE GROWERS' BANK. (No. 244.)

(Supreme Court of Arkansas. March 13, 1916.)

1. BILLS AND NOTES — 237 — DEFENSES — ACCOMMODATION MAKER.

As between the original parties to a note, the maker may set up as a defense that he signed it for accommodation merely.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 563, 564, 567-569; Dec. Dig. — 237.]

2. CANCELLATION OF INSTRUMENTS — 45 — BURDEN OF PROOF — ACCOMMODATION NOTE.

In suits to cancel notes and mortgages on the ground that they had been made to defendant merely for accommodation, and without consideration, it devolved upon the plaintiffs to

show such alleged facts by a preponderance of the evidence.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 100, 101; Dec. Dig. — 45.]

3. CANCELLATION OF INSTRUMENTS — 47 — ACCOMMODATION NOTES — SUFFICIENCY OF EVIDENCE.

In suits to cancel notes and mortgages alleged to have been made to the defendant bank solely for its accommodation and without any consideration, evidence held to sustain a decree for the defendant.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. — 47.]

4. APPEAL AND ERROR — 1009(4) — REVIEW — FINDINGS OF CHANCELLOR.

The chancellor's findings of fact will not be disturbed on appeal unless they are against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. — 1009(4).]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Actions by William Fisher and E. N. Harrod against the Rice Growers' Bank to cancel notes and mortgages with answers asking judgment for the amount of the notes and for foreclosure of the mortgages. Decree for defendant against each plaintiff, with foreclosure, and plaintiffs appeal. Affirmed.

Blackwood & Newman, of Little Rock, for appellants. Mann, Bussey & Mann, of Forrest City, for appellee.

HART, J. William Fisher and E. N. Harrod filed separate suits in the chancery court against the Rice Growers' Bank to cancel a note and mortgage. Each plaintiff alleged that he had signed a note payable to the Rice Growers' Bank in the sum of \$2,500; that the note was delivered to the bank to be used by it as collateral security for the purpose of securing money to meet certain overdrafts; that the note was executed at the solicitation of the president of the bank and solely for the accommodation of the bank; that there was no consideration whatever for the execution of the note. The bank filed an answer in each case, in which it denied that the notes had been executed for accommodation merely, but stated the facts to be that its cashier had an overdraft under his own name and had permitted customers of the bank to have overdrafts, against the rules of the bank; that plaintiffs signed these notes as friends of the cashier to cover these overdrafts. Judgment was asked in each case for the amount of the note sued on, and for foreclosure of the mortgage given to secure it. The same testimony was used in each case, and the cases are consolidated here for the purpose of trial. The chancellor found the issues for the bank, and judgment was rendered against each plaintiff for the amount of the note and the foreclosure of the mort-

gave ordered in each case. The cases are here on appeal.

[1, 2] In the case of *Boqua v. Brady*, 90 Ark. 512, 119 S. W. 677, the court held that, as between the original parties to a note, the maker may set up as a defense that he signed the note for accommodation merely. So it devolved upon the plaintiffs to show by preponderance of the evidence that they signed the notes for the purpose of accommodating the bank, and that there was no consideration for their execution.

[3, 4] E. N. Harrod testified substantially as follows:

I signed the note in question in August, 1913, at Wheatley, Ark. I had been engaged in the mercantile business there for several years, and the Rice Growers' Bank was also in business there. H. K. Smith was president and A. O. Bratcher the cashier of the bank. One morning Smith called me in the office of the bank and told me that Bratcher was in bad; that Bratcher had an overdraft of \$3,300 and had permitted Charles Fleming, a customer of the bank, to overdraw his account to the sum of about \$4,700, and C. S. Hemenway & Sons to overdraw in the sum of \$470.26. Smith stated the bank might have to close its doors if something was not done, and I agreed to sign a note for \$2,500 to enable the bank to procure money to meet the overdrafts. William Fisher was at that time in Missouri, but he was called back, and it was finally agreed that Fisher and I should each make a note to the bank for \$2,500 to be used in paying the overdrafts of Fleming and Hemenway. Smith said that he himself would take care of the overdraft of Bratcher. The notes were signed as accommodation merely to the bank, and Smith agreed that we should never have to pay anything on them; that, as soon as the overdrafts were taken care of by the parties, our notes would be returned to us.

William Fisher was in Missouri at the time the president first discovered the amount of the overdrafts and came to Wheatley at the request of Bratcher. He corroborated Harrod as to what occurred after he returned, and states that the notes were executed at the request of Smith as accommodation to the bank. Bratcher also testified that the notes were signed by the plaintiffs to cover the Fleming and Hemenway overdrafts, which amounted to about \$5,000, and stated that these overdrafts had since been paid. He said there was nothing said about the plaintiffs taking care of his overdraft, and said that Smith agreed to take care of it.

On behalf of the bank, Smith testified that the plaintiffs were friends of Bratcher and had executed the notes solely for his accommodation. He denied in positive terms that he asked the plaintiffs to sign the notes as accommodation to the bank, but stated that the overdrafts were wholly caused by the action of Bratcher, and that he did not know anything about them, and that it was against the rules of the bank for Bratcher to suffer customers to overdraw to that extent without consulting the directors, and that he had no right to overdraw himself; that the bank of Forrest City was placed in the hands of a receiver; that it had a

large block of stock in the defendant bank; that he told Bratcher that an auditor would doubtless be sent to go over the affairs of the bank; that he asked for a statement from Bratcher; that Bratcher gave him a statement purporting to show all overdrafts; that none of the overdrafts mentioned above were contained in the statement; that Bratcher upon being pressed admitted that he had done wrong and then acknowledged to his own overdraft, and then to those of Hemenway and Fleming; that Bratcher procured plaintiffs to sign the notes because they were his friends.

Russell Johnson, the bookkeeper of the bank, testified that he was a nephew of the president of the bank; that, when his uncle asked Bratcher about the overdrafts, Bratcher first stated that the list was correct, and then admitted that it was not. He then told of his own overdraft, and of the Hemenway and Fleming overdrafts. He stated that he knew he had ruined the bank, and asked that he be given time to get some one to help him. In other respects, the witness corroborated the testimony of the president of the bank, to the effect that the notes were signed by the plaintiffs as accommodation to Bratcher.

When the notes were executed and money was procured by using them as collateral, the overdraft of Bratcher was first paid off with the proceeds, and then the overdraft of Hemenway was taken up, and the balance credited on the overdraft of Fleming. Bratcher knew that this was done and made no objection thereto.

There was a meeting of the directors to discuss the matter of the shortage of the cashier and of the overdrafts permitted by him. Two of the directors resided at Mariana and came to Wheatley to attend the meeting. They testified that they knew nothing about the overdrafts until that time, and had not authorized them; that Bratcher had no authority to permit overdrafts to that amount without the direction of the board of directors; that they understood that Bratcher's overdraft was to be taken care of by the plaintiffs; that Bratcher was present and seemed to understand it that way.

We have only attempted to set out the substance of the testimony. The witnesses were examined and cross-examined at great length. It is the settled rule in this state that the findings of fact made by a chancellor will not be disturbed on appeal unless they are against the preponderance of the evidence. Tested by this well-known rule, we think the decree should be affirmed.

It is true that both the plaintiffs and Bratcher testified that the notes were signed to accommodate the bank merely; but their testimony is not only contradicted by the president of the bank and its bookkeeper, but also by the attendant circumstances.

The bank records show that the notes executed were issued as collateral to borrow money, and that the proceeds were first applied to the overdraft of Bratcher and the remainder to the overdrafts of Fleming and Hemenway. Bratcher knew this record was being made, and this record was inconsistent with the testimony to the effect that Smith was to take care of Bratcher's overdraft. It was Bratcher who telegraphed Fisher to return and solicited him to sign the note.

The absent directors testified that they understood that the plaintiffs had signed the overdrafts to help Bratcher and not as accommodation for the bank; that Bratcher was present and seemed to so understand it; that he seemed well pleased that he had gotten out of his trouble.

All of the evidence shows that Bratcher was wholly without authority to make an overdraft himself, or to allow customers to do so in the amounts allowed to Hemenway and Fleming. The evidence shows that plaintiffs renewed their notes to the bank after Fleming and Hemenway had paid their overdrafts to the bank, and this fact we consider a strong circumstance against the contention of the plaintiffs. In short, we think all the circumstances point to the fact that plaintiffs signed the notes in order to help their friend out of a difficulty, and not as accommodation merely to the bank.

The decree will therefore be affirmed.

STATE v. WALKER. (No. 247.)

(Supreme Court of Arkansas. March 13, 1916.)

CRIMINAL LAW §1024(7)—APPEAL BY STATE—GRANT OF NEW TRIAL.

Under Const. art. 7, § 4, giving the Supreme Court, except as otherwise provided, appellate jurisdiction only, co-extensive with the state, under such restrictions as may be prescribed by law, Kirby's Dig. § 2584, providing that an appeal shall only be taken on a final judgment, except on behalf of the state, and Kirby's Dig. § 2603, providing that when the prosecuting attorney prays an appeal for the state, and a transcript is transmitted to the Attorney General, the latter, if he is satisfied that error has been committed to the prejudice of the state and upon which it is important, to the correct and uniform administration of the criminal law, that the Supreme Court should decide, may by lodging the transcript in the Supreme Court take the appeal, the state can appeal from interlocutory rulings in felony cases only where they might affect the jurisdiction of the cause, or as would be necessary to the correct and uniform administration of the criminal law, and cannot appeal from an order granting a new trial to defendant after verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2609; Dec. Dig. §1024(7).]

Appeal from Circuit Court, Prairie County; Thos. C. Trimble, Judge.

R. E. Walker was convicted of making false entries upon the books of the bank of which he was cashier and a new trial was granted by the trial court, from which the state appeals. Appeal dismissed.

This appeal is prosecuted by the state from a judgment of the lower court granting appellee a new trial. He was cashier of the Bank of Hazen, and indicted and convicted of making false entries on its books of account with the felonious intent to defraud the bank. He moved for a new trial, setting up various alleged errors committed in the trial as grounds therefor, including the one that Claud Grant, one of the jurors, was a member of the grand jury which indicted him for embezzlement of \$4,000 of the funds of the Bank of Hazen, at the March, 1914, term of the circuit court.

Affidavits were submitted in support of the motion, and the court, in rendering its opinion indicating its consideration of the testimony and its effect, appeared to think it was a close question of whether the evidence was sufficient to submit to the jury, and concluded, saying, "Any preconceived opinion as to the defendant's guilt on the part of a juror, especially an opinion officially expressed, must be taken as having been the cause of the doubtful verdict," and granted the motion for a new trial.

It appears from the affidavits that Claud Grant, one of the jurors, was a member of the grand jury of the March term, 1914, which returned indictments against appellee Walker for embezzlement of certain sums of money from the Bank of Hazen. Some of the witnesses stated the substance of the testimony that was before the grand jury, including statements relative to false entries in the bank books made by the cashier at the time of such indictments, and that W. D. White, one of the grand jurors, requested at the time Walker was indicted for embezzlement that he should not be indicted for making false entries in the books, as it might affect the interest of the bank, saying he could later be indicted therefor.

Albert Youngman stated he was a member of the petit jury which convicted the defendant, and that Claud Grant was a member of said jury and "showed by his acts, conduct, and words that he was very much prejudiced against defendant; that one of the jurors suggested that they should have further instructions from the court as to the meaning of the false intent, and that Grant objected to asking such instructions."

Certain other affiants stated that they testified before the grand jury when the indictment for embezzlement was found and made no statement whatever about false entries in the books, and that same were not detected until after the indictment for embezzlement had been returned.

Other affiants, members of the petit jury, stated that Claud Grant did not do or say anything in the consideration of the case to indicate that he was prejudiced in any way against the defendant, and denied that he had objected to the jury asking further in-

structions of the court. Grant himself testified: That he had no recollection whatever of any testimony, before the grand jury of which he was a member in March, 1914, that indicted Walker for embezzlement relating to any false entries in the books of the bank; that it did not occur to him when he qualified as a juror in this case that he had been on any grand jury which indicted the defendant, "nor did it occur to me after the evidence was all in that I had ever heard any testimony which in any way pertained to false entries in the books of the Bank of Hazen by Walker;" that when selected as a juror he had no acquaintance with Walker, had never seen him until that term of the court, had no prejudice against him or feeling of any kind in the matter, had never formed or expressed an opinion; and could not see how his conduct on the jury would indicate he was prejudiced. "I did and said nothing that could have been prejudicial." He remembered the discussion upon the suggestion that the jury ask the court for further instructions, but took no part in it, and said that the juror who made the suggestion, when another juror explained what the court meant, seemed satisfied.

The judgment granting a new trial does not indicate upon which ground the motion was sustained.

Wallace Davis, Atty. Gen., Hamilton Moses, Asst. Atty. Gen., Manning, Emerson & Morris, of Little Rock, and Jas. B. Reed, of Lonoke, for the State. Trimble & Williams, of Lonoke, and Blackwood & Newman, of Little Rock, for appellee.

KIRBY, J. (after stating the facts as above). It is contended that the state is without authority to appeal from a judgment granting a motion for a new trial in a felony case.

The Constitution provides:

"The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions as may be from time to time prescribed by law," etc. Article 7, § 4, Constitution 1874.

"An appeal shall only be taken on a final judgment, except on behalf of the state." Section 2584, Kirby's Digest.

When the state desires an appeal, the prosecuting attorney prays it, and a transcript of the record is made and transmitted to the Attorney General, and—

"if the Attorney General, on inspecting the record, is satisfied that error has been committed to the prejudice of the state, and upon which it is important, to the correct and uniform administration of the criminal law, that the Supreme Court should decide, he may, by lodging the transcript in the clerk's office of the Supreme Court within sixty days after the decision, take the appeal." Section 2603, Kirby's Digest.

In *State v. Flynn*, 31 Ark. 35, where the state appealed from an order granting de-

fendant a change of venue from Garland to Pulaski county, the court said:

"Whilst we would not encourage, or suppose that the Legislature intended to provide for, appeals by the state, in felonies, from every interlocutory decision of the court, yet it was well enough for the Attorney General to allow the appeal in this case, before final judgment, for if the court had proceeded to try the prisoner, the verdict and judgment would have been invalid if it turned out on appeal that the court had no jurisdiction of the cause."

In *State v. Ross*, 34 Ark. 376, the state appealed from an order granting the defendant a new trial upon the ground that there was no authority under the law for holding the term of the circuit court of Pike county at which the defendant was convicted, and although this court held that the trial court was in error in its ruling, declined to remand the cause with instructions to sentence the defendant, and dismissed the appeal as not authorized by law.

The case of *State v. Robinson*, 55 Ark. 439, 18 S. W. 541, is not an authority, as contended by appellant, in favor of the proposition that the state can appeal from a judgment granting the defendant a new trial in a felony case. It questioned only the court's ruling on the sufficiency of the indictment to charge a public offense, and belongs in the classification of appeals allowed as necessary for the correction of errors in order to the correct and uniform administration of the criminal law.

It was evidently the purpose, in excepting the state from the provisions of the statute providing an appeal shall only be taken on a final judgment in prosecution for felonies, to permit such appeals from interlocutory rulings and decisions that might affect the jurisdiction of the cause or as would be necessary to the correct and uniform administration of the criminal law, and from the statutes and authorities quoted it is apparent that it was not intended to permit appeals by the state from judgments granting new trials to defendants to review such decisions, or control the discretion of the circuit court in the granting of new trials in prosecutions for felonies.

The appeal not being from a final judgment, nor one from which the state can take an appeal, it must be dismissed, and the trial court will proceed with the cause. It is so ordered.

BANK OF ALMYRA v. LAUR. (No. 222.)
(Supreme Court of Arkansas. March 6, 1916.)

1. EXECUTION \S 220 — SALE OF PERSONAL PROPERTY—PLACE OF SALE—"PRESENCE OF PROPERTY."

An execution sale of personal property, consisting of a soda fountain and bar, glassware, chairs, etc., in a house, conducted out in front of the door, was made in such proximity to the property as to satisfy the requirement of the law that the sale be made in the presence

of the property, where it can be seen and examined by prospective purchasers.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 622-625; Dec. Dig. ¶ 220.]

2. EXECUTION ¶ 216—SALE—"DE FACTO OFFICER."

A constable, holding over from his preceding term, when no successor had been elected, in view of Const. art. 19, § 5, providing that all officers shall continue in office after the expiration of their term until their successors are qualified, in conducting an execution sale of personal property was at least a "de facto officer," so that the sale was not void.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 601-606; Dec. Dig. ¶ 216.]

3. FRAUDULENT CONVEYANCES ¶ 104(5) —BILL OF SALE TO WIFE—GOOD FAITH—EFFECT.

Where a wife's claim under a bill of sale from her husband to recover for the conversion of property sold and removed under execution against the husband, was not bona fide, or where she permitted the husband to hold the property out to creditors as his own, she could not claim the property as against his creditors, who might enforce their claims by execution.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 342; Dec. Dig. ¶ 104(5).]

Appeal from Circuit Court, Arkansas County; Thos. C. Trimble, Judge.

Action by Ida V. Laur against the Bank of Almyra and others. Judgment for plaintiff, and the defendant Bank appeals. Reversed, and cause remanded for new trial.

R. D. Rasco, of De Witt, for appellant. W. N. Carpenter, of De Witt, for appellee.

McCULLOCH, C. J. Appellant brought suit before a justice of the peace in Arkansas county against one L. Laur, to recover the amount of a promissory note executed by him to appellant, and recovered judgment. An execution was sued out on the judgment and placed in the hands of Sam P. Boswell, as constable, who levied the same on one soda fountain and bar, tank, glassware, chairs, and tables, and sold the same under said writ. After sale the said property was delivered into the possession of the appellant at its banking house, and was there stored. Appellee, Ida V. Laur, is the wife of said L. Laur, and she instituted this action against appellant, and against said Boswell, as constable, and certain other parties who removed the property under the latter's direction, alleging that she was the owner of said property sold under execution, and that the same was wrongfully sold by said constable under the direction of appellant, and that the conversion of the property was wrongful. Appellant and the other defendants answered, setting forth facts in justification of the sale of the property under the execution against L. Laur. It is alleged that the said property was really the property of L. Laur, the defendant in the execution, and that appellee's assertion of title thereto was a mere fraudulent scheme to defraud the creditors of L. Laur. The

case was tried before a jury, and a verdict was rendered in favor of appellee, assessing damages at the sum of \$1,000 to the property sold, and the sum of \$250 for loss of business, and \$50 for trespass, making the total sum of \$1,300, for which sum judgment was rendered in favor of appellee against appellant.

Appellant was engaged in the banking business at the town of Almyra, and appellee and her husband, L. Laur, were operating in the same town a small business, consisting of a soda fountain outfit and a lunch, candy, and cigar stand. The business was started in April or May, 1913, and both of said parties assisted in the operation of the business. The proof introduced by appellee, principally her own testimony, tends to show that the business was started on her money, and that she leased the house under a written contract executed by her husband and certain other heirs of an estate. The soda fountain outfit was purchased from the American Fountain Fixtures Company under written contract dated April 29, 1913, between L. Laur and said vendor, and the title was reserved in the vendor until the purchase price should be paid. Appellee testified that she sent her husband to Memphis to make the purchase of the soda fountain, and that the initial payment was made out of her own funds, and that she was the real owner of the business, and that it was conducted in her own name. Appellee exhibited with her testimony a bill of sale, alleged to have been executed to her by her husband, dated September 27, 1913, conveying to her the soda fountain and cold-drink outfit—in fact, all of the articles that were sold under the execution.

The cashier of appellant bank testified that at the time of the purchase of the soda fountain he, as cashier, made a loan to L. Laur in the sum of \$200, and took his note therefor, and that the first payment on the soda fountain was made by L. Laur out of money deposited to his credit from that loan, and that the balance of the money thus loaned was used in payments on the soda fountain. The judgment obtained by the bank against L. Laur was upon a renewal of that original note. It was also shown by the testimony of the same witness that the deposits of the proceeds of the business were made in the bank at frequent intervals by L. Laur, and that he held himself out to the bank and to the public as being the owner of the business. Numerous other witnesses testified that the business was generally understood in the community to be that of L. Laur, and the place of business was known generally as "Luck Laur's" place. The constable, after levying the execution on the soda fountain and cold-drink outfit, left the property in the house until date of sale, and the sale was made on the day advertised

by an auctioneer standing out in front of the door. Appellee was present and protested against the sale, claiming the property as her own. As soon as the sale was over, the constable summoned several men as help, and took the property out of the house, over appellee's protest, and carried it over to the premises of appellant.

The trial court, over appellant's objection, gave an instruction to the jury, stating that the property in controversy was never in fact levied on, and that the sale made by the constable under said execution was illegal and void, and that the jury should not take into consideration the fact that a sale of the property had been made under execution. This instruction amounted to a peremptory one to find a verdict in favor of the appellee, for there was no other issue in the case except the right to subject the property to sale under the execution. The appellant asked the court to give instructions, submitting to the jury the issue whether or not the execution of the bill of sale of the property by L. Laur to his wife, the appellee, was for the fraudulent purpose of hindering or defrauding creditors, but the court refused to give that instruction or any other instruction on the subject.

[1] It was error to give a peremptory instruction to the effect that the sale under the execution was void. The only grounds upon which counsel for appellee attempts to defend that instruction is that the sale under the execution was not conducted in the presence of the property, and he cites decisions of this court in support of the rule that the sale of personal property under execution, or under power in a mortgage, must be made in the presence of the property, where it can be seen and examined by the prospective purchasers. The testimony concerning this sale is to the effect that it was conducted out in front of the door of the house in which the property was situated, and that appellee was present and protested against the sale. We are of the opinion that the sale was made in such proximity to the property as to satisfy all the requirements of the law in that respect, and that the sale was not invalid on that account.

[2] There is also a suggestion in the brief, casting a doubt upon the authority of Boswell to act as constable, but he was at least a de facto officer, and the sale was not void for that reason, if for no other. But, in addition to that, there is proof in the record that Boswell had been elected and duly qualified as constable for the preceding term, and that he was holding over without a new induction into office. It does not appear that any successor had been elected, and the Constitution (article 19, § 5) provides that all officers shall continue in office after the expiration of their terms until their successors are elected and qualified.

[3] The real question in the case was whether or not appellee was the owner of the property, and entitled to hold it against the creditors of her husband, or whether her claim was fictitious and colorable. Appellant introduced evidence which would have warranted a finding in its favor that appellee was not the owner of the property, and that her claim thereto was fictitious. That evidence tends to show that her husband, L. Laur, was operating the business in his own name, and that he bought the soda fountain and made the initial payment by money which he borrowed from the appellant, and that he made all the other payments on it. It would have warranted a finding that her claim was not a bona fide one, or that she permitted her husband to hold the property out to creditors as his own. Upon that finding of the facts, the jury should have been told that she could not claim the property against the creditors of her husband, who extended credit on the faith of her husband's ownership, and that such creditors had the right to enforce their claims by execution. *Mitchell v. State*, 86 Ark. 486, 111 S. W. 806.

Other assignments need not be discussed, for the reason that what we have already said is sufficient to dispose of this appeal.

The judgment is therefore reversed, and the cause remanded for a new trial.

WEATHERLY v. STANE. (No. 250.)

(Supreme Court of Arkansas. March 13, 1916.)

1. GARNISHMENT \S 172—INSTRUCTIONS—INDEBTEDNESS.

An instruction that, if the jury should find for plaintiff, they might find against the garnishee the amount of the garnishee's indebtedness to the defendant, not exceeding the amount due from defendant, was not objectionable as requiring the jury to find for a greater sum than the garnishee admitted to be due, if they found defendant's indebtedness in a larger sum.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 313; Dec. Dig. \S 172.]

2. APPEAL AND ERROR \S 1067—INSTRUCTIONS—PREJUDICIAL ERROR.

Where garnishee contended that he owed defendant \$3 for work, but that he had not bought timber from defendant, but from his father, whom he paid, the refusal of the garnishee's instruction that, if he purchased the timber from defendant's father, the jury could not find against him for more than the amount owing to the defendant for work, was prejudicial error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. \S 1067; Trial, Cent. Dig. § 475.]

3. TRIAL \S 260(1) — INSTRUCTIONS — SUFFICIENCY.

The court is not required to give all of the instructions which correctly declare the law, but the instructions are sufficient if, taken as a whole, they fairly and clearly present the law applicable to the respective theories of the parties on which they have offered competent evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. \S 260(1).]

Appeal from Circuit Court, Randolph County; J. B. Baker, Judge.

Action by Lee Stane against Johnnie Phillips, with garnishment against Arthur Weatherly. Judgment for plaintiff against defendant, and the garnishee appeals. Reversed and remanded.

Campbell, Pope & Spikes, of Pocahontas, for appellant. S. A. D. Eaton, of Pocahontas, for appellee.

SMITH, J. Appellee brought suit against one Johnnie Phillips in which he alleged that Phillips was indebted to him in the sum of \$324.52 on account of certain timber sold and delivered to him, and at the time of filing the complaint a garnishment issued against appellant, in which appellant was required to answer in what sum he was indebted to Phillips.

Phillips answered, and denied that he had purchased any timber or was indebted to plaintiff in any sum. Appellant, the garnishee, answered, and admitted an indebtedness of \$3, but denied any other indebtedness. Appellee filed a response to the denial of appellant in which he alleged that appellant had purchased the timber in controversy from Phillips, and was indebted to Phillips for the value thereof. The cause was submitted to the jury under conflicting evidence touching Phillips' liability for the timber, but there was a verdict against him, and a verdict also against appellant for the same amount.

Over the appellant's objection the court gave the following instruction:

"(4) You are further instructed that, if your verdict in this case should be for the plaintiff, then and in that event you are further authorized to find for the plaintiff and against the garnishee, Arthur Weatherly, such amount as shown by a preponderance of the evidence that said garnishee was indebted to the defendant, Johnnie Phillips, on the 20th of May, 1915, not to exceed such amount as you may find due from the defendant."

The court refused to give at appellant's request the following instruction:

"(2) You are instructed that, if you find from the evidence that the garnishee, Weatherly, did not purchase any timber from the defendant, Johnnie Phillips, but purchased the timber from John P. Phillips, then you cannot find against the said garnishee for more than \$3 owing by the garnishee to the defendant for work."

These were all of the instructions given, except one on the form of the verdict, and another to the effect that, if the jury found, from a preponderance of the evidence, that defendant purchased from plaintiff the timber in question, their verdict should be for the plaintiff for a sum equal to the value of the timber so purchased and received by defendant.

[1] On the part of the appellant it is in-

sisted that instruction numbered 4 was erroneous, in that it assumed that the liability of the garnishee was the same as that of the defendant, and that it assumed that the garnishee was indebted to the defendant, and required the jury to find against the garnishee if their finding was against the defendant. We think the instruction is not open to this objection. The garnishee admitted that he was indebted to the defendant in the sum of \$3 for work, and the jury was properly directed to return a verdict for that amount; but we do not understand that the instruction required the jury to find in a greater sum merely because they might also find that the defendant was indebted to the plaintiff in a larger sum.

[2] We do agree with appellant's contention, however, that the second instruction should have been given. It presents in a very concrete form the issue in the case; it being contended by appellant that he did not purchase the timber from Johnnie Phillips, but had purchased the same from his father, John P. Phillips, and had paid John P. Phillips for the timber by supplies furnished at his store. It was, of course, necessary for the jury to find that appellant's indebtedness was due to Johnnie Phillips, instead of John P. Phillips, and the instruction presents this issue in a clear-cut statement. Appellee admits that this is the law, but contends that the idea embraced in the second instruction is covered in the two instructions which the court gave upon his motion. But we cannot agree with him in this contention. Each party has the right to have the theory he contends for, and which he has adduced evidence to support, submitted to the jury upon a proper instruction. And we think that right was not accorded appellant.

[3] This is not a case where instructions had been multiplied and in which the same declaration of law was expressed in a different manner; for in such cases we have held that the court is not required to give all of the instructions which correctly declare the law, but that the instructions are sufficient if, taken as a whole, they fairly and correctly present the law applicable to the respective theories of the parties to the litigation which they have offered competent evidence to sustain. Had this second instruction been given, no doubt could have arisen in the minds of the jury that they must first find that Johnnie Phillips, and not his father, John P. Phillips, purchased the timber, and appellant had the right to require that the jury first find this before any verdict could be rendered against him. And for the error of the court in refusing to give this instruction the judgment must be reversed, and the cause will be remanded.

SHELDON HANDLE CO. et al. v. WILLIAMS. (No. 288.)

(Supreme Court of Arkansas. March 18, 1916.)

MASTER AND SERVANT—§218(2)—INJURIES TO SERVANT—ACTIONS—ASSUMPTION OF RISK.

Plaintiff was required to lace the belts in a factory in which he worked. Deciding that a belt near his place of work needed relacing, he secured lacing leather, and after some hesitation used it, though it was the thin side of the hide, and he at first tried to find the superintendent, who was temporarily absent, to procure another side of lacing leather. *Held* that, the leather being suitable for some belts and not defective, plaintiff assumed the risk of injury from the insufficiency of the strength of the leather, and hence cannot recover for an injury caused by the breaking of the lace.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 560; Dec. Dig. § 213(2).]

Hart, J., dissenting.

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by Claude Williams against the Sheldon Handle Company and others. From a judgment for plaintiff, defendants appeal. Reversed, and cause dismissed.

M. S. Cobb, of Hot Springs, and Wilson & Armstrong, of Memphis, Tenn., for appellants. H. B. Means and J. C. Ross, both of Malvern, for appellee.

McCULLOCH, C. J. Sheldon Handle Company is the name of a partnership composed of Mason Sheldon, M. O. Sheldon, and Z. L. Sheldon, who are operating a wooden handle factory at Malvern, Ark. The factory was constructed in the autumn of 1913, and was actually put into operation in January or February, 1914. The plaintiff, Claude Williams, began working for the defendants at the factory before the actual operation was begun. In other words, he was employed in November, 1913, to do general work about the plant, and when the operations began he was put to work at a lathe and continued to work there until he received the injury, on August 31, 1914, for which he seeks to recover compensation in this case. While he was at work at his lathe early in the forenoon of that day, a belt came loose from above him and fell down and struck his elbow and threw his hand into the knives of the machine, and serious injury to the limb resulted.

The cause of the giving way of the belt was that the lacing broke. There was no defect in the belt itself, and the plaintiff testified that he noticed when he went to work that morning that the lacing seemed to be in good condition. It was a 7-inch belt, and, according to the testimony of one of the witnesses, carried 10 or 15 horse power. The mill had been shut down nine days—from Saturday, August 22d, to Monday, August 31st, the day plaintiff was injured. It was a part of plaintiff's duty to see that the

things about his machine, including the belt, were in proper order. Two or three days before the mill was shut down, plaintiff put new lacing in the belt. It is not explained in the testimony, so far as we have observed, whether the lacing broke or came loose, or merely was thought to be worn out; but, at any rate, plaintiff undertook to lace it, as was his duty. Lace leather was kept in the plant to use in lacing the belt. A side of lace leather had been purchased by Mr. Sheldon, the manager, when the mill began operation and was kept in a certain cupboard or locker. At this time the side of leather had been used down to a strip about 6 inches wide and about 3 feet long, which included the thin or flanky part of the side of leather. When the plaintiff got ready to lace the belt, he went to the locker and got the piece of leather, but, after looking at it, decided that he would rather cut the lacing from a new side of leather which Mr. Sheldon had recently procured, but which it does not appear had been put in use. He talked with one of the men, Mr. Burch, who was also a witness in the case, and decided that he would rather cut strips from the new side of leather because he could get longer strips, and also because he thought that the thicker part of the hide would be better. He went off to find Mr. Sheldon, but the latter was away from the plant at that moment and the office was locked, so without seeking further the plaintiff went back and got the old piece of lace leather, and, with the help of Burch and another employé named Hicks, proceeded to cut the strips and lace the belt. The testimony shows that he cut the strips the full width allowed by the holes in the belt and that the lacing was properly performed.

The plaintiff and the other witnesses testified that the leather appeared to be and was in good condition, except that it was the thin and flanky part of the hide which was not so strong as the thicker part of the hide. There is some conflict in the testimony as to what is the best part of a side of lace leather, and there seems to be a difference of opinion as to the relative strength of the different parts; but it is undisputed that all parts of the hide are used, according to the size of the belt to be laced—that the larger the belt the stronger the lacing required, which is obviously true. Many of the witnesses say that the thin side of the hide is strong enough for anything below a 7 or 8 inch belt, and other witnesses say it is strong enough for any size belt.

One of the contentions of counsel for defendant is that the plaintiff assumed the risk of the danger from using that particular piece of leather for lacing the belt, and we are of the opinion that the contention is sound and that the plaintiff has not made out a case for the recovery of damages. This is not a case of furnishing defective, rotten,

or worn-out material. It is uncontradicted that the side of leather purchased by the defendants and placed there for use was of the best material obtainable, and the only contention with respect to its unfitness for use is that it had been used down to the thin or flanky part of the hide, which it was claimed was not strong enough to be used in lacing a belt of that size. Now, it was a part of the plaintiff's duty to lace the belt, and it necessarily followed that he was to determine whether the material placed there was fit for that particular use. It would be different if the material purchased had been defective in any other way so that the master might have discovered its unfitness by reasonable inspection, but such is not the case here, for the material was, as before stated, fit for use, and the only question was whether the unused part was fit for the particular use that plaintiff wanted to put it to. If he discovered that it had been used down to the place where it was unfit for use in lacing a belt of that size, then he could not use it without assuming the risk of the danger. It was obvious from his own testimony that he did fully appreciate the fact that it was not altogether suited for that purpose, but he decided to go ahead and use it without waiting for the return of the superintendent so that he could get the new side of leather. He did proceed to use it of his own volition, and the belt remained in that condition throughout the period of nine days during which the mill was idle.

The case falls, we think, within the principle announced by decisions of this and other courts to the effect that where the duty is delegated to the servant himself of making his own working place and appliances safe, or to determine the sufficiency of the appliances or material which he has to use, then he assumes the risk of any danger arising from the use of such working place, appliances, or material. *Southern Anthracite Coal Co. v. Bowen*, 93 Ark. 140, 124 S. W. 1048; *Fordyce Lumber Co. v. Lynn*, 108 Ark. 377, 158 S. W. 501, 47 L. R. A. (N. S.) 270; 4 *Thompson on Negligence*, § 4003.

The case of *Bligh v. Goldie*, 143 Mich. 596, 107 N. W. 316, which is cited on the brief of counsel for defendant, is quite similar to the facts of the present case. There the employé whose duty it was to repair a belt, went to the foreman to get lace leather which he preferred to use rather than rivets; but upon the suggestion of the foreman he went back and used the rivets, and an injury resulted from the breaking of the belt. The court held that the servant assumed the risk, and in disposing of that branch of the case said:

"There is nothing in his testimony that indicates a lack of knowledge with reference to the manner in which the belt was fastened, nor that any representations were made to him to lead him to suppose that the belt would be fastened in any other way than it was. As to this fea-

ture of the case, he must be deemed to have assumed the risk."

To sum up the situation presented in this case, it is seen that there was no negligence on the part of the master in failing to exercise care to discover defects nor in furnishing material that was wholly unfit for use; but, on the contrary, the material which finally proved unfit for this particular use was in fact good material for other uses about the plant, and the choice of using it for this particular work was left entirely to the plaintiff. We think therefore that it presents a clear case of assumption of risk, and that plaintiff has no right to recover. That being true, it is unnecessary to notice other assignments of error, and, the case having been fully developed, no useful purpose would be served in remanding it for a new trial.

The judgment is therefore reversed, and the cause dismissed.

HART, J., dissenting.

SALLEE, Treasurer of Running Lake Drainage Dist., v. BANK OF CORNING et al.
(No. 225.)

(Supreme Court of Arkansas. March 6, 1916.)

1. DRAINS § 20 — TREASURER — ACTION — STATUTES.

A drainage district was created by Sp. Acts 1911, p. 544, section 4 of which provides for a treasurer. Section 11 makes it his duty to collect assessments, and section 17 provides that he shall collect taxes, give a bond to the president, be the financial agent of the district, and have charge of its funds. Sections 22 and 24 provide that money from the sale of bonds, or from loans, shall be paid into the treasury. *Held*, that the treasurer of the district was the real party in interest and had authority to sue the defendant bank for money deposited by his predecessor and belonging to the district.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 20.]

2. DRAINS § 20 — TREASURER'S ACTION TO RECOVER DEPOSIT—CHECK.

In such case, the check given by the treasurer's predecessor was not the foundation of the suit against him for refusing to pay over the funds of the district to his successor, or against the bank in which such funds were deposited, as it only amounted to an admission that the amount named therein was the amount of the funds in the former treasurer's hands belonging to the district; so that, notwithstanding the check was not signed by the former treasurer as treasurer or made to his successor as treasurer, the treasurer might maintain an action thereon against the former treasurer and the bank.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 20.]

3. DRAINS § 20 — TREASURER'S ACTION FOR FUNDS—SUFFICIENCY OF COMPLAINT.

In such suit, a complaint, alleging that the plaintiff's predecessor, as treasurer, deposited the funds of the district in the defendant bank, that the funds remained in the bank and were wrongfully withheld by it from the custody of plaintiff, that prior to such time the plaintiff was elected and qualified as treasurer, and that demand was made upon the bank and payment was refused, sufficiently alleged that the former treasurer deposited the fund in the defendant

bank and that it was still on deposit to the credit of the district.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. ¶ 20.]

4. PLEADING ¶ 216(1) — DEMURRER — CONSTRUCTION.

In determining whether a demurrer to a complaint should be sustained, every allegation therein, together with every inference reasonably deducible therefrom, must be considered.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 535, 536, 539; Dec. Dig. ¶ 216(1).]

5. VENUE ¶ 22(1) — JOINT DEFENDANTS — SUMMONS.

Under Kirby's Dig. § 6072, providing that certain actions, including such as a suit by the treasurer of a drainage district to recover the funds of the district, may be brought in any county in which one of the several defendants resides or is summoned, where the service of summons against the other defendants, who were proper parties, was made in R. county, where the suit was commenced, service upon the president of defendant bank in O. county, where it had its place of business, was sufficient.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 35; Dec. Dig. ¶ 22(1).]

Appeal from Circuit Court, Randolph County; J. B. Baker, Judge.

Action by J. O. Sallee, as treasurer of Running Lake Drainage District, against the Bank of Corning and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Appellant sued appellees to recover the sum of \$23,775.81, with the accrued interest, the amount alleged to be due him as treasurer of Running Lake drainage district by appellees. Appellant, in his complaint, alleged: That J. O. Sallee is treasurer of Running Lake drainage district in Randolph county, Ark.; that he succeeded Ferd Spinnenweber as treasurer of said district; that said district was duly organized under Act No. 197 of the acts of the General Assembly of the state of Arkansas, approved April 20, 1911; that Ferd Spinnenweber was on the 13th day of May, 1913, elected treasurer of said district; that the United States Fidelity & Guaranty Company for a valuable consideration became surety upon a bond which said Spinnenweber executed to the president of said drainage district as such treasurer; that said bond was conditioned for the safe-keeping and faithful accounting of all the funds of the district that came in the hands of said Spinnenweber as treasurer. A copy of the bond is made Exhibit A to the complaint. The plaintiff further alleges that the term of office of said Spinnenweber as treasurer expired on the 7th day of June, 1915, and that on said date J. O. Sallee was duly elected and qualified as treasurer of said district; that he filed his bond as required by law and became entitled to the possession of all the funds belonging to said district; that the sum of \$23,775.81 was in the hands of Spinnenweber as such treasurer; that said funds at a prior date had been

deposited in the Bank of Corning, a corporation doing business in Clay county, Ark.; that said Spinnenweber executed and delivered to said Sallee a check upon the Bank of Corning for said sum of \$23,775.81; that said check was duly presented to the Bank of Corning and payment thereof was refused by said bank; that said Bank of Corning is wrongfully withholding said sum of money to which Sallee is entitled as treasurer of said drainage district; that demand was made upon said Bank of Corning and said Spinnenweber for the payment of said money on June 7, 1915, but that same was then, and at all times since then has been, refused. Appellees, Ferd Spinnenweber and United States Fidelity & Guaranty Company, demurred to the complaint on the following grounds: (1) That said complaint shows on its face that Sallee had no authority to maintain the action. (2) That said complaint does not state a cause of action against them. (3) That the bond sued on and made a part of plaintiff's complaint is made to the president of the drainage district, and Sallee has no authority or right to bring an action thereon. That the check described in the complaint and made an exhibit thereto shows on its face that it is not properly executed, in that it is not signed by the president and board of directors, as required by section 17 and 22 of the act creating the drainage district. The demurrer was by the court sustained, and, appellant electing to stand on his complaint and refusing to plead further, his cause of action was by the court dismissed at his cost. Thereupon appellee Bank of Corning filed its motion to quash the service of summons on it for the reason that it is a corporation organized under the laws of the state of Arkansas and engaged in banking business in Clay county, and that summons was served on its president in Clay county. The motion was by the court sustained, and service of summons on said bank was by the court quashed. From the judgment rendered, appellant has duly prosecuted an appeal to this court.

Campbell, Pope & Spikes, of Pocahontas, for appellant. C. H. Henderson, of Pocahontas, and G. B. Oliver, of Corning, for appellees.

HART, J. (after stating the facts as above). [1] We think the treasurer of the district was the real party in interest and had authority to sue for the money belonging to the district. In the case of *Haynes v. Butler*, 30 Ark. 69, the court held that the county treasurer has capacity to sue or collect on his official bond for a failure to pay over money to him at a delinquent tax sale in excess of tax penalty and costs. The court said that, as a general rule, all public officers, though not expressly authorized by statute, have a capacity to sue, commen-

surate with their public trusts and duties. In *Hunnicut v. Kirkpatrick*, Treasurer, 39 Ark. 172, the court held that either the state, the obligee in the bond as trustee of an express trust, or the county treasurer, may maintain an action on his predecessor's bond for the amount of school funds found, upon settlement with the county court, to be due from him.

Running Lake Drainage District was created by Special Act of the Legislature of 1911. See Special Acts of 1911, p. 544. Section 4 of the act provides for the officers to be elected biennially. One of the officers is a treasurer. Section 11 makes it the duty of the treasurer to collect assessments for the district. Section 17 also provides that the treasurer shall collect the annual taxes and assessments upon the property within the district. It also provides that he shall give a bond with approved security payable to the president conditioned upon his honest and faithful accounting for funds. It further provides that he shall be the financial agent of the drainage district and shall receive a receipt for the funds due the district and pay out the same only upon the warrant of the secretary indorsed by the president. It also provides that he shall take charge of the funds arising from the sale of bonds issued by the district. Section 22 also provides that the money arising from the sale of bonds shall be paid into the treasury of the levee and drainage board. Section 24 also provides that moneys borrowed or arising from the sale of bonds shall be paid into the treasury of the levee and drainage board.

Thus it will be seen that the treasurer is made the custodian of the funds of the district. Among his duties is that of disbursing the moneys of the district to the proper persons. It is true money could only be paid out by him on the warrant of the secretary countersigned by the president, but he alone had authority to pay out money for the district or handle any funds belonging to the district. He was entitled to the possession of the money of the district that he might properly perform his duties as treasurer. He was entitled to the possession of the money in order that he might properly disburse it as provided for in the act creating the district. Therefore he had a right to maintain an action against any person or corporation improperly withholding the money from him in order that he might execute his trust.

It is true, as contended by counsel for appellees, that the bond was made payable to the president of the board, and, under the authorities above referred to, the president of the board, as obligee of the bond, might have brought an action on it against the treasurer when improperly withholding the funds from his successor in office; but, in case of recovery, the court should have ordered the money deposited in the treasury of the district as provided for by the act.

The president of the board did not have any authority to handle the funds of the district. As we have already seen, the treasurer alone was entitled to the funds, and, as the real party in interest, had the right to maintain this action.

[2] Again, it is contended by counsel for appellees that the check was the foundation of the action, and for that reason controlled the allegations of the complaint, and that the check was not signed by Spinnenweber as treasurer of the district, nor made to Sallee as treasurer; that it follows that Sallee as treasurer could not maintain an action on the check against the Bank of Corning or against Spinnenweber, because the check had never been assigned to him as treasurer.

In answer to this contention, we need only say that the foundation of the suit is not the check given by Spinnenweber to Sallee. The complaint alleges that Sallee was duly elected treasurer of the district and qualified as such and was entitled to the funds of the district; that Spinnenweber had in his possession certain funds belonging to the district when his term of office expired, and refused to turn over the funds on hand to his successor in office. His refusal to pay over the funds of the district to his successor in office was the basis in the action. His giving the check only amounted to an admission that the amount named in the check was the amount of funds in his hands belonging to the district.

[3, 4] It is also contended by counsel for appellees that the judgment should be upheld, because there is no allegation in the complaint that Spinnenweber as treasurer deposited the funds in the Bank of Corning, and no allegation that the funds were not still on deposit in the Bank of Corning to the credit of the drainage district.

In determining whether or not a demurrer to a complaint should be sustained, every allegation made therein, together with every inference reasonably deducible therefrom, must be considered. *Gus Blass Dry Goods Co. v. Reinman*, 102 Ark. 287, 143 S. W. 1087; *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 137, and cases cited; *Arkansas Life Ins. Co. v. American National Ins. Co.*, 110 Ark. 130, 161 S. W. 136. Tested by this rule, we think the complaint alleges that Spinnenweber deposited the funds of the district in the Bank of Corning, and that the funds are now in the bank and are wrongfully withheld by it from the custody of the present treasurer.

The complaint alleges in express terms that, prior to the time the present treasurer was elected and qualified, Spinnenweber deposited the funds in the Bank of Corning; that demand was made to the bank, and payment thereof was refused. Again, the complaint alleges that the Bank of Corning is wrongfully withholding said sum of money belonging to said district to which the plaintiff is entitled as its treasurer. Again, the

plaintiff alleges that demand was made upon the Bank of Corning and Spinnenweber for the payment to plaintiff of said money on June 7, 1915, but that same was then, and at all times since then has been, refused. Therefore we think the allegations of the complaint were sufficient to entitle the plaintiff to maintain the action, and that the court erred in sustaining the demurrer thereto.

[5] The court also quashed the service of summons upon the Bank of Corning. The suit was commenced in Randolph county, and service of summons against Spinnenweber and United States Fidelity & Guaranty Company was had in that county. The Bank of Corning had its place of business in Clay county, and service of summons was had upon its president in that county. This was sufficient.

Under section 6072 of Kirby's Digest, an action like the present one may be brought in any county in which one of several defendants resides or is summoned. If the suit had been against the Bank of Corning alone, it should have been brought in Clay county where the bank was situated and did business. See section 6067 of Kirby's Digest. However, as we have already seen, the suit was brought against the Bank of Corning and other defendants, and service was had upon the other defendants in Randolph county. They were proper parties to the suit, and judgment against the Bank of Corning could be upheld under section 6072 of Kirby's Digest. See *Beal-Doyle Dry Goods Co. v. Odd Fellows Building Co.*, 109 Ark. 77, 158 S. W. 955.

From the views we have expressed, it follows that the court erred in sustaining the demurrer to the complaint, and for that error the judgment must be reversed, and the cause will be remanded for further proceedings according to law.

ST. LOUIS, I. M. & S. RY. CO. v. NEEDHAM. (No. 236.)

(Supreme Court of Arkansas. March 13, 1916.)

1. CARRIERS ⇨271—SETTING DOWN PASSENGER—NOTICE OF NECESSITY OF CHANGE OF CARS.

An adult passenger, apparently of ordinary intelligence, and in full possession of her senses, was bound to take notice of her route and make the necessary change of cars, and the carrier was not required to give her special notice of the necessity therefor, so that, if it announced the arrival at a junction where it was necessary to change for points on the line of the connecting carrier, it was not liable for carrying the passenger beyond the junction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1067-1071; Dec. Dig. ⇨271.]

2. CARRIERS ⇨278(1) — CARRYING BEYOND JUNCTION—QUESTION FOR JURY—ANNOUNCEMENT OF JUNCTION.

In an action for damages from defendant's negligent failure to notify plaintiff of the necessity for changing cars at a junction, evidence held to make the defendant's announcement of

the junction and the necessity for changing a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1080; Dec. Dig. ⇨278(1).]

3. TRIAL ⇨253(4)—INSTRUCTION—IGNORING ISSUES.

In such action, where the issue was whether the carrier had announced the junction and the necessity for changing cars as claimed by it, an instruction, leaving it to the jury to determine whether the trainman had exercised ordinary care to apprise plaintiff of the place she was to leave the train to take a train on a connecting road, was erroneous, as ignoring the real issue.

[Ed. Note.—For other cases, see Trial, Dec. Dig. ⇨253(4).]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by Mrs. S. E. Needham against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

E. B. Kinsworthy and W. G. Riddick, both of Little Rock, for appellant. Geo. F. Jones, of Little Rock, for appellee.

MCCULLOCH, O. J. The plaintiff, Mrs. Needham, became a passenger on one of the defendant's trains en route to Heber Springs, a station on the Missouri & North Arkansas Railway, and was carried beyond the junction where she should have changed cars. This is an action to recover damages alleged to have been sustained by reason of negligent failure on the part of defendant's servants to notify plaintiff of the necessity for changing cars at Kensett, the junction of the two roads. The case was tried before a jury, and the result was a verdict against the defendant, and from the judgment rendered thereon the defendant has prosecuted this appeal.

[1, 2] Plaintiff resided in Little Rock and bought a round-trip ticket to Heber Springs, the ticket reading over defendant's line from Little Rock to Kensett, and thence over the Missouri & North Arkansas Railroad to point of destination. Plaintiff boarded a train at the Union Station, Little Rock, at 2:45 p. m. The conductor came through the train shortly after leaving Little Rock, and detached the coupon covering the fare for passage to Kensett, and returned the balance of the ticket to plaintiff. Plaintiff testified that she did not know where Heber Springs was, but supposed that it was on the line of defendant's road, and that she would not have to change cars. The conductor says that when he took up the ticket he informed plaintiff of the necessity of changing cars at Kensett, but this the plaintiff denies in her testimony. The train stopped at Kensett a sufficient length of time for passengers to debark, and the name of the station was announced by one of the trainmen in the coach in which the plaintiff was riding, but there is a conflict in the testimony as to the extent of

the announcement. Plaintiff said that the brakeman or other employé merely called the name of the station, but the flagman testified that he called the name of the station and gave the announcement to "change cars for Searcy and Eureka Springs." At any rate, plaintiff failed to debark at the station, and she says that she did not learn that a mistake had been made in not changing cars until she reached Crawfordsville, a station on the road 17 miles west of Memphis. She states that the conductor then admitted that she had been carried by on account of his mistake, and stopped the train at Crawfordsville so that she could get off. She was furnished transportation from Crawfordsville back to Wynne, and thence back to Kensett, but in doing so she was kept up all night, either at the station at Wynne or continuing the journey back to Kensett.

It is contended by counsel for defendant that the judgment should be reversed and the cause remanded for the reason that according to the undisputed testimony the stop at Kensett was announced, and that that was all that the servants of the company were required to do, the plaintiff being guilty of negligence in failing to ascertain that that was the point for changing cars. It is clear that if there was an announcement made, as claimed by the flagman, giving notice of the necessity for a change of cars to points north on the Missouri & North Arkansas Railroad, the plaintiff was bound to take notice of her route and make the necessary change. She was an adult, apparently of ordinary intelligence, and in full possession of her senses. Therefore the carrier was not required to give her special notice of the necessity for a change of cars. All that the law required was that a suitable regulation be made for the convenience of passengers, and that reasonable steps be taken to bring those regulations to the attention of the passenger; no further individual notice being required. *St. L., I. M. & S. Ry. Co. v. Atchison*, 47 Ark. 74, 14 S. W. 468; *Jewell v. St. L., I. M. & S. Ry. Co.*, 82 Ark. 598, 102 S. W. 370; *Rock Island, A. & L. R. Co. v. Stevens*, 84 Ark. 436, 105 S. W. 1062, 108 S. W. 517, 16 L. R. A. (N. S.) 1132; *Lilly v. St. L. & S. F. Ry. Co.*, 31 Okl. 521, 122 Pac. 502, 39 L. R. A. (N. S.) 663; *Central of Georgia Ry. Co. v. Ashley*, 159 Ala. 145, 48 South. 981. In the Alabama case above cited, the rule is, we think, correctly stated as follows:

"A primary duty rests on the carrier of passengers to give publicity to its regulations, whether of schedule, including places whereat its train will stop for the discharge or reception of passengers, or of routing on its roadway, embracing points of change to another line of its roadway or that of another company, to the end that the ordinarily prudent and intelligent traveler may be informed of the facts essentially necessary for him to accomplish his journey. The reason for such duty inheres in the nature of the service afforded by such agencies, in connection with the power possessed by carriers to formulate and enforce such reasonable regu-

lations as the conduct of the business requires." Having this power, it would be wholly irrational to say that no duty, commensurate with the power, rests on the carrier to advise the traveling public, by reasonable means, of regulations so necessary to any journey by rail; for such a pronouncement would essentially cast upon the passenger the obligation, not simply to exercise reasonable prudence and diligence to ascertain the regulations, with respect to where, when, and how his journey may be made under regulations existing and published, but to seek out unpublished regulations the operation of which affect his journey. The result would be, naturally, that no carrier of passengers would make any effort to give publicity to its regulations touching matters associated with the employment of its transportative agencies."

We think the above statement of the law is correct, as applicable to the facts of this case, and that while the defendant had the right to assume that the plaintiff had informed herself as to the route to her destination, yet the obligation rested upon the carrier to give some notice of the arrival at the junction point, and of the fact that it was the junction point applicable to the route plaintiff was traveling. The undisputed evidence shows that there was such a regulation, which consisted of an announcement of the fact that it was the junction, and that it was necessary to change for points to the north on the line of the connecting carrier. If that announcement, in accordance with the regulation, was in fact made, then there can be no recovery in this case, but there is a dispute on that point. It is argued that, inasmuch as the plaintiff confesses that she did not know that Heber Springs was on another line of railway, the announcement, even if it had been made, would have been ineffectual so far as she is concerned, and would have meant nothing to her. It is true the plaintiff says that she did not know that she had to change cars at all, but we cannot say that an announcement of the change at Kensett would not have attracted the plaintiff's attention to the extent that she would have pursued further inquiry to ascertain whether or not that change applied to her route. The jury might have drawn the inference from the circumstances that the announcement, if made, would have put the plaintiff upon an inquiry which she would have pursued by asking information of the conductor. We are of the opinion, therefore, that there was enough to go to the jury on that issue, about which there was a sharp conflict in the testimony.

[3] That issue was not, however, correctly submitted to the jury, and for that reason the judgment must be reversed for a new trial. The court gave the following instruction, over the objection of the defendant:

"(10) You are instructed that it was the duty of the defendant to use ordinary care to apprise plaintiff of the place she was to leave its train and catch a train on another road to continue her journey under the ticket defendant had sold her. By ordinary care is meant that care an ordinarily prudent person would exercise under the circumstances. If you find that her having been carried by Kensett was the result of want of ordinary care on the part of the

employees of the defendant, then you will find for the plaintiff, if you find she suffered any damages of which such failure to exercise ordinary care was the proximate cause. By 'proximate cause' is meant the natural and probable result of an act, and that that should have been foreseen under the circumstances."

The instruction is erroneous in leaving it to the jury to determine what would constitute ordinary care. The regulation of the company for the junction station to be announced, and the announcement of the necessity for changing cars for points on the intersecting line, was reasonable, and constituted the full measure of the carrier's duty to the passengers. It was not proper to leave it to the jury to say whether or not, if that regulation had been complied with, it constituted ordinary care. The flagman testified that he made the announcement of the necessity for change of cars, and the jury may have accepted his statement as true, and yet found that ordinary care required a special notice to the plaintiff that she must change cars in order to go to Heber Springs. The instruction ignores the real point at issue in the case, as to whether or not the announcement was made as testified by the flagman, and erroneously leaves it to the jury to determine whether or not the trainmen had exercised ordinary care "to apprise plaintiff of the place she was to leave its train and catch a train on another road."

For that error, the judgment is reversed, and the cause remanded for a new trial.

CHAMBERS et al. v. CUNNINGHAM (No. 237.)

(Supreme Court of Arkansas. March 13, 1916.)

1. USURY §117—SUFFICIENCY OF EVIDENCE.

In an action to foreclose a mortgage on realty, evidence held insufficient to sustain the plea of usury as to the notes representing the secured debt.

[Ed. Note.—For other cases, see Usury, Dec. Dig. §117.]

2. EXECUTORS AND ADMINISTRATORS §29(5)—APPOINTMENT—NECESSITY OF ADMINISTRATION.

The appointment of an administrator by the probate court is conclusive of the necessity for administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 181; Dec. Dig. §29(5).]

3. EXECUTORS AND ADMINISTRATORS §114 — ACCEPTANCE OF ASSIGNMENT OF NOTE—AUTHORITY.

Where notes and a mortgage were executed by a debtor and his wife to the creditor's widow and her son, who assigned them to the creditor's administrator, the maker could not, in the administrator's action to foreclose the mortgage, question his authority to accept an assignment of the notes.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 465, 466; Dec. Dig. §114.]

Appeal from Conway Chancery Court; J. M. Martin, Special Chancellor.

Action by G. L. Cunningham, Jr., as administrator, against J. B. Chambers and others. From a decree for plaintiff, defendants appeal. Affirmed.

Appellants pro se. Sellers & Sellers, of Morrilton, for appellee.

McCULLOCH, C. J. This is an action instituted in the chancery court of Conway county by G. L. Cunningham, Jr., as administrator of the estate of G. L. Cunningham, deceased, against the defendants, J. B. Chambers and others, to foreclose a mortgage on real estate. The mortgage was executed on March 8, 1911, by J. B. Chambers and his wife to G. L. Cunningham, Jr. (individually), and his mother, M. J. Cunningham, to secure a debt of \$2,738.90 evidenced by five promissory notes, each for the sum of \$547.78, bearing interest at the rate of 6 per cent. per annum from date until paid. Subsequent to that date letters of administration on the estate of G. L. Cunningham, Sr., were issued to G. L. Cunningham, Jr., and said notes were by the payees transferred to said administrator.

M. J. Cunningham and G. L. Cunningham, Jr., are the widow and only heir of G. L. Cunningham, deceased, and it is undisputed that said notes were executed to them by J. B. Chambers in renewal of certain notes which Chambers had previously executed to the senior Cunningham. There had been no administration on the estate of said decedent at the time of the execution of said notes, but, as before stated, letters of administration were issued to the plaintiff subsequent to that date and prior to the commencement of this suit. The evidence shows that there was no indebtedness of the estate of Cunningham, deceased, except a small amount of household expenses which had been paid.

The defendants challenge the authority of the administrator to sue on the notes, but the principal defense offered is that the original debt to Cunningham, Sr., was usurious, and that these notes, being executed in renewal thereof, are likewise void on account of usury. It is alleged in the answer, and the testimony of J. B. Chambers tends to prove, that the original indebtedness to G. L. Cunningham, Sr., was evidenced by notes bearing 10 per cent. interest from date until paid, and that, in addition thereto, there was an oral agreement between the parties that the maker of the notes was to pay interest at the rate of 25 per cent. per annum. The testimony of Chambers, if accepted as true, also shows that the notes were, in fact, paid. He testified that he began dealing with G. L. Cunningham, Sr., in the early part of the year 1901, and executed two notes, payable in the fall, one of which was for \$50, and the other for \$682.89; also that he executed a new note on January 14, 1902,

for \$878.85, and another note on March 17, 1904, for \$767.70, and another on January 17, 1905, for \$587.36. He claims that the last two notes were executed for accumulated usurious interest, and that he had paid, from time to time, more than enough to satisfy the original debt and lawful interest.

It appears from the testimony that some time prior to the year 1911, G. L. Cunningham, Sr., died, leaving his widow and the plaintiff as his sole heir at law. The plaintiff is a young man, and knew nothing at all about the affairs of his father, but in going through the papers found the notes executed by defendant Chambers, aggregating, with accumulated interest, the amount of the notes in suit. The old notes were secured by a mortgage on land and on a gin outfit. He testified that he conferred with Chambers several times about the payment of the debt, and that Chambers asked for time, and promised to make payments in the following fall, but failed to do so. Another creditor of Chambers sued out an attachment and levied it on the gin property, and, according to the testimony of plaintiff, this circumstance was reported to him by Chambers, who stated that the property belonged to the Cunningham estate by reason of the mortgage, and that it was their duty to protect it. In February, 1911, Chambers executed to young Cunningham and his mother a bill of sale for the gin outfit at an estimated price of \$1,500, to be credited on the old indebtedness, but on March 3, 1911, the gin property was reconveyed by Mrs. Cunningham and her son to Chambers, who then executed the new notes now in controversy for the amount of the original debt and accumulated interest. The old notes were not introduced in evidence, and the only testimony given on that subject is that of the plaintiff, who testified in general terms that the amount of the new notes was the aggregate of the old notes and accumulated interest. He denies that anything was said between him and Chambers about the notes being usurious until after the commencement of this suit.

Chambers testified that young Cunningham came to see him about the notes, and figured up the amount to be \$4,238.90, that he informed Cunningham of the usurious character of the transactions with the latter's father, and insisted that he had paid all that was justly due, and asked Cunningham to accept the new notes for one-half of the amount of the old ones, with accumulated interest, which offer he said was declined, and that he then executed the bill of sale for the gin, and subsequently the mortgage in controversy. There is an important inconsistency in the testimony of Chambers, for he claims that Cunningham figured up the notes to be \$4,238.90, and insisted upon payment of the whole sum, expressly refusing to accept any less, and yet the fact is undisputed that the new notes were executed for amounts aggregating only \$2,788.90. The consideration

of \$1,500 for the bill of sale of the gin outfit would, if deducted from the amount which Chambers says was asserted against him, leave the amount of the notes, but the proof is that the gin outfit was reconveyed to Chambers, so that credit does not stand on the amount of the indebtedness. The statement of Chambers to the effect that he informed young Cunningham of the usurious character of the old indebtedness is corroborated by the testimony of his wife and his daughter-in-law, but it is contradicted by the testimony of another witness who, so far as the record shows, has no interest in this controversy. There is also in the record the testimony of two or three witnesses who say that the senior Cunningham during his lifetime told them that he was charging Chambers 25 per cent. interest.

[1] We premit any discussion of the question whether or not the testimony of Chambers was rendered incompetent because of the fact that it related to transactions with the decedent, inasmuch as a ruling on the motion to strike it out was not pressed before the lower court. Treating the testimony as competent, we think it cannot be said that the finding of the chancellor was against the preponderance of the evidence. Proof of the fact that usury was actually charged depends wholly on the testimony of Chambers himself and upon the additional testimony of two or three parties to the effect that Cunningham told them that he was charging Chambers 25 per cent. interest, which, under the circumstances which the witnesses say these statements were made by the elder Cunningham, is so unreasonable as to be entitled to very little, if any, credit. Now, the fact that Chambers waited until after the death of the elder Cunningham, and in the meantime executed new notes for the debt without saying anything about the usurious character of the indebtedness, is a strong circumstance against crediting his testimony, especially when he claims that he had, in fact, paid a sufficient amount to the elder Cunningham to discharge the indebtedness. The chancellor had the right, after having reached the conclusion that Chambers had kept silent so long a time and in the meantime executed new notes without saying anything about the defenses which he now asserts against the old indebtedness, to take those circumstances to the discredit of Chambers in weighing his testimony; nor can it be said that the chancellor erred in reaching the conclusion that Chambers had not, as he claims, said anything about the usurious character of the indebtedness to young Cunningham when he executed the new notes. Upon the whole we are not convinced that the plea of usury is established by the preponderance of the testimony, and it therefore becomes our duty to leave the finding of the chancellor on that issue undisturbed.

[2, 3] In answer to the contention that

plaintiff has no right to sue, for the reason, in the first place, that there being no indebtedness of the estate there was no authority for the issuance of letters of administration, and, next, that the administrator had no authority to accept an assignment of the notes, it may be said that the appointment of the administrator by the probate court was conclusive of the necessity for administration (Stewart v. Smiley, Administrator, 46 Ark. 373), and that the defendants are not in a position to question the authority of the administrator to accept an assignment of the notes. The notes and the mortgage were, in fact, executed by Chambers and wife to Mrs. Cunningham and her son, and they assigned them to the administrator, and the decree protects the defendant from any further suit on the debt.

Finding that the finding of the chancellor is not against the preponderance of the evidence as to the only real issue in the case, it follows that the decree must be affirmed; and it is so ordered.

GARDNER v. FIRST NAT. BANK OF DE QUEEN. (No. 227.)

(Supreme Court of Arkansas. March 6, 1916.)

1. CHATTEL MORTGAGES \Leftrightarrow 138(1)—ARTISANS' LIENS—PRIORITY.

The artisan's lien created by Acts 1911, p. 298, § 1, though it attaches subsequent to the recordation of a chattel mortgage on personal property used in the operation of a mill, is prior to such mortgage when the work for which the lien is claimed was necessary to permit the conduct of the business, so that the mortgagee must have contemplated its being done as necessary to the securing of his mortgage lien.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 229, 231-236; Dec. Dig. \Leftrightarrow 138(1).]

2. LIENS \Leftrightarrow 5—ARTISANS' LIENS—CHARACTER.

Artisans' liens are a creation of the common law, and are not dependent upon statute for their existence.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 25; Dec. Dig. \Leftrightarrow 5.]

3. MORTGAGES \Leftrightarrow 151(3)—MECHANICS' LIENS—PRIORITY.

There is no implied authority from the mortgagee of real property to construct improvements thereon, so that the mechanic's lien for such improvements is not prior to the recorded mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 332-336; Dec. Dig. \Leftrightarrow 151(3).]

Appeal from Circuit Court, Sevier County: Jeff. T. Cowling, Judge.

Action by A. B. Gardner against T. J. Harvill, in which the First National Bank of De Queen intervened. From a judgment for the intervener, the plaintiff appeals. Reversed and remanded.

T. J. Harvill, the owner of a sawmill, was indebted to A. B. Gardner, a blacksmith and wheelwright and horseshoer, in the sum of \$50.85 for repair work on a wagon and shoeing horses. He filed an itemized account of

his work done with the circuit clerk within the time required by the statute. Then he instituted this action before a justice of the peace to enforce his lien against the property. The First National Bank of De Queen filed an intervention claiming the ownership of the property by virtue of a mortgage executed to it by T. J. Harvill before the work was done by the plaintiff. The plaintiff recovered judgment before the justice of the peace, and the case was appealed to the circuit court. The facts, briefly stated, are as follows: T. J. Harvill owned and operated a sawmill. In connection with it, he used some log wagons and some horses and mules. The First National Bank of De Queen had a mortgage on the wagons and horses and mules, but allowed Harvill to use them in the operation of his sawmill. The mortgage was duly recorded. After this, the plaintiff, Gardner, who was a blacksmith and wheelwright, made certain repairs on the wagons and shod some of the horses and mules which were engaged in pulling the wagons. The mortgagee did not know that the mortgagor had had the repair work done and did not give its specific consent to its being done. The circuit court held that the bank had a lien prior in point of time to that of Gardner and that its lien was superior to Gardner's lien. Judgment was thereon rendered in favor of the bank, and the plaintiff, Gardner, has appealed.

Garrison & Steel and B. E. Isbell, all of De Queen, for appellant.

HART, J. (after stating the facts as above). [1, 2] Section 1 of Act 324 of the General Acts of 1911 provides that:

"Blacksmiths, wheelwrights and horseshoers, who perform work or labor for any person, if unpaid for same, shall have an absolute lien on the product of their labor and upon all wagons, carriages, implements and other articles repaired or horses or other animals shod by them, for all sums of money due for such work or labor and for any materials furnished by them and used in such product, repairs or shoeing."

See General Acts of 1911, p. 298.

Artisans' liens are a creation of the common law and are not dependent upon statute for their existence. In the case before us, the mortgagor operated a sawmill, and the personal property in the controversy in this suit which was embraced in the mortgage to the bank was used by him in the operation of the mill. He used them as a means of earning the money to pay off the mortgage debt. The mortgagee allowed the mortgagor to keep and use the property for that purpose. It was necessary that the wagons be repaired and that the horses be shod in order to be used by the mortgagor for the purpose for which they were allowed to remain in his possession. In short, the record discloses that the mortgagee allowed the mortgagor to keep the property to use in running his sawmill, and it may be fairly implied that such

use of the property was contemplated when the mortgage was executed. Under such circumstances, necessary repairs are superior to the lien of the mortgage as the mortgagee had impliedly authorized them.

The rule is well stated in *Hammond v. Danielson*, 126 Mass. 294, which was a case of a lien for repairs on a hack left in the possession of the mortgagor to be used in his business. In that case, Gray, C. J., said:

"A lien on personal property cannot indeed be created without authority of the owner. *Hollingsworth v. Dow*, 19 Pick. [Mass.] 228; *Globe Works v. Wright*, 106 Mass. 207. But in the present case such an authority must be implied from the facts agreed. The subject of the mortgage is a hack, that is to say, a carriage let for hire, described in the mortgage as 'now in use' at certain stables, and which, as the parties have agreed in the case stated, the mortgagor retained possession of and used agreeably to the terms of the mortgage. It was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt. The case is analogous to those in which courts of common law, as well as of admiralty, have held, upon general principles, independently of any provision of statute, that liens for repairs made by mechanics upon vessels in their possession take precedence of prior mortgages."

To the same effect, see *Smith v. Stevens*, 86 Minn. 303, 81 N. W. 55; *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. Rep. 663; *Tucker v. Werner*, 2 Misc. Rep. 193, 21 N. Y. Supp. 264; *Ruppert v. Zang*, 73 N. J. Law, 216, 62 Atl. 998; *Garr v. Clements*, 4 N. D. 559, 62 N. W. 640; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

There is nothing in our decisions in regard to the priority of mortgages over mechanics' liens which conflict with the rule we have here announced.

[3] In the case of the mortgage of realty there can be no implied authority from a mortgagee that the mortgagor go on and create a lien for erecting new buildings or improving existing ones that shall take precedence of the mortgage. The buildings are attached to the soil, and, as soon as erected, become a part of the realty. Buildings which are repaired are a part of the realty before the repairs are made. No facts exist in the nature of the transaction from which authority on the part of the mortgagor to build or to repair houses can be implied.

The doctrine of agency implied from circumstances upon which the decision is based was recognized by this court in *Sheeks-Stephens Store v. Richardson*, 76 Ark. 282, 88 S. W. 983. There the court held that the lien of the laborer who produced the crop is superior to that of the mortgagee who furnished supplies necessary to raise the crop. As part of the reason for holding as it did, the court said that one who takes a mortgage on

a crop to be thereafter produced must know that it requires labor to produce it, and, under the statute, laborers have liens for their work. So, under the circumstances of this case, it was contemplated between the parties that the mortgagor should use the property in his business, and this raised by implication the right of the mortgagor to repair the property and thus render it fit for the intended use, as such action on his part was for the benefit of all concerned.

From the views we have expressed, it follows that the judgment must be reversed, and the cause remanded for a new trial.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. HEWITT. (No. 221.)

(Supreme Court of Arkansas. March 6, 1916.)

1. INSURANCE — §719(1) — FRATERNAL INSURANCE — POLICY — FUTURE CHANGE OF BY-LAWS.

Where either the benefit certificate itself or the constitution and by-laws in existence at the issuance of the policy contained a stipulation for future changes, they might be made, and, when made, applied to pre-existing contracts.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1855; Dec. Dig. § 719(1).]

2. INSURANCE — §789(1) — FRATERNAL BENEFICIARY INSURANCE — PROOF OF INJURY — AMENDED BY-LAWS.

In an accident benefit certificate or policy issued when the insurer's by-laws provided a payment of \$200 to a beneficiary suffering a fracture of the arm; reciting its issuance in consideration of the insured's compliance with the by-laws existing or thereafter legally amended, and an amendment providing that in the event of fracture satisfactory proof should be furnished the insurer, and that satisfactory proof in such case should be taken to mean an X-ray photograph, made and certified to by the insurer's physician, the insured was required to submit to an examination by the insurer's physician and to furnish an X-ray photograph with his proof of loss, but was not concluded by the fact that such photograph did not show the fracture claimed, and might prove that fact by any other competent evidence.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1963, 1964; Dec. Dig. § 789(1).]

3. INSURANCE — §819(4) — FRATERNAL BENEFICIARY INSURANCE — SUFFICIENCY OF EVIDENCE — INJURY.

In a suit on an accident certificate, evidence on the issue of the fracture alleged to have been sustained held to support a judgment for the insured.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 819(4).]

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

Action by A. J. Hewitt against the Eminent Household of Columbian Woodmen. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Roane, of Atlanta, Ga., and W. C. Rodgers, of Nashville, for appellant. D. B. Sain, of Nashville, and T. D. Crawford, of Little Rock, for appellee.

McCULLOCH, C. J. Appellant is sued on a life and accident insurance policy issued to appellee, as one of its members; the right of action in the case being based on an accidental injury alleged to have been sustained by appellee, resulting in a fracture of one of his arms. There was a trial of the issue before a jury and a verdict in favor of appellee for the full amount mentioned in the policy for that character of injury.

The policy was issued to appellee in the year 1908, and the accidental injury is alleged to have occurred in February, 1915. Appellee adduced the testimony of himself and two or three physicians who treated him, to the effect that his arm was fractured. The affidavits of the physicians were sent in to appellant with the proof of injury, and at the request of appellant the appellee submitted to an X-ray examination by a physician designated by appellant, and furnished the X-ray photograph as a part of the proof of loss, but the photograph did not show that there had been a fracture. The physician who made the X-ray examination testified that there was no evidence disclosed by the examination that there had been a fracture.

Appellant defends on the ground that there is no liability unless the fracture is disclosed by an X-ray examination by a physician of its own selection. It relies for this defense upon an amendment to the by-laws enacted subsequent to the date of the issuance of the policy to appellee. The benefit certificate or policy recited that it was executed in consideration of the warranties made by the assured in the application and his compliance with the constitution and by-laws of the fraternity "now existing or hereafter legally amended, all of which * * * are a part of this covenant." The original by-laws in force at the time of the issuance of the policy to appellee provided that, if the beneficiary suffer a fracture of the arm, he should be paid the sum of \$200, and the policy contains a covenant to that effect.

At the annual meeting of the fraternity in December, 1914, the by-laws were amended by the enactment of another section in the following language (section 8, art. xi):

"In the event of fracture as provided in this section satisfactory proof thereof shall be furnished the society, and satisfactory proof in such case shall be taken to mean an X-ray photograph made and certified to by a physician selected by the Eminent Medical Director, the expense incurred in connection with such proof to be paid by the society."

The constitution and by-laws, as set forth in the record in this case, contain no further reference to a requirement for a proof of loss, and the question of liability turns upon the construction of the amendment quoted above. Much effort is devoted by counsel to discussion of the question whether or not the amendment can be given a retroactive effect so as to apply to a contract with appellee entered into prior to the enactment of the amendment. The view we take of the case

in construing the amendment renders it unnecessary for us to enter into a discussion as to how far a fraternal order can go in applying amendments of the by-laws to antecedent contracts of insurance made with its members.

[1] The authorities on that subject are not in entire accord. It seems to be very generally settled that, where either the policy itself or the by-laws and constitution in existence at the time of the issuance of the policy contain a stipulation for future changes, they may be made, and, when made, apply to pre-existing contracts. But some of the cases limit the exercise of such power to such changes as do not materially affect the original contract. 29 *Cyclopedia of Law*, 72 et seq.; *Fraternal Union of America v. Zeigler*, 145 Ala. 287, 39 South. 751; *Reynolds v. Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776.

[2, 3] But we assume for the purposes of this decision that the change in the by-laws was authorized, and that it applied to the contract with appellee, and we proceed to determine whether or not the proper construction thereof defeats appellee's right of recovery. The contention of learned counsel for appellant is that furnishing an X-ray photograph showing a fracture of the arm is a condition precedent to the right of recovery. We do not so interpret the language of the contract, according to the amended by-laws. The provision undoubtedly constitutes a requirement that satisfactory proof of the injury be furnished, and it undertakes to define what satisfactory proof is. According to its language an X-ray photograph is defined to be satisfactory proof, but it does not state that the X-ray examination and the photograph thereof must show the fracture. This is an important distinction; for, if it had been intended to make the right to recover depend upon the fact that an X-ray photograph revealed the existence of a fracture, then it could have been expressed in more appropriate language. The original by-law and the policy issued pursuant thereto contained an unconditional provision that in case of a fracture of the arm by the beneficiary he should be entitled to the payment of \$200. The language of that section stands unamended by the subsequent enactment, but the effect of the new provision brought about by the amendment is that an X-ray photograph made and certified by a physician selected by the fraternity should be furnished as a part of the proof of loss. The language used does not justify us in holding that the proof by an X-ray photograph was intended to be exclusive evidence of the fracture on the merit of the case. Especially is this true in the face of the original provision that a certain stipulated sum should be paid in the event of a fracture.

We think the proper construction is that the undertaking on the part of the insurer

was to pay the sum named in case of an accidental fracture, but that the assured must submit to an examination by a physician selected by the fraternity, and an X-ray photograph furnished with the proof of loss. This does not exclude any other proof of the existence of the fracture, but was intended as a requirement to give the officers of the fraternity an opportunity to make the fullest investigation. The assured is not concluded by the fact that the X-ray photograph does not reveal the fracture, but is entitled to prove that fact by any other competent evidence. It cannot be said that because the X-ray photograph is required as the satisfactory proof of loss that the assured must necessarily be bound by it. The contract as to the form of proof of loss under a policy is not intended as a substitute for evidence of loss to be adduced at the trial of an action to recover the amount thereon. Unless the contract itself expressly makes the right of recovery depend upon the existence of the loss as disclosed in the proof furnished, the assured has the right to resort to other proof in the trial of his suit.

Our conclusion, therefore, is that the fact that the X-ray photograph fails to reveal the existence of the fracture does not preclude recovery on the policy, where the assured complied with the terms by submitting to the examination and furnishing the photograph, and has proved his injury by other competent evidence. The issue was submitted to the jury upon instructions in conformity with this view of the law, and we find no error in the record.

The judgment is therefore affirmed.

**SOUTHWESTERN SURETY INS. CO. v.
TERRY et al. (No. 195.)**

(Supreme Court of Arkansas. Feb. 21, 1916.)

**PRINCIPAL AND SURETY — 100(3) — LIABILITY
— CONSTRUCTION BONDS — "ALTERATION" OF
PLANS — DISCHARGE OF SURETY.**

Where a construction contract, upon which the bond was based, required plain, straight front windows, and thereafter the contract was altered to require a double arcade, and it was further altered to require a wooden basement floor instead of concrete, both changes being at additional expense and neither being possible of completion independent of the principal contract, the changes were a material alteration of the contract such as to discharge the surety in the absence of his consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 163; Dec. Dig. 100(3).]

For other definitions, see Words and Phrases, First and Second Series, Alteration.]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Adolphine Fletcher Terry and another against the Southwestern Surety Insurance Company. Judgment for plaintiffs, and defendant appeals. Reversed, and cause dismissed.

This appeal is from a judgment against it as surety upon a contractor's bond for the erection of a six-story building for appellees, the owners, upon the northwest corner of Main and Fourth streets, in the city of Little Rock.

On the 7th day of December, 1911, Adolphine Fletcher Terry and Mary Fletcher Drennan, the owners of the property, entered into a contract with the Oklahoma City Construction Company to construct a modern six-story fireproof mercantile building in two sections or units thereon.

The portion of the building to be first constructed was known as the north three bays, being about 60 feet front on Main street, which was required to be completed within 200 working days from the delivery of the premises to the contractor. The second portion, the south two bays being about 40 feet front on Main street and adjoining the first portion, was to be completed within 120 days. The owners had previously entered into a contract of lease, with the Gus Blass Dry Goods Company, and let to them for a period of years the building they then occupied, which was on the site where the new building was to be erected and agreeing to erect a modern department store building on it and the adjacent 40 feet to the south. At the time possession could not be obtained of the south 40 feet occupied by the Pfeifer Clothing Company, necessitating the erection of the new building in two units, the first unit, the north 60 feet, being required completed without regard to whether possession could be obtained of the ground for the building of the second.

The Oklahoma City Construction Company on the 18th day of December, 1911, executed a bond to the owners in the sum of \$95,000 for the faithful performance of its contract with the appellant, the Southwestern Surety Insurance Company, as surety thereon; the condition of the bond being as follows:

"Whereas, the said, the Oklahoma City Construction Company, has on the day of the date of these presents, executed and entered into a certain contract for the erection of certain buildings in said contract described, which contract is hereto annexed: Now, if the said the Oklahoma City Construction Company shall well and truly perform and fulfill all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled and any alterations and additions to said contract, provided such alterations and additions, if any such be made, shall not exceed in extra cost the sum of \$15,000, we, the said surety, hereby expressly waiving all rights to be notified of, or by any further act to give our assent to, such alterations and additions, and acknowledging ourselves to be bound unconditionally for the faithful performance of said contract and of such alterations and additions within the limit of said contract price and of such extra cost aforesaid, and shall keep the said Adolphine Fletcher Terry and Mary Fletcher harmless and indemnified from and against all and every claim, etc., * * * then this obligation shall be void, otherwise the same shall remain in full force and virtue."

After the contractor began work making the foundation for the north 60 feet of the building, he had to suspend because of litigation with the Pfeifer Clothing Company about possession of the site. The name of the contractor was changed to D. H. Shenk Construction Company. The first unit or north 60 feet of the building was completed in January, 1913, and full settlement made with the contractor therefor, and for all extra work done during the month of March, 1913. Meanwhile possession had been obtained of the remainder of the site and work begun upon the construction of the second unit. In the early part of July, 1913, D. H. Shenk, the president of the construction company, contractor, was injured while engaged upon another building in the city and died on July 21st. About that time the construction company suspended work on the building, being unable financially to proceed with it, and the bond company was notified and requested to take charge and complete the work, which it declined to do and the owners thereupon completed same.

This suit is brought by the owners against the construction company and the bond company to recover the damages alleged to have been caused the owners by the contractor's abandonment of the work and failure to complete the contract and pay off and discharge the claims for liens asserted against the building. The contractor did not answer, but the bond company answered denying that the contractor had abandoned the work before completion, that the owners made demand upon it to complete the building, and that it had refused to do so, and alleged it was discharged from liability as surety because the parties had changed the contract without notice to it for the construction of a six-story building as contracted for and erected a seven-story building instead; second, that substantial alterations were made in the work, changing the original contract in a material manner without a written order of the architect; third, because the Gus Blass Dry Goods Company without the surety's knowledge or assent was made a party to the contract; fourth, because the owners had paid the contractor more than 85 per cent. of the value of the work as it progressed and did not retain the 15 per cent. as required by the terms of the contract until the final completion of the work; and, fifth, because the alterations and additions had been made to the original contract which were largely in excess in extra cost in the sum of \$15,000, and the same were made without notice to the surety and without its consent.

It was not disputed that the contractor abandoned the work before the completion of the building, that the owners made demand upon the bond company to finish the building which it refused to do, and thereupon the owners took possession and completed it, and it was virtually undisputed that the contractor was not financially able to proceed

with the work at the time of its abandonment. A vast amount of evidence was taken as to the kind, character, amount, and value of extra work performed by the contractor, and whether such work amounted to alterations and additions to the principal contract, or was independent and additional thereto not contemplated by its terms; also, as to whether certain work was solely for the benefit and convenience of the Gus Blass Dry Goods Company, the lessee, and not included within alterations and additions to the building contract. The bond company contended that all items of extra work were such in character as under the terms of the building contract, and its bond amounted to alterations and additions to the contract. The owners contended that less than \$15,000 of the extra work was of such character.

The evidence as to the correct classification of the extra work done by the contractor was conflicting as to many items. The original contract price of the building was \$136,355, and the owners had paid the contractor to the time of Mr. Shenk's death and the abandonment of the work, \$148,552.73, and had retained under the terms of the contract \$6,705.30, making a total for the building of \$155,258.03, showing a balance of \$18,903.03, paid the construction company over and above the original contract price. The testimony also shows that the Gus Blass Dry Goods Company, lessee of the building, took possession before it was completed, directed a number of changes to be made by the contractor, independent of the owners, but with their assent; that other changes were made in the original plans under an agreement with the owners, whereby the Blass Company and the owners were to pay jointly the expense of the change. The Blass Company was charged with about \$9,000 for extra work.

It is admitted and the architect allowed certain items of the account of the contractor for extras as being alterations and additions to the building contract amounting to the sum of \$14,257.97, which included the raise of the height of the attic on the sixth floor to a seventh story. He allowed also, of the extras claimed against the owners, certain other items in the sum of \$5,046.87, classed as additional or separate contracts with the owners an allowance to compensate the contractor for time lost, etc., that did not involve any alteration or change in the building contract. He allowed the claim of the contractor for certain other extras against the Gus Blass Dry Goods Company in the amount of \$8,635.30. Testimony was taken upon each item of the claim for extras.

In the construction of the building on the first floor, a change was made from plate glass show windows upon the property line on the front or Main street side to an arcade or tile floor passage, with plate glass walls across the front, making in effect a double or box show window with plate glass on the street side, and plate glass on the side next

to the passageway, and plate glass show windows on the other side of the passageway, the front of the storerooms, at an additional cost of more than \$4,000. The contract required, and the specifications provided, for a cement basement floor of one inch thickness of Portland cement and sand in proportion on top of a five-inch thickness of composition of Portland cement, coarse sand, and crushed stone, which was changed to pine lumber on a three-inch base of composition in the construction, at a cost of more than \$2,000. These changes were made with the assent of the owners at the suggestion of the lessee, Gus Blass Dry Goods Company, which agreed to pay therefor.

Other facts will be stated in the opinion.

J. W. & J. W. House, Jr., of Little Rock, for appellant. W. L. & D. D. Terry and Moore, Smith, Moore & Trieber, all of Little Rock, for appellees.

KIRBY, J. (after stating the facts as above). In *Snodgrass v. Shader*, 113 Ark. 429, 168 S. W. 567, the law relating to the discharge of a surety on account of material alterations in the terms of a contract made without his consent was declared as follows:

"The courts have long held that any material alteration in the terms of a contract, whereby a surety is bound, discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they cannot bind the surety thereto without his consent, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. *O'Neal v. Kelley*, 65 Ark. 550 [47 S. W. 409]; *Singer Company v. Boyette*, 74 Ark. 601 [86 S. W. 673, 109 Am. St. Rep. 104]; 1 *Brandt on Suretyship*, § 429; *Hubbard v. Reilly* [51 Ind. App. 19] 98 N. E. 886; *Warren v. Lyons* [152 Mass. 310, 25 N. E. 721], 9 L. R. A. 858; *Stern v. Sawyer* [78 Vt. 5] 61 Atl. 86 [112 Am. St. Rep. 890, 6 Ann. Cas. 356]; *Miller v. Stewart*, 9 Wheat. 702 [6 L. Ed. 189]; *Penn v. Collins*, 5 Rob. (La.) 213. In *Berman v. Shelby*, 93 Ark. 479 [125 S. W. 124], the court said: 'For a surety will be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered.'

The bond of the surety herein permitted any alterations and additions to the contract not exceeding in extra cost the sum of \$15,000, and, of course, the surety would be bound to the performance of it so long as the alterations and changes made did not exceed said sum, having consented in advance thereto.

It is conceded that alterations and changes within the meaning of the contract were made in the said sum of \$14,257.97, allowed by the architect and owners for extras. It is contended by appellant that the construction of the arcade in the front of the first floor of the building, instead of the straight show windows, and of the wooden floor in the basement, instead of the cement, as provided

in the contract, were alterations within the meaning of the surety's bond, and increased the extra cost of alterations beyond the said sum of \$15,000 consented to and released it from liability thereon. Unquestionably, the arcade and the wooden basement floor were not provided for, nor contemplated in the making of the contract, and undeniably were both constructed by the contractor in the erection of the building at the extra cost specified, and, although it was done at the instance of the lessee who agreed to pay the extra cost thereof, it was done with the assent of the owner, and, if it was an alteration within the meaning of the bond, which with the others raised the extra cost in excess of the said sum of \$15,000, released the surety.

The appellees insist that neither were alterations within the meaning of the contract, but in effect independent and additional contracts within the doctrine announced by many cases of other jurisdictions cited, and our own case of *Hinton v. Stanton*, 112 Ark. 207, 165 S. W. 299. In this case the court said:

"The test of materiality of the change [of the building] is this: 'Could the owner have made a separate contract for the porte cochere and could that contract have been performed without * * * changing the contract which Norris had made, and upon which appellee was surety? If this could have been done, then the contract for the porte cochere is an additional contract and not a change in the original contract.'"

In *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 204, the court said:

"Without pretending to state a rule applicable to all cases, we will say that where the different matter does not consist of a change of that provided for or contemplated by the contract, but is something additional not included in the contract, then it is an independent transaction."

The undisputed testimony shows that the arcade could not be constructed independently by another contractor during the progress of the work of construction of the building nor the building completed without the construction either of the straight show windows specified or the substituted arcade consented to, and also that the putting in of the wood or plank floor instead of cement, in the basement, was a change or alteration of the floor construction required by the contract, and, although it was shown the wooden floor could have been constructed by another contractor after the cement floor was finished in accordance with the specifications, it could not have been done without tearing up and reconstructing the floor, and the contract called for a floor constructed in the basement by the contractor, and could not have been performed without the construction of the floor required by the specifications, or one of some other kind agreed upon. The change from cement to wood was necessarily therefore an alteration within the meaning of the contract permitting alterations not to exceed in cost the sum of \$15,000, as was likewise the building of the show

windows in arcade style, rather than with straight front effect. *Neuwirth v. Moydell*, 188 Mo. App. 467, 174 S. W. 207.

In the court's view of the case as already expressed, it becomes unnecessary to determine the several other questions raised. Said material alterations, not having been consented to by the surety, discharged it; and the judgment is, accordingly, reversed, and the cause dismissed.

MORGAN ENGINEERING CO. v. CACHE RIVER DRAINAGE DIST. et al.
(No. 224.)

(Supreme Court of Arkansas. March 6, 1916.)

1. DRAINS § 2(1) — ESTABLISHMENT OF DISTRICT — VALIDITY — DESCRIPTION.

Acts 1911, p. 1245, § 1, of which establishes a drainage and levee district with territory as fixed by the description therein, which description did not close the boundaries of the district without doing violence to the plain and unequivocal language of the statute, was void for want of a definite description of the boundaries.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 17; Dec. Dig. § 2(1).]

2. CONSTITUTIONAL LAW § 70(1) — STATUTES — UNCERTAINTY — CORRECTION BY COURTS.

In such case, where there was nothing to indicate that the defective description was a mere clerical misprision, the court was not justified in ignoring the language actually used and in substituting entirely different words and figures, as the description of the district was a legislative, and not a judicial, function.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 129, 132, 137; Dec. Dig. § 70(1).]

3. APPEAL AND ERROR § 1195(1) — LAW OF CASE — CONSTRUCTION OF FORMER DISPOSITION — NEW ISSUES — "FURTHER PROCEEDING."

In a contractor's action to enforce warrants issued by a drainage district, in which landowners intervened, contesting the claim on the ground that the amount claimed was excessive, and that under a repealing act the contractor could only recover upon a quantum meruit, without challenging the validity of the drainage district, and where on appeal by both parties the Supreme Court held that the recovery should be measured by the contract and not on a quantum meruit and reversed and remanded for "further proceedings in accordance with the opinion," the language "further proceedings" contemplated a new trial on the issues that might be presented, and did not foreclose inquiry into the validity of the contract following the invalidity of the act establishing the district, as the language on the former appeal was not applicable to the changed issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4661; Dec. Dig. § 1195(1).]

4. APPEAL AND ERROR § 1195(1) — SUBSEQUENT APPEAL — LAW OF CASE.

The law of a former appeal is binding and is the law of the case where the testimony on a second trial is substantially the same as on the first trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4661; Dec. Dig. § 1195(1).]

5. CONSTITUTIONAL LAW § 290(1) — DRAINS § 2(1) — EMINENT DOMAIN § 71 — DUE PROCESS OF LAW — DRAINAGE LAW — CURATIVE ACT — TAKING PROPERTY WITHOUT COMPENSATION.

Acts 1911, p. 1245, establishing a drainage and levee district, being invalid for want of a definite description of the boundaries and contracts by the district being void, the defect could not be cured by Acts 1918, p. 512, purporting to abolish the district and directing a levy upon the lands intended to be benefited for the preliminary expenses incurred under the contract with plaintiff, as it was not within the power of the Legislature to validate contracts of the district or to make the preliminary expenses incurred under such void contracts liabilities against the land included in the proposed district, as to do so would be a taking of property of the owners without due process of law and without compensation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871, 874, 875; Dec. Dig. § 290(1); *Drains*, Cent. Dig. § 17; Dec. Dig. § 2(1); *Eminent Domain*, Cent. Dig. §§ 180-187; Dec. Dig. § 71.]

Appeal from Circuit Court, Craighead County; J. F. Gautney, Judge.

Action by the Morgan Engineering Company against the Cache River Drainage District and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 172 S. W. 1020.

The Legislature of 1911 passed an act creating the Cache River drainage district (Act No. 457, Acts of 1911, p. 1245), section 1 of which provides:

"A drainage and levee district is hereby * * * established in the counties of Craighead, Jackson, and Lawrence to consist of and contain all that territory in said counties including and bounded by the following lines:

"Commencing at the north boundary line of Craighead county at a point where section line between sections 3 and 4 intersects the said boundary lines; thence south on said section line between sections 3, 4, and 9, and 10, 16 and 15, 21 and 22, 28 and 27, 33 and 34, township 15 north, range 3 east, to where it intersects the south boundary line; thence west on said township line to the northeast corner of section 1, township 14 north, range 2 east; thence south on range line to south line of section 18, township 14 north, range 3 east; thence east 1 mile to the southeast corner of section 18; thence south on section line between sections 19 and 20, 29 and 30, 31 and 32, to the south township line; thence west on said township line to St. Louis Southwestern Railroad Company; thence in a southwesterly direction along said railroad to the southeast corner of section 12, township 13 north, range 2 east; thence west on south section line of said section 12, and on section lines between sections 11 and 14, 10 and 15, 9 and 16, 8 and 17 and 18, to where it intersects range line between ranges 1 and 2; thence south on said range line to south boundary line of Craighead county; thence west on south boundary line of Craighead county to the southwest corner of said county; thence west on the south boundary line of township 13 to range line between ranges 2 and 3, Jackson county; thence north on said range line intersecting the boundary line between Lawrence and Jackson counties, to the St. Louis, Iron Mountain & Southern Railway Company; thence in a northeasterly direction with the railroad to where it intersects township line between townships 15 and 16 N. R. L. east, in Lawrence county; thence east on said township line to the north-

west corner of Craighead county; thence east on the north boundary line of said Craighead county to the point of beginning."

The board of directors of the district entered into a contract with the appellant to do the engineering work for the district. The appellant entered upon the work under this employment and continued as the engineer of the district until the general assembly of 1913 repealed the act of 1911 referred to above. See Acts 1913, p. 512. The appellant held warrants for its services, issued by the board of directors on the treasurer of the district for the sum of \$15,652, which it presented to the county court of Craighead county, pursuant to the provisions made by the repealing act of 1913. It set up its contract, alleged that it performed the work, which had been liquidated by the issuance to it of the warrants covering the sum above claimed, and asked that these warrants be allowed and paid.

Certain landowners intervened and contested appellant's claim on the ground that the amount claimed under the contract was excessive, and that under the repealing act appellant could only recover upon quantum meruit. The county court reduced appellant's claim, and it appealed to the circuit court. The case was there tried before a jury, and from a judgment rendered in the circuit court both parties appealed to this court. So this is the second appeal. *Morgan Engineering Co. v. Cache River Drainage District*, 172 S. W. 1020.

On the former appeal we stated the issues between the respective parties as follows:

"It is the contention of the drainage district that under the terms of the repealing act the engineering company could recover only such compensation as the jury might find reasonable; on the other hand, the engineering company contends that its compensation should be measured by the terms of the contract, and that, having done all of the preliminary work required under the act, it was entitled to recover from the drainage district 2 per cent. of the estimated cost of construction of the whole work."

We held on the former appeal that the compensation of the appellant should be measured by the terms of the contract, and not upon quantum meruit. The court reversed and remanded the cause for errors in the trial court's instructions, which resulted in an erroneous verdict. In the opinion we prescribed the correct rule for ascertaining the amount due appellant and remanded the cause for "further proceedings in accordance with" the opinion.

On retrial the interveners, by leave of the court, filed additional exceptions to the claim of appellant, setting up that the original act creating the drainage district was void for uncertainty, in that the metes and bounds set forth in the act did not describe any particular territory; and the interveners alleged that the board of directors therefore had no authority to enter into a contract with the engineering company, and that consequently there was no lien existing on the lands of the

intervenors, and that the Legislature had no power to fix a lien on the same.

Substantially the same testimony was adduced at the last trial as in the first, and in addition Morgan, an expert engineer, testified in part as follows:

"The description of the boundaries of the Cache River drainage district, as given in Act No. 457 of the Special Acts of 1911, contains a typographical error in this way: The act states: 'Thence west on south boundary line of Craighead county to the southwest corner of said county; thence west on the south boundary line of township 18 to range line between ranges 2 and 3, Jackson county.' Now that figure '3'— If the figure '8' were read a figure '1,' the entire description would be made intelligible, because the act reads further: 'Thence north on said range line intersecting the boundary line between Lawrence and Jackson counties'—which call would be properly carried out by changing the figure '3' to a figure '1,' but it is not properly carried out by leaving the figure '3,' because in the latter case the line is carried to a point that does not touch Lawrence county."

He was asked, "What county would it touch?" and answered, "Independence county."

The appellant presented the following requests for declarations of law:

"First. That all matters and questions which were made or might have been made on the former trial cannot be properly made here, but that this proceeding must relate solely to matters left open by the opinion of the Supreme Court.

"Second. That the act of 1913, repealing the act creating the Cache River drainage district is more than a curative act, and is in fact a legislative levy against the lands included in the assessment, and that such a levy is valid regardless of any imperfection or infirmity in the description in the original act."

The court refused these requests, and, over the objection of appellant, made, among others, the following findings of fact:

"Third. The act of 1911 is void for uncertainty.

"Fourth. There is nothing in the repealing act which in any manner attempts to cure any defect in the original act"

—and declared the law to be that the act creating the Cache River drainage district "is void for failure to define the boundaries of the district with certainty, and that the act of 1913, repealing the above-mentioned act, does not cure the uncertainty of said original act," and rendered a judgment in favor of the appellees, from which appellant has duly prosecuted this appeal.

Allen Hughes, of Memphis, Tenn., for appellants. Hawthorne & Hawthorne, of Jonesboro, and D. K. Hawthorne, of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). [1] 1. In its opinion the learned trial court states as follows:

"The act of 1911 is void for want of a definite description of the boundary of said district. An examination of the public maps and surveys of the state will show that there is no possible certain way of closing the boundaries of said district without doing violence to the plain and unequivocal words used in the statute. It is doubtful whether it was intended by the statute to use as a boundary the range line between 2

and 3 in Jackson county, 2 and 1 in Jackson county, or 1 east and 1 west, between Jackson and Craighead counties. It is certain that if the range line between 2 and 3 in Jackson county is followed north that no point on the Iron Mountain Railway can be reached. It follows that the attempted description of the drainage district is void for uncertainty. Therefore no act or contract of the directors would have any validity. The repealing act, treated as a curative act, does not attempt to make certain the boundaries of the district, and as a curative act can do no more than cure irregularities. The Legislature would be without power to create a drainage district having no boundaries; therefore the repealing act would not cure the void act referred to."

These conclusions of the learned trial judge are correct, and we hereby adopt and approve them as our own.

In *Ferrell v. Keel*, 105 Ark. 380-392, 151 S. W. 269, 274, this court had under review an act creating a certain levee district, in which the boundaries of the district were not any more accurately defined than they are in the present case. In that case we said:

"We understand the law to be that, when the Legislature creates a levee or other improvement district, it must define its boundaries with certainty, or provide for the same being done by some other agency. The Legislature undertook to define the limits of this district. We have carefully considered the act, and hold that it fails to define the limits of the district with sufficient certainty to determine what lands are included therein."

Then, after setting out the defects, the court continues:

"There are other defects in the description, but we do not discuss them, as those already mentioned are sufficient to defeat the act for uncertainty in the description of the territory proposed to be embraced therein. We hold the act invalid for this reason."

So here.

[2] Counsel for appellant says:

"The act calls for the range line between 2 and 3 running to south line of Lawrence county. That line does not run to the monument named. No range line between 3 and any other township whatever, and no range line between 2 and any other township whatever except 1 would reach the south line of Lawrence county. No other range line in the district would do so. We cannot make the call mean anything without making it mean the range line between 1 and 2, and so construed it harmonizes with the remainder of the description."

To make such a radical change in the language of an act of the Legislature as is here pointed out in order to make certain the description of the boundaries of an improvement district is purely a legislative, and not a judicial, function. There is nothing to indicate that the defective description was a mere clerical misprision, and we find no authority in any of the canons of construction that would justify us in substituting entirely different words and figures for those actually used by the Legislature in order to effectuate what we might conceive to be the legislative purpose. To do so would be to ignore the language actually employed by the Legislature and to substitute therefor our own. The intention must be gathered, mainly, from the language of the act itself. *State v. Lan-*

cashire Ins. Co., 66 Ark. 463, 472, 51 S. W. 638, 45 L. R. A. 848.

[3, 4] II. In reversing the case on the former appeal we said:

"The court should have taken proof of the value of the services under the contract which had been performed by the engineering company at the time the repealing act was passed and should have found for the engineering company for that amount."

Counsel for appellant contends that the circuit court was foreclosed, on the last trial, by the above language, from inquiring into the validity of the contract, because such language was an adjudication of the binding effect of the contract, and that appellees are bound by the above language under the doctrine that such language, whether right or wrong, was the "law of the case." And he cites numerous authorities upon which he relies, among others, the following: *Scott v. Fowler*, 14 Ark. 427; *Yell v. Outlaw*, 14 Ark. 621; *Hollingsworth v. McAndrews*, 79 Ark. 185, 95 S. W. 485; *National Surety Co. v. Long*, 85 Ark. 158, 107 S. W. 384; *Railway v. York*, 92 Ark. 554, 123 S. W. 376; *Lewis v. Jones*, 97 Ark. 147, 133 S. W. 596.

These decisions but announce and adhere to the rule that where an issue has been raised in the court below and has been finally adjudicated on appeal to the Supreme Court, the same issue cannot be reopened on another trial in the circuit court, and that where a cause, on the former appeal, is reversed and remanded for a new trial, if there was not any material change in the second trial from the testimony and facts established in the first trial, the principle of law announced as applicable to those facts in the first trial must also prevail in the second, even though this court should conclude on the second appeal that the principles of law announced on the first appeal were erroneous. *Lewis v. Jones*, *supra*; *Westerfeld v. New York Life Ins. Co.*, 157 Cal. 339, 107 Pac. 699.

But this doctrine can have no application here for the reason that on the former appeal the judgment was reversed because the court erred in its instructions to the jury, and the case was remanded with directions, not "to render judgment in accordance with the opinion," but, for "further proceedings in accordance with the opinion." There is a marked distinction between the two. "Further proceedings" contemplated that there was to be a new trial on the issues that might be presented, and that proof might be introduced on these issues. The order was in effect a remand for a new trial in general. Of course, all further proceedings that were to be had were to be in accord with the opinion, and if the issues on the second trial and the testimony remained substantially the same, then the appellant would have been entitled to a judgment for the value of its services under the terms of the alleged contract under which it claimed, computed in the manner directed by this court in its opinion on the

former appeal. But, as was said in *St. Louis, Iron Mountain & Southern Ry. Co. v. York*, supra:

"The finding of facts upon the former appeal cannot be binding as to the finding of the facts in this second trial, because the testimony on the second trial might be different from or additional to that given on the first trial. But the principles of law determined and announced upon the former appeal are binding, and must stand as the law of this case; and if the testimony upon this second trial is substantially the same as on the first trial, then the former decision of this court upon all questions of law involved in this case must be followed on this appeal."

In the case of *Hollingsworth v. McAndrews*, supra, relied on by appellant, "the cause was not reversed and remanded for new trial or for further proceedings, but 'with instructions to the lower court to render judgment in accordance with the opinion.'"

The rule of law which controls here is as follows:

"When on an appeal or writ of error a cause is reversed and remanded for new trial the case stands as if no action had been taken by the lower court. If the facts developed on second trial remain the same as they were on the first trial, the lower court must be governed in applying the law to the facts by the principles announced by this court in that case as controlling. If the facts are different, then the lower court may apply a different rule of law."

Now, on the first trial the appellees (interveners) did not challenge the validity of the drainage district, and they introduced no evidence to show that the district was invalid. Their contention was that under the act abolishing the district the appellant should be allowed to recover only such compensation as the jury might find reasonable. They did not directly call in issue appellant's contract, but only claimed that it was not entitled to recover under it. On the last trial the issues were entirely changed. By permission of the court the appellees were permitted to put forth an entirely new defense to appellant's claim, and to set up that, the district being void for uncertainty, the directors had no authority to enter into a contract with appellant, and that therefore such contract was void, and that appellant was not liable at all, and they introduced evidence to sustain their contention. Thus the issues and the facts on the last trial were entirely different from what they were on the former appeal, and hence what was said by us in the former opinion as to the contract and its binding effect would not be the law applicable to the changed issues and facts as discovered by this record.

[5] III. Counsel for appellant contends that, although all the prior proceedings were invalid, yet the General Assembly had power to pass the act of 1913 abolishing the district and directing a levy upon the lands intended to be benefited for the preliminary expenses incurred under the alleged contract with the

appellant, and that the act levying the assessment for this purpose adopted the description of the lands as assessed, and that therefore this latter act was not void for uncertainty—citing *Board of Dunbar*, 107 Ark. 285, 155 S. W. 96; *Fellows v. McHaney*, 113 Ark. 363, 371, 168 S. W. 1099; *Thibault v. McHaney*, 177 S. W. 877. We cannot agree with this contention of counsel, for the act of 1911, purporting to create the Cache River drainage district, as we have seen, was void ab initio because of the uncertainty in the description of the boundaries of such district. In the cases cited by appellant to support its contention the acts creating the districts were valid acts, and the districts were therefore legally brought into existence, and there was authority for incurring the preliminary expenses in forwarding and promoting the improvement contemplated. But such was not the case here.

The act of 1913 did not purport to and could not cure the defects of description in the act of 1911 that rendered the so-called Cache River drainage district void for uncertainty; and it was not within the power of the Legislature of 1913 to validate contracts made with those acting in the capacity of directors of a district that never had in fact any existence and to make the preliminary expenses incurred under these void contracts liabilities against the lands included in the proposed district. To do this would be taking property of the appellees and other landowners without due process of law and without compensation.

It follows that the court did not err in refusing appellant's request for declarations of law, and did not err in the findings of fact and declarations of law made by it, and its judgment in favor of the appellees is correct, and must therefore be affirmed.

ROSE v. STATE. (No. 226.)

(Supreme Court of Arkansas. March 6, 1916.)

1. INDICTMENT AND INFORMATION \S 191(8)—INCLUDED OFFENSES — RAPE — CARNAL KNOWLEDGE.

The offense of carnally knowing a female under the age of 16 years, prohibited by Kirby's Dig. \S 2008, is an "included offense" of rape, as defined by section 2005, and conviction thereof may be had under an indictment for rape under section 2413, permitting conviction of lesser included offense under indictment for the greater offense consisting of different degrees.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 616; Dec. Dig. \S 191(8).]

2. RAPE \S 52(1)—SUFFICIENCY OF EVIDENCE.

That the prosecutrix was asked leading questions, that she wavered in her testimony, and that her story was improbable went only to her credibility as a witness, and did not show that the evidence was insufficient to sustain a conviction for carnally knowing her.

[Ed. Note.—For other cases, see Rape, Cent. Dig. \S 71, 72, 76; Dec. Dig. \S 52(1).]

3. CRIMINAL LAW \S 1159(2, 4)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

The credibility of witnesses and weight of their testimony in a prosecution for rape is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8075, 3077; Dec. Dig. \S 1159(2, 4).]

4. CRIMINAL LAW \S 553 — WITNESSES—DUTIES OF JURY.

The jury in a prosecution for rape is not required to accept testimony of a witness in toto, or reject it, but it must accept such portions as it believes, and discard the remainder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1252; Dec. Dig. \S 553.]

5. RAPE \S 52(1)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain a conviction of carnally knowing a female under the age of 16 years.

[Ed. Note.—For other cases, see Rape, Cent. Dig. \S 71, 72, 76; Dec. Dig. \S 52(1).]

6. CRIMINAL LAW \S 726, 1137(2)—APPEAL—INVITED ERROR.

Where defendant's attorney argued that there was no evidence that the prosecutrix was returned to an orphan's home on account of abuse by defendant's family, it was not prejudicial for the state's attorney to argue that he could have shown that fact but for defendant's objections; that being provoked, and, if erroneous, invited, and not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1681, 8009; Dec. Dig. \S 726, 1137(2).]

Appeal from Circuit Court, Conway County; M. L. Davis, Judge.

Richard Rose was indicted for rape, and was convicted of carnally knowing the prosecutrix, and he appeals. Affirmed.

Edward Gordon and Sellers & Sellers, all of Morrilton, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. Appellant was indicted for the offense of rape upon a female under the age of 16 years, and convicted of the offense of carnally knowing her, under section 2008 of Kirby's Digest. From a judgment of conviction, he has duly prosecuted an appeal to this court.

[1] It is insisted by counsel for appellant that the offense of which he was found guilty is not in a degree of or included by the one for which he was indicted as provided by section 2413 of Kirby's Digest.

We have decided that an indictment for rape of a female under the age of 16 years will sustain a conviction of carnal abuse; the difference between the two offenses being that in order to convict him of the greater it was necessary to charge and prove that he had carnal knowledge of the female mentioned forcibly and against her will and consent; whereas the lesser offense was made out by proof of carnal knowledge of her, though had by her consent. See *Coates v. State*, 50 Ark. 336, 7 S. W. 304; *Henson v. State*, 76 Ark. 267, 88 S. W. 965; *Peters v. State*, 108 Ark. 119, 146 S. W. 491.

The facts are as follows: The mother of

Maggie Moreland, the prosecuting witness, was dead, and she was placed in the orphan's home at Morrilton, Ark. On the 15th day of June, she went to the home of Gilbert Rose to live as a member of his family, and stayed there about two weeks, when she was carried back to the orphan's home because she had stated that the defendant, Richard Rose, a brother of Gilbert Rose, had ravished her. She detailed the circumstances attending the commission of the crime as follows:

"Q. Did this Richard Rose that is being tried for abusing you, did he ever mistreat you? A. Yes. Q. Where was it that he did that? A. In the garden. Q. Where was Mrs. Rose? A. She was at Gilbert's daddy's, George Rose. Q. Where was Gilbert? A. He was there, too. Q. What time in the day was it? A. About 12 o'clock; somewhere along there. Q. What were you doing in the garden? A. Hoeing tomatoes. Q. Were you by yourself? A. Yes. Q. What did he do to you? A. He grabbed me and threw me down. Q. Did he get between your legs? A. Yes. Q. Did you see it? A. Yes; I did. Q. Did he place his privates in you? A. He tried to. Q. Did he do that? A. I don't know. Q. Did he get that into you? A. I don't know. Q. Did he hurt you? A. A little bit. Q. How long did he stay there on you? A. I don't know. Q. Was it a good little bit? A. Yes. Q. What were you doing; did you cry out or anything? A. Yes. Q. Did you try to get him to quit? A. Yes. Q. Did you know he was doing wrong? A. Yes. Q. Did he hold you? A. Yes. Q. Were you hurting when you got up? A. Yes; a little. Q. Did he say anything to you? A. No. Q. Told Mrs. Rose about it? A. Yes. Q. At the time this occurred in the garden it was between 12 and 1 o'clock? A. Yes. Q. Was it before dinner? A. No. Q. Who eat dinner with you? A. The home folks eat with me. Q. Who were they? A. Gilbert and his wife. Q. How far is it from there to his father's? A. A quarter, I guess. Q. How long do you say it was after you eat until this occurred in the garden? A. Well, sir, I can't tell. Q. How far was it from the garden to the house? A. Right in front of the house."

When the prosecuting witness was carried back to the orphan's home, the superintendent had her examined by two physicians. They testified that they found the hymen gone, which indicated she had had sexual intercourse; that the hymen was hanging in shreds; that copulation would cause this, but that it might be destroyed by other objects penetrating it; that, if the intercourse had been had against her will, it was possible that she could have gotten up and gone to work at once, but that it was highly improbable.

On cross-examination, the prosecuting witness admitted that she had testified that she was 12 years old when the offense was committed. There was other evidence tending to show that she was 14 years old.

Other physicians testified that under the circumstances detailed by the prosecuting witness it was highly improbable that she could have gotten up at once and gone to work. There was also evidence that Richard Rose got out a license to marry the prosecuting witness, and in his application stated his own age at 18 years and her age at 15 years.

The defendant, Richard Rose, denied that he assaulted Maggie Moreland, and denied that he had sexual intercourse with her. He admitted that he became engaged to marry her while at his brother's house, and that they became engaged the first time he talked to her there. Evidence was also adduced by the defendant tending to show that the prosecuting witness had had sexual intercourse with another man, that Mrs. Gilbert Rose was sick on the day of the alleged assault, and that the defendant did not have intercourse with the prosecuting witness while she was at the home of Gilbert Rose. The prosecuting witness denied that she had ever had sexual intercourse with any other man.

[2-5] It is earnestly insisted that the evidence does not support the verdict. Counsel for the defendant point out that leading questions were asked the prosecuting witness; that it was highly improbable that the prosecuting witness could have gone to work at once if the intercourse had been had under the circumstances testified to by her. It is true all the physicians testified to this fact. Counsel also point to the fact that the prosecuting witness first testified that the intercourse was had on a certain day, and that several witnesses testified that Mrs. Rose was at home sick on that day, and that it was not possible that the intercourse could have been had and outcry made by the prosecuting witness without Mrs. Rose having heard her; that the prosecuting witness then wavered in her testimony and said she did not remember on what day the intercourse was had with her. All these matters, however, only went to the credibility of the witness. The jury was the sole judge of the credibility of the witnesses and the weight to be given to their testimony. They were not required to accept or reject in toto the testimony of the witness. It was their duty to accept that portion of the testimony of any witness they believed to be true and reject that part they believed to be false. Therefore the jury might have believed, and by its verdict shows that it did believe, that the prosecuting witness yielded to the defendant, and that he was only guilty of carnal abuse. The undisputed evidence shows that she was under 16 years. The physicians say that the hymen was ruptured, and that sexual intercourse caused this. True they said it could be caused by other means but here again it was the province of the jury to weigh the evidence. The defendant admitted that he procured a license to marry the prosecuting witness, and that this was done after the al-

leged assault. He said that he became engaged to her within an hour after he first met her. The jury might have believed that he intended to marry her to avoid this prosecution. But it is not within our province to say where was the weight of the evidence. That was peculiarly within the province of the jury. The evidence was sufficient to support the verdict; and the contention of counsel for defendant on this point must be denied.

[6] The next inquiry is whether or not the judgment should be reversed on account of certain remarks made by the prosecuting attorney. The record declares that in his closing arguments the prosecuting attorney stated:

"That the state had authority to prove by introducing letters from parties who lived near the Roses, where the manager of the orphans' home got his information, why Maggie Moreland was recalled from the Roses and who informed the manager of the orphans' home about how she had been mistreated by the Roses, what caused him to have her examined by physicians after she had denied that she had been mistreated, but that the defendant objected to said evidence and by objecting to said evidence closed the mouth of the state and prevented it from proving these facts."

This argument of the prosecuting attorney was made in reply to a statement in the argument of the attorneys for appellant as follows:

"That there was not any evidence in record to show how the manager of the orphans' home learned that Maggie Moreland had been mistreated by the Roses, or why he sent for her, or where he received the information that she had been mistreated by the Roses and had her examined by the physicians, and no one stated where it was obtained."

The argument of the prosecuting attorney was provoked by the remarks made by counsel for appellant. Improper arguments cannot be complained of if they are necessitated by what was said by the argument of an adversary. In such cases the error complained of is invited, and it is well settled in this state that a judgment will not be reversed for invited error.

In the case of *Ferguson & Wheeler v. Good*, 112 Ark. 261, 165 S. W. 628, we said:

"Argument of counsel for plaintiff, explaining why a certain witness was not called is not prejudicial when made in answer to argument of defendant's counsel, making charges as to why the said witness had not been called."

See, also, *St. L. S. W. Ry. Co. v. Leflar*, 104 Ark. 528, 149 S. W. 530.

We have carefully examined the record, and find no prejudicial error in it.

Therefore the judgment will be affirmed.

MOORE et al. v. MOYE et ux. (No. 235.)

(Supreme Court of Arkansas. March 13, 1913.)

1. DEEDS \Leftrightarrow 208(5) — DELIVERY — AUTHORITY OF DEPOSITORY OF DEED — SUFFICIENCY OF EVIDENCE.

In an action to cancel a deed as a cloud on plaintiff's title, evidence held sufficient to sustain the chancellor's finding that plaintiffs placed the deed in the hands of a third person merely to await the furnishing of a satisfactory abstract of lands exchanged by the grantees, and that each party was to have the privilege of determining whether the abstracts were satisfactory.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 629; Dec. Dig. \Leftrightarrow 208(5).]

2. DEEDS \Leftrightarrow 58(1) — DELIVERY TO THIRD PERSON.

Where grantors exchanging land delivered their deed to a third party not in escrow, but subject to their further direction, which was never obtained, the third party delivering to the grantees without the grantors' consent, such grantors could have the deed canceled as a cloud on their title, since the deposit of a deed with a third party for delivery must be irrevocable to render it a deposit in escrow, and if it is subject to the order of the grantor it has no binding effect.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130, 133, 135; Dec. Dig. \Leftrightarrow 58(1).]

Appeal from Hot Spring Chancery Court; J. P. Henderson, Chancellor.

Action by W. H. Moye and wife against M. L. Moore and another. From a decree for plaintiffs, defendants appeal. Affirmed.

McRae & Tompkins, of Prescott, for appellants. W. Morton Carden, of Malvern, for appellees.

McCULLOCH, C. J. Appellants owned lands in Dallas county, Ark., and entered into an oral agreement for the exchange of those lands with appellees for certain lots in Malvern, Ark. Each of the respective owners executed their deeds of conveyance pursuant to said agreement and delivered the same to H. L. McDonald, the cashier of one of the banks in Malvern, to await the completion of abstracts of title. Appellants furnished an abstract of title and subsequently applied to McDonald for delivery of the deed executed by appellees, and pursuant to said request McDonald delivered the deed to appellants, and the same was placed on record.

This is an action instituted by appellees against appellants in the chancery court of Hot Spring county to cancel said deed as a cloud on the title, it being alleged in the complaint that the deed was delivered without the consent of appellees and upon the false representation made by appellants to McDonald to the effect that appellees had consented to deliver the deed. Appellants answered, alleging that the deeds had been delivered in escrow to McDonald for delivery to the respective grantees as soon as abstracts were furnished showing merchantable title to the land, which abstract had been fur-

nished by appellants, and that the deed had been delivered to them by McDonald pursuant to the agreement with appellees. On trial of the issue the chancellor found in favor of the appellees, and entered a decree canceling the deed.

[1] There is a substantial controversy between the parties as to the effect of the delivery of the deeds to McDonald. The contention of appellants is that the deeds were delivered in escrow, conditioned only on the furnishing of an abstract showing a merchantable title. On the other hand, it is the contention of appellees that the deeds were placed in the hands of Mr. McDonald merely to await the furnishing of a satisfactory abstract, but that each party was to have the privilege of determining whether the abstracts were satisfactory, and that the deeds were not to be delivered except upon the consent of each party. The chancellor determined this issue in favor of appellees, and we are unable to say that the testimony preponderates against that finding.

Each one of the appellees testified as to the terms of the trade, stating positively that McDonald was not to deliver the deeds to appellants until they consented thereto. In this statement they are corroborated by the testimony of others. Mr. McDonald was introduced as a witness, but his recollection does not seem to be entirely clear as to the details of the transaction, though his testimony rather tends to support the contention of appellees that he was not to deliver the deed until appellees gave him directions to do so. He states that he held the deed until it was represented to him that appellees had consented. Mr. Moore, one of the appellants who applied to McDonald to deliver the deed, states that he did so after having a telephone conversation in which he understood that W. H. Moye, one of the appellees, had consented to the delivery. The fact that he found it necessary to obtain the consent of appellees before applying for delivery of the deed tends in some degree to support the view that he was conscious of the necessity of obtaining such permission, and that that was in accordance with the terms of the trade. Mr. Moore testified positively that the deeds were delivered to McDonald solely on condition that there was to be a delivery to the respective parties when abstracts of title were passed, showing merchantable title, but the preponderance of the testimony seems to be against him on that issue. At any rate, we are not able to say that the finding of the chancellor on that issue was against the preponderance of the testimony.

[2] Now, if the deed was not in fact delivered in escrow, but was to be held by McDonald subject to the further direction of the appellees, which was never obtained, and delivery was made without such consent, then it was wrongful, and appellees were en-

titled to have the deed canceled as a cloud on the title. The contract rested entirely in parol, and unless there was a delivery of the deed in escrow, there was nothing to bind the parties, and they could not be bound by a wrongful delivery of the deed. The deposit of a deed with a third party for delivery must be irrevocable in order to constitute it an escrow, and if it is subject to the order of the party it has no binding effect. *Masters v. Clark*, 89 Ark. 191, 116 S. W. 186.

In that case, Judge Battle, speaking for the court, said:

"In this case the instruments were not deposited to be delivered on the happening of a certain event or the performance of a condition, but to be delivered on the joint order of the grantor and grantee. They were still within their power to cancel or modify; they had not received any permanent force, but were still within the control of the parties. They were not escrows."

It follows, therefore, that appellees were not bound by the delivery of the deed without their consent, and that they are entitled to have it canceled as a cloud on their title.

Decree affirmed.

EDWARDS, Sheriff, v. THAYER. (No. 248.) (Supreme Court of Arkansas. March 13, 1916.)

1. EXEMPTIONS — 76 — FEE BILL — DEBT BY CONTRACT — STATUTE.

A judgment in a suit to foreclose a lien on realty with levy of attachment upon articles of personal property rendered for the debt was, as to the additional judgment for costs of suit, on contract within Kirby's Dig. § 3906, so that the defendant might claim his constitutional exemption as against it.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 100, 101; Dec. Dig. — 76.]

2. EXEMPTIONS — 76 — NATURE OF PROCESS — FEE BILL — STATUTE.

In such case the suing out and levy of a fee bill under Kirby's Dig. § 3523, had the force of an execution within section 3906, so that a supersedeas issued staying execution within 12 months exempted the scheduled property, as against a subsequent fee bill.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 100, 101; Dec. Dig. — 76.]

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

Action by Gertrude Thayer against Thomas Edwards, Sheriff. Judgment for plaintiff, and defendant appeals. Affirmed.

B. E. Isbell, of De Queen, for appellant. Steel, Lake & Head, of Texarkana, for appellee.

SMITH, J. This cause was heard by the court below on the following agreed statement of facts:

"It is agreed by the parties hereto that the facts of this case are as follows: That E. M. Nix instituted suit in the chancery court of Sevier county against Gertrude Thayer to foreclose a lien upon real estate, and won the suit, obtaining judgment for the debt and cost of suit; that during the progress of the suit, and before trial, plaintiff sued out a writ of attach-

ment against defendant which was levied upon certain articles of personal property; that said Thayer filed her schedule for exemptions before the clerk of this court, and the schedule as filed was allowed and supersedeas issued; that the land in the foreclosure proceedings did not sell for a sufficient sum to pay the judgment and cost; and that after the sale a fee bill for the cost of suit in the name of the officers of the court was issued against Thayer, and levied upon the following described articles, as stated below (with value of each):

One majestic range cooking stove.....	\$.....
One dining table.....	\$.....
One bed with springs.....	\$.....

Total\$36.00

"And the said articles so levied upon and sold under the fee bill by the defendant in this action were included in the schedule of exemptions and supersedeas hereinbefore mentioned, and within less than 12 months after such supersedeas was issued."

The court rendered judgment against the sheriff for the agreed value of the property, and this appeal questions the correctness of that decision.

[1] It is argued on behalf of appellant that the cause is controlled by the case of *Buckley v. Williams*, 84 Ark. 187, 105 S. W. 95, 120 Am. St. Rep. 24, 13 Ann. Cas. 258, and that under the authority of that case the claim of exemptions should not have been allowed. This case is distinguishable on the facts from that case, however. The present case is founded upon a fee bill issued upon the authority of section 3523 of Kirby's Digest. In the case of *Buckley v. Williams*, supra, it was said:

"This is not a suit based upon section 3523 of Kirby's Digest allowing officers to issue fee bills for costs against the party at whose instance the services were rendered, and we express no opinion on that question."

So it appears that the question now presented was there expressly reserved.

In the *Buckley v. Williams* case the court followed and approved the decision of the Supreme Court of Indiana in the case of *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362. In stating the issues involved in that case the learned judge who wrote the opinion said:

"The controlling question in this case is: Does the right of exemption exist against an execution issued upon a judgment for costs in favor of the defendant against an unsuccessful plaintiff in an action founded upon or growing out of contract?"

The facts there were that the plaintiff sued for a debt alleged to be due upon contract, but recovered nothing. Thereupon under the law the defendant recovered judgment for his costs; hence the judgment for the costs which was rendered in the case was not incident to and did not grow out of any contract. It was there said:

"Where a suitor obtains a judgment for damages in an action for tort, or a money recovery in an action upon contract, and is awarded costs, the judgment is an entirety, and must be collected according to the laws for the collection of the judgment for damages or the money re-

covery upon contract. In other words, the judgment for costs is an incident to, and must be controlled in its collection by, the principal judgment. This is so even where the principal judgment is only for a nominal amount."

In that opinion the court reviews its previous decisions on the subject, and its reasoning is that, where plaintiff sues upon a contract, and fails to recover, the judgment which is rendered in favor of the defendant is not incident to the contract, and therefore cannot and does not partake of the nature of the contract. The defendant incurs his costs in his effort to disprove the plaintiff's claim, and when he has successfully done so the statute awards him a judgment against his adversary for the costs of the litigation. The liability thus fixed is statutory, and not contractual. Where, however, the plaintiff prevails and recovers judgment, he is permitted, as an incident to his recovery, to have judgment also for his costs, and it is said that the costs partake of the nature of the judgment.

In the case of *Martindale v. Tibbetts*, 16 Ind. 200, it was said:

"The judgment for the debt and costs is an entirety; the costs following as an incident to the judgment for the debt, and to be collected in the same manner."

The case of *Massie v. Enyart*, 33 Ark. 688, is to the same effect. The syllabus in that case is as follows:

"The exemption of personal property is in cases of debt by contract only, and a judgment or decree for tort or fraud is not a debt by contract, nor are the costs, which are but an incident of the judgment."

[2] It is argued that the process in this case is not an execution, but is a fee bill, and that therefore the fact that a supersedeas had issued within 12 months thereof is not controlling. Kirby's Digest, § 3906.

The court made a finding of fact that the fee bill had issued for all the costs in the case, and that it was therefore of the nature of an execution, and it was intended thereby to subject to the satisfaction of the plaintiff's judgment property which had been previously held to be exempt from his demand.

We think the same rule should be applied here as would be applied if the process was an execution, instead of a fee bill, and that the court properly held that the property was wrongfully sold, and that the sheriff was liable for its value.

The judgment of the court below is therefore affirmed.

CHICAGO, R. I. & P. RY. CO. v. SCOTT. (No. 273.)

(Supreme Court of Arkansas. March 20, 1916.)

RAILROADS—295—ACCIDENTS TO TRAINS—
COLLISION—CONTRIBUTORY NEGLIGENCE OF
INJURED.

Under the lookout statute (Acts 1911, p. 275), a railroad company is liable for personal injuries or death of a brakeman of another railroad company caused by a collision of its train

with another train, if the crew of its train, by keeping a constant lookout, could have seen the other train in time to avoid the collision by exercising ordinary care, and contributory negligence of injured is no defense.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 940-942; Dec. Dig. ¶ 295.]

Appeal from Circuit Court, Crittenden County; J. F. Gautney, Judge.

Action by Chloette Scott, administratrix, against the Chicago, Rock Island & Pacific Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Thos. S. Buzbee and H. T. Harrison, both of Little Rock, for appellant. Covington & Grant, of Ft. Smith, for appellee.

SMITH, J. Appellee recovered judgment as administratrix of the estate of her deceased husband to compensate the loss occasioned by his death while engaged in the pursuit of his duties as a brakeman. The suit was brought against both the appellant railway company and the Frisco Railroad Company. It was alleged in the complaint that both of said railroads were operating trains through the town of Mansfield, Ark., where there were numerous side tracks and switches used by them for switching cars and for other railroad purposes; that appellee's intestate, Ira M. Scott, was, on the 5th of May, 1914, employed by the Frisco Railroad Company, at which time the employes in charge of the train on which he was engaged as a brakeman and the trainmen operating one of the trains of the appellant company carelessly and negligently ran said trains together, and as a result of this collision the deceased received the injuries from which he died after suffering great pain. Appellant filed a separate answer, in which it denied specifically all the material allegations of the complaint, and pleaded affirmatively that the death of appellee's intestate was due to his own negligence. At the conclusion of appellee's testimony, the court, upon motion of the Frisco Railroad Company, ordered appellee to elect which of the defendants she would proceed against, whereupon she dismissed her suit against the Frisco and elected to proceed against the appellant company.

The evidence in support of the allegations of the complaint tended to establish the following facts: Appellant's railroad runs in a southwesterly direction through the town of Mansfield, while the Frisco tracks run almost due east and west, curving to the north, in going from Mansfield to Jensen. The tracks of the two roads come together about 1,200 or 1,400 feet east of the Rock Island depot. Frisco trains from Jensen to Mansfield, after reaching Mansfield, leave the main-line Frisco track at a point near where the two roads come together, and back up to the depot, traveling over what is called the run-around track. On the day in question, the Frisco train had gone into the depot in the

usual way, and the switch leading from the Frisco track to the runaround track had been left open with the red target or danger signal exposed, which fact gave notice that the track leading from the switch to the depot was being used at the time by a Frisco train. The Frisco train was composed of an engine with a caboose attached to the rear and a large refrigerator car coupled to the front, and after unloading some freight at the depot it started on its return to its own main track, where the car which was being pushed in front of the engine was to be placed upon the track for which it was intended by a flying switch. As this train was returning to its own track, it encountered the Rock Island engine, which had "run over" the red target and come in upon the same track the Frisco train was on, and the trains collided with such force that Scott, who was riding on the pilot of the engine on the engineer's side, was killed, as was also another brakeman who was riding on the pilot on the opposite side of the engine. It was Scott's duty to have been on top of the car which was being pushed in front of the engine, or to have been on the ladder on the side of the car in a position to signal the engineer. As it was, there was no one on the Frisco train who could keep a lookout, and this train went blindly towards the switch where it would leave appellant's tracks for its own. The only possible excuse that could be offered for this negligence was the fact that the red target at the switch would apprise the trainmen in charge of appellant's engine of the presence of the Frisco train.

It was shown, however, on the part of appellant, that it was not negligent in having come in upon the runaround track on which the collision occurred, and that its train had a right to go upon this track notwithstanding the presence of the other train, provided the engine was kept under control, and the same duty rested upon the operatives of both trains to keep the engines under control. It was shown that by "operating under control" was meant having that control of the engine which would enable the engineer to bring his engine or train to a stop within the range of his vision, that is, within the distance he could discern the presence of danger upon the track ahead of him, or in case his vision, for any cause, was obstructed, to have his engine under such control that he could stop it within the range of vision of the man whose duty it was to pass signals to him.

There are not many controverted questions of fact in the case, but among such questions are the relative speed of the trains, and the distance from each other when appellant's engineer saw, or could have seen, the other train, and the distance traveled by the Frisco train after the whistle on the Rock Island engine was blown as a warning of danger. While the witnesses do not agree as to the speed of the two trains, it appears to

be reasonably certain that the Frisco train was traveling faster than the Rock Island train. Without setting out this evidence in detail, it may be said that it is sufficient to support a finding that, if the employes of either company whose duty it was to keep the lookout had performed that duty, the unfortunate collision would not have occurred. The evidence on appellant's behalf is to the effect that its engineer was keeping a lookout, that he blew a shrill blast of the whistle, and that he did this as soon as he realized the impending danger, and that he had applied his air brakes and had just reversed the engine when the impact came.

It is urged that appellant's engineer could not have prevented the collision because of the blind and heedless manner in which the Frisco train was backing up the track, and that there was no time during the events leading up to the collision and until the occurrence of the collision itself when the deceased could not, by the exercise of care, have averted the fatal consequence to himself either by giving appropriate signals to his engineer or by jumping off his engine. Appellant argues from this assumption that the case should have been submitted on the question only of whose negligence was the proximate cause of the collision. This idea was embraced in an instruction which reads as follows:

"(2) If you find from the evidence in this case that the collision in question was the result of the joint and concurring negligence of the operatives in charge of the Rock Island engine and of plaintiff's intestate, Ira M. Scott, it is your duty to return a verdict for the defendant."

Learned counsel for appellant review a number of cases which announce a rule that would require the giving of the instruction set out above and which would call for the reversal and dismissal of the case except for the lookout statute, enacted by the General Assembly of this state May 26, 1911 (Acts 1911, p. 275). The theory of the court below was that this statute was applicable and controlled the rule of liability under the facts of this case, and the correctness of that view presents the real question in the case.

We have considered this statute in a number of recent cases, and that the trial court correctly interpreted these decisions is shown by instruction numbered 3 which was given over appellant's objection, and which reads as follows:

"(3) If you find from a preponderance of the evidence that plaintiff's intestate was upon a train which was being operated upon the railway, and that the agents and servants of defendant company in charge of its train, whose duty it was to keep a constant lookout for persons and property upon the track, saw the train upon which plaintiff's intestate then was, and the perilous position thereof, in time to have avoided colliding therewith by the exercise of ordinary care, or that said agents and servants of defendant, by keeping a constant lookout, could have seen the train upon which the plaintiff was, and discovered the perilous position

thereof, in time to have avoided colliding therewith by the exercise of ordinary care, and failed to exercise such ordinary care to protect plaintiff's intestate from danger and injury, then you will find for plaintiff."

When we have approved this instruction as applied to the facts of this case, we have practically decided the case, and we do approve it. Prior to this lookout statute, the law was that, notwithstanding a railroad company was guilty of negligence in the operation of its trains which caused the injury, there could be no recovery if the person injured was guilty of negligence contributing to his injury, unless the peril of this negligent person was discovered in time to avoid injuring him by thereafter exercising ordinary care for that purpose. But this lookout statute worked a radical change in the law. Indeed, it was enacted for the purpose of making railroad companies liable where, notwithstanding the contributory negligence of the person injured, the injury could have been averted had a lookout been kept, and it is made immaterial whether the operatives of the train know of the person's presence and danger or not, provided the circumstances are shown to be such that the injury could have been avoided by the exercise of ordinary care had a lookout been kept. A lookout here would have revealed that the Frisco crew was guilty of the negligence of which appellant complains and also the peril and danger impending. It is true deceased could have gotten off the engine if he had known of his danger, and it may be true he would not have been endangered had he been at his post of duty to communicate appropriate signals to the engineer; but the keeping of a lookout on appellant's part would have revealed to the Rock Island train crew the impending collision which the negligence of the Frisco crew made probable, and we think the jury was warranted in finding that this collision would have been avoided had the Rock Island trainmen performed their duty by keeping a proper lookout.

Finding no prejudicial error, the judgment is affirmed.

IZARD COUNTY v. VINCENNES BRIDGE CO. (No. 240.)

(Supreme Court of Arkansas. March 13, 1916.)

1. COUNTIES \S 169—COUNTY COURT—WARRANTS—VALIDITY—COLLATERAL ATTACK.

A proceeding under Kirby's Dig. \S 1175, authorizing the county court to call in outstanding warrants to redeem, cancel, or reclassify them, is a direct, and not a collateral, attack on the order issuing the warrants.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 255; Dec. Dig. \S 169.]

2. COUNTIES \S 206(2)—COUNTY COURT—ALLOWANCE OF CLAIMS—REVIEW.

The county court may not review former judgments for mere errors in allowance of claims

where the allowance was not illegal or procured by fraud.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 322, 323, 325; Dec. Dig. \S 206(2).]

3. BRIDGES \S 20(2)—CONTRACT FOR BRIDGE—LETTING AT AUCTION—NECESSITY—WARRANTS—VALIDITY.

Warrants for building a bridge cannot be canceled because the contract for the construction of the bridge was not let at public auction as required by statute, where there was an appropriation for the bridge, and it was constructed for an amount within the appropriation, and was accepted and used by the county.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. \S 42, 44; Dec. Dig. \S 20(2).]

Appeal from Circuit Court, Izard County; Z. M. Horton, Special Judge.

The county court of Izard County made an order calling in warrants for redemption, cancellation, reissuance, and classification, and the Vincennes Bridge Company presented warrants for approval and reissuance. The county court entered an order rejecting the warrants, and the Bridge Company appealed to the circuit court. From a judgment there supporting the validity of the warrants the county appeals. Affirmed.

Bradshaw, Rhoton & Helm, of Little Rock, for appellant. McCaleb & Reeder, of Batesville, for appellee.

HART, J. This is an appeal from the judgment of the circuit court denying the right of the county court to cancel certain warrants issued to appellee in payment for a bridge built by it across Piney creek, in Izard county.

The county court of Izard county at its January term, 1915, made an order calling in county warrants for redemption, cancellation, reissuance, and classification. The warrants were ordered to be presented on the 19th day of April, 1915. On that date appellee presented warrants of the aggregate value of \$720 for approval and reissuance. Accompanying same was appellee's affidavit to the effect that the warrants presented were issued by order of the county court of Izard county in payment of the fulfillment of a bona fide contract made and entered into between said county and appellee on the 20th of March, 1913, for the construction of a bridge across Piney creek, in said county. The said contract was not on file in the office of the county clerk in Izard county.

The county court entered an order reciting that it had thoroughly examined the warrants and found that none of them was a just and legal evidence of indebtedness against Izard county. From the order rejecting them, appellee prosecuted an appeal to the circuit court. There Izard county filed an answer in which it admitted that the levying court of said county at its October term 1912, made an appropriation of the sum of \$1,000 for the purpose of building

a bridge across Piney creek, and appointed commissioners to erect said bridge. It further admitted that the county court records show that the plans of said bridge was submitted to and adopted by the court, but avers that no specifications of said bridge was submitted to and approved by the county court. It further alleged that the contract to build the bridge was not let at public outcry by the county court as required by the statute.

The circuit court found that the warrants attempted to be canceled were issued on orders of the county court on matters of which it had jurisdiction, and that no appeal was taken therefrom; that neither the county court nor the circuit court on appeal had any right or authority to cancel said warrants. Whereupon an order was entered reversing and setting aside the judgment of the county court, canceling the said warrants, and ordering the county court to reissue said warrants as required by the statute. Izard county has appealed to this court.

[1] In the case of *Monroe County v. Brown*, 177 S. W. 40, the court held that a proceeding under Kirby's Digest, § 1175, authorizes the county court to call in outstanding warrants to redeem, cancel, or reclassify them, is a direct, and not a collateral, attack on the judgment. The court further held that only those warrants may be rejected which could not have been valid claims against the county or where the judgment of allowance was obtained by fraud. In discussing the question the court said:

"The statute is not construed to mean that the county court is authorized to review former judgments of the court for mere errors in the allowance of claims, but they are authorized to reject claims which have been illegally or fraudulently issued. In other words, where the claim against the county was one which, under any evidence which might have been adduced, could not have been a valid claim against the county, or where the judgment of allowance was obtained by fraud practiced, it may be set aside, and warrants issued pursuant thereto canceled. However, to carry the review beyond that, and to permit investigations for mere errors of the court, would make it purely a collateral attack on the judgment, which is not authorized by the statute. This distinction is illustrated by our two decisions in *State v. Perkins*, 101 Ark. 358 [142 S. W. 515], and *Fuller v. State*, for Use of Craighead County, 112 Ark. 91 [164 S. W. 770]. In the former case we held that there

could be no review of a judgment of the county court adjusting the settlement of a collector merely because there had been an error discovered in the amount of commissions allowed; but in the last-cited case we held that there could be a review where the court allowed commissions which were wholly unauthorized by the statute, as such an allowance constituted fraud in law."

The record shows that an appropriation was made for the building of the bridge, and commissioners appointed to construct the same. The bridge was constructed for an amount within the appropriation, and was accepted and used by the county. This is conceded by counsel for the county, but they contended that the warrants should be canceled because the contract for the construction of a bridge was not let at public auction as required by statute.

[2] Under this state of the record we do not think that the county court in the first instance was without jurisdiction to issue warrants for the claim. As we have already seen, the county court is not authorized to review its former judgments for mere errors in the allowance of claims, but it is only authorized to reject claims which have been illegally issued, or whose issuance has been procured by fraud.

[3] An appropriation was made by the levying court for building the bridge. The county court let the contract and had the bridge built. After it was constructed it accepted the bridge and allowed the public to use it, and it could not thus get the benefit of the work and labor of appellee and still defeat the claim for compensation upon the ground that the contract to construct the bridge was not let at public auction. See *Howard County v. Lambright*, 72 Ark. 330, 80 S. W. 148; *Watkins v. Stough*, 103 Ark. 468, 147 S. W. 443. In any event it could not be considered that the action of the county court in issuing the warrants under the circumstances related was illegal and without jurisdiction. There is no allegation that there was any fraud or collusion between the county judge and the appellee in regard to the contract for the construction of the bridge.

It follows that the judgment must be affirmed.

TUCKER et al. v. WADLOW et al.
(No. 17359.)

(Supreme Court of Missouri, Division No. 1.
Feb. 29, 1916. Rehearing Denied
March 30, 1916.)

1. PLEADING — 403(2) — PETITION — AIDED BY ANSWER.

In a suit to restrain defendant from recording a quitclaim deed to lands on the ground that such deed would cast a cloud on plaintiffs' title, the petition failed to set out the description of plaintiffs' lands or the facts relating to the patenting of such lands, but the answer admitted the quitclaim deed covered plaintiffs' lands and supplied the other defects. *Held*, that the petition was aided by the answer so that a demurrer was no longer available.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347; Dec. Dig. — 403(2).]

2. PUBLIC LANDS — 61(9) — SWAMP LANDS — PATENT — VALIDITY.

Where swamp lands patented to Stoddard county were sold under an execution on judgment against the county, and thereafter the county compromised with the purchasers at execution sale, receiving compensation for the lands, the patent made by the county's special commissioner carried title to the lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 204; Dec. Dig. — 61(9).]

3. PUBLIC LANDS — 61(5) — SWAMP LANDS — SALE.

Where under judgment against Stoddard county swamp lands were sold by the sheriff under execution against the county, the title of the purchasers who received the sheriff's deed was void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 197, 198; Dec. Dig. — 61(5).]

4. QUIETING TITLE — 5 — CLOUD ON TITLE — RECORDATION OF DEED — MULTIPLICITY OF SUITS.

Where the recordation of a quitclaim deed covering thousands of acres would cast clouds on the title of many landowners, plaintiff may to avoid a multiplicity of suits sue for himself and others similarly situated to enjoin recordation; for, if the instrument was recorded, many suits to remove the cloud would be necessitated.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 13; Dec. Dig. — 5.]

5. QUIETING TITLE — 8 — CLOUDS ON TITLE — ENJOINING RECORDING OF DEED.

Where a quitclaim deed made by persons whose title to lands was void would cast a cloud on plaintiffs' titles necessitate a multiplicity of suits and affect the merchantability of plaintiffs' titles, recordation of the instrument will be enjoined, particularly as the consideration for the conveyance, which covered thousands of acres, was purely nominal, and it was apparent that the purpose of the conveyance was to cloud plaintiffs' titles.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 34, 35; Dec. Dig. — 8.]

Blair, J., dissenting.

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Action by William L. Tucker and others against George W. Wadlow and another. From a judgment for plaintiffs, the named defendant appeals. Affirmed.

This action was commenced in the circuit court of Stoddard county aforesaid, on March 13, 1912, by Wm. L. Tucker for himself and

others similarly interested, against defendants, George W. Wadlow and Hugh M. Flannery, to enjoin the latter, as recorder of said county, from recording a quitclaim deed from Allie W. Hicks, a single man, and son of David G. Hicks, deceased (late of Stoddard county, Mo.), to George W. Wadlow, of St. Louis, Mo., defendant in this action.

The above deed is dated January 16, 1912, and the expressed consideration therein is \$75. It purports to convey the undivided one-sixth interest of said Allie W. Hicks in about 14,220 acres of land in said county, and his undivided one-fourth interest in about 50,000 acres of land in the same county.

It appears from the record that on September 28, 1850, the United States conveyed to Missouri about 1,800,000 acres of swamp land for drainage and reclamation (Act Sept. 28, 1850, c. 84, 9 Stat. 519); that afterwards by numerous acts of its Legislature, beginning in 1851, and ending about 1879, Missouri conveyed the 350,000 acres of above lands in Stoddard county, Mo., to said county of Stoddard, in trust for drainage and reclamation, with residue, if any, to the public school fund of said county. The above land, except about 20,000 acres of same situated in Nigger-Wool Swamp, was about all of the very valuable land in Stoddard county aforesaid, for timber and agricultural purposes, the remainder being hilly, unproductive, and poorly timbered.

On March 13, 1868, Louis M. Ringer, procured a general judgment against Stoddard county by default for \$1,136.90. An execution was issued on said judgment, 107,000 acres of the 350,000 acres conveyed to Stoddard county as aforesaid were levied upon, and on September 16, 1868, said entire tract of 107,000 acres was sold at public vendue to Louis M. Ringer, D. Starks Crumb, and others for the aggregate sum of \$683.95, and said judgment credited accordingly. At the February term, 1869, of the Stoddard county court, the latter, by an order entered of record, appointed William G. Phelan and David G. Hicks to institute suit to recover said 107,000 acres of land aforesaid, and agreed to convey to them 50,000 acres of said 107,000 acres as their fee for prosecuting said action in behalf of said county. Thereafter said Stoddard county court compromised with said Louis M. Ringer, and the other purchasers of said land under said sale for the expressed consideration of \$13,500, and said purchasers received patents for said 107,000 acres from said county, through its special commissioner, Alfred Elzroth, pursuant to said compromise. It was further provided by said county court, as a part of said compromise order, that said Wm. G. Phelan and David G. Hicks, in lieu of the 50,000 acres aforesaid, which they were to receive as their fee for prosecuting said action, were to receive 10,000 acres each of said land, to

be selected on their securing or paying said county \$1,500 of said \$13,500. They failed to meet said requirements, and received no patents for any portion of said lands. It was agreed that Stoddard county, Mo., is the common source of title; that all the lands embraced in said quitclaim deed are of the United States grant of September 28, 1850, aforesaid, to the state of Missouri, and from the state of Missouri, by acts of its Legislature, to said Stoddard county. It is further agreed that David G. Hicks died intestate in said county about 1871, leaving Allie W. Hicks, a son, and Wade Hampton Flint (née Hicks), a daughter, his sole surviving heirs at law.

It is admitted in the answer of Wadlow that the plaintiffs herein deraign their title to the land described in said deed from Hicks to Wadlow under and through said Elzroth patents. The answer of said defendant avers that plaintiffs claim in the aggregate only about 5,000 acres of the 64,220 acres embraced in said quitclaim deed, but in his statement it is admitted that plaintiffs deraigned title to about 12,000 acres of the land embraced in the Hicks deed to Wadlow, and that 142,220 acres of the lands described in said deed were not embraced in the Elzroth patents aforesaid.

It appears from the evidence that on March 14, 1868, a judgment was rendered in favor of Thos. J. Rodney, guardian and curator of Jane and Julia Allen, minor heirs of Frank J. Allen, deceased, against Stoddard county for \$4,840, and costs; that an execution was issued on said judgment, and the 14,220 acres described in said quitclaim deed were levied upon and sold as the property of said county on September 16, 1869, for the expressed consideration of \$299.10; that the same was stricken off to David G. Hicks, John E. Lisle, and Joseph J. Miller, as purchasers at said sale, and a sheriff's deed made to them therefor. The sale of the 14,220 acres under execution against Stoddard county was and is void, and did not divest said county of the title to any part of said 14,220 acres, and conveyed no interest therein to either David G. Hicks, John E. Lisle, or Joseph J. Miller. The evidence clearly shows that the recording of said quitclaim deed would cast a cloud on the title of plaintiffs' land, as well as that of all others similarly interested and claiming under Stoddard county as the common source of title. The recording of said deed, as shown by the testimony, would necessitate the bringing of a multiplicity of suits by landowners in said county who are affected like plaintiffs to remove said cloud upon their titles. It further appears from the evidence that the recording of said deed would greatly depreciate the market value of said lands, etc. It was conceded by counsel for plaintiffs at the trial that each and every one of the parties plaintiff own separate and distinct parcels of the lands in controversy.

Unless the Elzroth patents be declared void, the defendant Wadlow has acquired no title to any of the lands described in his quitclaim deed from Allie W. Hicks.

The trial court, upon the hearing of the cause, found the issues in favor of plaintiffs, and entered a decree perpetually enjoining the recording of said quitclaim deed, etc. Defendant Wadlow in due time filed his motion for a new trial, which was overruled, and the cause duly appealed to this court.

Andrew W. Hunt, of Bloomfield, and Geo. W. Wadlow, of St. Louis, for appellant. Wammack & Welborn and Mozley & Woody, all of Bloomfield, and Oliver & Oliver, of Cape Girardeau, for respondents.

RAILEY, C. (after stating the facts as above). [I] I. It is strenuously insisted by appellant that his demurrer to plaintiffs' petition should have been sustained, because of its failure to state facts sufficient to constitute a cause of action. The petition does undoubtedly abound in legal conclusions, and failed to allege certain specific facts which were necessary to establish a cause of action, but the answer and record of defendant Wadlow have supplied these deficiencies. While the petition failed to set out the description of plaintiffs' land and those associated with him as plaintiffs, yet the answer admits that as much as 5,000 acres of plaintiffs' lands were conveyed to them under the Elzroth patents, and are contained in said quitclaim deed. The petition fails to set out the facts relating to the Elzroth patents for said 107,000 acres of land, and failed to aver that the 50,000 acres contained in said deed were a part of said 107,000 acres conveyed to Ringer and others, under said Elzroth patents, but the answer in connection with the petition covers the foregoing matters, and hence, under the well-known doctrine of "express ailer," the defects in the petition are cured by the allegations of the answer, and the demurrer is therefore no longer available to defendant. *Garth v. Caldwell*, 72 Mo. loc. cit. 629, 630; *Hughes v. Carson*, 90 Mo. loc. cit. 402, 403, 2 S. W. 441; *Donaldson v. Butler County, Mo.*, 98 Mo. loc. cit. 166, 167, 11 S. W. 572; *Coulter v. Coulter*, 124 Mo. App. 149, 100 S. W. 1134; *Jackson v. Powell*, 110 Mo. App. 249, 84 S. W. 1132.

[2] II. The appeal herein was taken in March, 1912. Since that time this court, in no uncertain language, has adhered to the majority opinion in *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700. We therefore hold that the Elzroth patents for the 107,000 acres of land described therein conveyed to Ringer and the other patentees the title to said land. *Bryan v. McCaskill*, 17 S. W. loc. cit. 963, and cases cited; *Kent v. Hamilton*, 264 Mo. loc. cit. 575, 175 S. W. 967; *Wilson v. Drainage District*, 257 Mo. loc. cit. 290, 165 S. W. 734; *Senter v. Lumber Co.*, 255 Mo. loc. cit. 590, 164 S. W. 501.

Brinkerhoff v. Juden, 255 Mo. loc. cit. 720, 721, 164 S. W. 523.

[3] III. It is conceded in appellant's statement that the 14,220 acres mentioned in said quitclaim deed, and sometimes mentioned as 15,000 acres, was a part of the 350,000 acres conveyed to Stoddard county by the state of Missouri in trust for drainage and reclamation purposes, etc. It is claimed that Stoddard county was divested of the title to said 15,000 acres, by the sale of same under an execution dated August 9, 1869, on a general judgment rendered against said county March 14, 1868, in favor of the Allen heirs for \$4,840 debt, and costs, and that the same was conveyed to Hicks, Lisle, and Miller for \$299.10 in September 1869, by the sheriff of said county, under the execution sale aforesaid. This sale was void, and left the legal title to said 15,000 acres in Stoddard county in trust for drainage and reclamation purposes, as though no judgment had been rendered or sale had taken place thereunder. Allie W. Hicks therefore had no title to said 15,000 acres or any portion thereof, and hence passed no title to any part of same in his quitclaim deed to appellant. State ex rel. Robbins v. County Court of New Madrid, 51 Mo. 82; Ry. Co. v. Hatton, 102 Mo. loc. cit. 55, 14 S. W. 763; Bayless v. Gibbs, 251 Mo. loc. cit. 504, 158 S. W. 590; Senter v. Lumber Co., 255 Mo. loc. cit. 602, 164 S. W. 501, and following.

[4] IV. Appellant contends that plaintiff has no legal right to maintain this action in his own behalf and in behalf of others similarly interested. Every person who owns any part of the 64,220 acres described in the quitclaim deed in controversy obtained his title through Stoddard county. The recording of said quitclaim deed would cast a cloud upon the title of every landowner whose real estate was described therein. If it became necessary in a court of equity for all or a portion of said landowners separately to have said cloud upon their respective titles removed, it would require same evidence as to common source of title, the same evidence as to the cloud upon the title, and the same recitals in the respective decrees rendered. In order, therefore, to avoid a multiplicity of suits, and accomplish the same purpose in a single action, the modern rules of equity jurisprudence authorize the plaintiff in his own behalf, and in behalf of all others similarly interested, to maintain this kind of an action. Newmeyer et al. v. Railway Co., 52 Mo. 81, 14 Am. Rep. 394; Ranney v. Bader, 67 Mo. 479; Dennison v. Kansas City, 95 Mo. 416, 8 S. W. 429; Lilly v. Tobbein, 103 Mo. 489, 15 S. W. 618, 23 Am. St. Rep. 887; State ex rel. v. Wood, 155 Mo. loc. cit. 485, 56 S. W. 474, 48 L. R. A. 596; State ex rel. v. Woodside, 254 Mo. 580, 163 S. W. 845; 1 Spelling On Injunctions and other Extraordinary Remedies (2d Ed.) § 678; 1 High On Injunctions (4th Ed.) §§ 372 and 574. The

equitable principles sustaining the right to maintain this class of actions is forcefully stated in 1 High On Injunctions (4th Ed.) § 372, and cases cited thereunder, as follows:

"The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity, recognized by all the authorities, and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon title is closely analogous to the well-settled jurisdiction of courts of chancery for the removal of cloud upon title; and the reasoning which supports the jurisdiction in the latter case would seem to apply with equal, if not greater, force in the former. It seems, therefore, to follow as a necessary consequence that, if the aid of equity may be invoked to remove a cloud upon title to realty, it may with equal propriety be exerted to enjoin such illegal acts as will necessarily result in a clouded title. And it may be asserted as a general proposition that a sale of lands under execution, which would confer no title upon the purchaser, and whose only effect would be to cloud the title of others, will be enjoined."

The right of plaintiff to maintain this action for the benefit of himself and others similarly situated is sustained by the weight of authority.

[5] V. Were the facts sufficient before the trial court to warrant it in perpetually enjoining the recording of appellant's quitclaim deed? If recorded, it is too plain for argument that a cloud will be cast upon the title to the entire 64,220 acres, whether held by the county as trustee aforesaid or by individuals and corporations claiming through the county as a common source of title. No purchaser of any of said land would be willing to pay full value for same until the cloud upon the title occasioned by the recording of said deed had been removed. It is undisputed that a large portion of the land described in said quitclaim deed has become very valuable. The capitalist therefore who desired to loan money on this land, appraised at its reasonable value, would require that this cloud upon the title should be first removed before the full amount agreed upon should be paid over to the borrower. The very fact that the grantee in the quitclaim deed has received a conveyance of 64,220 acres of land for the expressed consideration of \$75, and without the semblance of title passing by said conveyance, is very persuasive evidence to our mind that either the appellant thought there might be some chance to obtain a reconsideration of the conclusion reached in the Simpson Case, supra, or said conveyance could be held as a club, when recorded, to force vendors, purchasers, money loaners, etc., to pay a monied consideration for every conveyance of said land made in order to remove a cloud from the title. In either event, a court of equity would be justified in enjoining the recording of said instrument.

VI. Upon a careful consideration of all the facts disclosed by the record we are of the opinion that the trial court was well within the law and the evidence in respect to its findings.

Its judgment in prohibiting the recording of appellant's quitclaim deed is therefore affirmed.

BROWN, C., not sitting.

PER OURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur, except BLAIR, J., who dissents.

OGDEN v. AUER. (No. 17539.)

(Supreme Court of Missouri, Division No. 2.
Feb. 15, 1916. Rehearing Denied
March 31, 1916.)

1. EQUITY \S 65(3)—MAXIMS—CLEAN HANDS. Irrespective of the doctrine of *res adjudicata*, equity will not aid one who has sought the same relief in separate actions on grounds so inconsistent as to evince a lack of candor and clean hands.

[Ed. Note.—For other cases, see Equity, Dec. Dig. \S 65(3).]

2. JUDGMENT \S 588 — RES ADJUDICATA—MATTEES CONCLUDED.

In an action in equity for the partition of land, a former judgment in an action between the same parties and seeking the same relief, but urging different grounds, was conclusive upon a plea of *res adjudicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1062, 1090; Dec. Dig. \S 588.]

* Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by Mary Auer Ogden against Reno A. Auer. From a judgment for the defendant, the plaintiff appeals. Affirmed.

Plaintiff deeming herself entitled to a moiety of certain lands situate in the city of St. Louis, brought this action in equity in the circuit court of that city against defendant to establish her alleged status as an heir of Andrew Auer and Elizabeth A. Auer, to the end that she might, as her prayer was, have said lands partitioned between defendant and herself. Cast below, she has appealed.

Defendant is the son of said Andrew and Elizabeth A. Auer, who died on the 26th day of November, 1909, and on the 7th day of March, 1910, respectively. Said Andrew was seised in fee of a part of the lands sought to be partitioned. These lands he devised to the said Elizabeth, so that she at her death was seised of all of them, and, dying intestate, they passed by descent to defendant as her only heir, subject, as the contention of plaintiff herein is, to her alleged right to a moiety thereof.

Plaintiff's petition is in two counts; the substance and legal effect of each thereof will be found among other facts, regarded by us as decisive of the case, in our discussion of the law deemed applicable to the issues presented.

August Walz, Jr., and W. G. Carpenter, both of St. Louis, for appellant. Wm. F. Woerner, of St. Louis, for respondent.

FARIS, P. J. (after stating the facts as above). Defendant, who is the respondent here, interposed below, among other defenses, that of former adjudication. In proof of this plea the files and the judgment in a former action between the identical parties were offered. From the petition in such former action it appears that on some day prior to October 24, 1911, but on what precise date does not appear, there was filed in the circuit court of the city of St. Louis, by plaintiff, an action in two counts: (a) For partition; and (b) for specific performance of a contract to adopt and for partition of the same lands now here in controversy and others not here involved. The first count in said last-mentioned petition averred in substance that plaintiff is the heir, for that she is the "natural-born daughter" of defendant's mother and father, and as such entitled to one-half of said lands. The prayer is for partition. The second count avers a promise made by defendant's parents to some unknown person for plaintiff's benefit, to adopt plaintiff as an heir; the performance of all duties as a child on plaintiff's part, and a prayer for specific performance of said promise to adopt, and for partition of the lands here in controversy.

The action above referred to, which we may for convenience style the "first action" to distinguish it from the case at bar (though it was not in fact the first action by two others—one in the probate court and another, which was dismissed in the circuit court), came on for trial on the 24th day of October, 1911. At the request of plaintiff, by motion to that end, the issue of whether plaintiff is the "natural-born daughter" of the Auers, born in lawful wedlock, was submitted to a jury. The evidence was heard, and on the 25th day of October the jury returned a verdict against plaintiff, in substance finding the fact to be, that plaintiff is not the natural-born child of the Auers, born in lawful wedlock. On October 28, 1911, plaintiff filed her motion for a new trial, which motion was by the court overruled on December 26, 1911, and judgment was thereupon rendered for defendant and against plaintiff on the first count of her petition, dismissing her bill. After the verdict and pending the motion for a new trial and on November 1, 1911, plaintiff dismissed the second count of her said first action, which said count is in all material respects a copy of the first count of the suit at bar. Likewise pending the motion for a new trial, and on the 3d day of December, 1911, the action at bar was filed.

[1, 2] From the judgment in the first action no appeal was taken, and whatever rights, if any, which were concluded thereby are obviously *res adjudicata* in this action. Leaving out of consideration the proceeding in the probate court which was dismissed and the earlier action in the circuit court (even preceding that called here the first ac

tion, which was likewise dismissed, and which it is plain, go only to show the divers attitudes and contradictory affidavits of plaintiff as well as the vexatious nature of this litigation), the point is strenuously urged, upon the facts stated, that the doctrine of res adjudicata precludes plaintiff from successfully maintaining this action.

Let us examine this question before we come to the merits. The only relief prayed for in each of these actions and in each count thereof was partition of the premises described in the first action and in this one. In the first action the right to a decree of partition was based upon the grounds: (a) That plaintiff is an heir of the Auers (from the fact averred that she is their child, born of them in lawful wedlock); and (b) that plaintiff was entitled to the specific performance of a contract made by the Auers with "some one acting for and in behalf of plaintiff," to legally adopt her as their child and heir.

In the case at bar likewise partition of the premises in controversy is the only relief sought, and the averred grounds upon which such partition is sought are: (a) That the Auers contracted and agreed with some unknown person "acting for and on behalf of this plaintiff," to take plaintiff and legally adopt her as their own child and heir, and (b) that plaintiff was reared by the Auers in the belief that she was their daughter; that they educated her as such and so held her out to others; that she rendered love and menial service to them for years as if she were their daughter, and in the belief that such blood relation actually existed; that through her said services rendered in the honest belief of such relationship, much of the identical property sought to be partitioned was earned, or augmented in value, and that a refusal to allow her to share in it to the extent that a child by blood of the Auers would share, would amount to a fraud upon her, and that defendant, by reason of the tortious acts of his ancestors from whom the property in dispute was inherited by him, is estopped to deny the validity of her claim, averred to accrue as above stated, to one-half of it.

Leaving out of question the divers contradictory attitudes assumed by plaintiff, which we could well consider as affecting the bona fides and merits of her case (Russell v. Sharp, 132 Mo. loc. cit. 287, 91 S. W. 134, 111 Am. St. Rep. 496), and, looking alone to her first action and to the instant one, we conclude that the plea of res adjudicata is well taken, and that the judgment of the court nisi is right whether he put it on the merits, or upon the plea of res adjudicata. Whether a partition action brought under our statute is an action at law or an action in equity, we need not here again rule; both of these actions were in equity till they were submitted, and in the first case until an advisory verdict upon a submitted issue was rendered by a jury. Both actions sought the self-same

judgment, viz., partition of the identical premises described in the first action and in this one. Certain differences of fact only existed in the two actions as to the grounds upon which plaintiff bottomed her right to the partition prayed for.

If plaintiff had the right to maintain partition for any one of the three reasons she has from time to time urged, it was a duty she owed to the courts to plead them all in one action. If they were so glaringly inconsistent as to be maintainable only in separate actions, then they are too inconsistent to allow relief in equity in a case like this (Russell v. Sharp, supra), when separately pleaded. For equity ought not to aid those who urge as grounds for one and the self-same judgment positions so glaringly contradictory as to evince from the simple recital of them a lack of candor and clean hands, to say no more.

Litigants are to be held bound to set out all reasons which they deem to exist for any relief they may consider themselves entitled to; they ought not to be permitted to take two or three bites to an equitable cherry any more than at a law cherry. A party weighed in the scale upon an urged plea of res adjudicata is to be held to plead all of the grounds he may possess and have at hand for either defense or as entitling him to any given relief. In fact he will be deemed to have so urged all such grounds as he might have urged. Stone v. Railroad, 261 Mo. 78, 169 S. W. 88; Emmert v. Aldridge, 231 Mo. 124, 132 S. W. 1050; Womach v. St. Joseph, 201 Mo. loc. cit. 490, 100 S. W. 448, 10 L. R. A. (N. S.) 140; Spratt v. Early, 199 Mo. loc. cit. 500, 97 S. W. 925; Lindell, etc., v. Lindell, 142 Mo. 61, 43 S. W. 368; Donnell v. Wright, 147 Mo. loc. cit. 648, 49 S. W. 874; McLure v. Bank of Commerce, 263 Mo. loc. cit. 135, 172 S. W. 336; Bobb v. Graham, 89 Mo. 200, 1 S. W. 90; Cantwell v. Johnson, 236 Mo. loc. cit. 603, 139 S. W. 365; Greengbaum v. Elliott, 60 Mo. 25; Union Railroad, etc., v. Traube, 59 Mo. 355; Shelbina Hotel Ass'n v. Parker, 58 Mo. 327; Bartley v. Bartley, 172 Mo. loc. cit. 212, 72 S. W. 521. In the case of Emmert v. Aldridge, supra, at page 128 of 231 Mo., page 1051 of 132 S. W., Graves, J., writing the opinion of Division 1 of this court, said:

"In the recent case of Spratt v. Early, 199 Mo. loc. cit. 500 [97 S. W. 925], this court in banc said: 'What is urged in the present action could have been urged in the former action. The first action involved the whole lot, and this a part of the lot. The parties are identical; and the exact contention made in this suit could have been made in the other. Plaintiff did not deem it proper, for reasons perhaps best known to himself, to make the contention. That he could have presented the matter goes without question. When evidence was introduced as to the homestead rights of Mrs. Duffy for the purpose of disrobing the conveyance of the alleged fraud, the plaintiff could have shown and should have shown that there was an excess over and above the homestead interest, which could be impressed with the fraud. Had he

done so, this court would have said so in the former opinion. Parties cannot be permitted to try their cases by piecemeal. Whatever should have been in the first case, for the purpose of passing upon the question of former adjudication, will be considered to have been there.

"In the Spratt Case, we called attention to the case of *Donnell v. Wright*, 147 Mo. loc. cit. 647 [49 S. W. 874], whereat Judge Brace for the court reviewed the case law upon the subject, and succinctly announced the rule thus: "The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

"We therefore say that when Starbuck was called into court in the case under section 650 to have his title ascertained and determined, he should have disclosed to the court all of his avenues of title whatever they may have been. If he had title to this one 40 acres by reason of the homestead act of 1865, and the deed from Mrs. Aldridge, it was his duty to have urged the matter to the court at that time. Under the rule the matter has been as fully adjudicated as if it had been specifically tendered and adjudicated. It was but one method by which he could show his alleged title to the court."

No reason can be seen in this case why plaintiff could not have done this. Her alleged ancestors were deceased then; they are still dead. Her condition has not changed, nor has the status of the defendant, or of her alleged right, or of the property in controversy been in any wise altered from the time of the first action down to this one. So having found a sufficient reason for the judgment rendered nisi, we need not cumber the books with the merits of the case, or the lack thereof.

It follows that the judgment of the court nisi was right, and ought to be affirmed. Let it be so ordered. All concur.

BERNERO v. GOODWIN et al. (No. 17556.)
(Supreme Court of Missouri, Division No. 2.
Feb. 15, 1916. Rehearing Denied
March 31, 1916.)

ADOPTION — 229 — WILLS — 229 — EFFECT OF
ADOPTION — DESCENDANTS OF ADOPTED
CHILD — CONTEST OF WILL.

Rev. St. 1909, § 1871, provides that a person may by deed adopt any child or children as his or her heir. Section 332 declares that the estate of a decedent shall descend and be distributed in parcenary to his kindred, male and female, first to his children or their descendants. Testatrix by deed adopted a son. Such son predeceased testatrix leaving issue. Held that, as the adopted son acquired all the rights of a natural child, his issue had sufficient interest to contest her will, being entitled to take as if it were a natural descendant of testatrix.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 42; Dec. Dig. ¶ 23; Wills, Cent. Dig. §§ 550-554; Dec. Dig. ¶ 229.]

Appeal from St. Louis Circuit Court;
Hugo Muench, Judge.

Suit by Louis Bernero, an infant, by his curatrix, Lorraine T. Bernero, against The-

resa L. Goodwin and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This is a suit to contest the validity of what purports to be the last will and testament of Theresa Bernero, deceased, on the ground of undue influence and unsoundness of mind. The proceeding was instituted in the circuit court of the city of St. Louis. Some of the defendants filed a pleading in the nature of a plea in abatement which alleged that plaintiff would have no interest in the estate of deceased in the event there had been no will, and therefore he did not have such an interest as to entitle him to bring the suit. Trial was had by the court, which resulted in a judgment finding that plaintiff did not have such an interest in the estate as would entitle him to maintain the action to contest the will. The plaintiff thereupon duly perfected an appeal to this court.

The facts are undisputed, and may be stated substantially as follows: Louis Bernero, Sr., and Theresa Bernero (the alleged testatrix) were husband and wife. The husband died in August, 1904. On April 10, 1905, said Theresa Bernero, by deed of adoption, executed and acknowledged as provided by the statutes, adopted Emanuel C. Bernero as her child and heir. The deed of adoption recites that said Theresa and her husband, in 1880, while in Italy, agreed with the parents of said Emanuel to adopt him and brought him home with them to the city of St. Louis, where he lived with them as their child and as a member of the family, but no deed of adoption was ever recorded as required by the statutes. The deed of adoption further recites that it was made so as to comply with said statutes. At the time of the deed of adoption, Emanuel Bernero, the adopted child, was 28 years of age. On November 30, 1904, said Emanuel Bernero, the adopted son, married Lorraine Thompson, now Lorraine T. Bernero, appearing as the curatrix of the plaintiff infant in this suit. There was born of this marriage, on October 14, 1905, Louis Bernero, plaintiff in this case. Emanuel Bernero, the natural father of plaintiff, died in April, 1910, leaving surviving him his widow and his son, Louis Bernero, the plaintiff. On July 15, 1911, said Theresa Bernero (alleged testatrix) died in the city of St. Louis. It does not appear that she left any natural children or their descendants surviving her but that she left surviving her two sisters. After her death her alleged will dated June 25, 1910, was admitted to probate by the probate court of the city of St. Louis. The present plaintiff was made beneficiary under the will in the sum of \$10,000. The remainder of her property was left to several different legatees and devisees.

The condensed facts therefore appearing from the record necessary to a determina-

tion of the question here raised are that an adopted child died during the life of his adopting parent and left surviving him a natural child (the plaintiff herein), and thereafter the adopting parent died, leaving a will. Plaintiff brings this suit to contest the validity of the will. Defendants raise the issue that plaintiff could not inherit from the adopting parent in the event she died intestate, and that therefore plaintiff had not such an interest as would permit him to contest the will. Plaintiff contends that he inherits from the adopting parent of his natural father the same as if his father had been the natural child of the adopting parent.

Thomas D. Cannon, Moses N. Sale, D. Goldsmith, E. P. McCarthy, and John A. Burke, all of St. Louis, for appellant. Stewart, Bryan & Williams and McShane & Goodwin, all of St. Louis (John M. Goodwin and Geo. H. Williams, both of St. Louis, on the brief), for respondents.

WILLIAMS, C. (after stating the facts as above). [1] The question now presented for our review is whether or not the natural child of an adopted child shall share in the distribution of the estate of the adopting parent dying intestate; the adopted child having predeceased the adopting parent. This identical question has never been before the court for determination. After a careful consideration of the question, we have reached the conclusion that the question should be answered in the affirmative.

The rule here applicable, and supported by the great weight of authority, is stated in 1 R. C. L., 614, as follows:

"If an adopted child dies during the life of its adopting parent, leaving children, such children are for most, if not for all, purposes, regarded as natural grandchildren of the adopting parent, and are entitled to represent their parent and to receive from the estate of his adopting parent what he would have been entitled to receive had he lived until after such parent's death."

To the same effect and directly in point are the following authorities: *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596, 83 L. R. A. 207; *Power v. Haffey*, 85 Ky. 671, 4 S. W. 688; *Pace v. Klink*, 51 Ga. 220; *Irr re George Walworth's Estate*, 85 Vt. 322, 82 Atl. 7, 37 L. R. A. (N. S.) 849, Ann. Cas. 1914C, 1223; *In re Estate of Winchester*, 140 Cal. 468, 74 Pac. 10; *In re Webb's Estate* (Pa.) 95 Atl. 419, not yet officially reported; 1 *Corpus Juris* 1402, § 187.

It appears that in the majority of the foregoing authorities the principal argument or reason given in favor of the holdings is that, since adoption was a creature of the civil law and unknown to the common law, the courts would look to the civil law for aid in construing the respective statutes; that under the civil law the children of an adopted child stood in the position of grandchildren of the adopting parent.

In the case of *In re Webb's Estate*, supra, the reason given in support of the holding was that the word "heir," used in the adoption statute of Pennsylvania, "ex vi termini implies representation," and that therefore upon the death of an adopted child her children succeeded to her rights as heir of the adopting parent. Respondent attacks the correctness of the reasoning given as a justification for the holdings in some of the above-entitled cases.

Without here undertaking to determine whether the respective reasons given in the authorities cited would be sufficient to sustain a like result in the present case, we will state that we think a sufficient reason can be given in justification of the conclusion reached in the present case without calling to our aid the precepts of the civil law or without relying upon the implication of representation springing from the word "heir" as discussed in the Pennsylvania case. We have reached the conclusion that in this state the natural child of an adopted child (the adopted child having predeceased the adopting parent) inherits from the adopting parent for the following reasons:

Section 1671, R. S. Mo. 1909, provides that a person may by deed "adopt any child or children as his or her heir," etc. The deed of adoption in the present case was in compliance with that statute. Section 332, R. S. 1909, being one of the statutes of descent of the estate of an intestate, provides, among other things, that:

The estate "shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following course: First, to his children, or their descendants, in equal parts."

It has been held by this court that an adopted child was a child within the meaning of the above-quoted statute on descents (*Fosburgh v. Rogers*, 114 Mo. 122, loc. cit. 133, 21 S. W. 82, 19 L. R. A. 20), and also that an adopted child is a child within the meaning of other sections of the descent laws (*Moran v. Stewart*, 122 Mo. 295, loc. cit. 299, 26 S. W. 962). The above-mentioned portion of the statutes on descent as construed, therefore, means the same as if it read:

"First, to his children [either natural born or adopted], or their descendants, in equal parts."

Since Emanuel C. Bernero (the adopted child) was the inheriting child of Theresa Bernero (the adopting parent), within the meaning of the foregoing statute of descent, and since Louis Bernero, appellant here, was the blood child, and therefore unquestionably the descendant, of said Emanuel, deceased, we think it inevitably follows that, under the statute of descent, Louis is entitled to the said distributive share in said estate in the event said Theresa died intestate. As we have gathered it from the briefs and oral argument, respondent's main contention is that the appellant, the blood child of the

adopted child, must receive its rights to a distributive share, if any, solely under the deed of adoption executed by his natural father and the adopting parent, and that, since the adoption statute makes no provision for the descendants of the adopted child, and since the rights created by the deed of adoption are personal between the contracting parties, and not such as extend to other parties, the appellant can receive no share in the estate of the adopting parent. The error of the above position, as it appears to us, is in assuming that the rights of appellant to claim a distributive share in the estate is limited solely to the adoption laws and deed of adoption, to the exclusion of all rights given by the statute on descents.

It was pointed out in the case of Fosburgh v. Rogers, supra, that the statute of descents merely laid down the general rules of inheritance, but did not undertake to accurately define "how the status is to be created which gives the capacity to inherit" (Id., 114 Mo. loc. cit. 133, 21 S. W. 82, 19 L. R. A. 201), and that this status might be created elsewhere, as, for example, by compliance with the adoption law or the law providing a way for making illegitimate children legitimate. In the present case appellant, the natural child of the adopted child, does not, in a proper sense, take under the deed of adoption. The deed of adoption created the status of an inheriting child in appellant's father, and the right of appellant to represent his father is given him by the statute of descents, by use of the words "or their descendants." So, as in the first instance, it is not necessary to refer to the civil law to ascertain whether an adopted child in Missouri is thereby given the right to be an heir, this because the Missouri adoption statute expressly says he is an heir. Neither is it necessary, in the second instance, to look to the implication of representation arising from the use of the word "heir" in the adoption statute; this because the statute of descent takes hold of the matter when once the status of an inheriting child is given the adopted child, and provides for representation or succession by use of the words "or their descendants."

The fact that the courts of other states have reached the same conclusion as herein reached, but by a different process of reasoning, but strengthens the soundness of the result herein reached. An examination of the adoption laws of the different states cited above, where the question has been discussed, discloses that the rights of an adopted child to inherit from the adopting parent in those states, so far as they affect the point now discussed, are the same, in effect, as the rights of inheritance given the adopted child in Missouri. In none of those states, as well as in Missouri, does either the adoption statutes or the descent statutes expressly say

that the natural child of an adopted child inherits from the adopting parent, but in each case cited the same result has been reached as we have reached in the present case.

We do not consider that anything herein decided conflicts in any manner with the ruling in *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, which held that the adopted child does not inherit from the collateral kindred of the adopting parent.

The judgment is reversed, and the cause remanded.

ROY, C., concurs.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All the Judges concur.

BAJOHR v. BAJOHR et al. (No. 17873.)
(Supreme Court of Missouri, Division No. 1.
Feb. 29, 1916. Rehearing Denied
March 30, 1916.)

1. WITNESSES \S 144(11) — COMPETENCY — TRANSACTIONS WITH DECEASED PERSONS.

Rev. St. 1909, \S 6354, providing that where one of the parties to the contract or cause of action on trial is dead, the other party thereto shall not testify either in his own favor or in favor of any party to the action claiming under him, does not prevent a widow from testifying that her husband had changed the name of the grantee in a deed to property, purchased by her and given to him to record, from her name to his.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 639; Dec. Dig. \S 144(11).]

2. APPEAL AND ERROR \S 837(12)—REVIEW—EVIDENCE CONSIDERED.

Evidence, first admitted, but later erroneously stricken by the court, if in the record on appeal, can be considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3276; Dec. Dig. \S 837(12).]

3. REFORMATION OF INSTRUMENTS \S 45(4)—SUFFICIENCY OF EVIDENCE—ALTERATIONS.

In a suit by a widow to reform a deed, evidence held to show that she paid the purchase price for the property, and that the deed was originally made out to her, but had been altered by her husband before being recorded by him, by substituting his name for hers as grantee.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. \S 160, 166, 178; Dec. Dig. \S 45(4).]

4. HUSBAND AND WIFE \S 121—WIFE'S SEPARATE PROPERTY—DEPOSIT IN HUSBAND'S NAME.

Where a wife deposited her money in a bank in her husband's name, and he gave her blank checks signed by him to fill in and use, a payment for property by one of those checks was a payment by her, even if the money in the bank was the money of the husband, and he was only indebted to her for the amount, since his giving her the checks was a payment of the debt to that extent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 432, 435-441; Dec. Dig. \S 121.]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Suit by Clara Bajohr against Alma M. Bajohr and others to reform a deed. Decree for the defendants, and plaintiff appeals. Reversed and remanded, with instructions to enter decree for plaintiff.

William L. Bohnenkamp and Eugene C. Tittmann, both of St. Louis, for appellant. Taylor R. Young and Henry T. Ferriss, both of St. Louis, for respondent Christopher & Simpson Iron Works Co. Kurt Von Reppert, of St. Louis, for respondents Hoboy and Nanninga.

GRAVES, P. J. Clara Bajohr is the widow of Carl Bajohr, who died in 1910. The action is one in equity to reform and correct a deed, as such deed now appears of record. In her petition she charges that she bought a certain lot in the city of St. Louis from Katherine Katlander for the price of \$400, which she paid out of her own money. She further avers that when the deed was made and executed by Katherine Katlander such deed contained the name of Clara Bajohr as grantee therein, and not the name of Carolus Bajohr, as grantee, as such deed now appears of record. She avers that she delivered the deed to her husband to be recorded, and never discovered that the name of the grantee had been changed from Clara Bajohr to Carolus Bajohr until after his death. The petition further charges that such change was made without her knowledge or consent. She prays that such deed as of record be corrected and reformed so as to read as it was when originally executed; in other words, to show the name of Clara Bajohr as the grantee. The deed which has been filed in this court shows it to have been executed January 19, 1899, but not recorded until December 31, 1902. In this petition she made the children and creditors of Carl Bajohr defendants. By answer the children, who were made defendants, answered by admitting all the allegations of the petition, and asked that the prayer of plaintiff's petition be granted. The answer of the creditors is quite lengthy, but when you eliminate therefrom the admissions made therein, it may be thus summarized: (1) They deny that plaintiffs bought the land, or that the deed was ever made to her and delivered to her; (2) that the property in dispute was never the property of plaintiff, but was always the property of Carl Bajohr; (3) that Carl Bajohr recorded the deed with his name as grantee; that plaintiff knew this fact and acquiesced therein; that by reason thereof Carl Bajohr was enabled to establish a credit which he otherwise would not have had, and that by reason of the facts plaintiff is estopped. The reply placed in issue all the new matter. But two witnesses were used: (1) The notary public, who took the acknowledgment of the deed; and (2) the plaintiff.

The court dismissed plaintiff's bill, and from such judgment she has appealed. As indicative of the trial court's view of the case, a memorandum filed in the case speaks for itself, thus:

"The court is of the opinion that plaintiff is not entitled to a decree for two reasons, as follows: (1) The lack of probative force of the evidence offered by plaintiff to sustain the allegations in her petition; (2) because the court erred in admitting plaintiff's testimony over defendant's objections, because of her incompetency as a witness, under section 6354, Revised Statutes 1909."

It will be observed that the court permitted the plaintiff to testify and withdrew that testimony from his consideration. This is one of the questions in the case. This sufficiently outlines the case.

[1] I. It is urged that Mrs. Bajohr was not a competent witness in this case, and that the trial court was right in excluding her testimony from his consideration. The respondents say that section 6354, R. S. 1909, precludes her. The pertinent part reads:

"Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided."

This is an old and familiar statute. The trouble with respondents' contention is that the statute does not apply to the facts in this case. Mrs. Bajohr was not a party to any contract with her husband concerning this land. She says the contract was between her and Katherine Katlander. She is not seeking redress under a contract, but is asking that her contract with another person be reinstated to where it was prior to the alleged tortious and felonious act of the husband. The contract which she is trying to establish is one between her and Katlander. She makes no claim against the husband or his estate owing to a contract with him. One might as well say that had the husband stolen the wife's horses and sold them to a third party, and then died, she would be incompetent to identify her own stock and testify in a case against the parties holding it. It is true she is attacking an alleged deed to the husband, but she is no party to even that alleged contract. In *Freeland v. Williamson*, 220 Mo. loc. cit. 231, 119 S. W. 564, Gantt, P. J., said:

"Moreover, she did not testify as to any contract with her husband. Her right to the land was not derived through any contract between her and her husband, but depended upon the payment of the money for the land in question by her father for her benefit, under an agreement between her father, Andrew Miller, and John Spencer, to which arrangement her husband was not a party. We think she was clearly a competent witness in her own behalf."

[2] In that case Miller, the father of Mrs. Freeland, sent to one Spencer \$8,000, for which Spencer was to get a tract of land for Mrs. Freeland. The land contemplated was an 80 acres belonging to one Kaufman, but for which Spencer had traded. Spencer directed Kaufman to make the deed to Freeland, but he made it to the husband. The husband died, and the suit was by the widow against the children to decree title to the land in her. Under these facts Judge Gantt held she was a competent witness, as indicated supra. He says her title to the land was not dependent upon any contract between her and her husband. So in the case at bar. Mrs. Bajohr's title is dependent upon an alleged contract with Katlander, to which the husband was in no sense a party. The court was in error in excluding all of the testimony of Mrs. Bajohr. But such is in the record, and can be considered here. It was first admitted and then later stricken out by the trial court. We hold the order striking it out and excluding it from consideration was error, and that it is now here in the record, and properly so, for the consideration of this court.

[3] II. We would be tempted to reverse this case, even though under the law we had found Mrs. Bajohr an incompetent witness. The deed is here for examination. It shows erasures throughout. It is a typewritten deed, and the erasures are made with pen and ink. The name, "Carolus Bajohr," appears four times in this changed deed. The first two times the whole name is written over erasures of the typewritten name. The second two times the word "Bajohr" in typewriting is permitted to stand, and only the word "Carolus" is inserted above the erasure of the given name, which was at first in typewriting. But this is not all. Whenever the word "her" appears in the typewritten deed it has been changed by pen and ink to "his." This is clear to be seen. In one of the three instances where the word "her" in typewriting appears, just the letter "e" is crossed out by writing the letter "i" over it, leaving the typewritten "h" and "r." "Herself" in typewriting has been changed to "himself" merely by writing "i" over "e" and "m" over "r." The typewritten letters are still clearly visible in these words we have been mentioning. Even on the back of the deed the given name of the grantee has been erased, and in a different handwriting the name "Carolus" substituted. On the back the full name of grantor was written in pen and ink. On the whole the face of this deed shows that it was first prepared in the name of a female grantee.

The notary public could not recollect the circumstances of the acknowledgment, but he kept a written record as the law requires. This record was in evidence. This record reads:

"1899, January 19th, acknowledgment Katherine Katlander to Clara Bajohr, warranty deed. Introduced by O. J. Mudd, in his office."

[4] That this deed, when acknowledged, contained the name of Clara Bajohr as grantee there can be no question under this evidence. A change thereafter must have been made. It is shown by Mrs. Bajohr that the deed was given to her in the notary's office, and she gave it to her husband for record, and never saw it afterward until after the husband's death. She says the written changes in the typewritten deed are in the handwriting of her husband. She says that she never consented to such a change, and had no knowledge thereof until after the husband's death. Mrs. Bajohr came from Europe in 1883. Her husband had come to this country before she did. She had a business in the old country, and when she sold that out she followed her husband to St. Louis. She says she brought with her \$8,000 as the proceeds of that business. She further says that her husband had no means, but she helped to start in the lightning rod business, in which, as we understand the evidence, he continued until his death. Some of her money she had loaned out, and some was in the banks in her husband's name. Both checked on the accounts. It was done in this way: The husband would leave her signed checks, which she could fill in and use. In the present instance she says that with one of these checks she checked out \$500 and paid \$400 of it to Katherine Katlander for this property. The creditors urge that it was not the money of plaintiff which paid for the lot. They say at most the husband was but the debtor of plaintiff; that he put money into this bank account from his business, and only his checks could get it out. The wife, of course, claims that it was her money in the bank, but there in his name. But even if we take the theory of the creditors in this case, it does not change the situation. Under the testimony the husband either held for the wife this money, or he owed her money to the amount received from her. Grant that the latter was true. When the husband left a signed blank check with the wife to use as against his bank account, and she used it, he was but paying back to her what he owed. When she drew it out, it was then her money. Under the evidence, he left with her these signed checks at all times for her individual use, because of the fact he had her money.

A long, able, and strenuous cross-examination did not shake the vital points of the plaintiff's testimony, notwithstanding the fact that she understood English poorly. This is a case largely of fact rather than law. On the facts, the decree should have been for plaintiff.

Let the judgment be reversed, and the cause remanded to the lower court, with directions to enter up a decree as prayed in the petition of plaintiff. It is so ordered. All concur, BOND and BLAIR, JJ., in result.

PIPES v. MISSOURI PAC. RY. CO.
(No. 18849.)

(Supreme Court of Missouri, Division No. 1.
Feb. 29, 1916. Rehearing Denied
March 30, 1916.)

1. MASTER AND SERVANT §250½. New, vol. 15 Key-No. Series—INJURIES TO SERVANT—LIABILITY OF MASTER—LAW GOVERNING.

It is no defense to an action at common law and under Rev. St. 1909, § 5434, providing that every railroad corporation in the state should be liable for all damages sustained by any servant while engaged in operating the railroad by reason of the negligence of any other servant, but that contributory negligence can be shown as a defense, and Act Cong. April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. 1913, § 8657), providing that a common carrier engaged in commerce between the several states shall be liable for any personal injury while employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carriers, that the car which the switching crew, of which plaintiff was a member, was trying to couple when plaintiff was injured was, at that time, employed in interstate commerce.

2. PLEADING §63—SUFFICIENCY—GENERAL LAWS.

In considering whether a petition states facts entitling plaintiff to relief, as required by Rev. St. 1909, § 1794, the general laws, either state or federal, must be considered, though not mentioned or in any way identified in the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 10, 133; Dec. Dig. §63.]

3. STATUTES §279—FEDERAL LAWS—PLEADING—“FOREIGN LAWS.”

The laws of Congress are not “foreign laws” that must be pleaded and proven in state courts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 378; Dec. Dig. §279.]

For other definitions, see Words and Phrases, Foreign Laws.]

4. EVIDENCE §471(24)—OPINION EVIDENCE—CAUSE OF CARS STOPPING.

In an action for injuries to a switchman, who was thrown from the front end of a string of cars when they suddenly stopped, where plaintiff had testified that, from the manner in which the cars stopped, he knew the brakes were set or the engine reversed, it was error to exclude as a conclusion testimony by another switchman, equally qualified, and who was midway between the engine and the front car, that the stopping was caused by the string of cars striking other cars to which it was to be coupled.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2150; Dec. Dig. §471(24); Witnesses, Cent. Dig. §§ 833-836, 988.]

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.

Action for personal injuries by Irwin H. Pipes against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action for personal injury suffered by the plaintiff in the course of his employment as a switchman in defendant's yard at Kansas City. Verdict and judgment for \$3,000, from which the defendant has taken this appeal.

The petition states, in substance, that the

plaintiff was a member of a switching crew employed by defendant in said yard. On June 12, 1914, he, with the crew, which consisted of a foreman, an engineer, and fireman, who operated the engine, and himself and another switchman, was engaged in handling cars in said yard; that in doing this work the engine was attached to the east end of a drag, consisting of 16 freight cars, for the purpose of shoving it west on one of the tracks to couple it to 3 freight cars standing on said track, and shoving the drag so made up to a gravity lead at the west end of the yard; that in executing the movement it was his duty to get on the top of the cars and pass along the running boards to the head of the drag or farthest car from the engine; that in pursuance of this duty he mounted one of the cars, climbed to the top, and walked west along the footboard; that while he was doing this the last car had been apparently coupled to the 3 that were standing on the track, so that there were 19 cars in the drag; that while plaintiff was still walking along the footboard on the top of the sixteenth car toward the head of the drag, and was at the west end of the sixteenth car, the fireman, who was driving said engine, without any signal to stop, applied the brakes to the engine and caused it to stop suddenly, and with a jerk, so that the three front cars, which had not been securely coupled to the one on which he was walking, separated from it, and plaintiff was thrown from the top of the car to the track below and injured. It specifies particularly that the “defendant was negligent, in that the said fireman carelessly and negligently caused said engine and drag to stop with a jerk, when no signal had been given to stop, when the defendant, by and through its agents and servants, in charge of said engine and drag, knew, or by the exercise of ordinary care could have known, that plaintiff was walking upon the running board of said cars of said drag and would be jerked off of said drag and injured by the stopping of said engine and drag with a jerk when no signal to stop had been given,” and that the agents and servants of defendant in charge of said engine and drag carelessly and negligently pushed it along without the 3 head cars being securely coupled, so that they would separate from the drag, being stopped with a jerk, when they knew, or by the exercise of ordinary care could have known, of the dangerous position of plaintiff, and that he was relying on the car being securely coupled. The answer consisted of a general denial and the ordinary general plea of contributory negligence.

There was no suggestion in any of the pleadings that the employment of the defendant at the time of the injury related in any way to commerce between the states.

There was evidence tending to prove that.

these 3 cars had been delivered at the yard that day by the Chicago, Milwaukee & St. Paul Railway Company, which had brought them from Laredo, Mo., and that one of them had been delivered at Laredo that morning from Ottumwa, Iowa.

There was also evidence tending to prove the allegation of the petition, unless there was a failure with respect to setting the brakes. On this subject the plaintiff testified as follows:

"I was standing there, looking back over my shoulder, and just at the time I was looking back the stop came, and the stop was so sudden that undoubtedly the stop was made by the application of the brakes, or else—"

At this point he was interrupted by an objection from defendant's attorney, who immediately moved to strike out the statement of the cause of the stopping, on the ground that it was mere speculation. This was overruled by the court, and the witness continued, stating that the jerk came with such an abrupt stop that, in his estimation or knowledge, the brakes were undoubtedly set or the engine reversed; that it was made by the stopping of the engine. The defendant moved to strike out this portion of the answer as being a mere opinion. The objection was overruled by the court, and to this action in admitting this evidence and refusing to strike it out the defendant excepted.

The defendant introduced Mr. Hogan, the other switchman of the crew, who testified that at the time Mr. Pipes fell from the top of the car he (Hogan) was standing at about the middle of the original drag of 16 cars, transmitting to the engine such signals as were given by the foreman, who was at the place where the coupling was to be done. During his examination by Mr. Hackney, for defendant (Mr. Field representing the plaintiff) the following took place:

"Q. Could you tell what, if anything, caused the 16 cars to stop?"

"Mr. Field: Objected to as calling for a conclusion of the witness. Q. Could you see what caused it?"

"Mr. Field: I suppose that is a conclusion. Let him state what he did see. (The objection was by the court sustained. To which ruling of the court the defendant then and there duly excepted.)"

"Mr. Hackney: I offer to show by this witness that the cars stopped in consequence of striking the 3 cars, and not from the application of the brake on the engine."

"Mr. Palmer: Objected to for the reason that it would be a mere conclusion of the witness unless the witness could see what was being done by the engineer on the engine, which he testifies was 8 cars away. (The objection was by the court sustained. To which ruling of the court the defendant then and there duly excepted.)"

The defendant, at the close of plaintiff's evidence and again at the close of all the evidence, asked the court to instruct the jury to find a verdict in its favor, which it refused, and defendant duly excepted. It also asked the court to instruct that if the plaintiff was negligent, and his negligence contributed in any way to his injury, they should

find for the defendant. This was also refused and exception taken. It also asked the court to instruct that if the jury should find from the evidence that the east car of the 3 to which the crew were trying to couple the drag—

"was U R T car No. 3832; that said car was loaded, and had been transported in such loaded condition by the Chicago, Milwaukee & St. Paul Railway Company from Ottumwa, Iowa, to Kansas City, Mo., and there delivered to the Missouri Pacific Railway Company for further transportation or delivery, then regardless of the other defenses in this case, the plaintiff is not entitled to recover, and your verdict must be for the defendant."

This was refused, to which defendant excepted. The cause was then submitted to the jury upon the sole theory, affirmatively expressed in substance in plaintiff's instructions and negatively in those given for defendant, that the liability of defendant depended upon the fact that after the drag of 16 cars struck the east car of the 3 to which they were attempting to couple it, and while the engine was pushing the 19 cars westward, the engineer or fireman, operating it without any signal to do so, suddenly stopped "with a jerk," letting the 3 cars, which had failed to couple, pass on, and throwing the plaintiff from the west end of the sixteenth car on which he was walking.

White, Hackney & Lyons, of Kansas City, for appellant. Percy C. Field and Clarence S. Palmer, both of Kansas City, for respondent.

BROWN, C. (after stating the facts as above). [1] The appellant assigns for error the action of the court in refusing its instruction, intended to direct the jury that if the car to which the crew was attempting to couple was, at the time, employed in interstate commerce, their verdict must be for the defendant. The instruction is without foundation. This is a common-law action, excepting in so far as it is modified by the terms of section 5434 of the Revised Statutes of Missouri, and by section 1 of the act of Congress of April 22, 1908 (Stat. 65). The former is as follows:

"Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

The latter provides that:

"Every common carrier by railroad while engaging in commerce between * * * the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

[2] These statutes constitute the law of the state with reference to the liability of railroad companies to their servants for injuries

inflicted upon them by fellow servants in the course of the common employment, and the state courts of general jurisdiction have cognizance of suits to enforce the liability created by them. This jurisdiction must be exercised in accordance with the procedure prescribed by the statutes of the state. The procedure provides (section 1704, R. S. 1909) that the petition shall contain a plain and concise statement of the facts constituting the cause of action, and the relief to which the plaintiff may suppose himself entitled. Its sufficiency is judged by the answer to the question, do these facts entitle the plaintiff to relief under the laws in force in this state? And in considering it, the general laws, whether state or federal, must be considered. It is not necessary that these laws be mentioned or in any way identified in the pleading. It is only required to state the facts which bring the case within them. *Emerson v. Railway Co.*, 111 Mo. 161, 165, 19 S. W. 1113; *Lore v. Manufacturing Co.*, 160 Mo. 608, 621, 61 S. W. 678; *McKenzie v. United Railways Co.*, 216 Mo. 1, 17, 115 S. W. 13; *Railway Co. v. Wulf*, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *Railway Co. v. Gray*, 237 U. S. 390, 401, 35 Sup. Ct. 620, 59 L. Ed. 1018.

[3] The laws of Congress are not foreign laws that must be pleaded and proven in the courts of this state. Had the answer in this case pleaded that the injury was suffered while the defendant and its switching crew were engaged in commerce between the states, it would have been no defense, but merely the statement of an immaterial fact attending the creation of the liability, and to have proven it without pleading could have no greater effect.

Since the trial of this case, the Supreme Court of the United States, which is the paramount authority upon the construction of the federal laws, has decided this question in *Railway v. Gray*, supra. In doing so it said:

"There are differences and similarities between the Wisconsin and federal statutes, but we do not perceive that there is any difference that made the railway company's position worse if tried on the hypothesis that the state law governed."

In this case there is no suggestion of any such difference in the application of these statutes. See, also, *C. & P. Ry. Co. v. Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. —.

The only case to which our attention has been directed which tends to support the theory of defendant is *Moliter v. Railroad*, 180 Mo. App. 84, 168 S. W. 250. In that case the Kansas City Court of Appeals held that actions upon the liability created by the state and federal statutes were so essentially different in their nature that they cannot be substituted for each other by amendment to the petition. This was probably a mere inadvertence, and ought not to be followed.

[4] 2. The next question presented will be

simplified by bearing in mind the facts upon which the plaintiff depends for his recovery. He was thrown from the top of a freight car over the front end, falling upon the track. The car from which he fell was the last or front car of a drag of 16 which had been shoved westward to be coupled to the east one of 8 cars standing upon the same track. The moving car, upon the top of which he was walking forward for the purpose of stepping upon the running board of the other car as soon as the coupling should be made, struck it, but the automatic couplers failed to work, so they were not locked together. Up to this point there is no difference between the plaintiff and defendant. Here, however, their theories diverge. The plaintiff says that the sixteenth car, upon which he stood, continued westward, shoving the 8 before it when the engineer, without any signal therefor, either by the application of the brakes, or by reversing the movement of the engine, suddenly stopped it with a jerk, and the three cars passed on, leaving a space in which the plaintiff fell to the track. On the other hand, the defendant claims that the 16 cars stopped by reason of their impact against the 8, which, not having coupled, moved away from them by the force of the impact, leaving the space into which plaintiff was thrown by the sudden stop. The jury were instructed that if they should believe the former theory, they must find for the plaintiff: if the latter, they were to find for the defendant. During the occurrences that resulted in the accident Mr. Lonergan, the foreman of the crew, stood at the east end of the 8 cars, where the coupling was to take place, directing the movement of the engine by signaling with his hands. Mr. Hogan, a switchman, stood about halfway between Mr. Lonergan and the engine, for the purpose of transmitting the signals from the former to the latter by repeating them. Upon the trial it was admitted that Mr. Lonergan was not available as a witness to either party. The plaintiff testified:

"I was standing there, looking back over my shoulder, and just at the time I was looking back the stop came, and the stop was so sudden that undoubtedly the stop was made by the application of the brakes."

At this point he was interrupted by defendant's attorney, who objected, and moved to strike out the statement on the ground that it was mere speculation. It was overruled by the court, and the witness was permitted to continue, repeating this statement, in substance: Stating that the jerk came with such an abrupt stop that in his estimation or knowledge the brakes were undoubtedly set or the engine reversed; that it was made by the stop of the engine. The defendant moved to strike out this additional statement as being a mere opinion. The court refused, and defendant excepted. These matters are assigned for error. The defendant introduced Mr. Hogan and asked him if he could tell what, if anything, caused the cars

to stop—if he could see what caused it? The plaintiff objected on the ground that the question called for the conclusion of the witness. This objection was sustained, and defendant excepted. The defendant's counsel then said:

"I offer to show by this witness that the cars stopped in consequence of striking the three cars, and not from the application of the brakes on the engine."

To this the plaintiff objected, for the reason that it would be a mere conclusion of the witness, unless he could see what was being done on the engine, 8 cars away. The objection was sustained, and defendant excepted. These matters are also assigned as error. It will be seen that the question raised upon the admission and exclusion of this testimony was of the most vital importance. It seems to us that the same reasons upon which the admissibility of the testimony of plaintiff must rest would apply with equal force in favor of the testimony offered through Mr. Hogan. Both were experienced railroad men, and, as such, must be assumed to have been equally competent to draw inferences from the facts which surrounded them relating to the operation in which they were engaged. The plaintiff was 16 cars away from the engine when it stopped, and it is not suggested that he was able to see anything that was taking place in the cab. In fact he places his knowledge upon the nature of the stop alone. Of course he could hear the rattle of drawbars and couplers as the 8 or 10 feet of slack of which he testified was taken up or payed out, and felt the final jerk attending the change from movement to absolute rest. If this was not sufficient to indicate to his trained senses the cause of the stop, the admission of his testimony was vital error. If he was qualified to speak in that respect so that the testimony was admissible, Mr. Hogan, a man of equal experience and intelligence, must have been equally qualified. He stood halfway between plaintiff and the engine, his duty requiring him to watch Mr. Lonergan, who stood at the place where the impact must occur, and in communication, by sight, with the man controlling the engine, to whom he must be prepared to signal with his hands, and who must be in plain sight of him to receive such signals. His instincts and perceptions were trained like those of the plaintiff. It seems impossible, under these circumstances, that he should not have been as well prepared as the plaintiff to speak of the cause of the stop, and as to whether it originated from force applied at the engine or at the front end of the drag. We think it was error to refuse to permit him to say whether or not he could, under the circumstances, tell what caused these 16 cars to stop, and whether or not he could see what caused it. If he could, he was perfectly competent to state, as the plaintiff stated, the cause, and

could be asked what it was for the purpose of proving that it was from the impact against the 3 cars ahead of it, and not from the application of the brakes. We think that the court committed prejudicial error in refusing to permit him to be so examined. It follows that the judgment of the Jackson county circuit court must be reversed, and the cause remanded.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

SMITH v. KANSAS CITY. (No. 15971.)

(Supreme Court of Missouri. March 1, 1916.
Rehearing Denied March 30, 1916.)

NEW TRIAL \S 13—GROUNDS IN GENERAL.

Plaintiff, while walking on a sidewalk, struck her foot against the edge of the side or the bottom of a depression, caused by gradual wear from the passage of pedestrians, from four to six inches in depth, several feet long and from one to three feet wide, having no previous knowledge of its existence, and sustained a fall and serious injuries. A verdict for plaintiff for \$1 was set aside by the trial court, and a new trial granted. Held, that the action of the trial court will be affirmed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 19; Dec. Dig. \S 13.]

Graves and Farris, JJ., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Suit by Mary Smith against the City of Kansas City. From an order setting aside a judgment for the plaintiff for nominal damages, and granting a new trial, the defendant appeals. Affirmed.

The plaintiff instituted this suit in the circuit court of Jackson county against the defendant to recover the sum of \$20,000 damages for personal injuries alleged to have been received by her through the negligence of the latter. The trial resulted in a judgment for the plaintiff for the sum of \$1, which, upon her motion, was set aside, and a new trial granted. The defendant appealed from the order granting the new trial.

The facts are few and practically undisputed. There was an excavation or depression existing in the sidewalk on the north side of Ninth street, in Kansas City, in front of the Victoria Hotel; and the depression was from four to six inches in depth, sloping east to west and from sides to center, and several feet long, from one to three feet across, caused by gradual wear from the passage of pedestrians. This hole or depression had been there, unguarded, for a long period of time, and while the plaintiff in daytime was walking along the street in the ordinary manner, not expecting or looking for a hole, and having no previous knowl-

edge or notice of its existence, her foot struck the edge of side of the hole, or, as appellant contends, the bottom of it, which caused her to stumble and fall upon the street, sustaining a Colle's fracture, which was very painful, and caused a permanent curvature and stiffness of her wrist, and she expended more than \$200 for medical and surgical treatment. The evidence is quite voluminous, covering about 200 printed pages. At the close of all of the evidence the defendant asked an instruction in the nature of a demurrer thereto, which was by the court refused, and defendant duly excepted.

A. F. Evans and Francis M. Hayward, both of Kansas City, for appellant. Thomson, Davis & Holmes, of Kansas City, for respondent.

WOODSON, C. J. (after stating the facts as above). I. The appellant, the city, assigns but one reason for a reversal of the judgment, and that is stated in the following language:

"The court erred in granting plaintiff a new trial because the court should have sustained defendant's instruction in the nature of a demurrer to the evidence at the conclusion of all the testimony, for the defect complained of was not of such a character as to make the sidewalk not reasonably safe for travel."

After a very careful reading of the evidence in this case, and due consideration given to the authorities cited, I am clearly of the opinion that the evidence made a prima facie case for the respondent, and that the court properly refused the demurrer, and that the submission of the case to the jury was not erroneous, without the case of *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 586, 985, is to be adhered to. In my opinion, according to all of the adjudications of this court up to the rendition of the opinion in that case, where the point was properly made, the respondent's case was properly submitted to the jury, but according to the law as there announced, which is the last expression of this court upon the subject, the trial court should have sustained the demurrer to the evidence. The opinion in that case was written by Judge Graves, and concurred in by Judge Farris. Lamm, J., concurred in a separate opinion, and Brown, J., for a different reason, however, from that stated in the opinion, concurred in result; Kennish, J., dissenting in a separate opinion, in which Woodson, J., concurred, and Valliant, C. J., was absent.

The *Ryan Case*, in effect, holds that, even though a pedestrian on the streets of a city has no knowledge or notice of a defect in a sidewalk, he has no legal right to presume that the street is in a reasonably safe condition for travel, but must exercise "ordinary care in the use of the eyes and other senses" to discover any defect or obstruction in or on the sidewalk which would render it unsafe for public travel, and that, if he did not

so use his eyes and other senses in trying to discover the defect or obstruction, then he could not recover damages for injuries sustained by falling into the hole or defect, or over the obstruction. This, I contend, is not the law of this state; nor does the law require that high degree of care of the traveling public to discover defects or obstructions. In the absence of knowledge or notice the public has the right to presume, and to rely upon the presumption, that the sidewalks are in a reasonably safe condition for travel by day and by night, the purpose for which they are constructed and maintained at such heavy cost and expense to the property owners. In the absence of knowledge, no one, either in the day or night time, while walking along the streets of a great city, continually uses his eyes or other senses in looking for or trying to discover obstructions upon or pitfalls along the sidewalks which make them unsafe for travel. All the law requires of a person walking upon the sidewalk is to exercise ordinary care.

Now, what is ordinary care? All of the text-writers and adjudicated cases concur in defining "ordinary care" to be that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances. Now, where is the man or woman of ordinary prudence, while walking upon the streets of a city, in the absence of known danger, who continuously or generally uses his or her eyes or other senses in trying to discover some possible danger? Speaking for myself, and in so far as I have observed the conduct of others, no such care is observed by any one; nor did I ever hear of any one exercising any such high degree of care in walking upon the sidewalks of a small town, much less upon those of a great city. Should the public use its eyes and other senses, as the *Ryan Case* requires, while walking upon the streets of a city, seeking to discover dangerous places, then, of course, there never would nor could be an injury inflicted upon any one through the negligence of the city for which it would be liable, without perhaps at night, when the streets were not lighted; and this was frankly admitted by counsel for appellant in the oral argument of this case.

According to the law announced in the *Ryan Case*, if, as previously stated, it is to be applied to the case at bar, then clearly the respondent is not entitled to a recovery, for the obvious reason that, had she used her eyes and other senses in trying to discover the depression into which she fell, then unquestionably she could have discovered it and passed around it, and thereby have avoided the injury; but, upon the other hand, if she was exercising ordinary care in walking along the sidewalk—that is, if she was walking along the street presuming that the sidewalk was reasonably safe for public travel—having no knowledge or notice

of the dangerous place, and stepped into it, then, according to law, as announced by this court in all cases prior to the delivery of the opinion in the Ryan Case, she was entitled to a recovery.

I have previously stated herein that all of the cases decided by this court prior to the decision in the Ryan Case, where the point was involved and presented to the court, it has uniformly held that the pedestrian in passing along the sidewalks of a city, in the absence of knowledge or notice of the dangerous condition thereof, has the right to presume and to rely upon the presumption that they are reasonably safe for travel by day or night. The very case cited in the Ryan Case and principally relied upon as sustaining the doctrine therein announced is the case of Coffey v. City of Carthage, 186 Mo. 573, 85 S. W. 532. In that case Judge Fox, after copying the instruction therein complained of, which was substantially the same as the one complained of in the case at bar, said:

"This instruction embodies a correct legal principle, and is substantially a proper declaration of law. Its error consists in not fully covering the law as applicable to the facts of this case."

Then after discussing the facts of that case and the law applicable thereto, on page 585 of 186 Mo., page 535 of 85 S. W., he said:

"The law upon this proposition may thus be briefly stated: If plaintiff had no knowledge of the defect or hole in the sidewalk, then she had the right to assume that the sidewalk was in a reasonably safe condition. But, while she was entitled to act upon this assumption, still she must exercise that degree of care and caution in walking on said sidewalk which a prudent person ordinarily employs under similar circumstances."

The next case cited and relied upon in the Ryan Case is the case of Wheat v. City of St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292. That case was not a suit for injuries sustained by plaintiff on account of a fall caused by the dangerous condition of the sidewalk, but by his milk wagon running over and being upset by a manhole six feet in diameter and projecting three feet above the surface of the street. All of the cases draw a broad distinction between the liability of a city for injuries caused by defects or obstructions in the streets of a city and upon the sidewalks thereof, which will be presently shown. But, independent of that fact, the plaintiff in that case, in the language of the court, "knew all about the manhole and had seen it and driven around it every day for a year, sometimes west of it, and sometimes turning east of it." So it is perfectly clear that when in that case the court used the language that it was the duty of the citizen "to use his God-given senses, and not to run into obstructions that he is familiar with, or which by the exercise of ordinary care he could discover and easily avoid," the italicized words were purely obiter, for the reason that the plaintiff knew

of the obstruction in the street, and had driven around it every day for a year; therefore the question here presented was not before the court in that case, nor was it discussed.

Nor does the case of Woodson v. Met. St. Ry. Co., 224 Mo. 685, 128 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1069, sustain the Ryan Case, for the reason that, when Woodson was injured, he was not walking along the sidewalk, but was attempting to pass over or across the obstruction, a pile of railroad iron, or rails, piled along the outer edge of the sidewalk near the center of the block, to a drug store on the opposite side of the street. Of course, under such circumstances the law imposed upon Woodson the duty of exercising ordinary care, because he was not crossing the street at the crossing, the point the law contemplates persons should cross, but undertook to pass over the rails in the middle of the block to the opposite side of the street. Clearly at the time of his injury he was not traveling along the sidewalk within the meaning of the law, as announced in any of the cases cited by counsel for either party. While Woodson had the legal right to cross the street at any point he desired, yet when he, or any one else, attempts to cross a street at an unusual point, then he must, in the first instance, exercise ordinary care to see that the way is reasonably safe for his passage, and is not entitled to the presumption that said way is reasonably safe, as is true with reference to the sidewalk. Cohn v. Kansas City, 108 Mo. loc. cit. 393, 18 S. W. 973; Ryan v. Kansas City, 232 Mo. loc. cit. 480, 134 S. W. 566, 985.

Nor does the case of Jackson v. Kansas City, 106 Mo. App. 52, 79 S. W. 1174, sustain the Ryan Case. In that case the plaintiff, at night, while going to a fire, fell into an open ditch, unlighted, in the middle of a street in Kansas City. No one under those facts would pretend that any such presumption existed as is invoked in the case at bar.

The last case cited and replied upon as supporting the rule announced in the Ryan Case is that of Yahn v. City of Ottumwa, 60 Iowa, loc. cit. 433, 15 N. W. 257. This case is practically the same as the case of Wheat v. St. Louis, supra, where the plaintiff was injured by driving his wagon over a barrel, an obstruction in the street. The rule announced in that case has been held by the same court in the following cases to have no application to a pedestrian walking along a sidewalk in a city: Mathews v. Cedar Rapids, 80 Iowa, 459, 45 N. W. 894, 20 Am. St. Rep. 436; Earl v. Cedar Rapids, 126 Iowa, 361, 102 N. W. 140, 106 Am. St. Rep. 361; Kaiser v. Hahn, 126 Iowa, 561, 102 N. W. 504; Ryan v. Foster, 137 Iowa, 737, 115 N. W. 595, 21 L. R. A. (N. S.) 969.

Having shown that the majority opinion in the Ryan Case is not supported by the

previous ruling of this court, I will now copy the dissenting opinion of Judge Kennish delivered in that case, in which I fully concur, for the purpose of showing that it is squarely against our former rulings, which is as follows:

"Kennish, J. I cannot concur in the opinion of the court or in the concurring opinion delivered in this case, for the reason that the law as declared therein is not only in conflict with the former decisions of this court and the current of authority upon that subject, but also because, under the facts of this case, the law as thus announced deprives a traveler upon a sidewalk in a city of the benefit of a principle of law the existence of which both opinions concede. *Heberling v. Warrensburg*, 204 Mo. 604 [103 S. W. 36]; *Perrette v. Kansas City*, 162 Mo. 238 [62 S. W. 448]; *Hitt v. Kansas City*, 110 Mo. App. 718 [85 S. W. 669]; *Langan v. Railroad*, 72 Mo. 392; *Porter v. Railroad*, 60 Mo. 160; *Mathews v. Cedar Rapids*, 80 Iowa, 459 [45 N. W. 894, 20 Am. St. Rep. 436]; *Earl v. Cedar Rapids*, 126 Iowa, 361 [102 N. W. 140, 106 Am. St. Rep. 361]; *Kaiser v. Hahn*, 126 Iowa, 561 [102 N. W. 504]; *Ryan v. Foster*, 137 Iowa, 737 [115 N. W. 595, 21 L. R. A. (N. S.) 969]; *Lerner v. Philadelphia* [221 Pa. 294, 70 Atl. 755], 21 L. R. A. (N. S.) 614, and authorities cited and reviewed in the annotation of that case; *Elliott on Roads and Streets*, p. 678.

"The importance of the subject and the conviction that the court has taken an erroneous view of the law requires, and is my apology for, a brief discussion of this case and the cases relied upon and referred to in the majority opinion.

"The facts of this case, as well as the instructions given on behalf of the city and of which complaint is made on this appeal, are stated fully and fairly to the appellant in the opinion of the court herein. However, as appellant complains of error in the giving of four separate instructions, and as defendant's instruction numbered 10D more sharply presented to the jury the alleged error complained of, I shall set that instruction out and use it as a basis for what is here said, rather than instruction numbered 4D, which is taken as typical and set out in the opinion of the court. It is as follows: 'The jury are instructed that it was not necessary for the plaintiff to have had actual knowledge of the excavation in the street, if any, for such knowledge to be imputed to her. Although the plaintiff may not have known of the excavation, if any, yet, if she should, by the exercise of ordinary care, have discovered the condition of the street at the point in question, and should by the exercise of ordinary care, have avoided the same, then the jury will find for the defendants.'

"It is conceded by all that it is the duty of the city to keep its sidewalks in a reasonably safe condition for travel, and that the pedestrian has the right to rely upon the presumption that the city has done its duty and that the sidewalk is in a reasonably safe condition. Notwithstanding the foregoing presumptions of the law, recognizing, on the one hand, the duty of the city, and on the other, the presumption in favor of the footman, under which, as said, he may 'walk by a faith justified by law,' this court approves an instruction which told the jury that, although the plaintiff did not know of the excavation in the sidewalk, 'yet, if she should by the exercise of ordinary care have discovered the condition of the street at the point in question,' and by like care could have avoided the same, the jury should find for the defendants.

"It is apparent, upon a mere statement of this proposition, that the presumption upon which plaintiff was entitled to rely was entirely ignored, and she stood before the jury, not pro-

ected by the presumption that the walk was safe, but, as a condition to her right of recovery, was required to have used ordinary care to have discovered the pitfall which the city had negligently permitted to remain in the sidewalk in the nighttime, unguarded by signal or barrier. This instruction, when considered in connection with the presumption upon which plaintiff had the right to rely, leads to the unreasonable result that the plaintiff might travel the street, relying upon the presumption that it was in a reasonably safe condition, while at the same time and place she was required to use ordinary care to discover whether or not it was, in fact, in a reasonably safe condition. The answer to such an anomalous doctrine was well stated in the unanimous opinion of Division No. 2 of this court in *Perrette v. Kansas City*, 162 Mo. loc. cit. 250 [62 S. W. 448], in which Burgess, J., speaking for the court, said: 'It is asserted that the action of the court in refusing the sixth instruction asked by defendant was reversible error. The argument is that, although defendant may have been guilty of negligence in failing to keep its sidewalk where the accident occurred in a reasonably safe condition for travel, yet, if plaintiff failed to use ordinary care in discovering the condition of the sidewalk, and by reason of such failure he was hurt, he was not entitled to recover. The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which in the absence of knowledge of its dangerous condition he had the right to assume was reasonably safe for travel; hence, no error was committed in refusing this instruction.'

"And in the case of *Hitt v. Kansas City*, 110 Mo. App. 718 [85 S. W. 669], in discussing the same subject, the court said: 'It is insisted that plaintiff had ample opportunity for knowledge of the condition of the sidewalk to have avoided the injury. If the fact that the place was well lighted is to be taken as conclusive evidence against her, then defendant's contention is correct; otherwise it is not. That is all the evidence in the case that would have justified the jury in finding that the plaintiff was not in the exercise of ordinary care. If she had looked for the defect, she would undoubtedly have seen it. But she was not required to do this. She had the right, in the absence of knowledge to the contrary, to feel secure, presuming that the city had performed its duty in keeping its sidewalks safe; and the fact that the place was well lighted was no evidence of itself, unsupported by any other fact, showing want of care or negligence on her part.'

"* * * If she had had knowledge of the condition of the sidewalk before she stepped into the hole, there would have been no such presumption. But so long as it was shown that the defect was there and unknown to plaintiff she had the right to presume that it was safe.'

"In *Langan v. Railroad*, 72 Mo. 392, in discussing the question of alleged contributory negligence upon the part of the plaintiff, this court said: 'Negligence is not imputable to a person for failing to look out for a danger when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended.'

"In the case of *Heberling v. Warrensburg*, 204 Mo. 604 [103 S. W. 36], Judge Gantt, voicing the unanimous opinion of Division 2 of this court, condemned an instruction containing the same identical doctrine as is approved in the opinion in this case, and upon facts, so far as the principle of law is concerned, not at all dissimilar from the facts of this case. As concisely stated in the syllabus of that case, the court held: 'It is not the duty of a person traveling on a public street to examine the street for defects, but he may act upon the presumption that it is reasonably safe so long as he conducts himself as a reasonably prudent

person would do under like circumstances.' And the court quoted with approval from the Perrette Case, supra, that: 'The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which, in the absence of knowledge of its dangerous condition, he had the right to assume was reasonably safe for travel.'

"The opinion in this case concedes that there is a conflict between the law as therein declared and the Heberling Case, but holds that the latter case is not in harmony with *Wheat v. St. Louis*, 179 Mo. 579 [78 S. W. 790, 64 L. R. A. 292]; *Coffey v. Carthage*, 186 Mo. 585 [85 S. W. 532]; and *Woodson v. Met. St. Ry. Co.*, 224 Mo. 685 [123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039]. An examination of these cases will show that, so far as they announce a different doctrine from that of the Heberling, Perrette, and Hitt Cases, supra, they are founded mainly upon what is a pure dictum in the *Wheat* Case, and upon an Iowa case which, it is respectfully submitted, lends no support to the correctness of the defendant's instructions in this case. The Iowa case, *Yahn v. City of Ottumwa*, 60 Iowa, 429 [15 N. W. 257], cited and relied upon as authority in the *Wheat* Case, supra, and again in this case, has been commented upon and distinguished in the later case in that court of *Mathews v. Cedar Rapids*, 80 Iowa, 459 [45 N. W. 894, 20 Am. St. Rep. 436], which will be found to be express authority against the law as announced by the court in this case. The law as announced by the Supreme Court of Iowa in that case is affirmed by that court in the three later cases cited at the beginning of this dissenting opinion, in one of which, namely, the *Earl* Case, it is said: 'Of course, one cannot close his eyes and walk blindly and heedlessly into a place of danger. On the other hand, he is not bound to be on the lookout for hidden dangers. All that is required of him is that he walk with his eyes open, observing his general course, and in the usual manner.'

"In view of the fact that both the Heberling Case and the opinion in this case, which admittedly hold opposing doctrines, claim to be in accord with the *Coffey* Case, I shall not discuss the latter case further than to say that upon an examination thereof it will be found to require, not alone an absence of ordinary care upon the part of the plaintiff, as constituting contributory negligence, but, in addition, the affirmative conduct that she 'proceeded carelessly and without paying any attention to where she was walking.' It was not held in the Heberling Case, nor is it now claimed to be the law, that a footman may go along the sidewalk carelessly, paying no attention to where he is walking, so that he would fail to see plain and obvious obstructions, and when injured thereby not be guilty of contributory negligence, but there is a wide gulf between that character of conduct of a footman and that which requires him to use ordinary care to discover defects in a sidewalk which he has the right to assume is safe.

"The cases relied upon by the majority opinion go back, for authority to uphold the doctrine of defendant's instructions, to the case of *Wheat v. St. Louis*, supra. It is shown by the facts of that case that the plaintiff, in the daytime, drove upon an elevation in the street around a manhole, without noticing the obstruction; that his wagon was turned over and the plaintiff was injured, and that 'plaintiff knew all about the manhole, and had seen it and had driven around it every day for a year.' Upon that state of facts this court, in holding that the plaintiff was not entitled to recover, outside of the facts of the case in judgment, said it was the duty of the citizen to use his 'God-given senses, and not to run into ob-

structions that he was familiar with or by the exercise of ordinary care he could discover and easily avoid.' It is obvious that the clause which the writer has italicized sought to state the law upon the facts not before the court, and that the decision to that extent is not binding upon this court as a precedent. A number of cases cited in that case support the doctrine that, where a person knows of a defect or obstruction in the highway, he must use ordinary care to avoid it, but, as it is not held in any of the cases relied upon and cited in this dissent that the presumption of the safe condition of the sidewalk ever obtains in favor of a person who has actual knowledge of its unsafe condition, the use of the *Wheat* Case and the cases therein cited as a foundation for the doctrine of the court in this case is like building a house upon the sand.

"The instruction in *Yahn v. City of Ottumwa*, supra, cited in the decision herein, and hereinafter set out, will be found widely different from the instructions in this case. Reviewing the *Yahn* Case, the Iowa Supreme Court, in the case of *Mathews v. Cedar Rapids*, supra, in which the former case was cited by one of the parties as sustaining the principles of law announced by the court in this case, said: 'Appellees cite with much confidence the case of *Yahn v. City of Ottumwa*, 60 Iowa, 429 [15 N. W. 257], to support the instruction given; but there is a clear distinction. In that case the plaintiff and his wife were just starting with their team on a street in the defendant city, when the wheel of the wagon struck a stone; and the wife was injured by falling from the wagon. The court refused an instruction to the effect that: "It was the duty of the plaintiff's husband to use care in driving, and look where he was driving, and to avoid all obstacles which were dangerous in their character, and which were plainly visible, and not obscured; and, if he failed to do so, and the plaintiff was thereby injured, then she cannot recover." This court held that the instruction asked, or some other applicable to the view of the facts stated, should have been given, and said: "When an obstruction is in the street, in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him for not seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result." It was a case of an obstruction on the surface of the street, against which there is no presumption. All persons know that temporary obstructions occur on streets and sidewalks; and it is not an unreasonable rule to hold that, if in plain sight, and there is nothing to divert the attention of the traveler, he must notice them. The distinction is this: Such obstacles as are known to be present—as, for instance, boxes and barrels on a sidewalk, and vehicles, building material, and rubbish in the street—challenge the attention of the traveler; and if, without excuse, he fails to observe them, and encounters them to his injury, the judgments of men would agree that he is negligent. But matters which he may not anticipate as likely to occur do not challenge such attention: and a failure to observe and avoid them is not, as a matter of law, negligence. It is also true that what might, as a matter of law, be diligence on a sidewalk, would not be in driving a team on a public thoroughfare in a city. Greater watchfulness to avoid accident in the latter case is certainly demanded, and for manifest reasons. * * * The two special findings to the effect that the light was sufficient to enable a person to see the opening, and that if plaintiff had looked he could have seen it, do not change the result; for we have considered the case upon the theory of such being the facts.'

"Applying the law of that case to the facts of the case before us, we find that, instead of requiring the plaintiff to use ordinary care to discover a defect in the sidewalk, it is held that, even if the plaintiff could have discovered the defect had she looked, it would not follow that she was guilty of contributory negligence for not having done so, and for the reason that she had the right to rely upon the presumption that the sidewalk was safe. Reliance upon that presumption does not mean that a person may go along the street, as the plaintiff in the Coffey Case, proceeding carelessly and without paying any attention to where she is walking, and be free from negligence, for persons in all relations of life are required to use care and caution; but it does mean that the multitudes who every day and night travel the sidewalks of our cities are not required as a condition precedent to a recovery for an injury received to use ordinary care to discover defects in the sidewalk. If they are going about their business, not looking for or thinking about dangers, relying upon the belief that the walk is safe, looking where they are going, and seeing and avoiding obstructions which are plainly obvious, they shall not be held at fault and denied redress merely because they did not use ordinary care to discover an unguarded excavation into which they may have fallen, and which, under the law, they had a right to presume did not exist.

"It was stated at the outset of this dissent that the opinion of the court is opposed to well-considered former decisions of this court and the current of authority upon the subject, and it is now submitted that an examination of the many cases cited in support of the law as herein contended for will fully bear out that statement.

"Woodson, J., concurs in this opinion."

If the law is as stated by the authorities I have reviewed and by those discussed by Judge Kennish in his dissenting opinion in the Ryan Case, then there can be no doubt but what the following instruction given in this case for the defendant is an erroneous declaration of the law, viz.:

"(1) The jury are instructed that the plaintiff in this cause is not excused from the use of ordinary care in passing along the street at the time and place she claims to have been injured, and it was the duty of plaintiff in passing along the street, at the time and place of the injury complained of, to reasonably employ her faculties that she might become aware of and avoid the danger, if any, confronting her; and, if the jury believe from the evidence that at the time and place plaintiff claims to have been injured she failed to use her eyes to inform herself of the danger, if any, and that by the reasonable use of her eyes she could have discovered the defect, if any, and could have avoided the same, then in that case the plaintiff was guilty of contributory negligence and cannot recover in this action, and their verdict will be for the defendant."

This instruction not only ignores the rule of law announced in all the cases before cited, which is to the effect that it is the duty of the city to keep its sidewalks in a reasonably safe condition for pedestrians traveling thereon by day and night, and that they have the right to rely upon the presumption that the city has performed that duty, and that the sidewalk is in a reasonably safe condition for that purpose, but it affirmatively told the jury that:

The plaintiff was legally bound to exercise her faculties to "discover and avoid the danger, if

any, and, if the jury believe from the evidence that at the time and place plaintiff claims to have been injured she failed to use her eyes to inform herself of the danger, if any, and by the reasonable use of her eyes she could have discovered the defect, if any, and could have avoided the same, then in that case the plaintiff was guilty of contributory negligence and cannot recover."

The grievous error of this instruction is clearly pointed out by the following language of Judge Kennish in the case of Ryan v. Kansas City, supra:

"This instruction, when considered in connection with the presumption upon which plaintiff had the right to rely, leads to the unreasonable result that the plaintiff might travel the street, relying upon the presumption that it was in a reasonably safe condition, while at the same time and place she was required to use ordinary care to discover whether or not it was, in fact, in a reasonably safe condition."

In the case of Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448, the defendant requested a similar instruction to the one here under consideration, which was by the trial court refused, to which action of the court defendant excepted, and appealed the case to this court. In discussing that instruction this court, on page 250 of 162 Mo., page 451 of 62 S. W., said:

"The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which in the absence of knowledge of its dangerous condition he had the right to assume was reasonably safe for travel; hence no error was committed in refusing this instruction."

I repeat that there is not one case in this state where a sidewalk case was presented and the point called to the attention of the court that is not in harmony with and recognizes and confirms the rule announced in the Perrette, Hitt, and Heberling Cases, as well as scores of others in this and other states.

The Wheat and Woodson Cases, cited in support of the Ryan Case, are not in point. The former was an action for an injury caused by driving over a manhole in the street, and the latter was for an injury caused by stumbling over some railroad irons piled along the edge of the curbing, while passing over them in the middle of the block to the other side of the street. And the other case cited in support of the Ryan Case is the Coffey Case, where Judge Fox, in his strong, terse way, stated the rule as I have stated it here, but held that it did not apply to that case, because the plaintiff knew of the dangerous condition of the sidewalk.

The rule of law as announced by all of the decisions in this state is in conflict with that stated in the Ryan Case, and it should, in my opinion, be overruled, which is accordingly done.

There is no pretense in this case that the plaintiff had any notice or knowledge of the defective condition of the street where she fell and injured herself. That fact brings her case squarely within the letter and spirit of the law as announced herein. If the respondent was entitled to a verdict then clearly she was entitled to recover more than \$1,

the sum the jury awarded her. Her injuries were serious, and her medical and surgical bills amounted to \$200.

For the reasons stated, the order of the circuit court granting the plaintiff a new trial is affirmed.

BOND, BLAIR, and REVELLE, JJ., concur in result only. GRAVES and FARIS, JJ., dissent. WALKER, J., absent.

GRAVES, J. I dissent from the views of the learned Chief Justice in this case. The defect in the sidewalk, if it could be called a serious defect at all, was open and obvious. Plaintiff was walking thereon in the open light of day. The least attention upon her part would have obviated the trouble. The Ryan Case so vigorously attacked by my Brother does not do away with the rule of the presumption that the wayfarer can entertain whilst traveling upon the sidewalks of the city. It expressly recognizes such presumption, but it does hold, and rightfully holds, that there is some duty upon the part of the citizen. This duty of the citizen we then thus discussed:

"The city is not an insurer of its sidewalks nor of the safety of pedestrians. The law only imposes the duty of having sidewalks reasonably safe for travel. The law does not say they must be safe, and thus insure the pedestrian. To say that the city must keep its sidewalks reasonably safe, and that the pedestrian may assume that such duty has been performed, does not mean that the pedestrian may walk thereon studying the stars, or blinded as a bat. Reasonably safe means that such walks can be used by a person in the exercise of ordinary and usual care. It means that, whilst they are not absolutely safe, yet the pedestrian can use them with safety to himself, if he uses ordinary and usual care for his own safety. As stated above, the pedestrian cannot be engaged in the study of astronomy, and blindly fall into a ditch when the light of day, or its substitute, arc lights at night, would show the danger if such there was. Nor does it mean that the pedestrian must keep his eyes riveted upon the sidewalk at each step of his progress. Ordinarily prudent and careful persons do neither. Such persons are not staring nor are they guarding each individual step they take. They do, however, use their senses to see that they do not encounter danger, and this without considering that they may assume that the city has fully performed its duty."

Lamm, J., in Ryan's Case puts the same idea in little better language thus:

"While a footman may presume a city has done its duty in keeping its sidewalks in a reasonably safe condition for travel by pedestrians, by night as well as by day, yet that presumption runs with a condition. It goes hand in hand with another vital proposition, viz., that a footman must use ordinary, that is, due, care to avoid injuring himself. Such care is the care of an ordinary person under like circumstances. Such care is broad enough to create the duty to look and see where one is going as well as the duty to avoid danger when actually discovered. That does not mean a pedestrian is an inspector of sidewalks or cannot take a step without look-

ing down to see that his feet do not carry him into a pit, nor does it mean that an ordinarily prudent person might not be deceived into taking an excavation full of water as part of the sidewalk at night in the glimmer of electric lights or during a storm. He need not be watching at every footfall for defects, but he should act like a prudent person, who makes reasonable use of his eyes while walking. He cannot shut his eyes, or blindfold himself, or walk backward, or not look about him at all, or, under the assumption no defects exist, walk heedlessly into obvious ones. Defendant's instructions announce good doctrine in that respect. Due care allows a reasonable person to act on the presumption of safety so long as (and no longer than) he uses due care to avoid his own injury. To rule that a plaintiff could be cast only when he actually knows of the defect, and thereafter acts negligently, is a dangerous doctrine I cannot subscribe to. He must use due care to discover in order to avoid. The jury take the presumption along with the proposition of due care in making up their estimate of liability, when plaintiff sees to it they get the presumption along with defendant's instruction on due care."

The instruction we were discussing in the Ryan Case, and which was approved, reads:

"The court instructs the jury that, if you believe from the evidence that there were lights along the street burning on the night in question, and the light cast from them was sufficient to light the place where plaintiff claims to have fallen, so that plaintiff by the exercise of ordinary care and the use of her eyes and other senses ought to have known of the excavation, if any, in the sidewalk, and ought by the exercise of ordinary care to have avoided the same, then the plaintiff cannot recover, and your verdict must be for defendant Kansas City."

The case at bar does in a way touch the vital question involved in the Ryan Case, because of the demurrer to the evidence. The facts are undisputed that, had plaintiff been looking, she could have seen and avoided the defect. In her failure to use ordinary care in looking out for the condition of the sidewalk, she has debarred her own recovery on the ground of contributory negligence. The defect was so open that any care upon her part, in open daylight as it was, would have obviated the accident. She failed in the exercise of ordinary care, a correlative duty imposed by law upon her. This correlative duty was imposed by the Coffey Case and the other cases. The Ryan Case and all the cases therein cited recognize the presumption, and they likewise recognize the other well-recognized rule. The opinion of my learned Brother entrenches on this rule, and I therefore dissent, being fully satisfied with the ruling in the Ryan Case. I am not ready to bankrupt the municipalities of the state by protecting the citizens when guilty of gross negligence, as was the plaintiff here.

The order granting a new trial should be reversed, for the reason that plaintiff's case failed by reason of her own negligence, and this on the theory that we can concede negligence upon the part of the city.

ELSBERRY DRAINAGE DIST. v. HARRIS
et al. (two cases). (No. 18617.)

(Supreme Court of Missouri. Division No. 1.
Dec. 21, 1915. Rehearing Denied
Feb. 29, 1916.)

1. DRAINS ⇐15—DRAINAGE DISTRICTS—PROCEEDINGS FOR CREATION—STRICT COMPLIANCE WITH STATUTE.

Since statutes providing for drainage districts, while in some respects highly remedial, involve such radical interference with rights of private property, all conditions precedent established by such acts for the exercise of their powers in summary proceedings to place a burden on the property of individuals must be complied with.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 7-10; Dec. Dig. ⇐15.]

2. CONSTITUTIONAL LAW ⇐309(2) — DRAINS ⇐2(1)—ORGANIZATION OF DISTRICTS—PROCEEDINGS—DUE PROCESS OF LAW.

Though the drainage district act vests in the circuit court jurisdiction to determine judicial questions relating to the organization and enlargement of drainage districts, the omission of the requirement of summons to resident defendants and provision for notice to all by publication only, is not a denial of due process of law contrary to the state or federal Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ⇐309(2); Drains, Cent. Dig. § 17; Dec. Dig. ⇐2(1).]

3. EVIDENCE ⇐25(2) — JUDICIAL NOTICE — DRAINAGE DISTRICTS.

While a drainage district is a quasi municipal corporation and after it has entered upon its work its existence is immune from collateral attack, in asserting its rights against individuals, it stands on the same footing as an individual and must prove its cause of action against them by competent evidence so that in proceedings to annex lands to the district, the court will not take judicial notice of proceedings of the district not relating to its incorporation.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. ⇐25(2).]

4. DRAINS ⇐15—DRAINAGE DISTRICTS—ANNEXATION OF LAND.

A drainage district organized under Rev. St. 1909, §§ 5496-5541, or under Act March 24, 1913 (Laws 1913, p. 237) § 9, of which requires the engineer to make a survey of all lands adjacent to the district that may or will be improved or reclaimed by the system, while it can annex without the owner's consent contiguous land necessary for the construction work and which will be benefited thereby, cannot annex land which will not necessarily receive any benefit simply to get the land on which to construct ditches and levees.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 7-10; Dec. Dig. ⇐15.]

5. DRAINS ⇐15—DRAINAGE DISTRICTS—ANNEXATION OF LAND.

A drainage district which, as originally constructed, included only lands south of a certain creek, cannot, against the opposition of landowners north of the creek, annex their lands to the district and drain them by a drain under the creek and ditch to the district pumping plant for the purpose of enabling individuals to reap the profit to be realized from the reclamation of certain lands north of the creek.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 7-10; Dec. Dig. ⇐15.]

6. DRAINS ⇐15—DRAINAGE DISTRICTS—ANNEXATION OF LAND—ACTS OF ENGINEER.

Even if it is not improper for the engineer of a drainage district who by Act March 24, 1913 (Laws 1913, p. 242) § 17, is made the superintendent of all the works and improvements of the district and special advisor of the board to make sales of lands contiguous thereto, which he recommends shall be included within the district, that fact may be taken into consideration in determining whether the motive for the annexation is the mutual benefit to the district and the lands or the private profit of the interested parties.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 7-10; Dec. Dig. ⇐15.]

7. DRAINS ⇐68 — DRAINAGE DISTRICTS — RIGHT TO TAX—PRIVATE PURPOSES.

Drainage districts cannot exercise the right of taxation to aid purely private enterprises.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. ⇐68.]

Appeal from Circuit Court, Lincoln County; E. B. Woolfolk, Judge.

Proceedings by the Elsberry Drainage District against Lottie Patton Harris and others for the extension of the boundaries of the district to include lands of the objectors. From a judgment including certain of the lands, but not all of them, the petitioner and the objectors whose lands were included appeal. Reversed in so far as the judgment includes lands of the appellant objectors, and affirmed as to the exclusion of the lands of the other objectors.

F. J. Duvall, of Clarksville, and Pearson & Pearson, of Louisiana, Mo., for appellants. J. D. Hostetter, of Bowling Green, and Avery, Young, Dudley & Killam, of Troy, for respondents.

BROWN, C. This is a proceeding begun August 26, 1913, in the Lincoln county circuit court under the act of March 24, 1913, relating to the organization of drainage districts by the circuit courts. It was instituted by the supervisors of the Elsberry drainage district for and in behalf of said district for the purpose of extending the boundaries so as to include lands of objectors who are appellants and respondents here, and to amend the "plan of reclamation" which had been adopted by the district. The petition states that it is necessary and desirable to include these additional lands, all of which are in Pike county, because the supervisors propose to amend the plan for reclamation already adopted so as to completely reclaim the lands in the northern end of the district by means of certain improvements, so that these lands would be greatly improved and benefited, and should be made to bear their just proportion of the burden. The main and controlling feature of these improvements consists of the construction of a levee completely surrounding these lands with other lands in Pike county lately annexed to the district and called in the record the "Annada Annex." The petition states that

this levee was to extend five feet above high-water mark of 1858, a flood in which the river attained a height never since equaled. All the lands then included in this annex had been annexed by order of the Lincoln circuit court made August 8, 1912, in a proceeding which was still pending on objection to the assessment of benefits to 1,700 acres of the land owned by one R. C. Jefferson. The petition in that case alleged, as required by the act then in force, that the land proposed to be annexed was "a contiguous body of swamp and overflowed land contiguous to the said Elsberry district," and—

"that it is necessary for the complete protection of the lands now embraced in the said Elsberry drainage district that the lands herein sought to be added to said district be embraced in said district for the purpose of having not only the lands sought to be added to said Elsberry district, but also the lands in said district contained fully reclaimed and protected from the effects of water. And if said extension of the said Elsberry drainage district is made as petitioned for herein, it will greatly increase the value of all of said lands for agricultural purposes, and will largely add to the sanitary condition of the persons owning and residing on said lands."

The objectors who are here as appellants are owners of lands not included in the original Annada Annex. Those who are respondents are the owners of a large tract of land included in the petition for that annex, and which was, upon issue joined, adjudged not to be wet and overflowed land, and was therefore not included.

The act of March 30, 1911, under which the proceeding for the original Annada Annex had been instituted and conducted, provided only for the organization into drainage districts of swamp and overflowed lands, from which class the lands of the objecting respondents were excluded by the order of August 8, 1912. At the next session of the Legislature an amendment was enacted (Acts 1913, p. 233, § 2) by which lands "subject to overflow" was added. This act was approved March 24, 1913, and on the same day Mr. Jefferson entered into a written agreement with Harmon, chief engineer of the district on behalf of the supervisors, to the effect that his objections to the assessment were to be withdrawn on condition that the supervisors adopt a plan agreed upon for complete reclamation of the land in the annex by levee against overflow and a system of drainage shown in "plans on file." It also contained the following paragraph:

"It is further agreed that if any reductions in assessments be made between the supervisors and any parties in the annex, the assessments shall be proportionately reduced on the Jefferson lands in said annex."

In pursuance of this stipulation the objections of Jefferson were dismissed, the present proceeding was instituted to carry it into effect, and Mr. Harmon "found a buyer" for the entire tract, and also for a Patton tract of some 1,100 acres. Using Mr. Harmon's own language:

"Before those sales were made, an agreement was made in this court, or at the time that the Patton sale was made, an agreement was made in this court with those that then owned this land that this should be done, it was a part of that stipulation or settlement with him on the other assessment, and at that time the Patton land was sold at the time and while court proceedings were pending, and the Jefferson land was sold afterwards, and that was agreed with Mr. Jefferson as a part of the settlement in this court of the previous assessments, that the entire area should be reclaimed."

The Elsberry drainage district was organized in the Lincoln county circuit court on March 13, 1911, and included about 25,000 acres of land, all being in Lincoln county, with the exception of a strip a mile or two wide on the north end, which was in Pike county. Its north line ran westerly from a point in the west bank of the Mississippi river corresponding with the center of section 26, township 52, range 2 east, substantially along the present line of Bryant's creek to the Chicago, Burlington & Quincy railroad near the village of Annada. About 2½ miles north of this, Ramsey creek, another stream from the bluffs having a drainage area of about 60 square miles, flows east across the railroad into the Mississippi. It is between these streams that the land annexed, and that proposed in this proceeding to be annexed, is situated. The entire tract contains about 6,500 acres and was, to a great extent, made of deposits from the overflow of Guinn's creek, a stream having a drainage area of about 40 square miles, which ran all over it in an unstable channel until some 20 or 30 years ago, when it was confined to the south side of a levee built by the King's Lake drainage and levee district from the bluffs easterly across the railroad where it joins the present converted channel of Bryant's creek. The village of Annada as well as the adjacent lands to the north had been protected by this old levee, which was adopted as a part of the inclosing levee of the annex.

Mr. Harmon now states in his testimony that the district wants to take in the land of the respondent objectors to get a better, cheaper, and safer place to build the levee and ditch necessary to carry out the Jefferson agreement.

His plan of reclamation of the original district contemplated a pumping plant near Apex, 10 or 12 miles from its north line, and the new scheme involves a concrete culvert 200 feet long, by which the water is expected to be transferred from the inclosed annex, under the bed of Bryant's creek at a depth not stated, and released into the main ditch of the company on the other side, along which it would flow 12 or 13 miles to the contemplated pumping plant, which, together with the main ditch, was to be enlarged to take care of it. He states that one or more of these pumping plants, under private ownership, was already at work in the annex at the time of the trial.

The court refused in this proceeding to include in the district the lands of the respondents J. H. and W. F. Patton, Carson E. Jamison, and W. A. Richards, which had been excluded in the former proceeding, on the ground that upon the facts the previous judgment was conclusive. From this the drainage district has appealed. All the appellants whose lands are annexed to the district by the terms of the judgment appealed from are appealing on the grounds: (1) That the court by its publication, which was the only notice attempted to be given the landowners, acquired no jurisdiction to impose upon such lands the burdens consequent to their annexation to the district; and (2) that the record does not disclose facts sufficient to authorize the annexation of these lands to the drainage district under the terms of the act of 1913, even though the notice was sufficient to confer jurisdiction upon the court to act.

[1] 1. While statutes providing for the reclamation of waste lands are, in some respects, highly remedial, they necessarily involve such radical interference with the control of property by the owner, and such a liberal exercise of the taxing power, as to call for the utmost care in their preparation and execution. There is no governmental function in the exercise of which the control which ordinarily pertains to the management and preservation of one's own must be more liberally surrendered in the interest of all. On the other hand, the great increase in values attending the redemption of our swamps from pestilence, and clothing them with fertility, has a tendency to excite the speculative instincts of those who wait upon opportunity to acquire property without adequate investment. In avoiding errors incident to these conditions it is frequently found that we have committed errors even more serious than those we have escaped. In this way it has happened that of late years the statutes relating to the formation and powers of drainage and levee districts by the circuit court have rarely survived, in their original form, the biennial legislative period in which they were enacted, and that the proceedings we are now called upon to consider have progressed for 3 years under as many different statutes. It is evident that when their extraordinary powers are used in summary proceedings to place a pecuniary burden upon the property of individuals, all the conditions precedent which they prescribe should and must be complied with. *Nishnabotna Drainage District v. Campbell*, 154 Mo. 151, 157, 55 S. W. 276. This principle is clearly recognized by the Legislature, in charging these powers and duties upon constitutional courts of general jurisdiction, which can only proceed upon inquiry, and condemn after an opportunity to be heard. It is in pursuance of the same legislative policy that this record is now before us upon appeal. Our duty is to determine whether the facts which there appear authorize the relief granted by the

circuit court, a question which seems to be well put by the several objections of the appellant landowners which are set out in it.

[2] 2. The appellants contend, as we understood them, that because this jurisdiction is vested by the act in the circuit court, a judicial tribunal established by the Constitution which generally exercises its judicial functions by procedure governed by the Civil Code, conformity to this procedure will be implied as a prerequisite to its jurisdiction over the persons of the litigants in this case. We understand them to say that the right of the court to try the issues of fact submitted to it in this case and to render judgment thereon depends upon its judicial character conferred by the Constitution, and that the provision of the act under which it attempted to exercise that jurisdiction is void because it does not require the issue of summons to resident defendants, and does not therefore constitute due process of law within the meaning of the state and federal Constitutions.

We cannot agree with this proposition in its application to this case. We find nothing in these Constitutions which implies that a uniform method of obtaining jurisdiction of the persons of litigants in either general or special proceedings is necessary. The act of March 24, 1913, under which this proceeding was instituted, prescribes a method by publication, which was followed, and the sufficiency of which constitutes the only question in this connection.

We said in *Houck v. Little River Drainage District*, 248 Mo. 373, 382, 154 S. W. 739, in connection with the citation of many Missouri authorities, that it was no longer open to question "that the state, by the Legislature, has the power to create corporations for the purpose of reclaiming or improving swamp and overflowed lands by ditches and drains and levies, in districts to be described by it, or to be ascertained and fixed by such appropriate instrumentalities as it may provide." That this includes the right of the Legislature to clothe the constituted courts with jurisdiction to inquire of and determine such *judicial questions* as may arise in the course of the proceedings, and to prescribe the practice therefor, is also plain. Having exercised this right by the terms of the act of 1913, having submitted to the court all questions of law and fact involved in the determination of the question whether, under the terms of the act the lands in question should be annexed to the Elsberry drainage district, we will assume that a practice must be provided or made available which will enable the court to proceed in accordance with that fundamental principle of all judicial procedure which gives the parties interested in the subject of the inquiry a reasonable opportunity to be heard. The subject of this inquiry is the status of the land involved. The Legislature undertook to provide for notice to all parties interested in it by publica-

tion of notice of its pendency. We do not have to take into consideration the fact that they are all here, contending strenuously for what they conceive to be their rights, to enable us to determine that the notice provided by the act and given in this case was well calculated to the end, and we hold that it was sufficient.

[3] 3. There being actually no evidence in the record as to the plan of reclamation of the lands included in the plaintiff district other than a profile of its contemplated main ditch extending from its levee along the south side of Bryant's creek to its contemplated pumping station 10 or 12 miles down the river, it suggests that the court will take judicial notice of its records, not only relating to the incorporation, but to all other proceedings of the company which appear therein, all such proceedings being "in the same case." Were this true, the objectors could only come to this court with their appeal by bringing the whole mass of records accumulated from the conception of the district to the time of the trial, to show that nothing has occurred during all that time to deliver them over to their adversary. The true rule sits in slightly simplicity upon a well-beaten road. The act of incorporation can only be assailed by a special plea verified as required by the Code. When it has entered upon its work as a quasi municipal corporation, it becomes immune against collateral attack. With respect to the assertion of its legal rights, it stands no higher than an individual, so that its mere existence does not prove its causes of action against strangers having no connection with its creation, but it must prove them by competent evidence by which its adversary is bound. We must find the right of the plaintiff to have the relief it is seeking in the record of the trial before us.

[4] 4. The objectors deny that there is any reason why their lands should be made a part of the Elsberry drainage district, and say that the execution of its plan of reclamation would in no way affect the lands sought to be annexed, and that no scheme of drainage proposed for such lands would affect the Elsberry drainage district. In short they plead, in substance, that there is no connection whatever between the levee and drainage conditions affecting the Elsberry district, and those affecting the lands sought to be annexed to it, and that the owners of the former ought not to be permitted to meddle in the affairs of their neighbors in which they have no legitimate concern. In support of their position they point to the statute under which this district was organized which fairly represents the general legislative policy of the state on that subject (article 1, chapter 41, R. S. 1909), and direct our attention to the fact that it required that the district to be organized should consist of a "contiguous body of swamp or overflowed lands," and that a majority in interest of the owners should unite in its formation. R. S. 1909, §

5496. We find no suggestion in this or any of these laws that if the majority in interest in any such body of lands should fail to agree to the formation of a drainage district, a coterie of them might form a little district of their own, from which they could reach out and take in their recalcitrant neighbors through the assistance of the courts, extended for the mere asking. This proposition is too absurd to be considered seriously. The submission of these questions to the courts implies that they are to be determined according to those fixed rules of construction and determination which are unfailing characteristics of all judicial action. In the recent case of Squaw Creek Drainage District v. Turney, 235 Mo. 80, 95, et seq., 138 S. W. 12, we examined this question at length, and arrived at the conclusion that while the policy of this statute was that schemes of this character must be inaugurated by the owners of the lands requiring the improvement, the right to extend the limits of the district so as to include other lands of like character was given to meet cases in which there is something in the character or situation of the lands to be annexed, or the nature of the contemplated improvement, which would enable them to share in the benefit of the work without contributing to the cost, or would otherwise make it inequitable to withhold their assistance. It is particularly noticeable that there is nothing in the law under which the plaintiff was organized, nor in the act of 1913 under which this proceeding was brought, which authorized the inclusion, by extension, of any lands not of the character entitling them to be included in its organization. While the fullest authority was given (Id. 5704a, added by Laws 1911, p. 232) to construct and maintain ditches, canals, levees, dams, sluices, reservoirs, holding basins, flow-ways, pumping stations, and any other improvements in or out of the district, necessary to the reclamation of the land within the district, it had no power to include in the district any lands for that purpose other than such as needed reclamation and protection from water. Its powers were ample to acquire lands for these purposes by purchase or condemnation, but not under pretense of subjecting it to any part of the burden of an improvement of which it was not susceptible, and which it did not need.

It follows that the question before the circuit court in this case was whether, in accordance with the principles we have just stated, the Elsberry drainage district was entitled, against the will and protest of the owners, to annex these lands; and we hold that unless there was some common interest between them, by reason of which the improvement of the district would affect beneficially those of the objectors, the right did not exist. We use the word beneficially because we can find nothing in these acts expressive of a legislative intent to provide for the annexation of either swamp or overflowed

lands as a substitute for their appropriation by condemnation, and that such an act would be a taking of the land for the purpose of the improvement without compensation being first paid. Section 9 of the act of 1913 (Laws 1913, p. 237) necessarily calls for this construction. It provides that immediately upon the appointment of the chief engineer he "shall make all necessary surveys of the lands within the boundary lines of said district, as described by the articles of association, and of all lands adjacent thereto that may or will be improved or reclaimed in part or in whole by any system of drainage or levees that may be outlined and adopted," and that his "report shall contain a plan for draining, leveeing and reclaiming the lands and property described in the articles of association or adjacent thereto from overflow or damage by water." The improvement or reclamation of these adjoining lands is the only purpose for which the district is authorized to meddle with them.

[5] 5. Although, as we have already said, statutes of this character should be liberally construed to the end that the public benefit contemplated by the Legislature be not defeated, it is equally important that this beneficent purpose should not, by construction, be made a vehicle of private greed or undue personal advantage. The facts of this case indicate that we should come to its consideration with both these suggestions well in mind.

The purpose of the plaintiff corporation seems to have been the reclamation from water of about 25,000 acres of Mississippi river bottom land lying between the Chicago, Burlington & Quincy Railroad and the river, and south of Bryant's creek, in Pike county. The record is obscure as to the particulars of its incorporation, and its subsequent proceedings, and we resort to the admission of counsel in printed argument, and such fragmentary evidence as bears upon these subjects for the meager details of which we are able to avail ourselves. One thing, however, is made plain. The lands of the Elsberry district were isolated from the lands lying north of it by Bryant's creek. It is also plain that its plan of reclamation involved the straightening of this stream and the construction of a levee along the south side of the converted channel, of such height and strength as to protect the district by turning back its flood waters upon these lands to the north. It does not plainly appear how any plan for the drainage and improvement of the district could benefit or improve the lands lying north of this stream, and the owners of the latter exhibited no desire to join in the enterprise. Notwithstanding this the new district, on May 4, 1912, presented its petition to the Lincoln circuit court to have about 5,000 acres of this land attached to it, stating that it was necessary to the complete protection from the effects

of water, of the lands already embraced in the district as well as that sought to be added. Neither the plan for doing this nor the nature of the mutual interest requiring it was referred to. Among the lands involved in that proceeding was about 700 acres belonging to Carson E. Jamison, W. A. Richards, and J. H. and F. W. Patton. J. H. Patton is now dead and his former interest is represented in this suit by Lottie Patton Harria, his sole heir. These owners objected to the inclusion of their lands, asserting that they were neither swamp nor overflowed. An issue was made upon this question, which was tried and found for said owners, and the court adjudged that the lands were not wet or overflowed, and excluded them, and, on August 8, 1912, entered its decree annexing the other lands described in the petition. The owners of the lands so excluded are pleading that judgment as an adjudication of the same question in this case. This plea was sustained by the court, and its action in this respect affords the ground of plaintiff's appeal.

6. About 1,700 acres, being more than one-third of all the land annexed in the proceeding referred to in the last paragraph, were then owned by one J. C. Jefferson. That these were swamp and overflowed lands badly in need of reclamation is evident. Proceedings were immediately taken to assess the benefits to the land included. Mr. Jefferson was dissatisfied with the assessment as to his own land and formally objected thereto, and the cause was continued upon his objection until settled by the agreement to which we shall presently refer.

Upon the incorporation of the Elsberry drainage district, Jacob A. Harmon, of Peoria, Ill., was appointed its chief engineer. He was a civil engineer of 25 years' experience, engaged in drainage work, in which he was an expert, and in addition to his professional employment, sometimes found purchasers for lands of the character to which his activities were directed. In that character and during these proceedings, he found purchasers for the 1,700 acres owned by Mr. Jefferson and 1,100 acres owned by one or more of the Pattons. These tracts included the greater part of the land in the annex.

The Elsberry people were not discouraged by their failure to obtain all they wanted in the proceeding from which Jamison, Richards, and the Pattons had escaped. By a fortunate coincidence, the next Legislature enacted a new law on the subject. Laws Mo. 1913, p. 232. The law in force during the previous proceeding had only provided for the organization into such districts of "swamp or overflowed lands." The new act (Laws 1913, p. 233, § 2) added the words "or lands subject to overflow" so that the loophole through which they had escaped was closed. The Elsberry people quickly took notice of this. The bill contained an emer-

agency clause (Laws 1913, p. 267, § 63) and was approved March 24, 1913. On the same day Mr. Jefferson entered into a written agreement with Mr. Harmon, representing the supervisors of the Elsberry district, by the terms of which his objections were to be withdrawn on condition that assessments for the work should not cost more than 30 per cent. of the benefits assessed. It provided that the supervisors should adopt a plan for the complete reclamation of the lands in the annex by levee against overflow and a system of drainage constructed to an outlet into the system of drains to the pumping plant, and that if any reductions in assessment be made between the supervisors and any parties in the annex, the assessment should be proportionately reduced on the Jefferson lands. There were other stipulations which, in the view we take of its effect, need not be noticed. On August 22, 1913, the supervisors commenced this proceeding to extend the boundaries of the district and amend its "plan for reclamation."

Mr. Harmon, who seems to have been the moving spirit in the affairs of the Elsberry district and especially in those matters connected with the improvement of the Jefferson lands, as well as its principal witness in this case, states in his testimony that it was agreed with Mr. Jefferson as a part of the settlement of the assessment against his land "that the entire area should be reclaimed"; "that that would be a protection, a complete protection and reclamation of the Jefferson lands;" "that in accordance with the plan he had made these surveys for the Elsberry drainage district to protect that land and that is the reason why it is being done." We have here an authoritative statement which can mean nothing less than that this proceeding was instituted under an agreement with a single owner to improve his lands upon the plan made by the agent who found a purchaser for them, and for a consideration moving entirely from that owner in the withdrawal of his objections to an assessment made against him. It is also in proof by the same witness and like his other statements to which we have referred, undisputed, that the "plan of reclamation" made in accordance with the agreement could be accomplished more cheaply by the use of the lands excluded from the district in the former proceeding, because they did not meet the description of "swamp or overflowed lands." It was here that the act of 1913 played its part in the transaction. In 1858 there had occurred an overflow of waters of the Mississippi river which has never since been duplicated, but which overflowed these same lands. They were therefore "subject to overflow" so that the plan for reclamation adopted and set out in the petition contained the following statement: "The top or grade line of the levee will be 5 feet above high water of 1858." The petitioner

is now insisting that in the former proceeding for the annexation of this land the question as to whether or not it was subject to overflow was not and could not have been tried because the law making that a ground for including it in the drainage district had not yet been enacted.

In the plan of reclamation presented by the petitioner in this case the petitioner for the first time attempts to show how the lands north of Bryant's creek will be benefited by attaching them to the Elsberry district. It presents a scheme by which the water that accumulates either from local rain or overflow, are to be gathered to the lowest point of the proposed levee on the north side of that stream, and then through a concrete culvert 200 feet long passing under its bed, then up into the main ditch of the district which is to be enlarged to take care of it, to the proposed pumping station at Apex which is in turn to be enlarged to raise it over the levee and into the river. This is an interesting plan, but we are not called upon to compare its utility with the more simple one of pumping it into the river from the land upon which it accumulates.

7. We have already said in a preceding paragraph that to authorize a drainage district organized under these acts to extend its limits over other lands without the consent of the owners, the lands of the district and those to be annexed must bear such a relation to each other that the proposed improvement will be of mutual benefit. A district has no right, either to go outside the object of its organization to force upon its neighbor an improvement in which he has no interest, or to compel its neighbor to improve his own land without receiving some benefit to compensate him for the outlay.

Looking at this proceeding in the light of these principles, we are confronted with difficulties in finding a reason to support it. Its object is to surround 6,500 acres of land disconnected from that for the improvement of which the petitioner was incorporated, with a levee so high and strong so as to render it immune from the effects of a repetition of a flood which occurred more than 55 years ago, and, by the complicated arrangement described in its plan, to turn loose on its land all the surplus water which may accumulate in this vast inclosure, enlarging its own ditches and pumps to take care of it. We may realize, to some extent, the magnitude of this last work from the profile of its main ditch to be enlarged for that purpose. It shows this ditch to be more than 12 miles long from the pumping station near Apex to the place where it would catch this water as it emerges from the ground beneath the bed of the stream and the levees intended to confine it. We have nothing in the record showing the cost of this work of enlargement, but, considered as a disinterested act of charity, it would be considerable.

We are not unmindful of the fact that before the beginning of this proceeding the larger part of this territory had been annexed to the Elsberry district by a judgment of the court from which no appeal was taken. That this judgment is binding we do not question, so that for all the purposes of this case we must consider the boundaries of the district as affected by its terms and the mutual interest of the parties as founded upon the lines of division which it establishes. We have examined at length the rights of the parties to this controversy as they existed at the time of the incorporation of plaintiff, because we think the evidence tends to show that the subsequent proceedings for the annexation of territory were in pursuance of a general plan or motive, which is the controlling factor of this case.

[8] That Mr. Harmon had great influence in the affairs of the Elsberry district is shown conclusively in this record. That he was not adverse, notwithstanding his official connection with the enterprise, to involving himself in its financial possibilities appears from the fact that during the progress of these proceedings he found purchasers for more than one-half the land included in the original annex, so that it is fair to say that in addition to his official compensation for the work done by him he shared in the first fruits of that enterprise. The largest item of this participation related to the sale of the Jefferson tract which comprised more than one-third of the lands annexed in the first proceeding. This sale was made after the decree for the annexation of the land had been entered, and in contemplation of all the resulting benefits and profits.

There is nothing in the record to indicate whether it was Mr. Harmon or Mr. Jefferson, or both of them together, that first conceived the idea of the contract prepared and signed by both, which embodied the final word fixing the favorable terms upon which the Jefferson land was to be admitted to the benefits of the improvement, limiting the amount of the cost that was to be charged against it, and providing that the supervisors should adopt for its benefit a plan for complete reclamation of all the land in the annex by levee against overflow and a system of drains constructed to an outlet to the pumping plant. That the plan presented in this petition is the plan for reclamation referred to in the contract is evident, and that this contract contemplated the bringing of this proceeding is equally evident. Both the contract and the petition described it with equal certainty, although with different degrees of particularity. That this proceeding was instituted solely for the performance of

that contract is practically admitted in the evidence.

Whether under the act of 1913 a drainage district may extend its limits for the purpose and under the circumstances we have stated is the question before us. The authors of the plan and the petitioner by its evidence frankly admit that the object of the extension is to carry out the terms of the Harmon-Jefferson agreement that the petitioner will reclaim the lands of the latter, principally at the cost of protesting neighbors, who are shown by the evidence to be amply able to take care of their own.

[7] These corporations are clothed by the state with governmental functions, including taxation and eminent domain, because the development in productiveness of the lands of the state and the promotion of the health and comfort of the people are matters of governmental concern which are to be exercised only for the benefit of the public. The drainage district in these respects are agencies of the state, and it is not necessary to say that they have no more power to levy a tax to aid a purely private enterprise than would the state itself. The very fact that they are clothed with these extraordinary powers imposes upon the courts in the exercise of their jurisdiction the duty of watchfulness to see that such powers are not prostituted to the purposes of private speculation. By the terms of the act (section 17) the chief engineer was made superintendent of all the works and improvements, and the special adviser of the board, and while we do not think it necessary to condemn Mr. Harmon for his participation in the sale of lands that must depend largely for their value on his own advice, we think the court should take the fact into its consideration in determining whether the motive of this proceeding was a public or private one.

For the reasons stated in this paragraph we think the court erred in extending the limits of the plaintiff district to include the lands of the objectors upon the evidence before it. For this reason the judgment will be reversed so far as it includes in the Elsberry drainage district the lands of the appellant objectors, and affirmed as to the respondent objectors, and the cause is remanded, with directions to the circuit court to proceed to final judgment in accordance with the principles stated in this opinion.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the Judges concur.

STATE v. McWILLIAMS. (No. 19026.)

(Supreme Court of Missouri, Division No. 2
Feb. 15, 1916. Rehearing Denied
March 31, 1916.)

1. INDICTMENT AND INFORMATION — INFORMATION — EMBEZZLEMENT — SUFFICIENCY.

Under Rev. St. 1909, § 4550, declaring that, if any agent, clerk, apprentice, or collector of any private person, except persons so employed under the age of 16 years, shall embezzle or convert to his own use, or shall take, make away with, or secrete with intent to embezzle or convert to his own use, without the consent of his master or employer, any money, goods, or valuable property, he is guilty of embezzlement, an information charging that defendant, being the agent of another, and not a person under the age of 16 years, did by virtue of his employment receive a large sum of money, the property of his principal, which he did feloniously embezzle and fraudulently convert to his own use, is sufficient; the information stating the facts constituting the crime as set forth in the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294; Dec. Dig. § 110(13).]

For other definitions, see Words and Phrases, First and Second Series, Embezzlement.]

2. EMBEZZLEMENT — OFFENSES — INTENT.

The statute creates two offenses, one consisting of the doing of the act itself, and the other consisting of the taking or converting of the master's property with intent to embezzle; hence the information, having charged the doing of the unlawful act, is sufficient, though it did not charge a felonious intent.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 40; Dec. Dig. § 27.]

3. CRIMINAL LAW — JEOPARDY — FORMER "JEOPARDY" — WHAT CONSTITUTES.

After defendant was granted a change of venue on an embezzlement charge, an amended information was filed, and on his announcement of ready the trial was begun. After the jury was impaneled, but before verdict was reached, the court stopped the proceedings, quashed the amended information, and ordered that accused be held for trial on the original information. Thereafter, when accused was put on trial on the original information, he set up former jeopardy. Held that, as the amended complaint was a mere nullity, accused was not placed in jeopardy within Const. art. 2, § 23, prohibiting double jeopardy on the theory that on the first trial he was in jeopardy under the original information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 313-319; Dec. Dig. § 177.]

For other definitions, see Words and Phrases, First and Second Series, Jeopardy.]

4. CRIMINAL LAW — CONTINUANCE — APPLICATION.

No intendments are to be indulged in favor of an application for a continuance for absent witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1370; Dec. Dig. § 609.]

5. CRIMINAL LAW — CONTINUANCE — ABSENT WITNESSES.

Accused, a real estate broker, was charged with embezzling the proceeds of a loan which he effected for a landowner. On trial he applied for a continuance on the ground of the absence of his confidential clerk, who had deposited the proceeds of the loan in a bank to accused's credit. The application showed that he had been in correspondence with such witness and had given

her money to attend trial. Held, that accused was not entitled to a continuance; for he must have known such witness' knowledge of the transaction in time to have taken her deposition, and so did not exercise proper diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1336; Dec. Dig. § 598(3).]

6. CRIMINAL LAW — CONTINUANCE — DISCRETION OF TRIAL COURT.

A motion for a continuance is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. § 536.]

7. CRIMINAL LAW — APPEAL — DISCRETION OF LOWER COURT.

Where no abuse is shown, the trial court's exercise of its discretion in denying a continuance will not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.]

8. EMBEZZLEMENT — PRINCIPAL AND AGENT — NATURE OF AGENCY.

Where a real estate broker received compensation from a landowner for the procuring of a loan, and he did not receive commission from the loan company, he was the agent of the landowner, the application for the loan being his first transaction with the loan company, and so a fraudulent conversion of the proceeds of the loan was embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15; Dec. Dig. § 14.]

9. EMBEZZLEMENT — OWNERSHIP OF FUNDS — AGENCY.

Where a landowner for whom accused applied and obtained a loan directed that the funds be transmitted to accused, the latter received the funds charged with the duty of accounting to the landowner, and his appropriation of the funds as his own constituted embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15; Dec. Dig. § 14.]

10. EMBEZZLEMENT — OFFENSES — NATURE OF.

Where defendant received moneys for his principal and deposited them in a bank to his own credit, the manner in which the money was drawn out or applied to defendant's own use is immaterial on the question of his embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 63; Dec. Dig. § 41.]

11. EMBEZZLEMENT — INTENT.

That defendant, who was commissioned to procure a loan for his principal, concealed from his principal that he had received the money, placed it to his own credit in the bank, and drew it out for his own purpose, shows felonious intent necessary to embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 3; Dec. Dig. § 5.]

12. EMBEZZLEMENT — PROSECUTIONS — EVIDENCE.

In a prosecution for embezzling the proceeds of a loan which defendant secured for a landowner, evidence that defendant, who was authorized to receive the money, did not apply it in discharging prior liens or as directed, but converted it to his own use, is admissible.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66; Dec. Dig. § 38.]

13. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

The erroneous admission of evidence as to facts which accused admitted is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8139; Dec. Dig. § 1169(3).]

14. EMBEZZLEMENT ⚡38—PROSECUTIONS—EVIDENCE.

In a prosecution for embezzlement, where accused, after securing a loan for a landowner, converted the proceeds, evidence as to his relations before or after with the loan company is immaterial.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66; Dec. Dig. ⚡38.]

15. CRIMINAL LAW ⚡829(1)—TRIAL—INSTRUCTIONS—REFUSAL.

Where the instructions given completely covered the case, further instructions may be properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829(1).]

Appeal from Circuit Court, Daviess County; Fred Lamb, Judge.

Charles E. McWilliams was convicted of embezzlement, and he appeals. Affirmed.

W. S. Herndon and R. H. Musser, both of Plattsburg, John Leopard, of Gallatin, and Paul D. Klitt, of Chillicothe, for appellant. John T. Barker, Atty. Gen., and Shrader P. Howell, Asst. Atty. Gen., for the State.

WALKER, J. In November, 1913, appellant was charged in an information filed in the circuit court of Livingston county with embezzlement under section 4550, R. S. 1909. Upon a trial in the circuit court of Daviess county, to which the case had been transferred by change of venue, appellant was convicted and sentenced to four years' imprisonment in the penitentiary. The original information was in one count. Appellant moved to quash same on the general ground that it did not state facts sufficient to constitute a cause of action. This motion was by the court overruled. After the case had been transferred to the circuit court of Daviess county in June, 1914, the prosecuting attorney of Livingston county filed in the circuit court of Daviess county an amended information charging the appellant with the same offense as in the original, but in two counts, one for the embezzlement of money, and the other for the embezzlement of a check. On the day said amended information was filed, the appellant announcing ready for trial, a jury was sworn and impaneled, and the trial proceeded, but before a verdict was rendered the court, on its own motion, stopped the proceedings and quashed the amended information, and ordered that the appellant be held for trial on the original information. Thereafter, on December 10, 1914, appellant filed a plea in bar on the ground that, having been put upon his trial on the amended information, and a jury having been impaneled and sworn to try him, he had been put in jeopardy, and hence should not again be required to answer for the same offense. This plea was overruled. Appellant then filed an application for a continuance on the ground of the absence from the state of a stenographer who had formerly been

in his employ, alleging that said witness, if present, would testify that Greger had told appellant to use the money he had obtained from Bartlett Bros. until the second loan was obtained and pay him (Greger) interest on same. This motion was overruled, and appellant waived formal arraignment, entered a plea of not guilty, and a jury was impaneled and sworn to try the cause. The trial progressed, and on December 12, 1914, the jury returned a verdict finding the appellant guilty as stated, and from this judgment he appeals.

In the spring of 1913 Charles E. Greger owned a farm in Livingston county burdened with two deeds of trust, one for \$3,000, and the other for \$1,600. Both were held by Frank B. Caesar. The notes secured by these deeds of trust becoming due, the owner desired their payment. The appellant at the time was in the real estate and loan business in Chillicothe, and Greger approached him for the purpose of securing a loan to enable him to take up these notes and release his farm from the deeds of trust. The first conversation in regard thereto between appellant and Greger was in the latter part of March, 1913, and as a result of same Greger filled out, at appellant's direction, an application to Bartlett Bros., of St. Joseph, for a loan of \$3,600. After some correspondence between Bartlett Bros. and the appellant, the former agreed to make the loan to the amount of \$3,400 on the Greger land, and on April 14, 1913, a note and deed of trust were executed by Greger to Bartlett Bros. for that amount, and same were delivered to appellant to be forwarded to Bartlett Bros. At the same time another note and deed of trust were executed for the sum of \$1,400, which sum of money was to be obtained from a source other than Bartlett Bros. When it had been ascertained that the money could be obtained from Bartlett Bros., Greger made and delivered to the appellant, at the latter's request and direction, the following paper:

"Utica, Mo., April 1st, 1913. Bartlett Bros. Land & Loan Company, St. Joseph, Mo.—Gentlemen: Please pay to Charles E. McWilliams or order the proceeds of my loan of \$3,400 negotiated by you for me. I hereby appoint said Charles E. McWilliams my agent to settle with you in full for said loan. Charles E. Greger."

On the completion of the abstract of title of the Greger land and its examination and approval by Bartlett Bros. on June 14, 1913, they forwarded to appellant their check, payable to him, for \$3,298, being the proceeds of the \$3,400 which they had agreed to loan Greger, less the commission. A few days prior to the forwarding of this check appellant had written Bartlett Bros. that he had completed the arrangements for the second loan, but it is further shown by the evidence that this had not been done, and that the second deed of trust was never recorded, nor was the note representing it ever negotiated.

The check for \$3,298 sent by Bartlett Bros. to appellant was indorsed by a stenographer in his office and placed to his credit in the People's Savings Bank of Chillicothe. None of this money was ever paid to Greger, but all of it was checked out, either by the appellant or persons in his office authorized to check on his account, and in November preceding the trial the entire amount had been thus withdrawn from the bank, leaving only a balance of 94 cents. Nor was any of the proceeds of this check ever paid to Caesar, the owner of the two deeds of trust. Appellant never at any time disclosed to Greger that he had received the \$3,298 or any other amount of money from Bartlett Bros. by reason of the execution of the note for \$3,400 and deed of trust by Greger to said Bartlett Bros. to secure same. Upon the consummation of this loan by the delivery made by appellant to Bartlett Bros. of the note and deed of trust for \$3,400 they at once placed the deed of trust upon record. Greger made frequent visits to appellant's office in Chillicothe after he had delivered the note and deed of trust to him, in an effort to ascertain whether he had received the money, but could not find him, although these visits were repeated at intervals from July, 1914, to the day of the trial, December 10, 1914. He says that during this time he was in California for his health. Appellant on the witness stand testified that a few days after the receipt of the money from Bartlett Bros. he told Greger the money had been received, but that he had not yet been able to negotiate the second loan for \$1,400. At that time appellant says Greger suggested that he would see the owner of the notes secured by deed of trust and endeavor to induce him to take the second loan. In the meantime appellant says he talked to Caesar and tried to get him to take the \$3,298 which had been received from Bartlett Bros. and apply it on the two notes aggregating \$4,600, but that Caesar had refused so to do. Appellant could not remember that Greger had ever given him a note in payment for his services in securing the loan. Shown a letter that he had addressed to Bartlett Bros. on June 13, 1914, in which he said, "We have been ready for a long time for our part of the deal and have the papers for the second loan on record and are awaiting your money," he admitted that the statement therein made was not true, but said when he wrote the letter he had the promise of the money to cover the second loan for \$1,400, and had given directions to some one in his office to have the deed of trust recorded, and thought it had been done. He further admitted that the check received from Bartlett Bros. in the sum of \$3,298 had been deposited to his credit in the People's Savings Bank in Chillicothe and had been checked out either by himself or some one in his office. When asked if it had been spent for his private benefit, he answered evasively, but admitted that he had never paid the

money to Greger; his excuse being that no demand had ever been made for it, that he had been gone several months, and had not seen Greger during that time, that he had never paid the money to Bartlett Bros., and had never given Greger a slip of paper or anything else showing he had used it, and that this was his customary way of transacting business of this character. Caesar, who owned the first and second deeds of trust, denied that appellant had ever offered to pay him the \$3,298 which had been received by appellant from Bartlett Bros. or any other sum, or that appellant had offered to give him any additional security as an inducement for him to take a second mortgage.

[1] The charging part of the original information is as follows:

"That Charles E. McWilliams on or about the 14th day of June, A. D. 1913, at said county of Livingston and state of Missouri, being then and there the agent of a certain private person, to wit, of one Charles E. Greger, and the said Charles E. McWilliams being then and there not a person under the age of 16 years, did then and there, by virtue of his said employment as agent of the said Charles E. Greger, have, receive, and take into his possession and under his care certain money to a large amount, to wit, to the amount of thirty-four hundred dollars, lawful money of the United States and of the value of thirty-four hundred dollars, of the property and moneys belonging to the said Charles E. Greger, and the said Charles E. McWilliams the same money then and there feloniously did embezzle and fraudulently convert to his own use, without the assent of his employer, the said Charles E. Greger, the owner of said money, and the said Charles E. McWilliams the said money, in manner and form aforesaid, feloniously did steal, take, and carry away, against the peace and dignity of the state."

I. *Information.*—The information charges a statutory embezzlement under section 4550, R. S. 1909. Its sufficiency is assailed generally. The well-established rule in regard to charging an offense based on a statute is that, where the statute sets out the specific facts constituting the crime, an information or indictment based thereon which is definitely descriptive of the offense, as defined by the statute, will be held sufficient. *State v. Perrigin*, 258 Mo. loc. cit. 236, 167 S. W. 573. The necessary constituent elements of the offense are set forth in the statute in the instant case, and hence the information which embodies its language is not subject to valid objection. *State v. Moreaux*, 254 Mo. 405, 162 S. W. 158; *State v. Blakemore*, 226 Mo. loc. cit. 574, 126 S. W. 429, 27 L. R. A. (N. S.) 415.

[2] In addition to the general objection urged by appellant to the information, it is contended that it does not allege a criminal intent. The statute upon which this charge is based creates two offenses, one consisting of the doing of the act itself, and the other of doing certain things in regard to the subject-matter with the intent to do the prohibited act. The information here is based upon the first offense denounced by the statute, and charges the commission of the act

itself, and not the doing of something else with the intent to commit the act.

Embezzlement is the fraudulent conversion of another's property by one to whom it has been intrusted or into whose hands it has lawfully come; and when it has been embezzled or converted, within the meaning of the statute, it is not an improper inference that the act was intended by the perpetrator of same. While it is true that no one can be convicted of a felony in the absence of a criminal intent, such an intent in a case of embezzlement may be inferred from a felonious or fraudulent conversion, and need not be alleged in the information or indictment. This ruling as to the sufficiency of a charge under the first class of offenses defined by the statute received the careful consideration of this court in *State v. Lentz*, 184 Mo. 223, 83 S. W. 970, in which it was held that it was not necessary to allege the intent with which the act charged was committed. This ruling was approved in *State v. Larew*, 191 Mo. loc. cit. 199, 89 S. W. 1081.

[3] II. *Jeopardy*.—Appellant interposes the plea of former jeopardy. This is not based upon the proceeding against him on the amended information, which he admits to have been a mere nullity; no other alternative remaining under our ruling in *State v. Bartlett*, 170 Mo. loc. cit. 672, 71 S. W. 148, 59 L. R. A. 756. But he contends that, while put upon his trial in the first instance on the amended information, he was in law, by reason of its invalidity, put in jeopardy under the original information; it being the only valid charge against him. The fallacy of this contention becomes apparent upon an analysis of same. It bases the plea of jeopardy upon an assumption, and not upon a fact. A defendant cannot thus be put in peril within the meaning of the Constitution. Article 2, § 23, Const. Mo. It will not suffice to assume that because appellant could not be injured by the invalid proceeding that he must perforce have cause of complaint because there was pending against him in the same case a valid charge which he was not then required to answer. If the appellant was only required at the time the amended information was preferred against him to answer the charge therein—and no further demand could the state then make—under what rule of reason or law can it be said that he was answerable under the original information? It is true that it formed the foundation for the prosecution and gave the circuit court of Daviess county derivative jurisdiction of the case upon the perfecting of the change of venue, but this did not give it power while simply lying in the files and undisposed of to operate as a charge against appellant because of the invalidity of the proceeding he was then being required to answer.

If the fallacy of appellant's contention be not sufficiently shown by the foregoing concrete reasons, let us see what light is thrown

on the question by the authorities. A rule well established here and elsewhere requires that before a plea of former jeopardy can be sustained these facts must be made to appear: That a valid charge either by indictment or information has theretofore been preferred against the accused in a court of competent jurisdiction charging him with the same offense of which he is on trial, and that in the former proceeding a legal jury was impaneled and sworn. *State v. Buente*, 256 Mo. loc. cit. 239, 165 S. W. 340, Ann. Cas. 1915D, 879, and cases; *State v. Keating*, 223 Mo. loc. cit. 94, 122 S. W. 699; 12 Cyc. p. 261. There are exceptions to this rule well stated in the *Buente* Case, *supra*, page 241 of 256 Mo., 165 S. W. 340, Ann. Cas. 1915D, 879, but not necessary to be considered here. Appellant was at no time before his arraignment and the trial, which resulted in his conviction, required to answer, on a trial, a valid charge preferred against him. This is one of the essentials necessary under the rule stated. The amended information, as he admits, lacked the requisite of validity, for the reasons set forth in *State v. Bartlett*, *supra*. He was not arraigned upon or required to answer the original information when the proceeding of which he complains was pending against him, nor was a jury impaneled and sworn to try him on this charge. To hold, therefore, that it operated to his injury in the absence of these essentials would be in violation of precedent and contrary to reason. No provision of our bill of rights was violated in the trial of appellant, nor was he entitled to be heard on the plea that the proceeding against him contravened the fifth amendment to the national Constitution. This, as has been repeatedly held, is applicable only to crimes against and trials under federal laws. *Capital City Dairy Company v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; *Thorington v. Montgomery*, 147 U. S. 490, 13 Sup. Ct. 394, 37 L. Ed. 252; *State v. Buente*, *supra*; 12 Cyc. p. 259. There is no merit in the plea in bar.

[4-7] III. *Continuance*.—Appellant complains of the action of the trial court in refusing to grant him a continuance. The application was properly refused. It is inconsistent, if not contradictory, in alleging that the appellant had conferred with the witness by correspondence, knew what her testimony would be, and sent her money to enable her to attend the trial, while at the same time alleging that he had only learned what her testimony would be during the last few days preceding the making of the application. Further than this, the allegation as to appellant's recent knowledge of the witness' testimony does not savor of sincerity. If true, it is contrary to all human experience. He was charged with a felony. She was his employé when he received the check from Bartlett Bros. the cash proceeds of which he subsequently embezzled. She, as his evi-

dently trusted employé, deposited this check to his credit in the bank. On account of her relation to his business, requiring her daily attention thereto and his alleged frequent conversations with Greger, he must have known of her presence when he had these conversations concerning which it is stated she will testify. This testimony, if true, was vital to his defense, and she was his most important witness. Yet, according to his statement, he did not know what she would testify until a few days prior to the making of the application. In addition, therefore, to the application in this respect lacking the import of truth, it does not show such diligence as must reasonably be expected will be exercised by a man of ordinary intelligence under like circumstances. *State v. Pagels*, 92 Mo. loc. cit. 308, 4 S. W. 931.

No intendments are to be taken in favor of applications of this character. *State v. Good*, 132 Mo. loc. cit. 129, 33 S. W. 790. From its express allegations the conclusion is reasonable that appellant knew, not only what the testimony of this witness would be, but her whereabouts in ample time between the date of the filing of the information and the trial to have enabled him to take her deposition. If the allegation as to appellant's then recent knowledge of the witness' testimony bore the impress of truth, which it does not, then the trial court would have been justified in granting the application, in view of the statement that he had sent her money to defray her traveling expenses to the place of trial, and that she had agreed to attend; but under the facts as we view them a proper exercise of diligence required him to take her deposition. This being true, the overruling of the application, which was addressed to the sound discretion of the trial court, was not unwisely or oppressively exercised, and we refuse to interfere with same. *State v. Cain*, 247 Mo. loc. cit. 705, 153 S. W. 1039; *State v. Crane*, 202 Mo. loc. cit. 74, 100 S. W. 422; *State v. Clark*, 170 Mo. loc. cit. 207, 70 S. W. 1117.

[8] IV. *Agency of Appellant*.—The controverted facts show that appellant was the agent of the borrower (Greger) in securing this loan. Greger testified that on the day he called at appellant's office to employ him to secure the loan he gave appellant a note, payable to the latter, for \$127.50 for his services in that behalf. Further than this, the order given by Greger to appellant on Bartlett Bros. (set forth in full in the statement of facts), which was to be delivered to the latter in the event the loan was secured, expressly declared appellant to be Greger's agent. Appellant does not deny either the execution of this note or the delivery to him of the order, but contents himself with a resort to a lack of memory in regard to the first and silence as to the second. Forgetfulness and evasion have never been regarded as indicative of truth. If it be conceded that appellant was the agent of the loan company

at the beginning of the transaction, this does not militate against the conclusion, supported by the facts stated, that he was the agent of the borrower to negotiate the loan and apply the proceeds thereof as had been directed; but the credibility of appellant's testimony as to his agency for the loan company at any time is shaken by the testimony of Peterson, a representative of the company, that up to the time the appellant made the application for Greger he was a stranger to the company, and that even the formal blank used in this application was not procured by the appellant from the company's office. Subsequently this witness stated that appellant during the year 1913 negotiated four or five loans through the company, but this does not tend to show appellant's agency in the matter at bar or in the cases of which the witness testified.

Circumstances naturally arising out of a transaction are sometimes as strong in probative force as sworn testimony. This case affords an illustration of this fact. Appellant was not compensated for his services in securing this loan by the company, as he would naturally have been had he been its agent, but by Greger. When the note and deed of trust had been executed and delivered to the loan company, it forwarded to appellant for Greger, not \$3,400, but a check for \$3,293, or \$102 less than the face of the note, which latter sum it deducted and retained for its services in making the loan. While it is stated in one of the letters from the company to appellant that "it will, when the loan has been completed, pay him his part of the commission," so far as the evidence discloses, none of the sum thus deducted or retained was ever claimed by or paid to him, nor did the company ever compensate him in any other manner. The reasonable conclusion from this fact is that he was not employed by the company to negotiate the loan, but by Greger to obtain it, and by the latter he had been fully paid. It is clear, however, whether he was paid by the company or not, that in all that is necessary to constitute the relation he was the agent of the borrower. The cases cited in respondent's brief under this head, by reason of the similarity of their facts to those in the instant case, sustain the conclusion we have reached in regard to appellant's agency.

[9, 10] V. *Ownership of Property*.—Appellant contends that the title to the check forwarded by the Bartlett Bros. Loan Company to appellant, the cash proceeds of which were to be paid to Greger or applied in part satisfaction of certain prior liens on his land, never left the company and at all times belonged to it. This contention is mystified by many words, principally copied from the formal application made by appellant to the company for Greger and the correspondence between appellant and the company prior to the making of the loan. The relevant facts from

which ownership must be determined are that the company contracted to loan \$3,400 to Greger to be evidenced by his note, which was to be secured by a deed of trust on his land, and upon the receipt of such note and deed of trust caused the latter to be recorded, and forwarded a check payable to appellant for the amount of the loan less the company's commission. Upon the acceptance by the company of the note and the recording of the deed of trust, the contract for the loan was consummated, whereby the obligation of the company to pay the amount called for in the note became fixed. Upon the transmittal, therefore, of the check to appellant by the company it parted with the title to same, and the nominal ownership therein passed to the appellant, who became burdened, upon the receipt of same, with the obligation to either indorse it to Greger, convert it into cash, and pay the proceeds to him, or apply it to the discharge of the prior lien on Greger's land. He did neither, but indorsed same to a bank, and had the amount called for therein placed to his credit. This created a technical appropriation, as the money realized from the check belonged to Greger, but until appellant indicated a purpose to do with this money as the thief does with the property of another in a case of larceny such a felonious conversion did not occur as to create the crime of embezzlement. But when it did occur the crime was complete. Nor is it material as to the manner in which the money was drawn out if converted to appellant's own use. *State v. Woodward*, 171 Mo. 593, 71 S. W. 1015; *State v. Moyer*, 58 W. Va. 146, 52 S. E. 30, 6 Ann. Cas. 344.

[11] VI. *Felonious Intent*.—Appellant's felonious intent is to be measured by his act. According to the testimony, to which the jury gave credence, the sufficiency of which is ample to sustain the verdict, it is shown that appellant, when the loan had been secured, evaded Greger. He concealed the fact from him that the loan had been consummated and that he had received the check. He placed the same to his own credit in a bank, and admits that he drew the money out for his own use and has not accounted for same. These facts sufficiently show a felonious intent on the part of the appellant, and, his relation to Greger as an agent having been established, his act is clearly within the purview of that general rule that, if one who has the possession of the property of another, instead of delivering it to the owner as his duty requires, neglects or refuses to account for it or otherwise diverts it so as to exercise dominion over it to the exclusion of the owner and to make it his own, he is guilty of embezzlement. *State v. Lentz*, 184 Mo. loc. cit. 239, 83 S. W. 970.

[12] VII. *Rulings on Testimony*.—Appellant complains because the trial court permitted the state to show by the witness Peterson that the appellant had neither used the

money received from Bartlett Bros. in paying off the prior liens nor had he returned the money to the loan company. The question at issue was whether or not the money so received by him had been applied as directed by Greger, and it was therefore pertinent for the state to show that the appellant had violated his directions as to the manner in which the loan should be applied.

[13] Further objection is made that the court erred in permitting the state to show that the check received by appellant from the loan company had been indorsed and deposited to his credit in a bank, and had later been checked out by him. The check was made payable to appellant, and necessarily under the authority given him by Greger he could not commit the crime of embezzlement until after it had been indorsed and converted into money. If in the latter form he used it as directed, he was guiltless; on the other hand, if he used the money for purposes other than to pay it to Greger or to discharge the prior liens, he was guilty as charged. It is manifest, therefore, that the court's ruling in this respect was not erroneous. Moreover, appellant admitted on the witness stand that the check had been received and deposited and the money drawn out of the bank by himself or others authorized to do so, and that he had used the same for personal purposes. Therefore, whether the action of the trial court in permitting a witness to state the condition of the bank was erroneous is immaterial, as the evidence given by such witness was in accord with that given by the appellant himself. Harmless error will not work a reversal.

[14] Appellant also urged that the court erred in refusing to permit the witness Peterson to state the number of applications appellant had submitted to the loan company during the year 1913. This witness did state that appellant had forwarded to his company possibly half a dozen applications for loans during that time. Presumably from the witness' former testimony these were made subsequent to procuring the loan for Greger. But, even if the court had refused to permit the witness to answer the question, it would not have been error. The matter at issue was whether the appellant had embezzled the money represented by the check which had been forwarded to him, and his relationship to other borrowers and the loan company prior or subsequent to this transaction was not material. The evidence shows that he was authorized to receive the proceeds of this loan, and was made the agent of the borrower in this particular case. Therefore whatever relationship he may have sustained to the loan company in previous or subsequent like transactions could have no bearing upon the issue to be determined by the jury in the instant case.

[15] VIII. *Instructions*.—The instructions given by the court advised the jury as to

the elements constituting the offense charged and the punishment prescribed therefor; that the charge is sustained if it was shown that the money was embezzled in one sum or in less amounts at different times; that want of assent to the appropriation of the money by the appellant may be shown either by direct and positive evidence or from all the facts and circumstances in the case; what facts must appear from the evidence to constitute the appellant the agent of the prosecuting witness; that the crime may be established either by direct or circumstantial evidence; that the criminal intent to deprive the owner of his property may be inferred when conversion is established. Other formal instructions were given as follows: As to the presumption of innocence and reasonable doubt; the weight to be attached to appellant's testimony; that the jury is the judge of the credibility of witnesses; that, if the prosecuting witness gave his consent for appellant to make personal use of the money in question, a verdict of acquittal must be returned; that, if it appears from the evidence that the appellant was the agent of the loan company and received the money conditionally, he must be acquitted; and that the mere failure to pay over the money to his principal does not constitute the crime charged. These instructions fully advised the jury as to all the principles of law arising under the evidence in this case, and are in substantial compliance with similar ones which have heretofore met with the approval of this court. See cases cited in respondent's brief approving instructions similar in all their material particulars to those given in this case. These instructions rendered the giving of those asked by appellant and refused unnecessary.

There was ample evidence to sustain the verdict. Appellant was awarded a fair trial, and has no just cause of complaint.

We find no error authorizing a reversal, and the judgment of the trial court is affirmed. All concur.

ORGAN v. BUNNELL et al. (No. 17668.)
(Supreme Court of Missouri, Division No. 1.
Feb. 29, 1916. Rehearing Denied
March 30, 1916.)

1. VENDOR AND PURCHASER \hookrightarrow 231(8) — NOTICE—DESTRUCTION OF RECORDS.

In view of Rev. St. 1889, § 2419; Rev. St. 1879, § 692; Gen. St. 1865, c. 109, § 25; and Rev. St. 1855, c. 32, § 41, a recorded deed imparted notice to subsequent purchasers, notwithstanding the destruction of the county records.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 522; Dec. Dig. \hookrightarrow 231(8).]

2. ESTOPPEL \hookrightarrow 35—PUBLIC LANDS—AFTER-ACQUIRED TITLE.

A warranty deed recorded before the granting of a patent from the United States government to the grantor passed the after-acquired title as against the grantee of a warranty deed

given by the same grantor after the patent was recorded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 84; Dec. Dig. \hookrightarrow 35.]

3. TAXATION \hookrightarrow 734(8)—SHERIFF'S DEED—VALIDITY.

Where a tax judgment was rendered jointly against one deceased before the suit was commenced and one without title, the sheriff's deed under the judgment conveyed no title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470, 1471; Dec. Dig. \hookrightarrow 734(8).]

4. TAXATION \hookrightarrow 642, 647—NOTICE OF SALE BY PUBLICATION—VALIDITY.

An order of publication, judgment, and sale for delinquent taxes, running against David M. B., did not pass the title of "Daniel" M. B.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1305–1307, 1312–1315; Dec. Dig. \hookrightarrow 642, 647.]

5. TAXATION \hookrightarrow 642 — NOTICE OF SALE BY PUBLICATION—VALIDITY.

Since a proceeding by publication is authorized by law where personal service cannot be had on the defendant and his residence is unknown, an order of publication in a proceeding for delinquent taxes, running against "J. R. and the unknown heirs of J. R., deceased," being void against J. R. because issued after his death, will be treated as if the name of J. R. had been omitted, and is valid against the unknown heirs of J. R., deceased, to authorize the passing of title by a sheriff's deed under a judgment in rem.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1305–1307; Dec. Dig. \hookrightarrow 642.]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by J. B. Organ against Mary T. Bunnell and another. From a verdict for plaintiff, the defendants appeal. Reversed and remanded, with directions.

On September 9, 1906, plaintiff filed in the circuit court of Dent county, Mo., his petition to quiet title to lots 2 and 3 of the northeast quarter, and lots 2 and 3 of the northwest quarter, of section 4, township 34 north, range 2 west, situate in the county and state aforesaid. The petition alleges that said real estate is wild, uncultivated, and timbered land; that it is not in possession of either plaintiff or defendants; that defendants claim title adversely to plaintiff. An order of publication was issued against defendants Nathan R. Porter, John Russell, David Bunnell, unknown heirs of John Russell, deceased, and Frank C. Russell, and judgment by default was rendered against them.

On October 14, 1911, a petition was filed in said court to review the judgment aforesaid, which said petition on December 8, 1911, was sustained, said judgment set aside, and leave given defendants to answer, by the first day of April term, 1912. On April 15, 1912, defendants Mary T. Bunnell and Leslie C. Bunnell filed an answer, admitting that they claim title to said land, and admitting that it is wild and uncultivated. They deny each and every other allegation in petition. The answer then avers that defendant Mary T. Bunnell is the daughter of John Russell, who

died in 1869; that Leslie C. Bunnell is her sole and only child and heir at law; that he is the only child and heir at law of her deceased husband, Daniel M. Bunnell; that Frank C. Russell conveyed a two-ninths interest in said land to Daniel M. Bunnell; that said Frank C. Russell, conveyed his other one-ninth interest in said real estate to Mary T. Bunnell; that Sarah E. Boal conveyed her three-ninths interest in said property to Mary T. Bunnell. It is averred that John Russell died in the year 1869, leaving as his sole and only children and heirs at law, Frank C. Russell, Sarah E. Boal (née Russell), and the defendant Mary T. Bunnell.

It appears from the record that Charles Pelfresne, on June 1, 1858, as shown by the plat book at Ironton, Mo., entered the land in dispute. Ten days after this entry, on June 10, 1858, but more than one year before a patent was issued, he executed a warranty deed to John Russell, and this deed was recorded April 5, 1859, in Dent county, Mo. The records of Dent county were destroyed in 1866, and Russell's deed was re-recorded October 19, 1878, in said county. The above deed to Russell describes the land in controversy. On July 1, 1891, Frank C. Russell and wife conveyed by warranty deed, a two-ninths interest in the land described in the patent aforesaid, to Daniel M. Bunnell. This deed was recorded July 30, 1891, in Dent county aforesaid.

The sole and only children and heirs at law of John Russell are Sarah E. Russell, who married Harry E. Boal, Frank C. Russell, and Mary T. Russell, who married Daniel M. Bunnell. The latter died September 14, 1910, leaving as his sole and only child and heir at law, Leslie C. Bunnell, and his widow, Mary T. Bunnell. On November 14, 1911, Frank C. Russell and wife conveyed by quitclaim deed to Mary T. Bunnell a one-ninth interest in the land aforesaid. On November 14, 1911, said Sarah E. Boal and husband conveyed three-ninths interest in the land aforesaid to said Mary T. Bunnell.

Mary T. Bunnell testified that Daniel M. Bunnell was her husband, and that he died September 14, 1910; that Leslie C. Bunnell, then 22 years of age, is her child; that her father's name was John Russell; that he died in Ohio, December 16, 1860; that Margaret M. Russell was her mother; and that Mrs. Boal, Frank C. Russell and herself were the only children and heirs at law of John Russell, deceased.

Plaintiff's title is deraigned as follows: United States to Charles Pelfresne, patent, dated September 1, 1859. Charles Pelfresne to John Russell, deed, dated June 10, 1858; recorded April 5, 1859; re-recorded October 19, 1878. Charles Pelfresne to John Simpson, deed, dated November 15, 1872; recorded April 24, 1873. John Simpson to Nathan T. Porter, deed, dated June 8, 1873, recorded. John Russell and Nathan T. Porter to E. B.

Sankey and E. L. Foote, sheriff's deed, dated April 5, 1892; recorded. E. B. Sankey and E. L. Foote to M. L. Organ, deed, dated July 9, 1908; recorded, April 18, 1909. John Russell, unknown heirs of John Russell, deceased, Frank C. Russell, David M. Bunnell, Nathan T. Porter, E. B. Sankey, and E. L. Foote to M. L. Organ, sheriff's deed for taxes, dated April 5, 1908; recorded August 6, 1908. M. L. Organ to J. B. Organ, deed, dated April 29, 1906; recorded September 5, 1908.

It is undisputed that John Russell died in 1860. The first tax deed therefore to Sankey and Foote is void on account of Russell's death. When the land was sold for taxes in 1908, the following parties were defendants in the tax suit: John Russell, unknown heirs of John Russell, deceased, Frank C. Russell, David M. Bunnell, Nathan T. Porter, E. B. Sankey, and E. L. Foote. The regularity of the petition in said last-named case, the order of publication and sale of the land aforesaid is not questioned, but the judgment upon which the sale is based is assailed, because it is against John Russell, the unknown heirs of John Russell, deceased, and David M. Bunnell. The sheriff's deed under the judgment of 1908 shows that only lots 2 and 3 of the northeast quarter of section 4, township 34, range 2 west, was sold to Martha L. Organ.

The court below found the issues for plaintiff and decreed that he was the owner of the land in controversy, but through oversight it is described as being in section 3, when it should read section 4. The instruction given by the court of its own motion, and the two instructions asked by defendants and refused by the court, will be considered in the opinion.

Defendants filed a motion for a new trial, which was overruled, and the cause duly appealed to this court.

G. C. Dalton and R. L. Horseman, both of Salem, and C. M. Buford, of Ellington, for appellants. Wm. P. Elmer, of Salem, for respondent.

RAILEY, O. (after stating the facts as above). [1] On June 1, 1858, Charles Pelfresne entered the land in controversy, at the government land office in Jackson, Mo., and received a patent from the United States therefor on September 1, 1859. On June 10, 1858, he conveyed said land by warranty deed to John Russell. The last-mentioned conveyance was recorded in the office of the recorder of deeds in Dent county aforesaid on April 5, 1859. The records of said county were destroyed by fire in 1866, but the recording of Russell's deed from Pelfresne imparted notice to subsequent purchasers, notwithstanding the destruction of the records of said county. Section 2419, R. S. 1889; section 692, R. S. 1879; section 25, G. S. 1865, p. 447; section 41, R. S. 1855, p. 364; Crane v. Dameron, 98 Mo. 567, 12 S. W. 251; Geer

v. Missouri Lumber & Mining Co., 134 Mo. 85, 92, 34 S. W. 1099, 56 Am. St. Rep. 489; Weir v. Cordz-Fisher Lumber Co., 196 Mo. 388, loc. cit. 395, 85 S. W. 341; Williams v. Butterfield, 214 Mo. 412, 426, 114 S. W. 13.

[2] The patent aforesaid was not recorded in Dent county, but was duly recorded at the General Land Office in Washington, D. C., at the time it was issued in 1859. There is no provision in our statute which requires a patent from the United States to be recorded in the county where the land lies. Wilcox v. Phillips, 260 Mo. loc. cit. 680, 169 S. W. 55; Mosher v. Bacon, 229 Mo. loc. cit. 358, 129 S. W. 680, and following; 2 Jones on Real Property, §§ 1877, 1878.

Pelfresne conveyed the land in controversy to John Simpson, by warranty deed, November 13, 1872, and said deed was recorded in Dent county, April 23, 1873. The deed from Pelfresne to Russell was re-recorded in said county October 19, 1878. It appears from the evidence that the above patent was found with the papers of John Russell, who died in 1860.

There is nothing in the record to indicate that Simpson paid a valuable consideration for the land, nor does it appear therefrom that he was not aware of the deed made by Pelfresne to Russell before the patent was issued. The record, however, shows that Russell received from Pelfresne a warranty deed for the land in controversy, on June 10, 1858, and recorded the same in Dent county, Mo., on April 5, 1859. John Russell, by virtue of said last-mentioned deed, became the absolute owner of the after-acquired title of Pelfresne. Wood v. Smith, 193 Mo. 484, 91 S. W. 85; Hammond v. Johnston, 93 Mo. loc. cit. 213, 6 S. W. 83; Callahan v. Davis, 90 Mo. 78, 2 S. W. 216; Waters v. Bush, 42 Iowa, 255; 32 Cyc. 1037, note 87; 32 Cyc. 1080 (k).

We accordingly hold that John Simpson acquired no title to the land in suit through his deed from Pelfresne supra, and that John Russell, through his warranty deed from said Pelfresne, became the absolute owner of the land in controversy.

[3] II. The tax judgment rendered on October 9, 1891, against John Russell and Nathan T. Porter, and the sheriff's deed to E. B. Sankey and E. L. Foote, under said judgment, conveyed no title to above land, for the reason that John Russell died before said tax suit was commenced, and Nathan T. Porter acquired no title from John Simpson, as the latter had none to convey. The court committed error, therefore, in admitting as evidence the deed from Simpson to Porter, and the sheriff's deed to Sankey and Foote.

III. On November 30, 1907, the circuit court of Dent county, Mo. rendered a tax judgment for about \$7.22 and costs, on an order of publication against John Russell, unknown heirs of John Russell, deceased, Frank C. Russell, David M. Bunnell, Nathan T. Porter, E. B. Sankey, and E. L. Foote. Special execution was issued on said judgment and the sheriff

of said county sold *part* of the land in controversy to Martha L. Organ, to wit: Lots 2 and 3 of the northeast quarter of section 4, township 34, range 2 west, in Dent county, Mo., for the sum of \$40. It appears from the above deed that lots 2 and 3 of the northwest quarter of section 4, township 34, range 2 west, was not sold by the sheriff. John Russell having died in 1860, the proceedings against him are void.

[4] We have heretofore held that E. B. Sankey, E. L. Foote, and Nathan T. Porter had no interest in, or title to, any of the land in controversy. The order of publication, judgment, and sale running against David M. Bunnell did not pass the title of Daniel M. Bunnell to his undivided two-ninths interest in said land. This leaves the remaining question as to whether the proceedings against the unknown heirs of John Russell, deceased, and Frank C. Russell, were sufficient to pass the remaining title or interest of Mary T. Bunnell and Leslie C. Bunnell, in and to said lots 2 and 3 of the northeast quarter of section 4, township 34, range 2 west.

IV. Having heretofore reached the conclusion that John Russell became the owner of the real estate in controversy, that the first tax judgment of 1891 and the sheriff's deed thereunder were void as to Russell's heirs, that lots 2 and 3 of the northwest quarter of section 4, township 34, range 2 west, were not sold by the sheriff as shown by his deed in 1908, to Martha L. Organ, it leaves the title to the land *last* named in the defendants as absolute owners in fee simple.

V. As the tax judgment of 1907 ran against David M. Bunnell, and not against Daniel M. Bunnell, and as the sheriff's deed simply purported to convey the interest of David M. Bunnell in lots 2 and 3 of the northeast quarter of section 4, township 34, range 2 west, the defendants have succeeded to the rights of said Daniel M. Bunnell, and are entitled to the undivided two-ninths of said last-described land, and hold the same in fee simple.

The tax sale of 1908 was based upon an order of publication running against the defendants therein named as follows: John Russell, unknown heirs of John Russell, deceased, Nathan T. Porter, E. B. Sankey, and E. L. Foote. Proof of publication having been made, judgment was rendered by default against said defendants on November 30, 1907, and the land in controversy charged with the payment of the taxes due thereon for 1905, amounting to \$7.22; and also costs taxes in said cause, for the sum of \$20.36.

On April 22, 1908, the sheriff of Dent county, Mo., sold lots 2 and 3 of the northeast quarter of section 4, township 34, of range 2 west, located in said county, to Martha L. Organ, for the expressed consideration of \$40, and executed to her a sheriff's deed for above land. It does not appear from said

sheriff's deed that lots 2 and 3 of the northwest quarter of section 4, township 34, range 2 west, in said county, were sold by the sheriff, or conveyed by the deed aforesaid.

We are confronted with the question, as to whether the tax judgment of 1907 supra, was void, on account of it having been rendered against John Russell and the unknown heirs of John Russell, deceased, etc. As heretofore held, the judgment and proceedings against John Russell, who died in 1860, are void. No personal judgment was rendered against any of above-named defendants, nor did the sheriff attempt to sell the interest of either defendant in the land involved here. On the contrary, a judgment in rem was taken, and the land in controversy charged with the payment of the delinquent taxes for the year 1905. The sheriff's deed simply undertook to pass the title to lots 2 and 3 of the northeast quarter of section 4, township 34, range 2 west, in said county.

[5] Where personal service cannot be had upon a defendant, and where his residence is unknown, a proceeding by publication is authorized by law, in order to charge his land with the payment of taxes. Presumably the heirs of John Russell knew the latter had died in 1860. If, therefore, the heirs of John Russell had seen the above publication as printed, they would have known at once, their ancestor being dead, that the purpose of said publication, was to impart notice to them that the collector was moving to have the land in controversy subjected to the payment of the delinquent taxes for the year 1905. They could not have been misled by the insertion of John Russell's name in said publication, for the obvious reason that they would have known, had they seen the publication, that he had been dead for many years. The publication and proceedings thereon being void as to John Russell, the service by publication should be treated as though John Russell's name had been omitted therefrom.

We have heretofore held that Nathan T. Porter, E. B. Sankey, and E. L. Foote had no title to, nor interest in, any of the land in litigation here. The publication having been made against David M. Bunnell, when Daniel M. Bunnell was the legal owner of two-ninths of all the real estate in controversy, the tax deed aforesaid, did not pass the title of said Daniel M. Bunnell to any part of the land involved in this proceeding.

We therefore hold that the tax judgment of 1907 supra, against the unknown heirs of John Russell, deceased, is valid, and that the sheriff's deed aforesaid conveyed to Martha L. Organ the undivided seven-ninths interest in and to lots 2 and 3 of the northeast quarter of section 4, township 34, range 2 west, situate in Dent county aforesaid.

VI. On the facts disclosed by the record, we have reached the conclusion that plaintiff is the absolute owner of the undivided seven-

ninths of lots 2 and 3 of the northeast quarter of section 4, of township 34, range 2 west, situate in Dent county, Mo.; that defendants are the absolute owners of lots 2 and 3 of the northwest quarter of the section, township, and range aforesaid, and are the absolute owners of the undivided two-ninths of lots 2 and 3 of the northeast quarter of section 4 aforesaid.

The court below, having tried the case upon a theory, inconsistent with the conclusions above indicated, we hereby reverse and remand the cause, with directions to the trial court to set aside its judgment rendered in favor of plaintiff, and to enter a judgment defining the respective rights, interests, and titles of the parties aforesaid, in and to the land in controversy, as above indicated in this paragraph.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RILEY, C., is adopted as the opinion of the court. All concur.

MEYER v. BOBB. (No. 18789.)

(Supreme Court of Missouri, Division No. 2. Feb. 15, 1916. Motions for Rehearing and to Transfer to Court in Banc Denied March 31, 1916.)

1. APPEAL AND ERROR \S 1198—REMAND—MANDATE—DISCRETION OF TRIAL COURT.

Where a case is remanded to the trial court, with specific directions to enter a certain judgment, the trial court has no discretion, but must comply with the mandate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. \S 1198.]

2. APPEAL AND ERROR \S 1096(1)—SCOPE OF REVIEW—PARTICULAR PROCEEDINGS.

On appeal from an order denying new trial, after entry of judgment in obedience to the mandate of the appellate court specifically requiring a certain judgment to be entered, the only question for review is whether the mandate was complied with.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1177, 4353, 4357; Dec. Dig. \S 1096(1).]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Action by Alfred C. F. Meyer against Clara P. Bobb. From an order denying new trial, the defendant appeals. Affirmed.

This is an appeal from the action of the circuit court of the city of St. Louis in entering judgment in favor of the plaintiff in conformity with the mandate of the St. Louis Court of Appeals in said cause. The history of this case, as we gather it from the briefs and record, is as follows:

The suit was originally instituted in the circuit court of the city of St. Louis to recover upon certain special tax bills which had been issued by the city of St. Louis against defendant's property. Trial was had

in the circuit court, resulting in a judgment in favor of the defendant. Thereupon plaintiff was granted an appeal to the St. Louis Court of Appeals. The St. Louis Court of Appeals transferred the case to this court, on the ground that the title to real estate was involved. The appellant (on that appeal) filed a motion in this court, asking that the case be remanded to the Court of Appeals. This motion was sustained, and the cause was remanded to the St. Louis Court of Appeals, where an opinion was delivered (Meyer v. Bobb, 185 Mo. App. 685, 171 S. W. 600) reversing the judgment below and remanding the cause, with directions to the circuit court to enter judgment in favor of the plaintiff. After the decision by the St. Louis Court of Appeals, the defendant Bobb applied to this court for a writ of certiorari for the purpose of reviewing and correcting the decision of the Court of Appeals. This application was denied by this court on January 22, 1915. On January 23, 1915, the respective parties appeared in the circuit court of the city of St. Louis, in which court the mandate of the Court of Appeals had been filed, and plaintiff then moved the court to render judgment in his favor in compliance with the mandate of the Court of Appeals. The court sustained this motion and entered judgment in favor of the plaintiff in strict compliance with said mandate. Thereupon the defendant (appellant here) filed a motion for a new trial.

The principal grounds for a new trial, contained in the motion, were in substance as follows: That the ordinance authorizing the issuance of said tax bills and the judgment herein permitted the taking of defendant's property for public use in violation of sections 20 and 21 of article 2 of the Constitution of Missouri; that said ordinance and judgment herein deprived defendant of her property without due process of law, contrary to section 1, art. 14, of the Amendments of the Constitution of the United States and contrary to section 30, art. 2, of the Constitution of Missouri; that the St. Louis Court of Appeals, in directing judgment against defendant, deprived defendant of a trial by jury, and violated the amendment of 1884 of article 6 of the Constitution of Missouri, as well as section 28, art. 2, of said Constitution; that the judgment directed by said Court of Appeals is in excess of the amount asked for in the petition; that the action of the Court of Appeals denied defendant the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States. The motion for new trial was overruled, and defendant perfected an appeal to this court.

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe, all of St. Louis, for appellant. Hickman P. Rodgers and Schulenburg & Diehm, all of St. Louis, for respondent.

WILLIAMS, C. (after stating the facts as above). It is not contended that the circuit court failed in any manner to follow the directions contained in the mandate of the Court of Appeals to enter judgment for the plaintiff, but it appears to be admitted that the circuit court complied strictly with the directions of said mandate in entering the judgment from which the present appeal was taken.

[1] It is well settled that when a cause is remanded to the trial court, with specific directions to enter a certain judgment, the trial court has no discretion in the matter, but must comply with the mandate. Rees v. McDaniel, 131 Mo. 681, 33 S. W. 178; State ex rel. v. Edwards, 144 Mo. 467, 46 S. W. 160; Scullin v. Railroad, 192 Mo. 1, loc. cit. 6, 90 S. W. 1023; Keaton v. Jorndt, 259 Mo. 179, loc. cit. 190, 168 S. W. 734. The rule here applicable was quoted in Scullin v. Railroad, supra, as follows:

"When a cause has been remanded, with special directions, it is out of the power of the court receiving such directions to open the cause and have a new trial. The mandate in such case is in the nature of a special power of attorney. By it authority and jurisdiction are granted to the lower court to take such steps as are necessary to carry the mandate into execution. It has no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed."

[2] The foregoing rule being correct, it necessarily follows that the appellate review in appeals like the present should be limited to the question of whether or not the trial court did follow the directions of the mandate, and we are therefore not permitted to enter into a discussion of the many constitutional questions sought to be raised by appellant. Since it appears from the record that the trial court entered the judgment in strict compliance with the mandate, it follows that the judgment should be affirmed.

It is so ordered.

ROY, C., concurs.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All the Judges concur.

STATE v. OTHIOK. (No. 19276.)
(Supreme Court of Missouri, Division No. 1.
Feb. 15, 1916. Rehearing Denied
March 31, 1916.)

1. LARCENY ~~§~~27—PERSONS LIABLE—CRIMES COMMITTED IN EXECUTION OF A COMMON SCHEME.

Where, in furtherance of a conspiracy between the defendant and A. and G. that they were to steal automobiles and deliver them to the defendant to be sold, and the proceeds divided, A. and G. did steal the car in question, although it was not specified as a car to be stolen, the defendant is responsible criminally

as if he had personally and directly participated in the theft, since, if a person combines with others to accomplish an illegal purpose, he is legally responsible for everything done by his confederates which follows incidentally in execution of the common design.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 55-57; Dec. Dig. § 27.]

2. CRIMINAL LAW § 954(5) — MOTION FOR NEW TRIAL — INDEFINITE STATEMENT OF GROUNDS.

Where the record did not show that any of the instructions given were asked for by the state, an assignment of error in a motion for new trial that the court erred in giving improper instructions asked for on the part of the state over the objection of the defendant, which does not designate which instruction is erroneous, or undertake to state that each instruction given was erroneous, is insufficient as too indefinite to raise a question for appellate review.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 954(5).]

3. CRIMINAL LAW § 372(5) — OTHER OFFENSES — CONSPIRACY.

In a prosecution for larceny of an automobile, evidence of the theft of other automobiles in furtherance of a conspiracy between the defendant and two others that they should steal automobiles and bring them to the defendant to be sold was admissible as part of a common scheme or plan for the commission of two or more crimes so related to each other that the proof of one tends to establish the other.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 372(5).]

Appeal from Criminal Court, Jackson County; Ralph S. Latshaw, Judge.

George Othick was convicted of larceny, and he appeals. Affirmed.

Upon an information charging him with the larceny of an automobile valued at \$500, defendant was tried in the criminal court of Jackson county, found guilty, and his punishment assessed at two years in the penitentiary. In the information the defendant was charged jointly with Charles W. Gippner and Alfred W. Adt, but upon application was granted a severance. It appears that his codefendants, prior to the trial of defendant, had pleaded guilty, been sentenced and paroled, and were used by the state as witnesses against the defendant.

The evidence upon the part of the state tends to establish the following facts: On the night of October 11, 1914, a Ford automobile, belonging to Leo Moyer, was stolen from the corner of Eighteenth and Cherry streets, Kansas City, Mo. Two days later the automobile was found by the police at Forty-Eighth street and Blue, in Kansas City, Mo., in the possession of Adt, Gippner, and the defendant. The car was in a dismantled condition; in fact, two cars were found in the possession of these men, and they were in the act of taking the pieces from one car and placing them upon the other car when the officers came upon them. At sight of the officers defendant started to run, but was captured after a shot was fired by one of the policemen.

Witness Adt testified that he had known defendant about three months, and had known Gippner several years; that three or four months before this occurrence he met defendant, through Gippner, and defendant made several proposals to Adt, in which he proposed that Adt and Gippner go out and steal automobiles and bring them to defendant, and that they would divide the proceeds of the sale. The witness at first refused to be interested in defendant's proposition, but, after being approached by defendant on many occasions, he finally consented and Adt and Gippner, in pursuance to said agreement, first stole an automobile from a man by the name of Brightwell at Grandview. This car was delivered by them to the defendant about 11 o'clock at night. Later the witness and Gippner stole a car at Topeka, Kan., belonging to one Holmes. They brought this car to Kansas City and took it out to a cottage at Forty-Eighth and Drury streets which Adt and Gippner had rented and where they were "baching." It appears that defendant had been arrested a short time after he received the first car, and he insisted that the witness and Gippner steal another car so that he could raise money to defend his case. It was in compliance with this request that they stole the car in Topeka, Kan. After this car was stolen defendant went out to the cottage where the witness was living and suggested to Adt and Gippner that they steal another machine so that he could change the parts and sell them. On this same day Adt and Gippner went down town in Kansas City, and about 11 o'clock at night stole the Moyer car (the one involved in this prosecution). They took the car out to the cottage, and the next day the defendant came out to the cottage, and was engaged in this work of changing the parts when apprehended by the police. The testimony of Gippner corroborates that of Adt. Mr. Moyer, the owner of the car, identified the car as belonging to him.

The evidence upon the part of the defendant tended to show that he resided with his parents, and that he had established an automobile repair shop in the rear of the place in which his father lived. Defendant's mother testified that the car brought to her home on September 18th by Adt and Gippner (this was the Brightwell car) was the first car that had been brought to her son for repairs. Defendant testified in his own behalf that he had known Adt about five months, and met him through Gippner; that he had known Gippner for several years; that after meeting Adt he next saw him when Adt and Gippner brought an automobile to his house to be repaired. He denied that he had made the proposition to Adt and Gippner that they steal automobiles and bring them to him and let him sell them, and that he had no idea that the first car brought to him by Adt and Gippner was a stolen car.

It appears from his cross-examination, however, that before he was apprehended by the police while in the act of changing the Moyer car, out at the cottage of Adt and Gippner, he had sufficient information to cause him to believe that the first car that Gippner and Adt brought to him was a stolen car.

Philip D. Clear, of Kansas City, for appellant. John T. Barker, Atty. Gen. (Lewis H. Cook, of Jefferson City, of counsel), for the State.

WILLIAMS, C. (after stating the facts as above). I. Appellant contends that the evidence is insufficient to support the verdict. In support of the above contention it is insisted that, even though defendant entered into a conspiracy with Adt and Gippner whereby they were to steal automobiles generally and bring them to defendant to be by him sold, and the proceeds divided among the three, yet, since the defendant was not present and directly participating in the theft of the Moyer car, and since the Moyer car had not been specified by the three conspirators as a car to be stolen, the defendant should not be held guilty of the larceny of that specific car.

[1] We are unable to agree with this contention. It appears that defendant, together with Adt and Gippner, entered into a conspiracy, the common purpose or design of which was that Adt and Gippner were to go out and steal automobiles and deliver them to defendant to be by him sold, and the proceeds of the sale divided among the three. In furtherance of this common purpose Adt and Gippner did steal the Moyer car mentioned in the information, and, even though this particular car was not specified by the three conspirators as a car to be stolen, yet the defendant is just as accountable criminally as if he had been personally present and directly participating in the theft. The correct rule here applicable is stated in 1 R. C. L. 133, as follows:

"There can be no doubt of the general rule of law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable criminaliter for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan."

To the same effect is the case of *State v. Darling*, 216 Mo. 450, 115 S. W. 1002, 23 L. R. A. (N. S.) 272, 129 Am. St. Rep. 526, wherein the above-mentioned rule is fully discussed and authorities cited. Further discussion here is therefore rendered unnecessary.

[2] II. The only reference in the motion for a new trial alleging error in the giving of instructions is the following:

"The court erred in giving improper instructions asked on the part of the state over the objection of defendant."

It does not appear from the record in this case that any of the given instructions were asked for on behalf of the state. Furthermore, the assignment does not designate which instruction is erroneous; neither does it undertake to say that each instruction given was erroneous. Under the rule announced in the recent case of *State v. McBrien*, 265 Mo. 594, loc. cit. 604, 605, 178 S. W. 489, the foregoing statement in the motion for a new trial is too indefinite to raise a question for appellate review.

[3] III. Appellant contends that the court erred in admitting over his objection the evidence as to the larceny of the Brightwell and Holmes automobiles. We are unable to agree with this contention. From the evidence it appears that the theft of these cars was but part of the "common scheme or plan embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the other." The evidence therefore was clearly admissible. *State v. Bailey*, 190 Mo. 257, loc. cit. 280, 88 S. W. 733; *State v. Hyde*, 234 Mo. 200, loc. cit. 226, 136 S. W. 316, Ann. Cas. 1912D, 191.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All of the Judges concur.

SCHROEDER et al. v. EDWARDS et al. (two cases). (Nos. 17270, 17271.)

(Supreme Court of Missouri, Division No. 2. Jan. 6, 1916. On Motion to Modify, Feb. 15, 1916. Further Motion to Modify Overruled March 31, 1916.)

1. NEW TRIAL \S 130—GROUNDS—SCOPE OF REVIEW.

The stated ground in a motion for new trial that "the verdict and judgment is unsupported by any substantial evidence" sufficiently raises the objection that prior judgments alleged to have been rendered in the circuit court in another state on which recovery against holders of unpaid corporation stock was sought, were shown by the proof to have been entered by the clerk in vacation, and that the statutory authority of the clerk to make such entries was not shown by proof, and could not be supported by presumption.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. \S 130.]

2. JUDGMENT \S 942—JUDGMENTS OF OTHER STATES — STATUTORY PROCEEDINGS — PRESUMPTIONS.

Proof of judgments entered by the clerk in vacation in another state, such procedure being of statutory origin, does not import validity of such judgments, which must be alleged and proved, and cannot be aided by presumption, under Rev. St. 1909, § 1836, requiring that if allegations that a judgment was duly made are con-

troverted, the facts showing jurisdiction and valid rendition must be proved.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1781; Dec. Dig. ¶ 942.]

3. EVIDENCE ¶ 85—JUDICIAL NOTICE—STATUTORY LAW.

Courts of Missouri do not notice judicially statutory laws of another state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. ¶ 35; Appeal and Error, Cent. Dig. § 2959.]

4. CORPORATIONS ¶ 232(2) — LIABILITY OF STOCKHOLDERS — MANNER OF PAYMENT FOR STOCK—SERVICES.

The services of an agent who lent his credit to a corporation for the purpose of securing short-time loans, receiving approximately one-half of the capital stock therefor, and was never required to make good the loans, could not be, as against general creditors, accepted as payment for the stock in his name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 883; Dec. Dig. ¶ 232(2).]

5. APPEAL AND ERROR ¶ 196—SCOPE OF REVIEW — PRESERVATION OF EXCEPTIONS — WAIVER.

A party cannot, on appeal, avail himself of error in overruling his motion to strike an amended petition from the files as constituting a departure, where he waived such error by answering to the merits and going to trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1247, 1489; Dec. Dig. ¶ 196; Pleading, Cent. Dig. § 1428.]

6. APPEAL AND ERROR ¶ 761—SCOPE OF REVIEW—RECORD ON APPEAL—SUFFICIENCY.

Under rule 15 (169 S. W. 1x), requiring all briefs to be printed and to contain, apart from arguments or discussion of authority, a statement in numerical order of the points relied on, a statement in the brief that portions of answer stricken out were material and that such action was error could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8096; Dec. Dig. ¶ 761.]

7. CORPORATIONS ¶ 240(1) — LIABILITY OF STOCKHOLDERS—UNPAID STOCK—ESTOPPEL.

One who aids in a transaction by which another party secures stock for services in excess of the value of such services, cannot be heard to deny that the stock was fully paid, though he might lend money to the corporation, but he is estopped by his acquiescence to make such claim.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 984, 939-942, 1099-1100½; Dec. Dig. ¶ 240(1).]

8. APPEAL AND ERROR ¶ 1178(6)—MODIFICATION—WHEN PROPER.

Where all issues but one were conclusively and properly determined on the trial, or on the appeal, a judgment remanding for new trial should confine trial to such single issue, and would be modified, if it failed to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4614, 4615; Dec. Dig. ¶ 1178(6).]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Suit by Herman Schroeder and others against George Edwards and others, in which John D. Gerlach, administrator, was substituted for Harvey Neville, deceased, as plaintiff. Judgment and decree for plaintiffs, except plaintiff Neville, and defendants appeal; and Gerlach, plaintiff, prosecutes a cross-appeal. Judgment as to plaintiff Gerlach affirmed, and judgment for other plain-

tiffs reversed and remanded, and motion to modify granted.

This is a proceeding in equity by judgment claimants of the Chester Light, Water & Ice Company, a corporation organized under the laws of the state of Illinois, to recover from the defendants, residents of St. Louis, Mo., as stockholders of said corporation, an amount alleged to be unpaid on the stock held by them in said corporation, and to have said amount, due on said stock, applied to the payment of the plaintiffs' respective claims. Trial was had in the circuit court of the city of St. Louis, resulting in a judgment and decree in favor of all of the plaintiffs, except plaintiff Neville, and judgment was rendered against defendant George L. Edwards for the sum of \$10,226.26, and against defendant Grant for the sum of \$343.16, making a total judgment of \$10,569.42, which was the total amount of judgments and claims held by the respective plaintiffs, less the claim of plaintiff Neville. Cross-appeals were duly taken to this court, one appeal by plaintiff Neville, and another appeal by the defendants Edwards and Grant.

The third amended petition, upon which the case was tried, alleged the incorporation of the Chester Light, Water & Ice Company, under the laws of the state of Illinois, with an authorized capital of \$35,000, divided into 350 shares of the par value of \$100 each, and that defendant George L. Edwards and one J. D. Gerlach were the original incorporators and promoters of said corporation, and that all but 5 shares of said capital stock were originally subscribed for by A. D. Grant as a "straw man," and that said Grant paid no consideration to said corporation for said stock.

That immediately after said corporation was organized said Grant transferred 340 shares of said stock to defendant Edwards; that said Edwards, afterwards, transferred all but 147 shares of said stock to other parties, among them J. D. Gerlach, 146 shares; that an understanding existed between Edwards and Gerlach whereby each was to receive approximately one-half of the capital stock of said corporation; that said defendant Edwards became the owner of and holder of 148 shares of stock in said corporation, and now owns and holds the same on the books of the corporation, and that no consideration has ever been paid to the corporation, nor has the corporation ever received any value for the 148 shares of stock so held by defendant Edwards.

That defendant Edwards, in 1901, indorsed and delivered to said J. D. Gerlach a certificate for said 148 shares of stock held by said Edwards, but that said transfer has never been recorded upon the books of the corporation, and that, at the time of the transfer, the corporation was insolvent and

said Gerlach was insolvent, and said transfer was made by said Edwards to avoid liability on said stock; that under the common law of Illinois, the transferrer of stock remains liable thereon until the transfer is recorded on the books of the corporation, and that such liability has not been removed by statute in said state; that there is now due and unpaid on said 148 shares of stock held by said Edwards the sum of \$14,800, for which said defendant is liable to these plaintiffs; that said defendant Grant owns 5 shares of the capital stock of said company upon which there has been nothing paid, and that there is due on such shares the sum of \$500; that said defendants Grant and Edwards are the only solvent stockholders, holding unpaid stock, within the jurisdiction of said circuit court.

The petition further alleges that section 8, chapter 32, of the Revised Statutes of Illinois, provides as follows:

"Every assignment or transfer of stocks, on which there remains any portion unpaid, shall be recorded in the office of the recorder of deeds of the county within which the principal office is located, and each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stock shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee until the said stock be fully paid. Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them, respectively, whether called in or not, as in cases of garnishment. Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon, to the extent and in the same manner as if he had been the original subscriber."

The petition further alleges: That plaintiff Herman Schroeder, on December 14, 1904, recovered judgment in the circuit court of Randolph county, in the state of Illinois, against said Chester Light, Water & Ice Company, in the sum of \$58.70, together with costs amounting to \$4.85. That execution was duly issued upon said judgment, addressed to the sheriff of said Randolph county, and was, by said sheriff, duly returned nulla bona. That said judgment still remains due and unpaid, and under the laws of the state of Illinois bears interest at the rate of 5 per cent. per annum. The judgments of the other respective plaintiffs are set forth in the same manner as the judgment of plaintiff Schroeder. The prayer of the petition asks that the court enter a decree against said defendants, in proportion to the amount of their respective stock liability, an amount sufficient to satisfy the total claims and judgments of the respective plaintiffs.

Defendants filed a motion to strike out the third amended petition on the ground that it was a departure from the original cause of action pleaded. This motion was overruled,

and defendant saved an exception. Defendants' answer to said third amended petition alleged:

First. That the court had no jurisdiction of the subject-matter.

Second. That the plaintiffs, or some of them, have no legal capacity to sue.

Third. They admit that defendant Edwards, in 1901, sold and transferred all of his stock in said company to said J. D. Gerlach for a consideration of \$5 per share and executed to said Gerlach a power of attorney to cause said shares of stock to be transferred on the books of the company to said Gerlach, and, that by reason thereof, the defendant Edwards ceased to be a shareholder in the company, and that if the company is indebted to the plaintiffs, as alleged in their amended petition, said indebtedness accrued long subsequent to the time when defendant Edwards ceased to be a shareholder, as aforesaid.

Fourth. That when the company was organized, it was mutually agreed between the incorporators thereof and all the subscribers to the capital stock that its capital stock should be paid wholly in services and contract and franchise rights to be rendered to and transferred to the company, or for its use and benefit, either before or after the incorporation of the company, and that all of the services and contract and franchise rights agreed to be rendered to and transferred to the company, in payment of the capital stock of the company, were rendered to and transferred to the company, as agreed, and its capital stock fully paid as agreed, all of which was known to the plaintiffs and each of them, and particularly to the plaintiff Harvey Neville, who was an incorporator of the company, shareholder, director, and treasurer thereof, from its organization to its final dissolution, and that neither of the plaintiffs gave or extended credit to the company on the faith that its capital stock had been paid in money or its equivalent in property value, but well knew that the capital stock of the property was not intended to be paid in money or in its equivalent in property.

Fifth. That the liability of shareholders in a corporation, organized under the laws of Illinois, to said corporation or its creditors, is a contractual liability, and that, under and by virtue of the laws of the state of Illinois, which form a part of the said contract, the shareholders of a corporation, organized under the laws of said state, can only be sued upon their stockholders' liability in the courts of that state, and such liability could not be enforced by suit or otherwise except by such suit or proceeding prescribed for that purpose by the laws of the state of Illinois, and in the courts of said state. That under and by virtue of section 8, and section 25, chapter 32, of the Revised Statutes of Illinois, it is provided as follows:

(Section 8 is the same section as is copied in plaintiffs' petition.)

"Section 25. If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money, after demand made by the officer, to be returned 'No property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his pro rata share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court. Said receiver shall be, in all cases, a resident of the state of Illinois, and shall be required to enter into bonds, payable to the people of the state of Illinois, for the use of the parties interested, in such penalty and with such securities as the court may, in the decree or order, appointing the same, require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him or it, from the county where the cause of action accrued to the sheriff of any county in this state for service."

That the plaintiffs have not commenced any suit as provided by the laws of the state of Illinois, to determine the liabilities and assets of the company and have not applied to the payment of the creditors of the company all the assets of the company and have not determined, in such a suit, the pro rata liability of all the shareholders of the company and, by reason thereof, are not entitled to maintain this suit.

Sixth. That on the _____ day of _____, in a certain cause, entitled _____ v. Chester Light, Water & Ice Company, pending in the United States Circuit Court for the _____ District of Illinois, _____ was appointed receiver to take charge of and administer the property and effects of the company, and he, if any one, is the proper party to collect any dues or liabilities which may be owing to the company or its creditors from the shareholders or others.

Seventh. That under the laws of the state of Illinois a shareholder is not liable to the creditors of a corporation upon their unpaid stock, unless the overvaluation of the property turned in for said stock was fraudulently and knowingly made, with the intent of evading the statutes of Illinois.

Eighth. That plaintiffs' claims are barred by the statutes of limitation of the state of Illinois.

Ninth. A general denial.

Upon plaintiffs' motion, the court struck out of defendants' said answer the following portions thereof:

First. The allegation that plaintiffs did not have legal capacity to sue.

Second. The allegation that defendant Edwards executed and delivered to Gerlach proper power of attorney to transfer upon the books of the company the stock sold to him in 1901.

Third. The allegation that, after said sale of stock in 1901, the defendant Edwards ceased to be a shareholder in the company, and that if the company was indebted to the plaintiffs, said indebtedness accrued long subsequent to the time when said defendant Edwards had ceased to be a stockholder in the company.

Fourth. The entire portion of paragraph 5 of said answer.

Defendants excepted to the action of the court in sustaining said motion. Plaintiffs thereafter filed an amended reply to the remaining portions of said answer. The reply contained a general denial and an allegation that the matters pleaded in the fourth paragraph of said answer constituted no defense to the plaintiffs' cause of action under the laws of the state of Illinois, as decided by the highest court of said state in the case of *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 878, 82 N. E. 891.

The record in this case is very large, but the facts shown by the evidence are not complex and may be stated substantially as follows: In 1892, one Gerlach, a resident of Chester, Ill., having procured certain electric light and water franchises from the city of Chester, was desirous of promoting a corporation to take over said franchises and erect an electric light plant and a water plant in said city. In furtherance of this plan, Gerlach called upon defendant Edwards in St. Louis and laid the plan before him. Gerlach was, at that time, cashier of a bank at Chester, but was not a man of any great financial resources. Mr. Edwards was engaged in the brokerage business in the city of St. Louis and was a man of means. It was agreed between Edwards and Gerlach that they would organize a corporation, under the laws of Illinois, with a capital stock of \$35,000 each to receive, approximately, one-half of the stock. Gerlach was to superintend the construction of the plants and Edwards was to act as financial agent. The plan was to bond the company for \$35,000 and, by the sale of the bonds, raise funds with which to construct the plants for the corporation. Gerlach's stock was to be paid for by his transferring to the company the franchises which he held in the city of Chester. Edwards' stock was to be paid for by services to be rendered by him as the financial agent of the corporation. The company was organized, J. D. Gerlach, A. D. Gordon, George L. Edwards, William H. Bryan, and Harvey Neville each subscribing for one share, and A. D. Grant (who acted as "straw man") subscribing for 845 shares. After the corporation was organized, all of the stock sub-

scribed for by Grant, with the exception of 5 shares, which he retained, was transferred on the books of the company so that, finally, defendant Edwards held 148 shares of the capital stock, Gerlach 147 shares, and the remaining stock divided in small amounts among other stockholders. Plaintiff Neville held 2 shares of the capital stock. After the corporation was organized, Gerlach transferred his franchises to the corporation, and the corporation began the construction of an electric light plant at Chester. The company had no funds with which to construct the plant, but the money was raised by the corporation giving its notes, with Edwards as indorser. In this manner, \$5,000 was first raised, then \$8,000 was raised, out of which the first \$5,000 of indebtedness was paid, and, at another time, \$13,500 was raised. The obligations upon which defendant Edwards became indorser were retired later with the money obtained from the sale of the mortgage bonds of the corporation. At the time that defendant Edwards was lending his name to the credit of the company, he was also the president of the company. Plaintiff Neville was treasurer of the company and also a director, and was the father-in-law of Gerlach. Gerlach was elected general manager.

At a meeting of the directors, on January 30, 1894, a resolution was passed allowing Gerlach the sum of \$14,700 in payment for his franchises, and, *on motion of H. Neville, George L. Edwards, defendant, was allowed the sum of \$14,900 for "services as financial agent and other services."* It appears that the stock of Gerlach and Edwards was paid for in this manner, and that neither Edwards, Grant, nor Gerlach paid any money to the corporation for their stock, and did not render any further consideration to the corporation than that above mentioned.

There was evidence tending to show that the company was insolvent in 1901, but the failure of the company did not occur until about 1903, at which time the bondholders filed a petition to foreclose the mortgage and a sale of the company property was had in such foreclosure.

Some of the witnesses testified that the services of defendant Edwards, as financial agent, were worth \$15,000; one of the witnesses stated that he did not mean to say that they were worth that much in cash. There was evidence tending to show that the company would not have been able to build its plants if it had not been for defendant Edwards indorsing the company's paper to raise temporary funds. It also appears, from the evidence, that defendant Edwards sold his stock to Gerlach in November, 1901, Gerlach paying Edwards \$5 per share for the stock; but no transfer of the stock was ever made on the books of the company.

A number of opinions by the Supreme Court of the state of Illinois were offered in

evidence; also the statutes referred to in the pleadings.

Defendants offered in evidence an order made by the circuit court of the United States, at the city of Springfield, Ill., on the 20th day of November, 1903, appointing a receiver for the company. The order appointed Don E. Detrich receiver, and ordered him to take and hold the property of the company, described in the bill, until further order of the court, and enjoined the defendant corporation, and all other persons, from interfering with any of said property, and from prosecuting against said defendant corporation any suits or actions at law or equity.

The petition, applying for the receiver, is not set forth in the record, neither are any of the subsequent proceedings in said foreclosure proceedings set forth in this record, but it appears, in the evidence, that the corporate property sold for much less than the mortgage indebtedness.

All of the plaintiffs, except one, made proof of their claims by duly authenticated, certified copies of the record of the circuit court of Randolph county, Ill., showing judgment for the respective amounts claimed by each plaintiff to have been rendered by the clerk, in vacation. The following is a copy of the record as to one of said judgments. All the judgments were similar as to form.

"Herman Schroeder v. The Chester Light, Water & Ice Company.

"Cognovit.

"Now, on this 14th day of December, A. D. 1904, it being in vacation after September term, A. D. 1904 of this court, comes the plaintiff, Herman Schroeder, by A. E. Crisler, his attorney, and files his declaration in a plea of trespass on the case on promises, and files also the instrument in writing on which this suit is brought, to wit: One promissory note, the execution of which is duly proven by the affidavit of Wm. H. Miller, on file in this cause.

"And now comes also the said defendant, by Don E. Detrich, attorney, and files herein his warrant of attorney, duly executed by the said defendant, authorizing him to appear in any court of record in behalf of said defendant and waive service of process, and confess judgment in favor of said plaintiff, and against said defendant, for the amount found to be due upon said certain promissory note annexed to said warrant of attorney, besides the costs of suit, the execution of said warrant of attorney being duly proved by the affidavit of Wm. H. Miller on file herein; and said defendant's attorney also files his cognovit, by which he waives service of process upon the said defendant and confesses the said action of the plaintiff, and that said plaintiff, by reason of the nonperformance of the promises in the plaintiff's declaration mentioned, has sustained damages in the sum of \$56.70, it being the amount due on said note, over and above his costs by him in this behalf expended; and the said defendant, by its said attorney, consents and agrees that judgment may be entered in this behalf in favor of the said plaintiff and against said defendant for the amount of damages aforesaid, to wit, for the sum of \$56.70, and for costs of suit; and release all errors in entering up this judgment, or in issuing execution thereon, and consents to the issuing of immediate execution on the same.

"By virtue whereof and in pursuance of the statute in such case, made and provided, it is

considered that said plaintiff have and recover of and from the said defendant the said sum of \$56.70, being the amount of damages so confessed as aforesaid, together with his costs and charges by him about this suit in this behalf expended and that he have execution therefor.

"Attest: W. Geo. Beever, Clerk."

Evidence was also introduced showing that executions were issued on these judgments and returned not satisfied. It appears from the evidence that Gerlach, prior to the institution of this suit, had received his discharge as a bankrupt. It further appears from the evidence that plaintiff Neville, who was a stockholder and a director of the company, held 2 shares of the company's stock and was elected treasurer of the company; that he was the father-in-law of Gerlach and was made a stockholder and director of the company so as to help supply a sufficient number of directors for the company, and that all of his acts, in connection with the company, were done at the suggestion of Gerlach. Mr. Neville was engaged in steamboating, and paid very little attention to the affairs of the corporation in question. However, we think that there is sufficient evidence to show that he knew that defendant Edwards' stock was attempted to be paid up by the financial services rendered to the company by Edwards, and, in fact, Neville made the motion, at a directors' meeting, to allow Edwards \$14,900 for his services as financial agent of the corporation. This resolution was passed by the board of directors. Mr. Neville had nothing to do with the books of the company and knew nothing about the company's affairs, except information given to him by Gerlach and information obtained by him at directors' meetings. Neville loaned the company money from time to time, and, at the time the company failed, it owed him for borrowed money the sum of \$5,065.74. Since the trial was had in the circuit court, Neville died, and the suit, as to him, has been revived in the name of John D. Gerlach, his administrator.

Jeffries & Corum, of St. Louis, for plaintiffs. Elliot, Chaplin, Blaney & Bedal, of St. Louis, for defendants.

WILLIAMS, C. (after stating the facts as above). We will first consider the appeal of the defendants below:

I. Appellants contend that the judgments introduced in evidence were insufficient in law to support the finding for plaintiffs. In this regard, it is contended that, in the petition, it is alleged that the plaintiffs' respective claims are based upon judgments "in the circuit court of Randolph county in the state of Illinois against said Chester Light, Water & Ice Company," etc., whereas the proof offered show only judgments entered by the clerk of said court in vacation and that, since no proof of statutory provisions of Illinois authorizing a procedure of this character was offered in evidence, no presumption

as to their validity can be allowed. Respondents attempt to meet this contention by saying: First, that the point was not raised below, and hence cannot be reviewed here; and, second, although it had been properly raised below, yet the judgments were of a court of general jurisdiction, and that it will be presumed that the court had jurisdiction to enter the judgment, unless it is affirmatively shown to the contrary.

[1] Was the point sufficiently raised below? One of the grounds of the motion for a new trial was the following: "Because the verdict and judgment is unsupported by any substantial evidence." We think this ground in the motion for a new trial raises the question as to the sufficiency of the evidence, which proposition, necessarily, embraces the point now urged by appellants.

[2] This brings us to the discussion of the question upon its merits, to wit: Was there a failure of proof which rendered the evidence insufficient to support the decree? The petition pleads the judgments as judgments of the circuit court. The proof shows judgments entered by the clerk of the court in vacation. Is the proof sufficient to establish the validity of the judgments offered in evidence? The only possible way that this proof could be established would be either, first, by presumption arising from the record offered, or second, by introducing in evidence the statutes of Illinois establishing the jurisdiction and authority to do that which it appears was done by the clerk in vacation. Since there was no attempt to make proof by introducing the statutes of Illinois, it leaves us to a determination of the sole question, to wit: Will it be presumed that the judgments introduced in evidence were regular and valid? We are of the opinion that the situation cannot be aided by presumption. This because the proceeding upon its face appears to be one unknown to the common law, and must therefore derive its validity from some statutory provision, and it also appears upon the face of the judgments that the judgments were not rendered by a court of general jurisdiction, but rather by one of the ministerial officers of the court, the clerk, in vacation.

Discussing the subject of the presumption to be indulged concerning judgments of a sister state, Black on Judgments (volume 2, par. 876) states the correct rule, here applicable, as follows:

"And it is further to be observed that if the court rendering the judgment was one of limited, inferior, or *statutory jurisdiction*, or if the proceedings were in *derogation of the common law*, jurisdiction will not be presumed but must be affirmatively shown by the face of the record or fully and distinctly pleaded and proved." (Italics ours.)

It would appear that the manner of pleading such judgments in this state is regulated by section 1836, R. S. 1900. The foregoing rule, stated in Black on Judgments, *supra*, was, by this court in banc, quoted with ap-

proval in the case of *State ex rel. v. Grimm*, 239 Mo. 340, loc. cit. 356, 148 S. W. 450, Ann. Cas. 1913B, 1188, and should therefore be considered as controlling here.

In discussing the matter of the presumptions attending judgments of a sister state, Division No. 1 of this court, in the case of *Norman v. Insurance Company*, 237 Mo. 576, loc. cit. 584, 141 S. W. 618, 620, said:

"Further, no matter whether the court of common pleas (of Philadelphia) is or is not a court of general jurisdiction, its jurisdiction in attachment and garnishment proceedings, they being special and statutory, is not supported by the presumptions which usually attend the acts of courts of general jurisdiction."

Applying said rule to the situation here, it necessarily follows that the evidence is insufficient to support the decree because of a failure to prove any statutory authority for the rendition of such judgments.

[3] Respondents, in support of their contention, rely upon the case of *Dodge v. Coffin*, 15 Kan. 277, which appears to be in point. It appears, however, that the court's ruling in that case was influenced, largely, by the fact that it took judicial notice of the statutory law of the state of Illinois. That is not the rule in this state. In Missouri, the statutory law of another state must be proven the same as any other fact in the case. *Gibson v. Railroad*, 225 Mo. 473, loc. cit. 483, 125 S. W. 453; *Norman v. Insurance Co.*, 237 Mo. 576, loc. cit. 582, 141 S. W. 618.

[4] II. It is contended that the court erred in failing to find that the services rendered the corporation by appellant Edwards were such services as could be given in payment of capital stock, and that they were reasonably worth the sum of \$14,900, the par value of the stock received by Edwards.

It appears that Edwards, the president of the company, and one of its active promoters, claims to have paid for his stock by services rendered the company as financial agent. His said services consisted in aiding the corporation to procure temporary loans, Edwards lending his credit to the company as indorser on the paper. It does not appear that Edwards had to pay any of these notes upon which he was indorser, but that the same were paid by money derived from the sale of bonds of the corporation. It further appears that the scheme of organization was that the company should be organized for \$35,000, and that the stockholders intended to build the company's plant, not from money paid upon the stock, but by bonding the company for an amount equal to the capital stock and then selling the bonds. In carrying out this plan it was perhaps necessary that the work be started before the bonds could find a suitable market, and to this end Edwards aided, as above stated, in temporarily financing the proposition until the money could be realized on the bonds. Edwards paid no other consideration for his stock, and it would appear that even the services which he

rendered were made necessary because of the fact that he had not paid anything on his stock. It appears that the plan was that the corporation should acquire its working capital from the proceeds of a liability (bonds) rather than from assets derived from stock subscriptions. And the said services of Edwards were expended in thus promoting and financing the company. If services of this kind can be given by an officer of a company, in payment of his stock subscription, then the whole purpose of the law requiring stock to be paid in "money or money's worth" can easily be defeated.

We think that the chancellor did not err in finding that, as against the claims of the general creditors, the services of Edwards, as financial agent, could not be given in payment of his stock. We have been unable to find a discussion of this exact point in any of the authorities, but it occurs to us that a bare statement of the matter is sufficient to justify the action of the learned trial court in the ruling made.

[5] III. Appellants cannot now avail themselves of the point that the court erred in overruling their motion to strike the third amended petition from the files on the ground that it constituted a departure; this because error, if any, occurring thereby, was waived by appellants filing answer to the merits and going to trial. *Castleman v. Castleman*, 184 Mo. 432, loc. cit. 440, 83 S. W. 757.

The same also may be said with reference to the point that the court erred in overruling appellants' motion requesting an election. *White v. Railroad*, 202 Mo. 539, loc. cit. 561, 562, 101 S. W. 14; *Hanson v. Neal*, 215 Mo. 258, loc. cit. 270, 271, 114 S. W. 1073.

[6] IV. Appellants contend that the court erred in striking out the several portions of their answer. Under the head of "Points and Authorities," in their brief, appellants, concerning this proposition, state as follows:

"The portions of defendants' answers stricken out by the court on the motion of the plaintiffs were material to the defense of these defendants, and error was therefore committed by the court in such action"—citing thereunder "31 Cyc. 639, and *Hoffman v. Wight*, 137 N. Y. 621 [33 N. E. 554]."

There were many portions of the answer stricken out by the court, and, with the aid only of the foregoing, it is difficult to ascertain what the point is, upon which appellants rely. The above statement under "Points and Authorities" is, in fact, nothing more than a mere assignment of error. Rule 15 of this court (169 S. W. ix) provides that:

"All briefs shall be printed and shall contain, separate and apart from the argument or discussion of authorities, a statement in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court."

In the recent case of *Harrison v. Cleino*, 256 Mo. 607, loc. cit. 608, 165 S. W. 987, in discussing this rule, *Woodson, P. J.*, said:

"Clearly the meaning of the rule is, that the statement of the points shall be clearly and fully stated, in order that the court may comprehend therefrom the facts upon which the legal proposition presented for determination are predicated."

For the foregoing reasons, therefore, we will not attempt a discussion of this assignment of error.

[7] V. We will now consider the appeal of the plaintiff John D. Gerlach, administrator of the estate of Harvey Neville, deceased. The points involved in this appeal do not differ, materially, from those discussed in the foregoing appeal, except in one important particular. The trial court found against the claim of plaintiff Neville on the theory that since Neville had participated in the organization scheme whereby the financial services of Edwards were agreed and allowed to be given in payment of his stock, he could not now be heard to question that the stock was fully paid. The trial court based its ruling upon the authority of *Meyer v. Mining & Milling Company*, 192 Mo. 162, loc. cit. 191 et seq, 90 S. W. 821.

Appellants contend that the court erred in so holding, and that the decree should have been in favor of plaintiff Neville's claim in accordance with the rule of law announced in *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891, which rule of law was pleaded by plaintiff in the reply. Respondents contend that the case of *Gillett v. Chicago Title & Trust Co.*, supra, is not in point. In the *Meyer Case*, supra, it was held that:

"A party to the transaction whereby property was turned over to the company as payment in full for the stock issued, cannot be heard to say that the stock is not full paid stock, even though he has loaned money to the company, and cannot hold his fellow stockholders as for unpaid subscriptions on their stock, to satisfy a judgment in his favor for money actually loaned to the corporation." 192 Mo. loc. cit. 192, 90 S. W. 828.

In that case, the case of *Sprague v. Bank*, 172 Ill. loc. cit. 168, 169, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17, was relied upon by the losing party as controlling. In the *Sprague Case*, it was held that the stockholders' liability upon unpaid stock "is not dependent, in any degree, upon the knowledge possessed by the creditor that such subscription was or was not paid in full. If unpaid to the corporation it must be paid to the creditor." *Sprague v. Bank*, 172 Ill. loc. cit. 168, 169, 50 N. E. 26, 42 L. R. A. 606, 64 Am. St. Rep. 17. In the *Meyer Case*, after stating that the facts of that case were unlike those in the *Sprague Case*, in that the creditor in the *Meyer Case* was one of the original parties agreeing to the method by which the stock should be paid while the creditor in the *Sprague Case* did not stand in such a position, reached the conclusion that the *Sprague Case* should not be considered as controlling, and used the following language:

"If the facts in judgment in the *Sprague Case* were like the facts in judgment here, this court might feel bound to enforce the interpretation

placed upon the Illinois statutes by the court of last resort of that state, but the decision in the *Sprague Case* imposes no such obligation on this court; and as such a result as is here is directly contrary to the rules that obtain in this state, this court will adhere to the rule heretofore announced by it in cases like this, until a similar case has been brought before the Supreme Court of Illinois, and that court has otherwise declared the law in that state upon similar facts." 192 Mo. loc. cit. 194, 90 S. W. 829.

The basic facts involved in the case at bar are the same, in effect, as those held in judgment in the *Meyer Case*, and, under the above ruling, the *Meyer Case* should be followed in the case at bar, unless it appears that the Supreme Court of Illinois has held otherwise on similar facts.

Appellants contend that the above-mentioned case of *Gillett v. Chicago Title & Trust Co.* is such a case, and that, since the facts involved in the *Gillett Case* are similar, in effect, to those held in judgment in the *Meyer Case*, the *Gillett Case* should control. If the principal facts underlying the *Gillett Case* were the same as those discussed in the *Meyer Case*, the position of appellants would be sound. But, after a careful consideration of the *Gillett Case*, we are unable to discover that the facts discussed were similar. The discussion of this point in the *Gillett Case* appears to be confined merely to the effect that the creditor's knowledge of the unpaid stock has upon his rights to recover against the stockholder. *Gillett v. Chicago Title & Trust Co.*, supra, 230 Ill. loc. cit. 414, 415, 82 N. E. 891. The opinion in no manner undertakes to discuss the legal proposition passed upon in the *Meyer Case* and now presented in the case at bar. In the *Gillett Case*, it does not appear that either of the original incorporators who agreed that the capital stock should be paid up by certain prospective patents, etc., were creditors, as is the case of creditor Neville in the case at bar.

It therefore follows that the trial court was correct in following the *Meyer Case* and in finding against plaintiff Neville.

VI. By reason of the conclusions reached in the foregoing discussion concerning the respective appeals, it follows that that portion of the judgment disallowing the claim of plaintiff Neville should be affirmed, and that the portion of the judgment finding in favor of the claims of the remaining plaintiffs and against the defendants should be reversed, and the cause remanded. It is so ordered.

ROY, C., concurs.

PER CURIAM. The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court.

FARIS, P. J., and WALKER, J., concur. REVELLE, J., not sitting.

On Motion to Modify.

PER CURIAM. [8] Herman Schroeder et al., respondents in the above-entitled cause,

have duly filed a motion to modify the foregoing opinion, so the retrial of the cause, when remanded, shall be confined to the single issue as to whether or not there was statutory authority in Illinois authorizing the entry and rendition by the clerk of the circuit court, in vacation, of the various judgments relied upon by the respective plaintiffs (respondents herein), as a basis of their respective claims.

It appears that all other issues in the cause were properly tried and determined before, and that the motion to modify should be sustained. *McLure v. Bank of Commerce*, 252 Mo. 510, loc. cit. 524, 160 S. W. 1005.

It is therefore ordered that the foregoing opinion be modified so that instead of remanding the cause generally for a new trial, the cause be remanded, with directions that the new trial shall be confined to the single issue as to whether or not there was statutory authority in Illinois authorizing the clerk of said circuit court to enter or render the respective judgments upon which said respondents base their respective claims. Either party may, if they so desire, so amend the pleadings as to more clearly draw the issue upon this question.

After a determination of this single issue, the circuit court will thereupon enter its judgment or decree, in accordance with the facts heretofore found and the facts then found upon this issue.

STATE ex rel. POWERS v. RASSIEUR,
Judge, et al. (No. 19000.)

(Supreme Court of Missouri. Feb. 9, 1916. Rehearing Denied March 30, 1916.)

1. PROHIBITION — 219 — NECESSARY PARTIES.

The judge of the tribunal whose action is sought to be prevented is ordinarily the only necessary party defendant in an action in prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 68; Dec. Dig. — 219.]

2. PROHIBITION — 226 — RETURN BY ONE PARTY — ADOPTION BY OTHERS.

In a prohibition suit, a private party, joined with the judge, against whom the writ is sought, on account of his relation to the controversy, is not required to make a return upon which issue is joined. He may adopt the return of the court, but cannot be required to do so.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 75; Dec. Dig. — 226.]

3. COURTS — 209(2) — SUPREME COURT — PROHIBITION — ISSUES OF LAW.

Issues of law are raised in the Supreme Court, in an original proceeding in prohibition, either by a demurrer of respondent to the petition, or by a motion to quash the writ, which ordinarily goes to the sufficiency of the petition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 765; Dec. Dig. — 209(2).]

4. PROHIBITION — 224, 25 — DEMURRER AND MOTION TO QUASH.

In a prohibition suit, a demurrer to the petition and a motion to quash the writ are at-

tacks upon the petition, admitting all facts well pleaded therein.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 73, 74; Dec. Dig. — 24, 25.]

5. COURTS — 209(2) — SUPREME COURT — PROHIBITION — MOOT QUESTION.

In an action for prohibition in the Supreme Court, where the petition prayed for relief on the ground that a judge was attempting to put his judgment in force pending motion for new trial, which the judge denied specifically, but no evidence pro or con was offered, and no facts agreed upon, the question whether, if the judge were doing the matters charged, he was right in law, was moot, and the record would support no judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 765; Dec. Dig. — 209(2).]

6. PROHIBITION — 224 — FILING RETURNS AFTER MOTION TO QUASH PRELIMINARY WRIT — EFFECT.

In an action for prohibition, where, after moving to quash the preliminary writ, respondent judge and the other respondent filed returns raising issues solely of fact, denying what they had admitted before by the motion to quash, the motion to quash was withdrawn, waived, or abandoned.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 73; Dec. Dig. — 24.]

Graves, Blair, and Revelle, JJ., dissenting.

In Banc. Petition for prohibition by the State, at the relation of Anthony W. Powers, against Leo S. Rassieur, Judge of the Circuit Court, City of St. Louis, and Charles H. Turpin. Petition dismissed.

This is an original proceeding in this court, whereby it is sought to prohibit respondent Rassieur from taking further steps to enforce a judgment rendered by him in a proceeding to contest an election, wherein respondent Turpin herein was contestant and relator was contestee, pending a motion for a new trial in such proceeding. The petition for our writ is lengthy, and we need not take up space in setting out the whole of it. In substance it recites that respondent Leo S. Rassieur was one of the judges of the circuit court of the city of St. Louis, presiding over division 4 thereof; that a proceeding was brought therein by respondent Charles H. Turpin as contestant against A. W. Powers, relator herein, as contestee, to determine the right of said contestant, as against said contestee, to the office of constable of the Fourth constabulary district of the city of St. Louis; that said contest proceeding was duly submitted to respondent Rassieur on July 17, 1915, and after having heard all the evidence therein respondent Rassieur did on the 4th of August enter judgment in favor of contestant, against relator, ousting him; that on the 5th day of August, 1915, relator filed a motion for a new trial of said cause, but that pending said motion for a new trial, and prior to any ruling thereon, respondent Leo S. Rassieur caused to be served upon relator a copy of said judgment, and caused demand to be made on said re-

lator that he immediately vacate the office of constable of the Fourth district aforesaid, and turn over all books, papers, and records pertaining to the office of constable aforesaid to respondent Turpin; and that respondent Rassieur has threatened and was at the time threatening to cause relator to be forcibly removed from the office of constable of the said Fourth district and was threatening and intending to make, and was about to make, other and further orders, and to issue attachments and process designed to further interfere with and molest relator in his possession of the books, records, papers, property, and effects pertaining to the said office of constable, and that all of said acts and conduct and orders of respondent Rassieur were each and every one premature and illegal, and without lawful warrant and authority, for that no final judgment had been rendered in said election contest, and the rights of the parties therein had not been finally determined in the court of original jurisdiction.

This is in substance the allegations of the petition for our writ of prohibition, in so far as said allegations refer to Judge Rassieur's acts in the premises. The contestant in the election proceeding before Judge Rassieur, one Charles H. Turpin, was also made a respondent in the instant action. Other allegations are made in the petition for our writ, setting out his alleged officious intermeddling with the office of constable aforesaid, and with the papers, books, and files pertaining to said office; but since they but follow in sequence and substance the allegations made as to the alleged acts of respondent Rassieur (except in Turpin's attitude touching a certain motion to quash, hereinafter referred to), we do not think we need cumber the books with them. The prayer of relator's petition for our writ will be found set out in our discussion of the case.

We may say, in passing, that our preliminary writ herein was issued without notice; allegations meet for such action having been made in relator's petition for the writ. This action is smartly attacked as an infringement of our own rule No. 34 (169 S. W. xii). Since this rule goes to our discretion, and was designed largely for our convenience in the issuance of original writs, and since this rule contains a saving clause, properly met in our opinion by the allegations of the petition when the writ was applied for, and issued, it is a little difficult to see how the fact of issuance without notice could ever be a valid ground of quashal, short of downright fraud upon the court, we may as well, with this explanation, let this phase of the case drop out of view. For reasons which will appear in our opinion we need not set forth any further facts in our statement, as all points necessary to an understanding of the conclu-

sions we reach will be found set out in our discussion of the case.

Thomas A. Dwyer, Ernest A. Green, and Holland, Rutledge & Lashly, all of St. Louis, for relator. George B. Webster, of St. Louis, for respondents.

FARIS, J. (after stating the facts as above). I. There are before us, composing the whole of the pleadings in this case: (a) The petition of relator, praying that our preliminary rule issue; (b) our preliminary rule, which follows the prayer of the petition as to the acts temporarily prohibited by us; (c) a "motion to recall and quash the preliminary rule," which motion was filed by respondents on the 8th day of September, 1915; and (d) the separate returns of respondents herein, filed by them on the 4th and 11th days of October, 1915, respectively. That is all. Respondent Turpin avers in his return that he "saves to himself the benefit of his motion heretofore filed herein to recall and quash the preliminary rule." Respondent Rassieur makes his separate return long subsequent to joining in the said motion to recall and quash, and without in any wise referring to that motion. Turpin, though averring that he has not by his return waived any grounds of quashal urged in the said motion theretofore filed, does not in his return set forth or even refer to any matters meet for quashal, as (and which were) alleged in the motion to quash. The return of Turpin, after admitting conventional matters as alleged by relator, down to the rendition of the judgment, denies that respondent Rassieur did any act whatever toward enforcing the judgment rendered in the case pending the motion for a new trial therein, but avers the fact to be that respondent Rassieur immediately left the state upon his vacation, without taking any further steps or doing any further acts in the case, and that he did not return till some time in September, 1915. Turpin denies that he himself did any act or meddled officiously in the premises.

[1, 2] Parenthetically, we may say that we are pretty clear that Turpin's acts done in the premises, and when disconnected from those of Rassieur, could not confer jurisdiction in us to prohibit Turpin. For, while we are not called on to rule upon the question whether Turpin is a necessary party in an original proceeding by prohibition, it would seem he is not. This for the reason that the writ runs from a court of superior to a court of inferior jurisdiction solely to prevent the inferior court from assuming a jurisdiction it has not, or from exceeding a jurisdiction it has. In short, to curb acts of an inferior court which, being in excess of jurisdiction, are ipso facto void. The right of Turpin to be a necessary party must be bottomed upon some such assumption that his vested rights are being affected by the action and that for

this he is entitled to be present when such rights are dealt with. Could Turpin, or any other private and unofficial litigant in an action which is halted by our writ of prohibition, for that such action is being maintained in a manner which makes it void, or by a court which has no authority over it, have any rights or interests in such said action which we would be bound to respect in law? We think not, and the better view seems to be that the judge or the tribunal alone whose action is sought to be halted and annulled is ordinarily the only necessary party defendant in an action in prohibition. 32 Cyc. 625; Connecticut, etc., Railroad Co. v. Franklin Co. Com'rs, 127 Mass. 50, 34 Am. Rep. 338; St. Louis, K. & S. Ry. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341. That the party litigant whose action it is sought to halt is a permissible party, no one, of course, doubts. But we say so much for the purpose of making clear that Turpin cannot dominate the pleadings; that his position taken in his return is to be disregarded if it conflict with that of the judge whose acts are sought to be prohibited. The rule as to Turpin, and mere private parties standing in like attitude as he, in a prohibition suit, is that ordinarily they are not even required to make a return upon which issue is joined; they may adopt the return of the court, but may not be required to do so. 32 Cyc. 629; Dayton v. Paine, 13 Minn. 493 (Gil. 454).

Respondent Rassieur in his return makes no manner of reference to the theretofore filed and pending motion to recall and quash our preliminary writ. He avers in his return, which he verifies, that he, as judge of the circuit court, rendered judgment in manner and form as averred by relator, and that said judgment is the usual statutory judgment in an election contest case, but that he left the state immediately thereafter and took no further action in the case whatever; that he did not return to the state till September 9th, and he specifically denies the allegations that he took such further or any further action as pleaded by the relator. When the preliminary rule was granted, relator filed affidavits showing divers acts on the part of respondent Turpin, tending to show that he was officiously intermeddling, but none whatever touching any act on the part of respondent Rassieur, showing any proceedings by him contradicting the facts said Rassieur sets up in his return. Lodged with our clerk here are certain affidavits which support the version of the facts as averred in said Rassieur's return.

Specifically the legal object sought to be attained by relator is to be gathered from the prayer of his petition, which petition in its averments justifies no other or further relief than that he prays for. This prayer reads thus:

"Wherefore your relator, employing the aid of this honorable court, prays to be relieved, and

that he may have the state's writ of prohibition, directed to said Leo S. Rassieur, judge of the circuit court, city of St. Louis, and to the said Charles H. Turpin, to prohibit him and them from in any manner interfering with relator's possession and occupancy of the office of constable of the Fourth district of the city of St. Louis, pending action upon the motion for new trial heretofore filed by relator, and pending the disposition of this case on appeal, and further prohibiting the said respondents from attempting in any wise to secure possession from relator of the office of constable of the Fourth district within and for the city of St. Louis until final action has been taken by this honorable court in said election contest."

[3-5] Upon this state of the record what issues are before us? It is plain that no issue of law is raised. Such issues are raised here in an original proceeding in prohibition, either by a demurrer of respondent to the petition (State ex rel. v. Sheppard, 192 Mo. 497, 91 S. W. 477), or by a motion to quash the writ, which latter motion ordinarily goes also to the goodness of the petition. Both a demurrer to the petition and a motion to quash the writ are attacks upon the petition, and admit all of the facts therein which are well pleaded. If the return is insufficient, and states no facts which as matters of law preclude the relief prayed for in the petition, a demurrer to the return (Vitt v. Owens, 42 Mo. 512), or a demurrer to the writ, it seems (State ex rel. v. Lubke, 29 Mo. App. loc. cit. 558), or a motion to quash the return (State ex rel. v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; 32 Cyc. 929), or a motion for judgment on the pleading (State ex rel. American, etc., Co. v. Shields, 237 Mo. 329, 141 S. W. 585), or even a motion for the writ (In re Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232), have been held to raise an issue of law upon the sufficiency as a matter of law of the facts set out in the return. State ex rel. v. Elkins, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; Wand v. Ryan, 168 Mo. 646, 65 S. W. 1025. But here the sole relief asked for, and the sole ground on which the prayer for relief is bottomed, is that Judge Rassieur was attempting to put his judgment in force pending a motion for a new trial. Judge Rassieur denies this specifically. No evidence pro or con is offered; no agreed facts are before us. We do not know and cannot find out from this record whether Judge Rassieur was or was not doing the acts complained of. So the matter of whether, if Judge Rassieur *were doing* the things he is charged with doing, *he would have a right or not in law to do them*, becomes a bald moot question. We can render no judgment on such a record.

II. It will be seen that the sole matter complained of in the petition for prohibition is the alleged acts of Judge Rassieur in attempting to enforce the judgment he had rendered in the election contest proceeding, pending a motion for a new trial. The rightfulness of Judge Rassieur's action in this be-

half is properly raised by the motion of respondent to recall and quash our preliminary writ, and the motion to quash admits the fact that he was doing all the petition charged him with doing. But for the fact that respondents pleaded over, by subsequently filing returns in which they raised issues solely of fact, and denied what they had before by their motion to quash in legal effect admitted, we could have determined this, the only tangible issue of law ever raised in the case, to wit, that of the applicability vel non to the facts here of section 4 of the act of March 31, 1899, entitled "An act to provide for the contest of election of judge of the circuit court." Laws of Mo. 1899, p. 202. This section has been carried forward into the revision of 1909, and now appears as section 5960 of the Revised Statutes of 1909. Authority to so carry forward said section 4 and the three other sections of the above-entitled act was conferred upon the committee on revision by virtue of section 8086, R. S. 1909, and other sections preceding and following the section last above.

[6] Dealing with a somewhat analogous situation as to pleadings in the case of *State ex rel. v. Bright*, 224 Mo. loc. cit. 523, 123 S. W. 1059, 135 Am. St. Rep. 552, 20 Ann. Cas. 955, which was an original proceeding in prohibition, we said:

"A return is in the nature of an answer, and a demurrer and answer cannot both stand at the same time, where they both cover the entire case. The rule is well stated in 6 Ency. Pl. & Prac. 382, thus: 'A party may demur to one part of a declaration, petition, or complaint, and plead or answer to another; but he cannot demur and plead or answer at the same time to the same part of the pleading. There cannot be an issue of law and of fact to the same pleading, or part of a pleading, at the same time. Thus, there cannot be a general demurrer and a plea or answer to the whole declaration or complaint at the same time, nor to the same count, or paragraph, except where the matters therein stated are divisible in their nature, and a part of the count or paragraph is good and a part bad; where this is the case, defendant may plead to the former and demur to the latter.' The author has collated the authorities from the different states, and we will not repeat the citation here. It is a rule too well established to need citation of authority that if a party demurs, and then afterward answers, he is deemed to have withdrawn, waived, or abandoned his demurrer. By analogy, the converse should be true; that is, if a party has answered, and afterward demurs, he should be deemed as having withdrawn, waived, or abandoned his answer."

In the last analysis the case is here at issue upon a controverted question of fact, with no evidence upon which to resolve such question. In a somewhat similar situation the Supreme Court of California dismissed the petition in a proceeding therein by prohibition. *Carliaga v. Dryden*, 80 Cal. 244. It is difficult to find fault with their action.

Let the petition herein be dismissed. All concur, except GRAVES, BLAIR, and REVELLE, JJ., who dissent.

WICHITA FILM & SUPPLY CO. v. YALE et al. (No. 1550.)

(Springfield Court of Appeals. Missouri.
March 11, 1916. Rehearing Denied
April 3, 1916.)

CORPORATIONS. ~~642~~(1)—FOREIGN CORPORATIONS—"DOING BUSINESS" IN THE STATE.

A foreign corporation which had not complied with Rev. St. 1909, §§ 3037-3041, relating to doing business within the state, entered into a contract with residents to supply performers for a Chautauqua course, which was to be carried on a week. The corporation advertised that the Chautauqua was a permanent affair, and that it would be continued in the following year, and its agent sold tickets and collected the proceeds for admissions to the Chautauqua. *Held*, that the corporation was doing business within the state, the expression "doing business" being equivalent to conducting or managing business, and so could not sue on contracts made in connection with such Chautauqua course, not having complied with the statutes (citing Words and Phrases).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521; Dec. Dig. ~~642~~(1).]

Appeal from Circuit Court, Jasper County, Frank L. Forlow, Special Judge.

Action by the Wichita Film & Supply Company against F. L. Yale and others. From a judgment for plaintiff, defendants appeal. Reversed.

Haywood Scott, of Joplin, and F. M. Cummings, of Kansas City, for appellants. C. H. Montgomery, of Joplin, and William Keith, of Wichita, Kan., for respondent.

FARRINGTON, J. The plaintiff, a Kansas corporation organized for pecuniary profit, brought suit against 15 individual citizens of Joplin, Mo., and recovered a judgment for the sum of \$1,417, from which the defendants appeal.

A number of grounds are raised by the appellants in their brief which they urge as reversible error. The record before us is voluminous, covering the various phases presented to the trial court. However, as we find one of the contentions of the appellants obviously well taken, which clearly disposes of the case, we will set forth only such of the facts as will indicate the ruling of this court.

The undisputed facts go to show that the plaintiff is a Kansas corporation organized for pecuniary profit; that its business, according to its charter, is to purchase and deliver films, moving picture machines, supplies, etc., for theaters of various kinds, and to manage and control theaters, and to do a general moving picture and theater business; that, acting under its charter, in furtherance of its business, it engaged in the business of furnishing, establishing, and conducting public entertainments commonly called "Chautauquas"; that on the 12th day of November, 1912, its authorized agent came to Joplin, Mo., and promoted a Chautauqua to be

held the following summer; that plaintiff through this agent, who the evidence clearly shows was authorized to act for plaintiff, entered into a contract with the defendants wherein the plaintiff agreed to "establish and conduct a Chautauqua in or near the town of Joplin, state of Missouri, during the season of 1913," and undertook "to furnish said Chautauqua complete with all talent for the program, all local and general advertising material, and a large auditorium tent with seats and equipment," and assume all financial responsibility of said assembly. It agreed that the Chautauqua would extend over a period of not less than seven days, with at least two sessions a day, afternoon and evening. In consideration that the plaintiff establish and conduct the said Chautauqua the defendants agreed to accept 650 season tickets to said Chautauqua and to pay for said season tickets before the opening of the Chautauqua at the rate of \$2 per ticket by placing the sum of \$1,300 to the credit of the plaintiff in a Joplin bank prior to the opening day of the Chautauqua, with the understanding that said bank would pay over said \$1,300 to plaintiff as follows: \$700 on the opening day, and \$100 on each succeeding day thereof. It was further agreed that the defendants would share 50 per cent. of the proceeds from the sale of any season tickets up to noon on the opening day over and above the 650 heretofore mentioned. The gate receipts were to go to the plaintiff. The evidence further shows that misunderstandings arose between plaintiff and the defendants shortly before the Chautauqua was to be held, but probably after the talent had been engaged by the plaintiff. The sale of season tickets by defendants brought in but \$525. A day or so before the Chautauqua was to open the plaintiff sent its representative to Joplin to be there and to receive the first installment of \$700, when there occurred a complete break between plaintiff and defendants, and at a meeting the representative of the plaintiff was offered the sum of \$525 as a full release to the defendants of any obligation owing from them to plaintiff under the terms of the contract. This was declined, and the plaintiff went ahead and conducted the Chautauqua. There is much space consumed in the record concerning the ability of the talent furnished, the plaintiff attempting to show that it was up to the average ordinarily furnished at Chautauquas, and the defendants by their witnesses contending that the performances were little, if any, above that ordinarily seen at five cent vaudeville theaters. The plaintiff's petition was based on the contract, alleging full performance and praying judgment against the defendants for the full sum of \$1,300, together with interest.

The answer, among other things, states that plaintiff was, at all times mentioned in the petition, a corporation organized under

the general statutes of Kansas; that on the 8th day of August, 1913, it commenced doing business in Joplin in this state by way of selling admission tickets and season tickets to the general public and putting on a show, and continued to do so, claiming to be carrying out the terms of the agreement mentioned in the petition; that it went from Joplin to Pierce City in this state and engaged in the same line of business; and that neither prior to the signing of the contract nor before filing this suit, nor since, has the plaintiff complied with sections 3037 to 3041, inclusive, of the Revised Statutes of Missouri, 1909, relating to the requirements of foreign corporations doing business in Missouri, and avers that the plaintiff had failed to perform the requirements prescribed in said sections, and was not authorized as a corporation to do business in this state, and prayed that the defendants be discharged.

The plaintiff in its reply admitted that it had not maintained a public office in Missouri, that it had not complied with the sections of the statutes pleaded in the answer, and alleges that it neither carried on, nor proposed to carry on, or conduct, any business in the state of Missouri of a permanent nature, such as is contemplated by the above-mentioned sections of the statutes; that the performers and lecturers, who merely gave temporary entertainment not to exceed a week in duration in any one place, were brought into the state of Missouri by the plaintiff for the purpose of conducting the Chautauquas. The evidence discloses that the plaintiff made arrangements with the various performers and lecturers to come into Missouri from other states; that it erected a tent on a vacant lot in the city of Joplin, employed a ticket seller, and managed and conducted the Chautauqua for a week; and that several hundred people attended and purchased tickets from plaintiff's ticket seller. Evidence introduced by the plaintiff disclosed that it intended to make the giving of Chautauquas in Joplin, Mo., a permanent business. This is shown by an advertisement placed in one of the daily newspapers at Joplin by the plaintiff and introduced in evidence by the plaintiff, a part of which is as follows:

"A Permanent Affair.

"The Wichita Bureau is a permanently organized company which will not go out of business with the passing of the present season. It expects to have dealings with this community again. Another season will find its advertisements in the columns of this newspaper telling the readers of other coming events in which they will be interested. The Chautauqua soon to be given is being planned with this in mind. It will establish a relationship with the people of Joplin that will mean more than the mere giving of one week of entertainment. The idea of permanency is uppermost. The cost of preparing for the 1913 Chautauqua would be prohibitive were it not for the reasonable assurance that this community will ask for another entertainment similar in nature next summer."

That the plaintiff intended to go into the permanent business of giving Chautauquas in Joplin yearly is also disclosed by the undisputed testimony of some five or six witnesses introduced by the defendants.

The question, therefore—decisive of this case—is whether the plaintiff was, as a foreign corporation, engaged in doing an intrastate business for pecuniary profit in the state of Missouri in violation of the Statutes referred to, and is therefore prohibited from maintaining a suit for recovery on this contract. Our answer to this question is in the affirmative, and that the contract entered into and here relied on by plaintiff evidenced an intention on its part to carry on an intrastate business in Missouri, and does not evidence that what plaintiff did was an isolated transaction. "To conduct" is synonymous with "to manage," "to direct," "to carry on," "to do business," as will be found on consulting the leading lexicographers, and Words and Phrases. By the terms of the contract, therefore, plaintiff was to do such business as is incident to carrying on a Chautauqua "in or near the town of Joplin, state of Missouri." By its own evidence, the plaintiff was engaged in establishing and conducting Chautauquas; that was its business, done for the purpose of making a profit. Seymour D. Thompson in his chapter on Foreign Corporations, 19 Cyc. at page 1280, in discussing this question, says:

"* * * Under a sound interpretation of such statutes, the doing of business consists only of carrying on the operations of its trade for the making of profit."

In the case of John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. loc. cit. 864, 2 Ann. Cas. 304, the court, in dealing with the question under consideration, used this language:

"Although the record in each case discloses but one transaction of the corporation, that transaction was not merely incidental or casual. It was a part of the very business to perform which the corporation existed. It did distinctly indicate a purpose on the part of the corporation to engage in business within the state, and to make Kansas a part of its field of operation, where a substantial part of its ordinary traffic was to be carried on. Therefore, although a single act, it constituted a doing of business in the state within the meaning of the statute, while several acts of a different nature might not have had that effect."

In the case of St. Louis Expanded Metal Fireproofing Co. v. Belharz (Tex. Civ. App.) 88 S. W. 512, it is held that a contractor in St. Louis, who agreed not only to furnish the material, but to construct a building in Texas, furnishing the necessary material and labor, was engaged in intrastate business in Texas.

It was held in the case of Butler Bros. Shoe Co. v. United States Rubber Company, 156 Fed. loc. cit. 17, 84 C. C. A. 167, that "interstate commerce," is not necessarily the sale of goods, and that it includes negotiations or contracts and dealings between citizens of different states which contemplate

and cause importation whether it be of goods, persons, or information.

It was held in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, that "commerce" includes more than "traffic"—"it is intercourse."

In the case before us, had the plaintiff merely made arrangements as a Kansas corporation to import the lecturers and performers to Joplin for the use of the defendants, there would be some basis for the plaintiff's contention that its contract and conduct amounted to nothing more than interstate commerce, and therefore not subject to the Missouri corporation laws. But here we have a foreign corporation, not only importing the talent, but coming with its servants and agents and a tent in which its paid performers were to entertain. The selling of tickets to the general public, in other words, exchanging the fruits of its labor in organizing a Chautauqua for the money of citizens of Joplin, was a Missouri transaction. So far as those were concerned who bought tickets at the door, that transaction or that doing of business was certainly in the state of Missouri, and those transactions were not isolated, nor were they merely incidental to the general scheme, but were a carrying out of the purpose for which the plaintiff came into Missouri. The plaintiff here is in an attitude similar to that of the plaintiff in the case of *Orr's Adm'r v. Orr*, 157 Ky. 570, 168 S. W. 757, where it is shown that the foreign corporation shipped its goods from Minnesota to Tennessee, and from the last-mentioned state made distribution through an agent, and it was held that the interstate feature of the transaction ended upon the delivery of the goods to the agent in Tennessee, and that from that time on the handling of the goods was doing business in Tennessee. This point was the distinguishing feature between that case and our case of *J. R. Watkins Medical Co. v. Holloway*, 182 Mo. App. 140, 168 S. W. 290. The contract in the case under consideration was made in Missouri, and was to be wholly and fully performed in this state by both parties.

It was said in the case of *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. loc. cit. 422, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, that the purpose of our statutes is to place foreign corporations on an equality with domestic corporations, and to impose the same burdens upon them that domestic corporations have to bear. To entitle a domestic corporation to do the business the plaintiff was doing, it must have become incorporated and paid the state an incorporation tax, and to be placed on the same footing, when engaged in the same business, a foreign corporation must do the same. Domestic corporations have an office and officers upon whom services of process may be had in case they breach their contracts in

doing business in Missouri, and so is the requirement as to foreign corporations. And it is said in that case that it was to prevent the happening of such contingencies that the statutes in question were principally enacted.

It is held in the case of *Parke, Davis & Co. v. Mullett*, 245 Mo. loc. cit. 176, 149 S. W. 461, that the regulation of foreign corporations is for the purpose of subjecting them to inspection, so that their condition might be known; further, that there be a protection to the public in subjecting foreign corporations doing business in this state to the jurisdiction of the courts of the state, and that the providing of revenue is merely incidental.

The entering into contracts such as the one under consideration is an unlawful act, and the contract is void. See *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, which involved a contract to furnish theatrical exhibitions; *Amalgamated Zinc & Lead Co. v. Bay State Zinc Mining Co.*, 221 Mo. loc. cit. 14, 120 S. W. 31, 23 L. R. A. (N. S.) 492; *Parke, Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461; *Interstate Amusement Co. v. Albert*, 128 Tenn. 417, 161 S. W. 488.

The contract and the evidence clearly indicate that the plaintiff was engaged at Joplin and at Pierce City, Mo., in the business of establishing and conducting a local enterprise, wherein it dealt with the public at large in charging and taking money for the privilege of viewing and hearing its entertainment furnished by its paid performers. The evidence discloses that the transaction was not isolated, temporary, or incidental, in connection with the plaintiff's business, but was a carrying on and a furtherance of its business of giving Chautauquas for profit, and the witnesses for the defendants corroborate plaintiff's paid advertisement that it had come to Joplin to stay.

The cases cited by plaintiff holding that the right of a foreign corporation to sue for its property located in a state in which it has not met the local requirements are inapplicable here because the suit is for damages for breach of contract, and seeks to recover on the void contract entered into. There is no claim in the petition that the defendants have any of the property or money the title to which is in the plaintiff.

The motion of the plaintiff, asking to have this case transferred to the Supreme Court on the ground that a constitutional question is involved, is denied, as the validity of the act pleaded in defendants' answer is in no way questioned by either side. As was said in the case of *Hilgert v. Barber Asphalt Pav. Co.*, 173 Mo. loc. cit. 326, 72 S. W. 1072, "Its construction was alone involved." The sections of the statutes involved in the deter-

mination of this case have been held constitutional by the Supreme Court in the case of *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086; and the Supreme Court, in the case of *State v. Campbell*, 214 Mo. 362, 113 S. W. 1081, refused to entertain jurisdiction where a statute was attacked as unconstitutional when it had previously adjudicated the question.

It necessarily follows from what has been said that the judgment must be reversed; and it is so ordered.

ROBERTSON, P. J., and STURGIS, J., concur.

BROWN v. CONNECTICUT FIRE INS. CO. OF HARTFORD, CONN. (No. 14091.)

(St. Louis Court of Appeals. Missouri. March 7, 1916. Rehearing Denied March 28, 1916.)

1. COURTS \Leftarrow 114 — AMENDMENT NUNC PRO TUNC.

Where the court, more than four years after setting aside a verdict, amended its record nunc pro tunc, utilizing as a basis of such order a memorandum filed by the judge at the time of setting aside the verdict, the order was invalid, as an entry nunc pro tunc may be made only upon evidence furnished by the papers and files in the case, and a mere memorandum filed by the court, as distinguished from the findings of fact and conclusions of law requested under the statute, is not recognized by the law as a proper basis upon which to predicate such entry.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 368; Dec. Dig. \Leftarrow 114.]

2. INSURANCE \Leftarrow 493 — AMOUNT OF DAMAGE TO PROPERTY.

In an action on a policy of a fire insurance the question of total or partial loss is to be ascertained by reference to the present condition of the building, and whether it has lost its identity and specific character as a building rather than the use to which it might be put after being repaired.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1266-1268; Dec. Dig. \Leftarrow 493.]

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

"Not to be officially published."

Suit by Rachel Brown against the Connecticut Fire Insurance Company of Hartford, Conn. From an order setting aside judgment for plaintiff and granting a new trial, plaintiff appeals. Reversed and remanded.

A. E. L. Gardner and R. H. Stevens, both of Clayton, and Chas. E. Morrow and Geo. E. Booth, both of St. Louis, for appellant. Bernard Greensfelder, of St. Louis, and Bates, Harding, Edgerton & Bates, of Chicago, Ill., for respondent.

NORTONI, J. This is a suit on a policy of fire insurance. Plaintiff prevailed at the trial but the court set the verdict aside on defendant's motion. It is from this order, setting the verdict aside and granting a new trial to defendant, that plaintiff prosecutes the appeal.

[1] By the provisions of the policy defendant insured plaintiff's residence to an amount not exceeding \$2,500 against loss by fire. There was \$2,000 other insurance on the property or a total of \$4,500 in all. The jury awarded plaintiff a recovery for the full amount of the policy, together with interest, in the view that the building insured was totally destroyed by fire. The court set this verdict aside by an order duly entered of record December 23, 1912. Subsequent to the adjournment of the term, indeed after several other terms of the court had intervened, and more than three years subsequent to the order setting aside the verdict, the court amended its record nunc pro tunc through utilizing a memorandum filed by the judge at the time of setting the verdict aside as a basis for such nunc pro tunc order. Such entries nunc pro tunc in this jurisdiction may be made only upon evidence furnished by the papers and files in the cause or something in the record or in the minute book or in the judge's docket as a basis to amend by. A mere memorandum or written opinion filed by the trial court, as distinguished from a finding of facts and conclusions of law requested under the statute, is not recognized by the law as a proper basis on which to predicate a nunc pro tunc entry. The Supreme Court has settled the precise question, as will appear by reference to *Missouri, K. & E. Ry. Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417, and it is therefore unnecessary to treat with it more extensively. The court proceeded without authority in making the nunc pro tunc entry, and the subject-matter for review relates alone to the action in setting the verdict aside because of refusing defendant's instruction.

There is much evidence tending to prove that plaintiff's house was totally destroyed by fire, and that its value was considerably in excess of the total insurance, and there is evidence, too, on the part of defendant tending to show the loss was but a partial one.

[2] Defendant requested the following instruction touching the matter of a partial loss under the policy, but the court refused it:

"The court instructs the jury that if they believe from the evidence that the dwelling house which was the subject of the insurance did not, by reason of the fire testified to, lose its identity as a dwelling house and could, after said fire, be repaired and restored and placed in as good condition for use as a dwelling house as before the fire, then said fire did not result in a total loss within the meaning of section 7020 of the Revised Statutes of Missouri, and the amount which plaintiff is entitled to recover under the policy of insurance sued on, if anything, is that proportion of the amount of the damages which you believe from the evidence was caused by said fire, as \$2,500, the amount insured by the policy in suit, bears to \$4,500, the total insurance covering said house at the time of said fire as shown by the evidence."

It appears that after the jury found the issue for plaintiff, to the effect that the building was totally destroyed by fire, the court

set the verdict aside because it erred in refusing defendant's instruction above copied. Manifestly this instruction was properly refused for that it tells the jury that if the dwelling house did not—

"by reason of the fire, * * * lose its identity as a dwelling house and could, after said fire, be repaired and restored and placed in as good condition for use as a dwelling house as before the fire, then said fire did not result in a total loss."

The instruction appears to proceed in the view that the question as to whether the loss is total or partial is to be ascertained by an inquiry as to whether the building may be restored and placed in as good condition for use as a dwelling house as before the fire when such is not the criterion. A policy of insurance against fire, as here, it is said, is upon "a building as such." See *Nave v. Ins. Co.*, 37 Mo. 430, 90 Am. Dec. 394. Therefore the question in respect of a total or partial loss is to be ascertained by reference to the condition of the building rather than to the use it might be put to after being patched up. Our Supreme Court, in *O'Keefe v. Ins. Co.*, 140 Mo. 558, 564, 41 S. W. 922, 923 [39 L. R. A. 819], says:

"By a total loss is meant that the building has lost its identity and specific character as a building and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing."

This is true, too, though some parts of the building which remain standing may be used in rebuilding. See *Stevens v. Norwich Union Fire Ins. Co.*, 120 Mo. App. 88, 101, 96 S. W. 684.

The court properly refused the instruction above set forth and erred in setting the verdict aside as it did.

The judgment should be reversed, and the cause remanded, with directions to the court to reinstate the verdict and enter judgment thereon. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

PROCTOR v. CITY OF POPLAR BLUFF. (No. 1450.)

(Springfield Court of Appeals. Missouri.
March 11, 1916. Rehearing Denied
April 8, 1916.)

1. EVIDENCE ~~§~~ 471(11)—MATTERS OF OPINION—SENSE OF TOUCH.

In an action for injuries to a pedestrian who stepped from a raised portion of a walk and received a fractured hip when her ankle turned on a loosened brick protruding up from the walkway, where there was evidence that the walkway was composed of loose bricks and sand, it was not error to permit the plaintiff to testify that she stepped on a brick, although it was so dark that she could not see it, and she testified that she knew it was a brick only by the sense of touch.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2161; Dec. Dig. ~~§~~ 471(11); Witnesses, Cent. Dig. § 833.]

2. DAMAGES \S 158(7) — PLEADING AND PROOF.

In suit by a pedestrian injured through defective sidewalk, where the petition alleged the facts as to where and how her limb was fractured, and that she had used crutches, and that her injury was permanent, plaintiff's testimony as to the shrinkage of her limb was admissible as showing a resulting condition due to the injury, which naturally resulted therefrom.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 442; Dec. Dig. \S 158(7).]

3. DAMAGES \S 158(1)—PERSONAL INJURIES—PLEADING AND PROOF.

If a condition sought to be shown by evidence as to personal injuries naturally and ordinarily, though not necessarily, results from the injuries alleged, proof thereof may be shown under the general allegation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 441, 443, 444; Dec. Dig. \S 158(1).]

4. MUNICIPAL CORPORATIONS \S 759(2)—DUTY TO MAINTAIN WALKS — CONTROL OF WALKS.

Even in the absence of formal acceptance of a walk by the city, it is under the obligation to keep it in a reasonably safe condition because of recognizing it as open for travel and inviting the public to use it, and such acts may be shown either by direct or circumstantial evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1596; Dec. Dig. \S 759(2).]

5. MUNICIPAL CORPORATIONS \S 759(3)—DUTY TO MAINTAIN WALKS — CONTROL OF WALKS.

Where a city established grade and did some work on a street and placed lines thereon and street signs, and permitted pedestrians for years to use a portion of the street as a sidewalk at the point where the plaintiff was injured, there was such control of the street as to render the city liable for failure properly to maintain the walk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1597, 1598; Dec. Dig. \S 759(3).]

6. MUNICIPAL CORPORATIONS \S 768(3)—DUTY TO MAINTAIN WALKS — DEFECTIVE WALKS—EVIDENCE—SUFFICIENCY.

Evidence that a walk, use of which was acquiesced in by the city for a number of years, was composed of sand and loose bricks on edge and in other unusual positions, was sufficient to show liability of the city for injuries to one who stepped on a loose brick and fell.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1624; Dec. Dig. \S 768(3).]

7. APPEAL AND ERROR \S 1050(2)—HARMLESS ERROR—IMMATERIAL EVIDENCE.

In a suit against a city for injuries due to a defect in a walk, plaintiff's introduction of an ordinance requiring a sidewalk to be built on another street was harmless error, since it could have added nothing to the plaintiff's case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4154; Dec. Dig. \S 1050(2).]

8. APPEAL AND ERROR \S 1066—INSTRUCTIONS—CURE OF ERROR.

In an action for injuries due to a defective walk, an instruction allowing a finding that bricks protruded three inches above the surface is not erroneous, though unwarranted by the evidence, where it required a finding that the walk was dangerous, and that such condi-

tion was, or by ordinary care could have been, known to the city.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4220; Dec. Dig. \S 1066; Trial, Cent. Dig. \S 558.]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by Annie A. Proctor against the City of Poplar Bluff. Judgment for plaintiff, and defendant appeals. Affirmed.

N. C. Whaley, Sheppard & Sheppard, and Leslie C. Green, all of Poplar Bluff, for appellant. Abington & Phillips, of Poplar Bluff, for respondent.

FARRINGTON, J. The plaintiff recovered judgment against the defendant (appellant) for damages sustained by her which she alleged were occasioned by reason of the negligence of the city in failing to keep a sidewalk in a reasonably safe condition for the use of pedestrians, in that it allowed, for many months prior to the date of plaintiff's injury, bricks and brickbats, some of which were entirely, and others of which were only partly, imbedded in the earth—some on their sides, some with their sharp edges up, and others with their pointed corners exposed and extending perpendicularly above the surface of the ground at distances varying in height from 1 to 4 inches—to remain immediately under a step-off in the street at and along that part of the street used by pedestrians as a walkway, that the same had been in that condition more than 12 months prior to the date of the injury, and that the servants and agents of the city knew or by the exercise of ordinary care could have known of the defective and dangerous condition of said walkway.

The evidence shows that plaintiff, who, with her daughter, left her home in the eastern part of Poplar Bluff (which is that part of the city lying east of Black river) after dark, was walking to a church on the west side of Black river. At Bartlett street a bridge connecting the two parts of the city spans the river, over which bridge pedestrians and vehicles traveled. In getting to this bridge plaintiff went west until she reached Front street, which is a street running parallel with the river and generally north and south. On the east side of Front street are storehouses, places of business, and residences. After traveling along Front street for some little distance, plaintiff came to what is known as Fee's saloon, which, we gather from the record, was kept in a frame building with a porch and roof extending out over the sidewalk line or where a sidewalk would be put down. This porch was built of boards, and was something like 8 or 10 feet wide. In traveling to this point, walking along the sidewalk line of Front street, plaintiff passed over cinder walks, board walks, and one granitoid walk, there being no uniformity in the kind of walks that had

been constructed. It was shown that all the walks on the east side of Front street were placed there by the resident owners who put such walk as they wanted in front of their property, none of which sidewalks were put down by order of the city. When plaintiff was on the board walk or porch in front of Fee's saloon her daughter told her to be careful in stepping off. It was dark, according to her testimony and that of her daughter, so that they could not see just what they were stepping on. The testimony shows that the electric light at the intersection of Bartlett and Front streets, about half a block away to the south, was not burning; nor was a light burning at the intersection of Hazel and Front streets, about half a block north of where plaintiff was injured, so as to light the walkway. Plaintiff's testimony is that, when she stepped off the board walkway in front of Fee's saloon, the distance she had to step down was something like 12 to 15 inches, and that her foot, on stepping down, struck a hard substance—something that was not like the ground—causing her foot to turn which threw her down on the ground, and broke her thigh bone near the place where it joins the hip. There is no contention made that she was not injured severely, nor is there any dispute but what she is permanently injured and will be required the remainder of her lifetime to move about on crutches, and that as a result of the injury she suffered great pain and mental anguish. The evidence shows that in the sidewalk line just south of the board walk in front of Fee's saloon and extending some distance south was a space of ground which had been for many years used by pedestrians upon which to walk, and that some 12 or 16 years before the date of plaintiff's injury the owner of the land there had thrown in and along this sidewalk line bricks and brickbats, scattered indiscriminately, the same not being placed with any regularity, and over which had been scattered a covering of sand or gravel; that for a long time prior to plaintiff's injury the gravel or top covering had been worn off, so that the bricks and brickbats projected above the surface of the ground, some edgewise, some pointed up with their corners, and some on ends, varying, under the testimony, from 1 to 2½ inches in height from the level portion of the ground. The night plaintiff was injured was the first time she had been along this part of the walkway, and she did not know the condition that existed there as to these bricks and brickbats. The evidence shows that pedestrians used this portion of Front street for years as a walkway, and that the city had graded that part of the street used by vehicles, having established a grade for the street, and placed street lamps along the street, and put up signs at the street corners showing the names of the intersecting streets.

The case was submitted to the jury on instructions some of which will be referred to herein, and a verdict for \$6,000 in favor of the plaintiff was returned. The appeal is by the city. The respondent raises some technical grounds on the form of the appeal, but we prefer to decide the case on the merits.

[1] It is urged that the court erred in permitting the plaintiff to tell the jury what, in her opinion, she stepped on when she stepped down onto the portion of the walkway where she was injured. The evidence clearly shows by a number of witnesses that the brickbats were immediately under where she stepped off the porch or walkway in front of Fee's saloon. It is true she stated that it was dark, and that she could not see just what she did step on, and did not see the place again until several months later, when she again passed that way. Under the facts detailed, that the brickbats were there, as testified to by a number of witnesses, at the very place plaintiff testifies she stepped off the porch, her testimony, which is objected to, could not have been prejudicial. She did testify that what she stepped on was hard and not like the ground, and there was no showing of the presence at that place of any other obstacle or defect. The sense of touch is something that is and can be relied upon, and, in the absence of light, is probably as certain as any other sense possessed by mankind. Had this occurred in the daytime, when plaintiff could have seen what she stepped on, she certainly would have been permitted to testify that it was a brickbat, and in determining in her own mind what it was she would have been required to rely in that case on her sense of sight, and after all her testimony in such a case, under appellant's contention, would have been a mere opinion. There was no error in the admission of this testimony. *Perry v. City of Sedalia*, 168 Mo. App. loc. cit. 237, 153 S. W. 536; *Binsbacher v. St. Louis Transit Co.*, 108 Mo. App. 1, 82 S. W. 546.

[2, 3] It is next urged that the court erred in permitting plaintiff to testify as to the shrinkage of her limb when there was no allegation in the petition upon which to base such testimony. There was an allegation in the petition as to where and how her limb was fractured, and that she had to use crutches after having remained in bed 6 or 8 weeks, and that her injury was permanent. The law is that one may show a resulting condition which naturally follows an injury, without special pleading setting forth such condition. If the condition sought to be shown by evidence is one that naturally and ordinarily, but not necessarily, results from the injuries alleged, the proof may be made under the general allegation. *Moore v. St. Louis Transit Co.*, 226 Mo. loc. cit. 698-703, 126 S. W. 1013; *Foster v. United Rys. Co.*, 183 Mo. App. 602, 167 S. W. 643.

Appellant contends that its demurrer to the evidence offered at the close of the case

should have been sustained: First, because it is contended that the evidence fails to show that the city of Poplar Bluff ever assumed the duty of building a sidewalk at the place where the accident occurred; and, second, because the evidence fails to show any defect in the sidewalk space sufficient to charge the appellant with negligence.

[4, 5] On the first proposition the leading case cited is *Ely v. City of St. Louis*, 181 Mo. 723, 81 S. W. 168. As said by our court in *Browning v. City of Aurora*, 190 Mo. App. loc. cit. 486, 177 S. W. 688, in discussing a similar question:

"In determining what is declared as the law in *Ely v. City of St. Louis*, an eye must be kept on the overruled case of *Ruppenthal v. City of St. Louis*, 190 Mo. 213, 88 S. W. 612, as well as what is said in *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418 [129 Am. St. Rep. 561]."

The facts of the case in hand bring it clearly within the rule announced in *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561, later reported in 248 Mo. 98, 154 S. W. 473, affirming that doctrine. And it is held in *Curran v. City of St. Joseph*, 264 Mo. loc. cit. 659, 175 S. W. 584 (see, also, *Robison v. Kansas City* [Sup.] 181 S. W. loc. cit. 1006, where the doctrine in the *Benton* Case is affirmed), that there is an obligation upon a city to keep its streets in a reasonably safe condition in the absence of formalities, and that a city devotes a highway to the use of the public by recognizing it as open for travel or inviting the public to use it as a street, and that such acts may be shown either by direct or circumstantial evidence.

In the case before us the Front street on which plaintiff was injured was lighted by the city, a grade had been established and work actually done on the street by the city, streets signs were placed thereon by the city, and for years pedestrians in going along said street had used as and for a sidewalk that portion of the street which was being used by the plaintiff when she was injured. Under the authorities cited this is sufficient to dispose of this point.

[6] Coming now to the question of whether there was a sufficient defect shown concerning which the defendant could be charged with negligence: Under the facts developed we have but to turn to any number of volumes of our official reports to find cases where the defect or obstruction was of no greater proportions than the brickbats that stood from 1 to 2½ inches above the level surface of the ground at the place where plaintiff was injured. In the case of *O'Donnell v. City of Hannibal*, 144 Mo. App. 155, 128 S. W. 819, the hinge on the trapdoor stood above the surface of the walk some 2 or 3 inches. In *Norton v. Kramer*, 180 Mo. 536, 79 S. W. 699, the injury was caused by falling on a brick, which, among others, had been thrown in the sidewalk space. And likewise the charge of

negligence was upheld in the city allowing brick to remain scattered in the sidewalk space over one of which plaintiff in that case in using the sidewalk stumbled. See *Sutter v. Kansas City*, 138 Mo. App. 105, 119 S. W. 1084; also *City of Terre Haute v. Constans*, 26 Ind. App. 421, 59 N. E. 1078. Our court, in the case of *Stephens v. City of Eldorado Springs*, 185 Mo. App. 464, 171 S. W. 657, held that it was negligence for a city to permit a flagstone to extend 6 inches at one end above the general level of a walk. And in the case of *Clancy v. City of Joplin*, 181 S. W. 120, we recognized that it was a jury question where the defect was a worn-out or cupped place in the walk some 2 to 4 inches deep. In the case at bar there is less excuse for defendant's failure to remedy the defect than in some of the cases above cited. While it was but one brick that caused plaintiff to fall, that one was one among many that were out of place, and were obstructions continuing along this sidewalk space for a number of feet—at least 10 or 12, and probably 25 or 30, feet.

[7] The plaintiff introduced an ordinance that had been passed by the city council requiring a sidewalk to be built on "Front street." From the ordinance introduced it is clear that there is a "Front street" in Poplar Bluff besides the Front street on which plaintiff was injured, as the ordinance requires the sidewalk referred to therein to be laid in a direction entirely different from that in which the Front street runs on which plaintiff was injured and between intersecting streets that do not intersect the Front street on which plaintiff was injured. The ordinance was inadmissible, because it referred to an entirely different street from that with respect to which the city is charged with negligence in this case. But how could that be prejudicial to the city under the facts of this case? That irrelevant testimony would tend to show nothing in this case except the fact that the city had taken control and jurisdiction over Front street, and that fact that the Front street on which plaintiff was injured was a street over which the city had exercised jurisdiction and which it had recognized as a public thoroughfare in the city was shown by an abundance of other testimony hereinbefore referred to. While the admission of this evidence was erroneous, it was manifestly harmless. *Wills v. Railroad*, 193 Mo. App. loc. cit. 632, 113 S. W. 713. We are enjoined by section 2082, R. S. 1909, not to reverse a judgment of any court unless the error committed materially affects the merits of the action.

[8] Turning to the instructions, appellant charges error in plaintiff's first instruction, which allowed the jury to find that the brickbats projected to a height of 3 inches above the ground, whereas, according to the appellant, there was no evidence on which to base that part of the instruction. Appellant states in its brief:

"The greatest height that any witness testified that the brickbats projected was 2½ inches, and the greater weight of the testimony shows that the projections were only from 1 to 1½ inches."

It is true that no witness testified that the brickbats extended above the ground to a height exceeding 2½ inches; yet the plaintiff testified that a cut place on her shoe which she had on at the time she fell was 3 inches above the sole of the heel. Requiring the jury to find this fact before returning a verdict for plaintiff was putting a greater burden on the plaintiff than the law required. The instruction did require the jury to find from the evidence that the condition of the sidewalk space was dangerous to pedestrians, and required a finding that this condition was known to the city, or could have been known by the exercise of ordinary care and diligence as a prerequisite to a verdict for the plaintiff. The error complained of was nonprejudicial.

The other errors urged with respect to instructions do not materially affect the merits of the action; nor does that portion of the argument of plaintiff's attorneys made to the jury and complained of as inflammatory and prejudicial warrant a reversal of this judgment.

ROBERTSON, P. J., and STURGIS, J., concur.

MARTIN v. RICHMOND COTTON OIL CO.
(No. 1533.)

(Springfield Court of Appeals, Missouri,
March 11, 1916. Rehearing Denied
April 3, 1916.)

1. ABATEMENT AND REVIVAL §15—PENDENCY OF OTHER ACTION—DISMISSAL—TIME.

Although pendency of an action in the federal court on the same cause will defeat a second action in the state court, it is sufficient to prevent abatement if the suit in federal court is terminated by nonsuit or dismissal before trial of the plea in abatement.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111-117; Dec. Dig. §15.]

2. DISMISSAL AND NONSUIT §43(2)—DISCRETION OF COURT—VACATION.

Dismissal of a case in vacation, with or without payment of costs, or even in term, is in the breast of the court until the end of the concurrent or succeeding term, and may be confirmed or set aside or opened up for cause, to permit proper proceeding thereon, although, if made at plaintiff's instance, it operates as an estoppel against him.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 86; Dec. Dig. §43(2).]

3. ABATEMENT AND REVIVAL §15—PENDENCY OF OTHER ACTION—VOLUNTARY DISMISSAL.

Although voluntary dismissal in vacation with payment of costs is not conclusive against the defendant, in the absence of court order thereon, it is such a dismissal as to plaintiff

as to permit him to bring another action on the same cause.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111-117; Dec. Dig. §15.]

4. ABATEMENT AND REVIVAL §15—PENDENCY OF OTHER ACTION—DISMISSAL—PAYMENT OF COSTS.

The retention of authority over a voluntary dismissal and the provisions of Rev. St. 1909, § 1979, requiring payment of accrued costs on vacation dismissal by plaintiff, being for the protection of the court officers, failure to pay the costs does not invalidate the dismissal so as to abate a subsequent suit on the same cause.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111-117; Dec. Dig. §15.]

5. DISMISSAL AND NONSUIT §42—EFFECT—RIGHTS OF DEFENDANT.

Dismissal in vacation by plaintiff on payment of costs, as provided for by Rev. St. 1909, § 1979, and voluntary nonsuit, the absolute right to which is given by section 1980, apply only to plaintiff's cause of action, and cannot dispose of the fixed rights of the defendant.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 75-83; Dec. Dig. §42.]

6. ABATEMENT AND REVIVAL §15—PENDENCY OF OTHER ACTION—DISCRETION OF COURT.

The abatement of a subsequent suit on the ground of pendency of another action between the same parties on the same cause being required only to prevent vexatious, unnecessary, and oppressive litigation, the court may, in its discretion, overrule a plea in abatement on the ground of pendency of another action, where it is only technically pending, but is dismissed in so far as plaintiff is concerned.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111-117; Dec. Dig. §15.]

7. LIMITATION OF ACTIONS §130(8) — COMMENCEMENT—NEW ACTION AFTER DISMISSAL—IDENTITY OF ACTIONS.

Where the original action, brought in time, alleged violation of the master's common-law duty to provide a safe place for his servants to work, and a new action after voluntary dismissal of the first alleged violation of Rev. St. 1909, § 7828, requiring the master to safely guard dangerous machinery, the mere change from common-law to statutory basis did not create a new cause of action so as to bar recovery under the statute of limitations; the facts for both causes being the same.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 555; Dec. Dig. §130(3).]

8. LIMITATION OF ACTIONS §130(3) — COMMENCEMENT—NEW ACTION AFTER DISMISSAL—IDENTITY OF ACTIONS.

Whether a change from common-law to statutory liability changes a cause of action so as to subject the new action to the bar of the statute of limitations depends on whether the facts relied upon are the same, rather than whether one law or another was relied on.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 555; Dec. Dig. §130(3).]

9. REMOVAL OF CAUSES §76—AMOUNT IN CONTROVERSY—INCREASE BY AMENDMENT.

Error cannot be assigned on the ground of fraud upon the federal court by permitting amendment increasing damages alleged from \$2,999 to \$10,000 after the time for removal had passed, where upon such amendment defendant, if it had moved therefor, might have had the cause removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 133; Dec. Dig. §76.]

10. MASTER AND SERVANT ⇨278(13)—INJURIES TO SERVANT—SAFE PLACE TO WORK—EVIDENCE.

Evidence held to show that a cotton seed conveyor was insufficiently guarded, so as to make the master liable for injuries to his servant who fell into it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. ⇨278(13).]

11. MASTER AND SERVANT ⇨233(2)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The servant's recovery for injuries due to defectively guarded machinery is not defeated on the ground of his negligence in leaving his place of work, where he was ordered to stop work temporarily, and went for a drink, and was returning through a dangerous passage, customarily used, to his place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 702; Dec. Dig. ⇨233(2).]

12. MASTER AND SERVANT ⇨265(14) — INJURIES TO SERVANT — ACTIONS — BURDEN OF PROOF.

The burden is on the defendant master to show contributory negligence of the servant in order to defeat his recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 908; Dec. Dig. ⇨265(14).]

13. MASTER AND SERVANT ⇨289(1) — INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

Evidence held to present a question for the jury whether deceased servant was contributorily negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. ⇨289(1).]

14. MASTER AND SERVANT ⇨265(14)—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE—HOW REBUTTED.

A servant's alleged contributory negligence may be rebutted by showing that the thing done was customary or done in the customary way, especially when the custom is observed by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 908; Dec. Dig. ⇨265(14).]

15. MASTER AND SERVANT ⇨235(2) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

A servant whose duty was to shovel seed into a screw conveyor through openings from which he removed the board coverings, and to replace only such boards as were removed by him, was not negligent in failing to replace boards at another place in the conveyor, through which it was customary for servants to reach their places of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 711; Dec. Dig. ⇨235(2).]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by Mattie Martin against the Richmond Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages in which the plaintiff recovered a judgment for \$6,250, and defendant appeals. The plaintiff's husband was killed in a cotton seed oil mill while in the employ of defendant on December 17, 1912. The widow appropriated the action

and filed her petition in the circuit court within six months thereafter, to wit, April 8, 1913. In that petition, called the original petition, she bases her cause of action upon the alleged negligent failure of the defendant to furnish the deceased a reasonably safe place in which to work. The damages alleged were \$10,000.

The defendant appeared on the first day of the June term, 1913, and filed its petition for removal to the federal court, which was granted, and the cause so removed. The cause was continued from term to term in the federal court till September 7, 1914, when, in the vacation of the court, plaintiff filed with the clerk of the federal court a praecipe or memorandum to dismiss said cause, but did not then, nor has she since, paid the costs then accrued.

The clerk of the federal court entered an order in vacation of said court as follows:

"Now at this day comes the said complainant by her attorney and files a praecipe dismissing this cause, which praecipe is in words and figures as follows, to wit: 'Now, on this 7th day of September, 1914, comes the undersigned attorney for plaintiff in the above-entitled cause and dismisses said cause at the cost of plaintiff. [Signed] T. R. R. Ely, Attorney for Plaintiff.'"

No subsequent action was taken by the court in term time or at any other time.

Prior, however, to the making of the above order in the federal court, and on April 30, 1914, the plaintiff filed a second suit in the circuit court based upon the alleged negligent failure of the defendant to comply with section 7828, R. S. 1909, requiring defendant to safely guard the machinery of its plant. Plaintiff voluntarily dismissed this suit December 14, 1914. The plaintiff had also filed on September 11, 1914, her third petition, the one now in controversy. It is based on the alleged negligent failure of the appellant to safely guard its machinery as required by said section 7828, R. S. 1909. The damages alleged when this petition was filed were \$2,999, \$1 less than the amount sufficient to give the federal court jurisdiction. On this third petition, after amendment, the case was tried. Before trial the court permitted an amendment increasing the damages to \$10,000.

Thereafter appellant, on December 4, 1914, limiting its appearance, filed its motion to dismiss said third petition for the reason that the cause of action attempted to be stated constituted a departure from the original petition, in that the original petition based its cause of action upon the alleged failure of appellant to furnish the deceased a reasonably safe place in which to work, while the third petition was based upon an alleged failure of the appellant to safely and securely guard its machinery as provided by statute (section 7828, supra), that the third petition was not an amendment or continuation of the original suit, and that therefore the same should be dismissed, and, for the further reason that, being a new,

cause of action, the same was barred by the statute of limitations, having been filed more than one year and eight months after the accident complained of occurred. This motion was overruled.

After the amendment increasing the amount of damages to \$10,000, the defendant moved to strike out the same, alleging that the court was without jurisdiction; that the permitting of the amendment would have the effect of defeating justice, and would be in contempt of the federal court in defeating the jurisdiction of said court and permitting the plaintiff to do indirectly what he could not do directly. This motion was overruled.

Thereupon the defendant, still limiting its appearance, filed its answer, containing six counts: (1) That there is a departure from the original suit, and that the present suit is a wholly separate and distinct cause of action requiring different proofs to sustain the allegations in the two petitions, and that the measure of damages is entirely different, and that the present suit is barred by the statute of limitations; (2) that the original suit is still pending in the United States District Court, and has never been dismissed, and that this suit should be abated; (3) a general denial, except admitting defendant's incorporation under the laws of Tennessee; (4) that, if deceased was injured, he was not injured in the performance of any duty imposed upon him by the appellant, that he had specific duties to perform at a fixed place in the plant, and that the performance of his duties did not require that he should be at the place where injured; (5) contributory negligence on the part of deceased; (6) that defendant had complied with section 7828, R. S. 1909, in fully and completely guarding the exposed machinery in so far as possible, and that deceased refused to use the safety appliances provided for his use.

Plaintiff demurred to the first, second, third, and fourth defenses, and the court sustained the same as to the first and second.

Oliver & Oliver, of Cape Girardeau, for appellant. Ely, Pankey & Ely, of Kennett, and J. L. Fort, of Dexter, for respondent.

STURGIS, J. (after stating the facts as above). [1] Preliminary to any discussion of the merits of the case, we will dispose of defendant's insistence that its plea in abatement should have been sustained on the ground of another action pending in the federal court. The plaintiff concedes that the present suit is for the same cause of action as that removed to the federal court, and her right to maintain this suit as against the special statute of limitations of one year is dependent on the fact that this suit was instituted within such time after the dismissal of such former suit. It is also conceded that the pendency in the federal court of an action removed to such court from a

state court is pleadable in abatement of a subsequent action in the state court between the same parties for the same cause unless the suit in the federal court has been determined by a voluntary nonsuit or dismissal, in which case the second suit may be maintained. 1 C. J. 89, and cases cited. This rule of law is modified in this state to the extent that, if the first suit is terminated by nonsuit or dismissal before the trial of the plea in abatement, that is sufficient. *Warder v. Henry*, 117 Mo. 530, 28 S. W. 776; *State ex rel. v. Hines*, 148 Mo. App. 298, 304, 128 S. W. 250.

[2-6] Defendant's point is that there was no dismissal of the suit in the federal court in that the vacation order above set out is ineffectual to accomplish that result, though evidently so intended and relied on by plaintiff. The defendant relies on our statute (section 1979, R. S. 1909), as governing the practice in the federal court sitting in this state, and which provides that suits may be dismissed by plaintiff in vacation "upon payment of all costs that may have accrued thereon." It is conceded that plaintiff did not pay the costs. It was also shown, though this evidence was excluded as not being material, that when plaintiff applied to the clerk of the federal court to dismiss this case, the form of *præcipe* signed by plaintiff's attorney was furnished by the clerk, and that the practice in that court on dismissals in vacation is similar to what was done in this case; that no costs were demanded as a condition of making the order; that at least one term of the federal court was held after the dismissal and before this trial, at which such case did not appear on the docket in the federal court as a live case, which fact must have been known to and acquiesced in by both parties.

The defendant cites, as sustaining its position that the dismissal of a case is a matter within the discretion of the court, and that the dismissal is not final till such discretion is exercised by the court, the remarks of Judge Rombauer in *Campbell v. Carroll*, 35 Mo. App. 640, 645, as follows:

"We are informed that a practice has grown up in this state sanctioning the dismissal of suits in vacation by the plaintiffs' filing a memorandum * * * with the clerk, but such memorandum necessarily goes for naught except as evidence of an estoppel by matter in pais, or abandonment, unless the court, by some appropriate entry of record at a succeeding term, gives effect to it as a judgment. The court alone is competent to order a judgment, and not the parties litigant or the clerk. It would be a strange anomaly if the plaintiffs in an injunction suit could escape all liability upon their bond by a simple memorandum of dismissal filed with the clerk in vacation."

These remarks must be taken, however, in connection with the subject there in hand, to wit: Whether a dismissal in vacation of an injunction proceeding is such a final disposition of the case as to prevent an assessment of damages on the injunction bond at

the succeeding term. The negative was held, and such would be true whether the dismissal in vacation was accompanied with the payment of costs or not. Obviously any dismissal of the case in vacation either with or without payment of costs, or in term time for that matter, is so far held in the breast of the court, at least until the end of the succeeding or concurrent term, that same may be confirmed, or set aside, or opened up for good cause shown, and so far as to permit any proper proceeding based thereon to be had. That the court might have taken any proper action looking to the collection of the costs in this case we may concede. We think defendant will concede that, although every dismissal or attempt to dismiss, even when accrued costs are paid, is not effective so as to defeat intervening rights of the defendant or third persons, yet such dismissal is, at least when costs are paid, sufficient to terminate the case so far as plaintiff is concerned, and thereby enable him to bring another suit. Is the payment of costs at the time the order of dismissal is made essential to accomplish this result? There might be a dispute as to the amount of costs due or the same might not be yet determinable or the parties to whom due may be willing to forego the same or give further time. It would appear that the provision as to paying costs on dismissal in vacation is for the protection of court officers and witnesses rather than the defendant, against whom no costs are adjudged. *Bradford v. Railroad*, 132 Ga. 851, 65 S. E. 127. The fact that the court so far retains jurisdiction and control of the case as to enforce collateral rights of the defendant or third parties, or even of the plaintiff himself, growing out of the first suit, is not inconsistent, we think, with the right of plaintiff to prosecute a new suit to enforce his cause of action. This seems to be the more reasonable, because our statute gives the plaintiff an absolute right to take a nonsuit at any time before the final submission of the case. Section 1980, R. S. 1909. Such dismissal or nonsuit applies only to plaintiff's cause of action, and does not dispose of rights of the defendant which have become fixed. *State ex rel. v. Hines*, 148 Mo. App. 298, 305, 128 S. W. 250; *Lanyon v. Chesney*, 209 Mo. 1, 106 S. W. 522; *Pullis v. Pullis*, 157 Mo. 565, 57 S. W. 1095.

Going to the reason of the rule that a second suit will be abated so long as the first is yet pending, the authorities all agree that it is because the second suit is unnecessary, vexatious, and oppressive. 1 R. C. L. 10; 1 C. J. 45; *State ex rel. v. Hines*, 148 Mo. App. 298, 303, 128 S. W. 250. The court, in *Warder v. Henry*, 117 Mo. 530, 541, 23 S. W. 776, in justifying its holding that, though our statute makes the fact of another suit pending a ground of demurrer, which strikes at the petition as it is, and, if not disclosed in the petition, then by answer, yet, if the

former suit was actually dismissed before the hearing on such question, that would suffice, said:

"The ground on which courts proceed in the abatement of subsequent suits is that they are unnecessary, and are therefore deemed vexatious and oppressive. * * * These decisions of this court show that this statute is not an iron rule. Like many other provisions of the Code, it is but declaratory of the common law; and in its application regard should be had to the substantial rights of the parties."

The Court of Civil Appeals of Texas, in *Harby v. Patterson*, 59 S. W. 63, 65, speaking of exacting the payment of costs in case of a plea in abatement, said:

"All these matters are held to be discretionary with the court, and it is said that the discretion may and ought to be exercised so as to prevent the plaintiff from annoying, harassing, and vexing the defendant with a multiplicity of suits for the same cause of action."

What the court said in *Trimble v. Railway*, 180 Mo. 574, 586, 79 S. W. 678, 681 (1 Ann. Cas. 363), goes to the very root of the matter:

"Therefore there can never be any conflict of jurisdiction between the state and federal courts in this case, and, as the reason of the rule underlying the doctrine of prior action pending is that the defendant shall not be called upon to defend two suits involving the same subject-matter, at the same time, in two different forums, the rule does not apply in this case."

In *Karnes v. Fire Insurance Co.*, 53 Mo. App. 438, a nonsuit was taken, but no final judgment was rendered disposing of the case. On a second suit being brought and plea in abatement made, the court held that the nonsuit was an abandonment of the cause, and was so treated by the parties, and added:

"The former case is ended. The nonsuit taken is irrevocable. * * * And we see no substantial reason or justice in holding it to be yet pending, for the purpose of defendant's plea."

This point is ruled against appellant.

[7] II. Is the cause of action sued on in the present suit the same cause of action as that sued on in the former case removed to the federal court and thereafter dismissed? If not, then plaintiff must fail here for two reasons: (1) The cause of action which plaintiff may again sue for within one year after a dismissal of another suit must be for the same cause of action; and (2) unless the cause of action, now sued for is the same as the other this cause of action is barred by the statute of limitations. The question of the identity of the cause of action is decisive of both points.

Briefly stated, the original petition alleged defendant's negligence to consist in not securely and safely covering or guarding the revolving metal conveyor or seed carrier extending along the floor in a trough and over which deceased was required to pass in performing his work, whereby his foot and leg came in contact with same to his injury. This act of negligence was alleged to be in violation of the common-law duty of the master to furnish the servant a safe place to work.

The present petition alleges the same negligent act of the master causing the same injury, but alleges the negligent act to be in violation of section 7828, R. S. 1909, requiring the master to safely and securely guard machinery dangerous to employes. The insistence is that this is a change from a common-law to a statutory action, and therefore a change of the cause of action.

It is certainly not the law in this state since *Minter v. Railroad*, 82 Mo. 128, that a cause of action cannot be changed from one based on common-law negligence to one based on statutory negligence without working an entire change in the cause of action where the change consists merely in the kind of negligence charged. That case so holds, and cited with approval *Calvert v. Railroad*, 34 Mo. 242, as holding that the cause of action for negligently running over and killing cattle can be sustained by proof of either common-law or statutory negligence; also *Goodwin v. Railroad*, 75 Mo. 73, as holding that the cause of action for negligence in managing and running a locomotive and cars can be sustained by proof of failure to comply with the statute as to ringing the bell and sounding the whistle. Other cases are cited to the same effect. These cases, it is true, originated in the justice court, and there was no question of pleading. But the same cause of action, and no other, can be tried in the circuit court on appeal from the justice court, and the *Minter* Case pointedly decides that it is the same cause of action, whether the negligence is common-law or statutory. This case is followed in *Rippee v. Railroad*, 154 Mo. 358, 363, 55 S. W. 438, where the court held that the cause of action was the killing of plaintiff's cow by the negligent running of defendant's train, with an attempt to specify two grounds of negligence; one being a failure to sound the bell or whistle while running at a high rate of speed through a village. This is common-law negligence. *Hudson v. Railroad*, 173 Mo. App. 611, 617, 629, 159 S. W. 9, and cases cited. But the court held that an amendment changing to the statutory negligence of failure to ring the bell or sound the whistle at 80 rods before reaching the public crossing did not change the cause of action. In the *Hudson* Case, supra, this court, on motion to modify the judgment (page 611), expressly held that a petition for damages based on statutory negligence could be amended so as to charge common-law negligence without changing the cause of action. See, also, *Shell v. Railroad*, 132 Mo. App. 528, 112 S. W. 39.

The various modern tests for determining when the identity of the cause of action is preserved by new or amended pleadings are stated in *Stewart v. Van Horne*, 91 Mo. App. 647, 655, *Walker v. Railroad*, 193 Mo. 453, 457, 92 S. W. 83, *Ingerson v. Railroad*, 150 Mo. App. 374, 381, 130 S. W. 411, and *Thorn-ton v. Smelting Co.*, 178 Mo. App. 38, 47, 163

S. W. 298; and, judged by the tests there stated, the cause of action stated in the two petitions now in question is the same.

Without reviewing the cases cited by defendant holding that a change from law to law, from common-law to statutory actions, works a change in the cause of action, we suggest that a line of cleavage will be found on determining whether what is termed statutory negligence creates a new kind of negligence, as liability for negligence of a fellow servant (*Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983), or merely enlarges or makes definite or arbitrary some particular kind or act of existing common-law negligence. In the latter case a change from one to the other leaves the cause of action intact. Thus, as we have noted, it is common-law negligence for a fast-moving train to cross a public highway without giving timely and effective warning, while the statute arbitrarily fixes both the distance and kind of warning to be given; also it is negligence at common law to run a car or train at an excessive rate of speed along or across streets or alleys where people are apt to be found (*Hardwick v. Railroad*, 181 Mo. App. 156, 168 S. W. 328), while statutes and ordinances fix arbitrary rates of speed, beyond which the speed is negligence per se. So also it is negligence at common law to leave machinery so uncovered on unguarded as to make the servant's place of work not reasonably safe, while the statute enlarges such negligence so as to make it negligence per se not to safely and securely guard all machinery designated by the statute when same is dangerous and can be so guarded. A change from the common-law measure of negligence to the statutory one in such cases, when preserving the identity of the resulting injury and measure of damages, is not a departure.

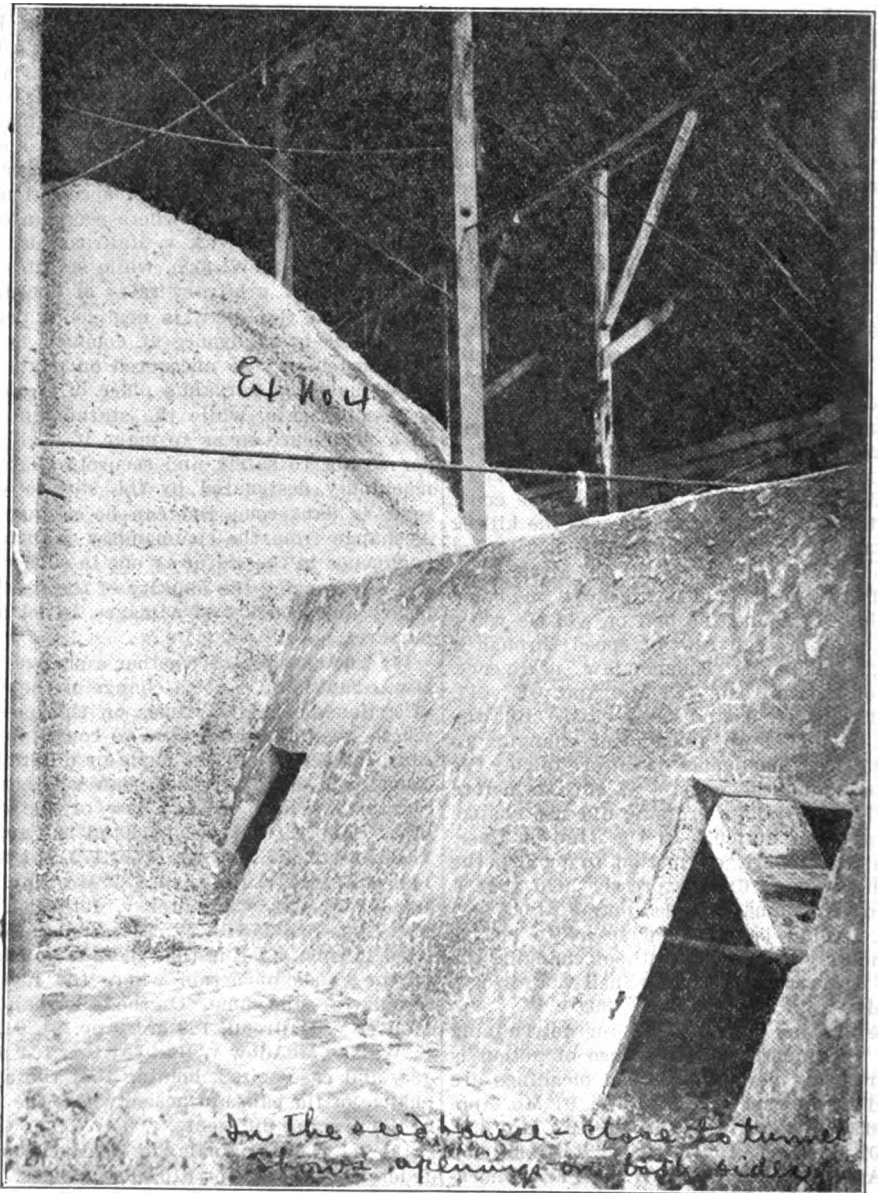
[8] The question of whether a change from law to law is or is not a change of the cause of action depends at times on the question whether the facts essential to constitute the cause of action are the same or different in the two pleadings, rather than whether the pleader intended the one law or the other law to apply. On the one hand is *Vaughan v. Railroad*, 177 Mo. App. 155, 172, 164 S. W. 144, *McIntosh v. Railroad*, 182 Mo. App. 288, 168 S. W. 821, *Carpenter v. Railroad*, 189 Mo. App. 164, 175 S. W. 234, and the cases cited in each, holding that there is no change of the cause of action where the facts of liability are the same. On the other hand are *Moliter v. Railroad*, 180 Mo. App. 84, 94, 168 S. W. 250, *McAdow v. Railway Co.*, 164 S. W. 188, and cases cited, holding that there is a change of the cause of action where the facts of liability are different.

[9] III. The original suit removed to the federal court was for \$10,000 damages. The present one, when filed, was for \$1 less than

\$3,000, the minimum jurisdictional amount authorizing removal to the federal court. Later the trial court permitted an amendment increasing the damages to \$10,000. Error is assigned that this worked a fraud on the federal court in preventing a removal to such court, in that the amendment was made after the time for removal had passed. No authorities are cited, and we ought not to be required to investigate or decide whether a right of removal existed in favor of defendant had it applied for same after the petition for the first time made such right available. It seems, however, that the right of removal had not been lost had defendant applied for same. *Powers v. Railroad*, 169 U. S. 92, 18

Sup. Ct. 264, 42 L. Ed. 673; *Barber v. Railroad*, 145 Fed. 52; *Remington v. Railroad*, 198 U. S. 98, 25 Sup. Ct. 577, 49 L. Ed. 959.

[10] IV. Turning to the merits of the case, the evidence discloses that deceased was engaged in feeding cotton seed into a screw conveyor, using a fork for that purpose. This conveyor extended lengthwise of the building in a trough along the concrete floor. Over this was constructed a roof-shaped concrete structure forming what is called the "tunnel," with doors or openings 10 to 12 feet apart through which the cotton seed was fed to the screw conveyor as needed. The accompanying photograph will make plain the situation and method of operation.



The conveyor runs lengthwise in the center of the floor within this tunnel. This tunnel is from 10 to 12 feet wide at the base or floor, and about 6 feet high, so that a man standing or walking therein must do so on the board covering over the trough in which the screw conveyor turns. The conveyor lacks an inch or two of being flush with the floor, and a covering of boards was laid thereon in sections, end to end, the full length of the conveyor. These sections were 3 or 4 feet long, and 12 to 14 inches wide, and had cleats nailed crosswise at the ends which, fitting into the rectangular trough, had a tendency to keep same in place. It is plaintiff's claim that this board covering was insufficient to comply with the statute in safely and securely guarding this conveyor and by reason thereof her husband met his death.

No one saw the accident, but, summoned by his cries of distress, other employes found him in the tunnel with his leg ground off in the conveyor. He was yet conscious, and stated that the board alipped and his foot went in there. There is abundant evidence that these boards did not form even a reasonably safe and secure guard over this conveyor. More than one witness states that the boards were frequently misplaced or angling across the trough; that the jar of the conveyor caused them to be shaken off; that the seed falling through the doors would push them up, and that too much seed passing through the conveyor would displace them. Witnesses state that these boards were hardly ever all in place, and that they had to be frequently replaced. It was also shown that an iron grating or triangular shaped screen, similar to a short section then in use, would be much safer, especially if fastened. The seed would pass through such a covering without its removal, and would be practically as efficient in feeding the conveyor as if entirely open. The use of the one section of this screen covering which was then in use was only intended to protect the opening made by removing the board at the place where the seed was being fed to the conveyor; and, though there was evidence that the deceased refused to use it, yet its use would in no way have protected the place where deceased was hurt. The whole length of the conveyor should have been so covered.

[11] It is true that the deceased was not hurt at his place of work in feeding the cotton seed into the conveyor with a fork. He was hurt at a point some 25 feet therefrom, and was evidently passing through the tunnel, walking on this board covering—the only place he could walk in so doing. In explanation of his passing through the tunnel at this time, it was shown that there was an "overflow," which means that an excessive amount of cotton seed had accumulated where it was being conveyed, and a signal

had been given him to stop feeding. The deceased then passed out of his workroom, and was last seen in the nearby engine room, where he went for a drink of water. The evidence justified a finding that he was returning to his work through the tunnel, or went therein from his place of work to the place of the accident in connection with his work. There is evidence that this tunnel was used frequently as a means of ingress or egress to and from the seedhouse where deceased worked, that the ends of the tunnel were left open for that purpose, and that no other way as convenient was available. It is difficult to understand what means were provided for ingress and egress to and from this building. The witnesses speak of a high opening reached by a ladder and of a board being off leaving a "crack" used for that purpose. As the house was frequently full or nearly full of seed, any ordinary doors would be clogged.

[12-14] In any event, the burden was on defendant to show contributory negligence, and such question was, at most, one for the jury under the facts here. Contributory negligence may be rebutted by showing that the thing done was customary or done in the customary way, especially when such custom is observed by the master. *Overby v. Mining Co.*, 144 Mo. App. 363, 128 S. W. 813; *Brunke v. Telephone Co.*, 115 Mo. App. 36, 90 S. W. 753; 29 Cyc. 517; 21 Enc. Law (2d Ed.) 524.

[15] It was deceased's duty to replace only the boards removed by him or such as came under his observation. He was not employed to regularly inspect and keep the board covering in place. The case of *Gleeson v. Manufacturing Co.*, 94 Mo. 201, 7 S. W. 188, is not in point.

Other alleged errors have been noticed, but their discussion would only prolong the opinion.

Finding no reversible error, the judgment is affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

KEMPF et al. v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

(No. 1645.)

(Springfield Court of Appeals. Missouri.
March 11, 1916. Rehearing Denied
April 3, 1916.)

1. INSURANCE § 130(3)—CONTRACT PENDING ACTION ON APPLICATION — DEATH BEFORE DELIVERY OF POLICY.

The printed receipt issued to the deceased by the defendant's agent for the first premium on a policy of life insurance provided that he was to be insured from the date of the receipt, if accepted by the company as an insurable risk under its rules and regulations, and stated that he was otherwise admissible on the plan and for the amount applied for. Upon its receipt by the defendant, the word "approved" was in-

dorsed upon the application of the deceased and a policy was issued the same in every respect as that applied for, except that the amount of premium was increased, but acknowledging and treating the first premium as paid in full. The deceased committed suicide before receiving or accepting the conditional policy. Held, as a matter of law, that by placing the printed form of receipt in his hands, the company authorized its agent to bind them in accordance with its terms, and the company having by its action on the application approved and accepted it without such condition as amounted to a new proposition, there was a contract of temporary insurance completed in Missouri from the date of the receipt until the conditional policy issued was presented to the deceased for acceptance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 198; Dec. Dig. ¶130(3).]

2. INSURANCE ¶146(2) — CONSTRUCTION OF AMBIGUOUS CONTRACTS.

Insurance contracts printed and prepared by skilled insurance experts and lawyers and offered to the public, which is without special knowledge, if in any respect ambiguous or capable of two meanings, must be construed in favor of the assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 294; Dec. Dig. ¶146(2).]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by Hattie E. Kempf and others against the Equitable Life Assurance Society of the United States. From a judgment for the plaintiffs, defendant appeals. Affirmed.

Alexander & Green, of New York City, and Barbour & McDavid, of Springfield, for appellants. W. T. Lamkin, of Billings, Mo., and J. T. Neville and J. T. White, both of Springfield, for respondents.

FARRINGTON, J. The plaintiffs (respondents) recovered judgment for \$5,000 based on the following petition (formal parts omitted):

"Now at this day come the plaintiffs herein and file this their final amended petition, leave of court being first had, and for their cause of action state:

"That the plaintiff Anna Kempf is a minor and that F. T. Stockard has been by order of this court duly and legally appointed her next friend under the statutes of the state of Missouri and is now acting herein in that capacity; that said Anna Kempf is the daughter, and plaintiff Hattie E. Kempf is the widow, of Joseph E. Kempf, deceased.

"That the defendant is a corporation duly organized under the laws of the state of New York and engaged in the business of life insurance, with its home office in the city and state of New York, and at all times herein mentioned was duly authorized to do business as a life insurance company in the state of Missouri.

"That one of the methods or plans by which the lives of individuals are insured by insurance companies is denominated and commonly called the 'Ordinary Life Plan,' whereby the assured pays a stipulated sum of money annually or semiannually at stated periods for and during the entire life of the assured, and wherein the insurer pays to the beneficiary of the assured a stipulated sum at his death.

"That the defendant among the plans adopted and used by it in insuring the lives of individuals adopted and at the times herein mentioned was using such 'Ordinary Life Plan' of insurance, and adopted certain forms of policy or insurance contracts for such 'Ordinary Life Plan,'

one of which forms containing the usual terms and conditions of such 'Ordinary Life Plan' is hereto attached and marked 'Exhibit A.'

"That on the 12th day of June, 1913, said Joseph E. Kempf applied to the defendant for a policy of insurance upon the said 'Ordinary Life Plan' in the sum of \$5,000, with plaintiffs herein as beneficiaries of such insurance, and the said Joseph E. Kempf and the defendant thereupon, on said 12th day of June, 1913, entered into a contract whereby the defendant agreed to insure and did insure the life of Joseph E. Kempf on said 'Ordinary Life Plan' and did promise to pay to plaintiffs herein in equal parts the sum of \$5,000 upon the death of said Joseph E. Kempf; that by the terms of said contract said insurance on the life of Joseph E. Kempf was to take effect and be in force from and after the said 12th day of June, 1913, provided the said Joseph E. Kempf was, on said date, in the opinion of the authorized officers of the defendant in New York, an insurable risk under the rules of said defendant, and the application of said Kempf was otherwise acceptable on the plan and for the amount applied for by him; that said contract was in writing and is shown by the application of said Joseph E. Kempf above mentioned, a copy of which is hereto attached and marked 'Exhibit B,' and a binding receipt for the first semiannual premium paid by said Kempf to defendant, a copy of which receipt was executed by M. A. Nelson, the duly authorized and acting agent of defendant, and a copy thereof is hereto attached and marked 'Exhibit C'; that all of said acts were done in the state of Missouri and said Joseph E. Kempf was at all times herein stated a resident of the state of Missouri and expected to remain a resident of Missouri.

"That said Joseph E. Kempf on said 12th day of June, 1913, at the time of the signing of said receipt and the presentation of said application, paid to the defendant the sum of \$111.25, the amount figured and estimated by the said M. A. Nelson, agent of defendant, as the correct and proper amount to be paid by said Joseph E. Kempf for the first semiannual premium to be paid by him for said insurance on his life in the sum of \$5,000, and that pursuant to said application and said receipt a policy of insurance upon the life of said Joseph E. Kempf was by said agreement to be issued to him by defendant in the sum of \$5,000.

"Plaintiffs further say that in the opinion of the defendant's authorized officers in New York, the said Joseph E. Kempf was on the 12th day of June, 1913, an insurable risk under the defendant's rules and his said application was otherwise acceptable on the plan and for the amount applied for as aforesaid and thereby the said contract of insurance became and was in full force and effect from and after said 12th day of June, 1913.

"That said Joseph E. Kempf on the 24th day of June, 1913, departed this life while said insurance was in full force and effect, but before any policy was delivered to him by defendant, and thereby the defendant became liable to the beneficiaries named in said application, these plaintiffs, for the said sum of \$5,000.

"Wherefore plaintiffs pray judgment against the defendant for the said sum of \$5,000 and interest from the filing of this suit, together with their costs."

The answer filed set up the defense: That the assured committed suicide within one year. That the contract, if any, was a New York contract, pleading the New York laws governing suicide cases. That the policy contained the following provision: "Self-destruction, sane or insane, within one year from the date of issuance hereof is a risk not as-

sumed by the society under this policy. In such an event the society will return the premiums actually received." That such provision in New York is a legal provision, pleading certain New York decisions on this question. That the acceptance and approval of the application and the issuance of the policy was done by the defendant's agents in New York. This part of the answer, over defendant's exception, was stricken out, and exception preserved.

That part of the answer pertinent to the issue as we see it, and which we deem decisive of the case and the theory on which the case was tried, is as follows (formal parts omitted):

"Comes now the defendant and for its answer to plaintiffs' amended petition admits that it is a corporation as alleged in said petition. It further admits that on June 12, 1913, Joseph E. Kempf applied to the defendant for a policy of life insurance in the sum of \$5,000, and at the same time executed to M. A. Nelson, the agent of the defendant, his promissory note in the amount of \$111.25 as and for the first semi-annual premium to be due on the policy as applied for, should one be issued as per the terms of said application. * * * Further answering, the defendant denies each and every allegation in said petition contained except as hereinabove admitted to be true, and having fully answered prays to be discharged with its costs."

The facts of the case may be stated as follows:

On June 12, 1913, Joseph E. Kempf made an application to the defendant company for \$5,000 insurance on the ordinary life plan, on which day he executed a note for \$111.25, the same representing the first semi-annual premium. On the same day the defendant's agent executed and delivered the following receipt:

"Received of Joseph E. Kempf one hundred eleven and 25/100 dollars, the first semiannual premium on proposed insurance for \$5,000 on the life of self for which the above-mentioned application is this day made to the Equitable Life Assurance Society of the United States. Insurance subject to the terms and conditions of the policy contract shall take effect as of the date of this receipt, provided the applicant is on this date in the opinion of the society's authorized officers in New York, an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount applied for; otherwise the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt. [Signed] M. A. Nelson, Agent. Dated at Springfield, Mo., 6/12/13."

The application for insurance, mentioned in the receipt, is the usual form of such documents, being a printed blank with printed questions to be answered and filled in by the applicant. It names the plaintiffs herein as beneficiaries, and contains the following stipulation:

"I hereby agree that the policy issued hereon shall not take effect until the first premium has been paid during my good health."

It also contains the following:

"I have paid to M. A. Nelson \$111.25 to cover the first semiannual premium on the policy applied for, in accordance with the provisions of the receipt of date and number corresponding

to this application, which I hereby accept, and agree to the conditions thereof."

In the application Kempf stated that he used alcoholic beverages to the extent of from one to two ounces before breakfast.

The local medical examiner pronounced Kempf in good health, stated that he was a first-class risk, and recommended him for life insurance. The forms for the application and the receipt were furnished to the defendant's agent by the defendant company. The application was received by the defendant on June 17, 1913, on which date there was made on defendant's record the notation: "Await inspection (habits). A. W. B." Inquiry was made by the defendant, and after the receipt of answers thereto the application shows the following entry thereon in New York: "June 23, 1913. Approved 5,000 age plus 45%. A. L. S." Dr. A. L. Sherill was one of the medical directors of the defendant company at the home office. The following appears under the above: "June 24, 1913. Issue O. L. age 47 plus 5 P. H. Send release. E. H." The evidence shows that "O. L." means "Ordinary Life." It is also shown that "45%" means five years added to the age of the applicant; that the applicant was "rated up"—that is, five years was added to his real age and the premium rate increased accordingly. With this change, the application was approved and the policy ordered released from the St. Louis office and delivered to the assured.

The letter sending the policy from the New York office to the St. Louis office, dated June 23, 1913, is known as a "ready letter writer"—that is, it is prepared in printed form, containing a great many orders and notations, and such as are to be used in connection with the particular policy sent are check marked. This letter is addressed to the St. Louis agent of the company, and is as follows:

"Dear Sir: Policy on the life of Mr. Joseph E. Kempf, if the risk be accepted, will be issued subject to the conditions checked below."

And the check marks are opposite these statements:

"Age rated up 5 yrs. b. Personal History. 20. A settlement has been taken in this case and conditional receipt issued. If policy issued is not accepted, return settlement promptly and take up receipt without fail."

It is agreed that on the 23d or 24th of June, 1913, the assured was found dead from a bullet wound and his pistol was found beside his body. There is little doubt but that he committed suicide. The company was advised of this on the 26th following, and it thereupon wired its St. Louis office that the policy was canceled and to return it.

The policy which had been written up and forwarded on the life of Kempf was for \$5,000, issued on the ordinary life plan, and corresponded in every way with the policy called for in the application and receipt except in the amount of the premium to be paid. It is explained by the officers of the defendant company that owing to the personal habits of Kempf as disclosed by his application

they were unwilling to issue him a policy on the plan and for the amount desired at the rate charged applicants 47 years of age of good habits, the rate for such a person requiring a semiannual payment of \$111.25, but that they were willing to issue to him, and in fact did write up the policy and send it for delivery to him for the amount and on the plan desired at a semiannual premium of \$187.55; that is, the only difference between the policy which would be issued to a man 47 years of age for the amount and on this plan, and the one which was forwarded from the New York office to the St. Louis office to be delivered to Kempf, was the increase in the semiannual premium from \$111.25 to \$187.55. On the back of the policy is the notation that the semiannual premium is \$187.55, due the 12th of June and December. This was all done after the receipt had been given and after the money paid by Kempf had been received and accepted by the company's agent. Nowhere on the policy issued is there disclosed what the first semiannual premium is to be, and in the letter forwarding the policy to the St. Louis office to be delivered to Kempf there is no instruction whatever that in case the policy is delivered the assured must pay, on delivery, the difference between \$111.25 and \$187.55.

The trial court in a jury trial held that under these conditions the life of Kempf was insured for \$5,000 in the defendant company, and the defendant has appealed, contending, first, that there was never consummated a contract of insurance, and, second, that it was a New York contract and that the assured's rights thereunder were forfeited by his own act.

[1, 2] As we think there was a contract of insurance dated on June 12, 1913, made and completed in Missouri, it will not be necessary to go into the second contention.

On turning to the receipt given by Nelson, defendant's agent at Springfield, to Kempf, we find that there was \$111.25 paid for the first semiannual premium on the proposed insurance of \$5,000; that:

"Insurance subject to the terms and conditions of the policy contract shall take effect as of the date of this receipt, provided the applicant is on this date in the opinion of the society's authorized officers in New York an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount applied for; otherwise the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt."

The evidence shows without question that in the opinion of the officers of the society in New York the assured was an insurable risk because they not only wrote across the application "Approved," but ordered that a policy issue thereon, and the policy issued was an ordinary life policy and for the sum of \$5,000. The applicant therefore was acceptable on the plan and for the amount applied for.

It is unnecessary for us to go into the question whether the medical examiners and off-

icers in the New York office could whimsically refuse to accept this applicant and issue him a policy, because their admitted acts concerning the matter with which they were dealing amounted in law to an approval and an acceptance of this applicant; that is, it shows in law that in the opinion of the officers the applicant met the conditions on which he was to be insured for \$5,000 on and from June 12, 1913, or that in their opinion he was an acceptable risk for the amount and on the plan as of the date of the application.

It is a consideration which is held out to prospective customers of the company that they will be insured from the date of their application if they meet the requirements set forth in the application and receipt. Otherwise, what benefit would it be to an applicant to have his policy dated back to the date of the application provided he lived and accepted? It is to cover the period from the date of the application until a delivery of the policy that he pays his money in advance, and it cannot be said that his temporary insurance is without consideration where he is either finally rejected by the company or himself refuses to accept the policy with the increased premium and his money is handed back to him. As a first consideration, it is an inducement to get business, and then it gives the insurance company the chance to insure this man's life for which chance it is willing to give this temporary insurance.

The law is wisely written and well settled in this state that insurance contracts, or in fact any contract, and especially insurance contracts that are printed and prepared by skilled insurance experts and lawyers and offered to the public, that is without special knowledge in this line of business, must be construed, in respects ambiguous, doubtful, or at least of two meanings, in favor of the assured. *Mathews v. M. W. A.*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 433; *Dezell v. Fidelity & Casualty Co.*, 176 Mo. loc. cit. 266, 75 S. W. 1102; *Still v. Insurance Co.*, 185 Mo. App. loc. cit. 553, 172 S. W. 625.

We think there is no question that the insurance company by the receipt given contracted with Kempf that he was insured from June 12, 1913, provided he met certain conditions in the opinion of the New York officers. That he was an insurable risk is clearly shown to have been the opinion of these New York officers, and as to whether the application was acceptable was qualified and limited on the plan and for the amount applied for; it was not necessary, so far as this receipt is concerned, that it be acceptable as to the first semiannual premium. On the other hand, there is no showing in this case that the first semiannual premium, which was paid, was to be the same as other semiannual premiums falling due in December and June of each year, and indeed the interpretation that the company placed upon

this contract when it forwarded the policy to its St. Louis office for delivery does not indicate that it expected Kempf, for the first semiannual premium, to make any further payment. Would it not be the natural thing, and in fact a prominent part of a letter sending the policy, to direct the agent that in case of a delivery he must collect the difference between what had already been paid (\$111.25) and \$187.55? And yet not one word does it voice in its letter in this regard. On the contrary, the policy sent with the letter acknowledges receipt of the first premium as in full and calls for the payment of the next premium to be paid in December, 1913. This shows that the company was treating the first semiannual premium as having been paid in full because no further premium for any amount was demanded under the terms of the letter and the policy till the December payment was due.

The policy issued as to premiums contains on its face the following provisions:

"Premiums. This insurance is granted in consideration of the payment in advance of one hundred thirty-seven and fifty-five one hundredths dollars, and of the payment semi-annually thereafter of a like sum upon each 12th day of December and June, until the death of the insured."

"Age. The premiums, loans and surrender values of this policy are on the basis of the rated-up age of 52 years, which is 5 years in excess of the age stated by the insured."

We therefore could rest this case on the proposition that where there are two meanings open upon the construction of a contract of this character, we must give that construction which is most favorable to the assured. But, as hereinbefore indicated, the contract in question appears to us as plain and unambiguous, meaning only in the light of common sense and justice that Kempf was insured from the date of his application, provided he met certain conditions which must in the opinion of the officers in New York have existed as of the date of the application. That such an opinion did exist has already been referred to. Respondents cite several cases directly in point arising under almost exactly the same facts.

Such a binding receipt, so designated by the appellant, insures from its date and is recognized as a form of insurance. 1 Cooley's Briefs on the Law of Insurance, pp. 535-537; 25 Cyc. 714. The case of *Lee v. Union Cent. Life Ins. Co.* (Ky.) 41 S. W. 819, deals with exactly the same question that we have here and is a case where the premium written in the policy was greater than that written in the application, and it was claimed in that case, as here, that such change amounted to a rejection of the applicant and was the making of a proposition to him. The point was ruled against the company, the court holding, as we hold here, that where no application was demanded, but the policy was issued on the application which was marked, by the officers of the company whose opinion was necessary, "Approved," and

where the officers whose business it was to order the issuance of a policy approved the application for the amount and on the plan applied for, was not the making of a new proposition, and that on a showing that the assured died, the beneficiary made a case. See, also, *Halle v. New York Life Ins. Co.* (Ky.) 58 S. W. 822.

The case of *Starr v. Mutual Life Ins. Co.* of N. Y., 41 Wash. 228, 83 Pac. 116, was where an application stated that insurance would be in force from date "provided this application shall be approved and the policy duly signed by the secretary at the head office of the company and issued." The application was approved and the policy issued and sent for delivery. The applicant died before the approval of the application and issuance of the policy. The court in deciding the case used the following language applicable to our case:

"By the death of Starr the subject-matter of the contract of insurance ceased to exist, and at that moment there was a contract of insurance or there was none. The approval or rejection of the application after that time would be ineffectual for any purpose. The object of the second provision of the application, above quoted, is not entirely clear, especially from the standpoint of the insured. If there was to be no contract of insurance in any event until the application was approved at the home office and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application or not. If he lived until the application was approved and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiaries would derive no benefit from the insurance. The chief object of the provision would therefore seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk."

Also the following language:

"If insurance companies deem it necessary for their protection to limit the operation of their contracts of insurance from the date of issuance of the policy, or from any other date, it is very easy for them to say so and to bring knowledge of that fact home to those with whom they are dealing. In this case, we hold that the receipt given constituted a present contract of insurance, subject to be continued or terminated by the approval or rejection of the application, and that the insured was not affected by any want of authority in the soliciting agent to enter into such a contract, unless notice of such want of authority was brought home to him."

The case of *Lee v. Union Cent. Life Ins. Co.*, supra, has not, so far as we can find, been overruled. However, the case of *Halle v. New York Life Ins. Co.*, supra, was criticized in the case of *Northwestern Mut. Life Ins. Co. v. Neafus*, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211. But the case last mentioned merely holds that the receipt given in the *Halle* Case was not a binding receipt, one of the conditions therein being that the insurance should first be issued. In

the Neafus Case the applicant is shown to be not an acceptable risk.

We are cited to a number of fire insurance cases in respondents' brief where binding receipts for fire insurance were given. Appellant contends that fire insurance cases are not applicable to life insurance contracts, citing 1 Cooley's Briefs on the Law of Insurance, page 419, wherein it is laid down:

"It may be stated, as a general rule, that agents of life insurance companies do not have authority to conclude absolutely the contract of insurance, but only to procure and receive applications, which they forward to the company to be acted upon by the immediate officers of the corporation." (Italics are ours.)

We know of no reason, however, why the same law would not apply to a life insurance contract that would apply to a fire insurance contract where the life insurance company places in the agent's hands forms which would, when filled in and signed, make a binding contract the same as in cases of fire insurance. See *Horton v. New York Life Ins. Co.*, 151 Mo. loc. cit. 617, 52 S. W. 356.

The case of *Mohrstadt v. Mutual Life Ins. Co. of N. Y.*, 115 Fed. 81, 52 C. C. A. 675, relied on by appellant, was a case where the entire plan as contemplated by the application was rejected by the company and a policy on a different plan offered. In our case, had the company when Kempf's application was received by the company's officers offered him an entirely different plan, such act alone would have shown a rejection of Kempf's original application and a new proposition made to him, which, of course, must have been accepted by him before it would be binding. Besides, the receipt in that case, required that the application be accepted by the company, whereas in our case the condition was that if the applicant was acceptable his insurance would be in force from the date of the receipt.

In the cases of *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653, *Aetna Life Ins. Co. v. Hocker*, 39 Tex. Civ. App. 330, 89 S. W. 26, *Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. W. 849, and *Phenix Ins. Co. v. Schultz*, 80 Fed. loc. cit. 342, 25 C. C. A. 453, no binding receipts were given. There was merely an application which amounted to nothing more than a proposition requiring action by the company before insurance began.

In the case of *Steinle v. New York Life Ins. Co.*, 81 Fed. 489, 26 C. C. A. 491, it was provided in the contract that if the application is not approved and accepted, the company shall incur no liability thereunder.

In the case of *Mutual Life Ins. Co. v. Young*, 28 Wall. (90 U. S.) 85, 23 L. Ed. 152, the receipt recited:

"To be in force from and after the date hereof provided the said application shall be accepted by the company."

The court there held to the terms of the receipt which required that before insurance begun the application must have been accepted. The condition in this and the other cases cited by the appellant did not depend upon the applicant's eligibility, which was the condition in our case, but upon some subsequent act to be performed by the company.

Appellant quotes copiously in its brief from the case of *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356. In that case, however, the question for decision was whether the agreement was a Missouri or a New York contract. A conditional receipt, as shown on page 614 of 151 Mo., 52 S. W. 356, was given, and in discussing this receipt (loc. cit. 620 of 151 Mo., 52 S. W. 356) the court broadly intimates that where it is shown that the agent has authority to give a binding receipt, the company could not escape liability. The court concluded (loc. cit. 621 of 151 Mo., 52 S. W. 356) because it appeared from the record that the agent had no authority to bind the company to a contract of insurance from the date of the acceptance of the application in New York, that it was not a New York contract and only became a contract upon delivery of the policy which was to be made in Missouri. An agent's authority is co-extensive with his employment, and where it is admitted that the company placed in the agent's hands the forms necessary to close a binding contract with those with whom the agent would deal on behalf of the company, such act shows that he had authority to bind the company as to the terms printed in that conditional receipt and application furnished by the company and forwarded to the agent for use, where the party dealing with the agent had no knowledge of a lack of authority.

We therefore hold that by the admitted written acceptance of the application for the amount and on the plan, and the order of the officers of the corporation that a policy be issued for the amount and on the plan desired, show as a matter of law that the company regarded Kempf as an insurable risk, and that the conditions necessary to make said insurance in force from and after June 12, 1913, had been met, and that this contract, subject to the determination of his eligibility, was all a completed contract made and entered into in the state of Missouri.

For the reasons herein appearing, the judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

HARMON v. DICKERSON. (No. 1561.)

(Springfield Court of Appeals. Missouri.

March 11, 1916. Rehearing Denied April 8, 1916.)

1. TRIAL \S 136(3) — QUESTION FOR JURY — CONSTRUCTION OF LEASE — THEORY OF TRIAL.

In an action by the buyer of a motion picture theater against the seller, where the seller so conducts his defense as to concede that he had no right or authority to assign his lease and makes no objection to the buyer's testimony introduced upon that theory, the court will not strictly construe the terms of the lease and instruct the jury that as matter of law there were no restrictions upon the seller's right to transfer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 326; Dec. Dig. \S 136(3).]

2. LANDLORD AND TENANT \S 76(3) — LEASE — PROVISION AGAINST SUBLETTING — ASSIGNMENT.

Where a sublease provided that the sublessee could not sublet or allow any other tenant to come in with or under him without the written consent of the landlord, such restriction was not exhausted by an assignment by the sublessee, and after the transfer by him the provision yet remained as a prohibition against a subletting by the assignee without the consent of the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 229, 230; Dec. Dig. \S 76(3).]

3. LANDLORD AND TENANT \S 104 — LEASE — PROVISION AGAINST SUBLETTING — PROTECTION BY FORFEITURE AGAINST BREACH.

Where a lessee subleased, the lease providing that the sublessee could not sublet without the written consent of the landlord, the lessee could protect himself, against a breach of the provision, by a forfeiture.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 328; Dec. Dig. \S 104.]

4. PAYMENT \S 17 — PAYMENT BY NOTE — FORECLOSURE OF CHATTEL MORTGAGE.

Where the seller of a motion picture theater, who took notes in payment, and a chattel mortgage on the equipment as security, foreclosed the mortgage, he cannot then say that he did not accept the notes in full payment of the purchase price.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. \S 17.]

5. FRAUD \S 35 — WAIVER BY DEALING WITH SUBJECT-MATTER — LEASE OF PROPERTY SOLD.

The buyer of a motion picture theater, whose vendor was guilty of fraud, did not waive the fraud by leasing the outfit to a third person.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 30; Dec. Dig. \S 35.]

6. DAMAGES \S 210(2) — INSTRUCTION — LIMITING RECOVERY TO AMOUNT CLAIMED.

In an action for fraud committed by the seller of a motion picture theater, an instruction as to damages should limit the damages recoverable to the total amount claimed in the petition.

[Ed. Note.—For other cases, see Damages, Dec. Dig. \S 210(2).]

7. DAMAGES \S 210(2) — INSTRUCTION — LIMITING RECOVERY TO AMOUNT CLAIMED.

In an action for fraud committed by the seller of a motion picture theater, an instruction should limit the special damages alleged to have been suffered in plaintiff's efforts to

operate the show to the amount claimed in the petition.

[Ed. Note.—For other cases, see Damages, Dec. Dig. \S 210(2).]

8. FRAUD \S 65(1) — INSTRUCTION — DAMAGES.

In an action for fraud committed by the seller of a motion picture theater, where there was testimony that the seller and also the plaintiff's assignee made money with the show, an instruction allowing the jury to assess as damages such sum as they found "from the evidence that the plaintiff necessarily expended in attempting to operate the moving picture show, over and above his receipts therefrom," was erroneous as fixing plaintiff's success with the show as the sole criterion for judging what the receipts should have been under defendant's representations after plaintiff bought; if the element of damages was recoverable at all, the jury should have been told if he operated the show as an ordinarily competent and prudent person would have done under the same or similar circumstances and loss resulted, then the jury might consider such loss in estimating his damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72-74; Dec. Dig. \S 65(1).]

9. DAMAGES \S 62(1) — FRAUD IN SALE OF BUSINESS — MITIGATION.

The buyer of a motion picture theater, induced thereto by the fraud and misrepresentations of the seller, after he operates long enough to discover that loss is certain, must stop the business under his duty to mitigate damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 119; Dec. Dig. \S 62(1).]

10. FRAUD \S 60 — MISREPRESENTATIONS — SALE OF BUSINESS — DAMAGES.

The buyer of a motion picture theater, induced thereto by the misrepresentations of the seller as to his right to assign the lease and as to the receipts of the show, could recover of the seller the benefit of his bargain as an element of damages, in addition to the price paid, unless the loss of business was occasioned by the buyer's lack of experience, skill, or industry.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 65; Dec. Dig. \S 60.]

11. FRAUD \S 59(1) — MISREPRESENTATIONS — RECOVERY OF BUYER.

The buyer of a motion picture theater under misrepresentations that the seller had the right to assign his lease and as to the daily receipts of the show, could recover at least the amount paid in cash and on his notes, with legal interest from the date of payment.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 60; Dec. Dig. \S 59(1).]

Farrington, J., dissenting in part.

Appeal from Circuit Court, Polk County; O. H. Skinner, Judge.

Suit by J. W. Harmon against Jerome Dickerson. From a judgment for plaintiff, defendant appeals. Judgment affirmed conditionally.

Watson & Page, of Springfield, Rechow & Pufahl, of Bolivar, and Patterson & Patterson, of Springfield, for appellant. V. O. Coltrane, of Springfield, Cox & Douglas, of Bolivar, and J. T. White, of Springfield, for respondent.

ROBERTSON, P. J. Plaintiff, as the testimony in his behalf tends to prove, bought of defendant a lease on the first story and

basement of a building at 127 Kirby Arcade in Springfield, together with the equipment for a moving picture show located on the first floor. He claims he was induced to make this purchase by the false representations of defendant that the business was making the defendant a profit of \$20 per day, and also by the false representation that defendant had the right and authority to transfer said lease. The purchase price was paid by the plaintiff giving the defendant \$300 in cash, executing his note to defendant for \$1,500 due one day after its date, and also his note for \$3,200 stated to be due one day after date, but providing the interest thereon and \$125 of the principal should be paid on the 16th day of each month and if not so paid, "then the whole debt shall become immediately due and payable." It is treated and considered by the parties as an installment note. At the time these notes were executed the plaintiff delivered to the defendant a claim against an insurance company for \$1,461.50, which was shortly afterwards collected by defendant and credited upon the \$1,500 note. Also at the time of the giving of the notes the plaintiff executed to the defendant a chattel mortgage upon the picture show equipment to secure both of said notes. At the time plaintiff made this purchase from the defendant the Kirby Realty Company owned the building and had given a lease thereon to one W. T. Kenderick. Kenderick then executed a lease on the first floor and basement to W. W. Smith for a term of four years and ten months from May 1, 1910, and this lease contained a provision to the effect that Smith would "not sublet or allow any other tenant to come in with or under him without the written consent of said Kirby Realty Company." It appears to be conceded that the lease from the Kirby Realty Company to Kenderick contained a similar provision because when Smith undertook to assign this lease to the defendant the consent of the Kirby Realty Company was obtained in which the officer of that company stated:

"I will consent to Mr. Kenderick making lease to Mr. Dickerson, but not release Mr. Kenderick in any way from his original lease."

At the time plaintiff bought the picture show outfit this lease had over two years yet to run, and he testified that after he had run the picture show for a while at a considerable loss he leased it and the building to one Gus Bennert, and when Kenderick learned that he (the plaintiff) was claiming to occupy the premises under an assignment of the lease from Dickerson that Kenderick immediately objected. Kenderick testified that he thought plaintiff was running the show for defendant, as defendant had made the only payment of rent Kenderick received after plaintiff went into possession. Kenderick, after plaintiff leased to Bennert, interfered, and Bennert paid the rent for the building to Kenderick and by some arrangement with plaintiff rent

was paid to him for the moving picture show equipments until March 28, 1913; when defendant foreclosed the chattel mortgage, and thus plaintiff stood ousted and deprived of all of the property which he purchased from the defendant. June 11, 1913, defendant executed a bill of sale to Bennert for the picture show property.

This action was brought in Greene county and a change of venue taken by defendant, and the case was sent to and was tried in Polk county. The defendant set up as a counterclaim the balance due from the plaintiff on the purchase price of said property, the sale under the mortgage having netted only \$800 which he had credited upon the notes. The trial to a jury resulted in a verdict for \$7,000 in favor of the plaintiff, and against the defendant on defendant's counterclaim for \$2,825.91, the balance on said notes. Plaintiff afterwards remitted \$1,000 of the judgment in his behalf, thus leaving a judgment in his favor of \$3,174.09. The defendant has appealed.

One of the points urged here in behalf of the appellant as a ground for a reversal is that the testimony in behalf of plaintiff tending to prove that the defendant represented that he owned a lease on the building and had the authority to transfer it to the plaintiff was not false, and this is the burden of the instructions requested by the defendant and refused. It is now contended, as it evidently was at the close of all the testimony, that the lease offered in evidence from Kenderick to Smith discloses that there was no restriction upon the right of the defendant to assign or sublet the premises, and that plaintiff could have successfully resisted the efforts of Kenderick to oust him. Authorities are cited in behalf of appellant to the effect that a provision contained in a lease restricting the right of assignment and allowing it to be done only upon the consent of the lessor that then after an assignment is so made there can be no further restrictions upon a subsequent assignment or subletting. It is also said that the lease from Kenderick to Smith contained no provision for forfeiture or re-entry for a violation of the provision in the lease, and that for that reason Kenderick had no power to oust the plaintiff, even if the assignment or subletting had violated this provision in the lease. Plaintiff, in making out his case, proceeded without objection upon the assumption that the provision in the lease from Kenderick to Smith was a restriction upon the right of defendant to assign or sublet, and also offered Kenderick as a witness who testified without objection that he never accepted at any time any rent from plaintiff, but that as soon as he ascertained that the plaintiff claimed to be holding under defendant he sought an interview with the defendant at which he served notice upon the defendant to vacate the premises on account of the violation of the terms of the lease. Kenderick then testified about what

defendant stated, which defendant does not deny as follows:

"He said he would bring Mr. Harmon up and see if it could not be arranged. The notice I served on him to vacate was a notice that he had forfeited his lease by letting Mr. Harmon come in under him without the consent of the Kirby Realty Company. He had not consulted me or consulted them. I had not met Mr. Harmon at that time. I never collected any rent from him."

When defendant went upon the stand and was testifying upon cross-examination he stated that the lease was not to be transferred to the plaintiff until the purchase price was fully paid, and he at first says that he had the consent of the representative of the Kirby Realty Company "to turn the lease over." He also testified that he did not tell plaintiff that he had the consent of the Kirby Realty Company to assign the lease to him, nor that he had the consent of Kenderick for that purpose. He testified that he did not have Kenderick's consent; that he did not state to the plaintiff that he had the right to assign this lease. Later in his testimony upon cross-examination, he testified that plaintiff was to get the lease when the purchase price was all paid, and that when that was done he (the defendant) would get the consent of the Kirby Realty Company and then plaintiff would get the lease. He says the lease and the good will of the business were the items that constituted the principal value of the sale to the plaintiff. Defendant also testified that at the time the controversy arose with Kenderick concerning this lease he sent a party to Kansas City to get the consent of the Kirby Realty Company, but did not succeed. The defendant placed upon the witness stand the party who had kept the account of his operations of this business for more than three months prior to the sale to the plaintiff, and the accounts produced by him disclose that the business made an average daily profit of only about \$12 during that time.

The provision of the lease is entirely different from the provisions contained in the leases involved in the adjudicated cases cited in behalf of the defendant. It also appears from the testimony of the defendant himself that he treated and considered this restriction as binding upon him, and in the trial of the case, after the plaintiff had introduced testimony upon this point without objection, the defendant took a position which assumed upon his part that he was unable to assign this lease to let plaintiff in under him without the written permission of the Kirby Realty Company. He even went so far in his efforts to convince the jury that he had not promised to do a thing which he had no right to do as to testify that he did not agree to give the plaintiff any sublease or assignment until after plaintiff had paid all of the purchase price, and according to the provisions of the note for the payment of the purchase price it would not

have been paid until less than two months before the expiration of the term of the lease. He did not make any such representations to Kenderick when served with notice, but we find him ignoring his lease and himself leasing the show equipments to Bennett from whom Kenderick was collecting rent for the part of the building used for the show.

[1] After the defendant acted as above set out and had proceeded with his defense in a manner that so clearly conceded the contention that he had no right or authority to assign the lease and after all testimony was introduced without objection by the plaintiff upon that theory, he cannot then be permitted to have strict legal construction by the court placed upon the terms of the lease, and the jury told that as a matter of law there were no restrictions upon his right and authority to transfer the lease. The defendant by his conduct, both before and at the trial, conceded that without the consent of the Kirby Realty Company and Kenderick's he had no authority to assign or sublet to the plaintiff, and the only issue left for submission to the jury upon this phase of the case was whether or not he made the representation. That question was properly submitted to and passed upon by the jury.

[2] But considering the legal effect of this provision in the lease from Kenderick to Smith to the effect that Smith could not sublet or allow any other tenant to come in with or under him without the written consent of the Kirby Realty Company, it will be observed that this is not a restriction which was exhausted as contended for by defendant, by an assignment, and when Smith transferred the lease to defendant that provision yet remained as a prohibition against a subletting by defendant without the consent of the Kirby Realty Company. When Kenderick got his authority to give a lease to Smith the Kirby Realty Company consented only on condition that he remain liable for the rent, and it was natural and proper that he protect himself as against those claiming under his lease to Smith.

[3] That Kenderick could protect himself against a breach of this provision in his lease by the forfeiture is so clear as to need no discussion of the technical reasons justifying such a conclusion, as otherwise no other remedy would be available in many instances, and in no other way could such a provision be properly enforced.

[4] Appellant contends that plaintiff cannot recover in this case because he did not perform his contract with defendant by paying his notes. This theory assumes that the giving of the notes did not constitute payment. Whatever else might be said on this point we think that after defendant proceeded to and did foreclose the mortgage given to secure the notes that he cannot now

be heard to say that he did not accept them in full payment of the purchase price, and, besides, he set up the balance due as a counterclaim and has a judgment thereon. There is no merit in this contention.

[5] It is also said that since the plaintiff leased the show outfit to Bennert he cannot be heard to further complain of the fraud perpetrated on him by defendant. The appellant has seized upon such expressions in the opinion in the case of *Brown & Pounds v. South Joplin Lead & Zinc Company*, 231 Mo. 166, 173, 132 S. W. 693, 140 Am. St. Rep. 509, as that the defrauded party "must not make any new agreement or engagement respecting" the subject-matter of the fraud, and that "if he does he waives the fraud." These statements, it will be observed, relate to engagements and new agreements with the party guilty of the fraud, and also to contracts wherein the party is seeking to rescind. This contention is ruled against defendant.

Complaint is made in defendant's brief as to instructions; the one concerning the alleged fraud of defendant is especially dwelt upon, and we have considered it and the others complained of and are convinced that they are, in the light of the facts in this case, wholly unobjectionable, and so clearly without error as to justify no detailed discussion, except the instruction on the measure of damages.

The petition alleges the damages caused to plaintiff in his effort to operate the show was \$1,000, and that his total damages were \$7,000. The instruction on the measure of damages reads as follows:

"If you find the issues for the plaintiff, then in assessing plaintiff's damages you should allow him the difference, if any, between the actual value of the property purchased by him from the defendant at the time of the purchase, and what said property would have been worth if it had been as represented by the defendant, together with such further sum, if any, as you may find from the evidence that the plaintiff necessarily expended in attempting to operate the moving picture show purchased by him, over and above his receipts therefrom, and you may also add interest at 6 per cent. per annum on said amounts from the time of filing this suit to date."

[6, 7] One objection urged against this instruction is that it failed to limit the damages to the total amount claimed in the petition, and also that it did not limit the special damages alleged to have been suffered in the efforts to operate the show to the amount claimed (\$1,000) in the petition—citing *Walters v. United Railways Co.*, 165 Mo. App. 628, 631, 147 S. W. 1098. The view we take of the other features of the instruction renders it unnecessary to consider whether or not the remittitur of the \$1,000 from the judgment cures these errors.

[8] Another and more serious defect in this instruction is that it allowed the jury to assess as damages such sum as they found "from the evidence that the plaintiff necessa-

rily expended in attempting to operate the moving picture show, over and above his receipts therefrom." Conceding for the purpose of plaintiff's contention that this is a proper element of damages, we will discuss this phase of the instruction. The testimony is that while the defendant operated the show he did so at a profit. While he did not make the profit that plaintiff testified he represented to him he was making, yet there was no loss. The testimony is that Bennert made money out of the show. The instruction fixed plaintiff's success with the show as the sole criterion for judging what the receipts should have been after he bought it. True, the instruction required the jury to find what he *necessarily* expended; but it is so worded that what he was able to make the show produce was the only basis for the computation of his loss. According to the testimony he was the only person who had operated at a loss, and we think that if this is an element of damages, the jury should have been told if he operated the show as an ordinarily competent and prudent person would have done under the same or similar circumstances, and that loss resulted, then the jury might consider such loss in estimating his damages. Any other rule would work great injustice. If the success of the purchaser is the measure of the possibilities of a business then any failure he makes, however incompetent and inattentive he is, would be charged against the seller. If a novice buys a business he cannot learn it at the expense of the seller, even though he was induced by the fraud charged here to buy.

[9] Another peculiar feature of this instruction is that it unqualifiedly allows loss in operating a business as an element of damages. There appears no reason for allowing damages arising by reason of loss after it has been operated sufficiently long to demonstrate this fact and after the fraud has been discovered. It would seem that after it has been properly demonstrated that loss is certain, the duty to mitigate damages arises, and the conduct of the business should cease, otherwise where would be the end of liability? The profit of the business to the buyer would be its losses. The plaintiff, to meet this phase of the instruction, cites *Kendrick v. Ryus*, 225 Mo. 150, 157, 123 S. W. 987, 135 Am. St. Rep. 585, where there is an instruction somewhat similar to this one, but there no facts were shown as here, no questions were raised as here, and the plaintiff (page 156 of 225 Mo., 123 S. W. 937, 135 Am. St. Rep. 585) "proved that he expended \$5,000 on the lease before he discovered the fraud." Here the plaintiff did not discover the inability of defendant to assign the lease until some time after he bought, but the instruction puts no limitation on the time of his operation. According to his testimony, he soon discovered the alleged fraud as to profits of the business.

[10] That the plaintiff is entitled to recover the benefit of his bargain as an element of damages is fully discussed and held in the Kendrick Case, *supra*, 225 Mo. 158 et seq., 123 S. W. 937, 135 Am. St. Rep. 585. The authorities cited and approved announce that the rule applies to sales of personal property and that the difficulty of ascertainment is no reason for disallowing such an element of damages. The defendant testified, as we have stated, that the chief value of the subject of the sale was the lease and the good will, and the jury may have understood the instruction to refer only to the lease, but we are discussing it as also referring to the entire business sold. In the case at bar the justice of the rule is fully exemplified. The plaintiff was induced by the representations as to the right to transfer the lease and as to the profits to quit his then occupation and to embark in a business of the kind represented by the defendant. The representations of the profitability of the business must be held to be such as would naturally follow when conducted as an ordinarily competent and prudent person, in that line of work, would carry it on. The plaintiff evidently contracted for such a business, and, if he failed to get it because of the fraud of the defendant, he should be compensated therefor. If the defendant represented to plaintiff that he was making a certain profit, plaintiff had a right to conclude that he was doing it by the use of ordinary skill and industry, and that he (plaintiff) could, by the same kind of management, under the same or similar conditions, produce practically the same results. This brings us back to the question of plaintiff's management, whether it was of this character, and if it was, and there was a loss, this would tend to prove that he did not get that for which he contracted. Any other rule would allow a man to practice a fraud upon a buyer of a business consisting almost exclusively of good will and escape payment of any damages, except a few dollars as the value of a small amount of tangible property necessary to carry on that business.

[11] Under appropriate instruction the jury found that defendant practiced upon the plaintiff the fraud alleged, and therefore he is entitled to recover at least the amount paid by him on his notes and in cash on the purchase price amounting to \$1,760.50, together with interest thereon from the date he made the payments at the rate of 6 per cent. per annum, and if plaintiff will remit from his judgment, within ten days after this opinion is filed, an amount sufficient to reduce it to said amount it will be affirmed; otherwise, on account of the errors in the instruction on the measure of damages, we must reverse the judgment, and remand the cause.

STURGIS, J., concurs, except as disclosed in his separate opinion filed. FARRING-

TON, J., concurs, except as to measure of damages, and files separate opinion.

STURGIS, J. (concurring). In addition to what is said in the foregoing opinion as to allowing damages in this case, I desire to add this: However reprehensible in morals it may be, damages cannot be allowed in law because one person who is making a success of any business, largely due to his skill, knowledge, training, and fitness for the same, sells such business to another who is not fitted for or competent to so conduct such business as to make it profitable, even if the seller knows that in the very nature of things such buyer cannot make it a success, provided the seller is not guilty of fraud or misrepresentation in inducing the sale. Every man must be his own judge as to his ability to run any business or manage any property successfully, and takes his own risk in investing therein. The owner of any business or property has a right to truthfully state what the profits of such business are or have been in order to effect a sale, without in any way guaranteeing that such business will be equally profitable, or profitable at all, in the hands of the buyer, even if such buyer conducts the business with ordinary skill and diligence; and if such seller knows that the buyer does not possess the qualifications to make the business a success, yet he may sell on the truthful representation of what the business is earning in his hands and the value of its good will. The seller is not to be held responsible for loss occasioned by the buyer's lack of ability or experience. In this case the defendant's misrepresentations as to the profits and expenses of this business and his failure to transfer the lease on the building where it was located combined with plaintiff's inexperience and lack of ability to conduct the business successfully in producing plaintiff's loss. The last element, the personal equation, was not taken into account in the instructions given. The instruction on the measure of damages applies alike to a competent or an incompetent person. The parties have not briefed to any extent the question of the damages for benefit of the bargain being too speculative under the facts to warrant any recovery for same, and I express no opinion thereon.

FARRINGTON, J. I concur in the main opinion in which it is ordered that the judgment be reversed and the cause remanded, but I do not concur in that portion thereof which permits a recovery of damages by the plaintiff over and above the actual amount paid by him to the defendant; we differ only on the measure of damages to be applied to the case. The damages sought by the plaintiff in this action in excess of the purchase price of the picture show are based on the running expenses incurred by the plaintiff after purchasing the same, and damages

such as are designated "for the benefit of the bargain."

The facts necessary to be known to understand my view of the case may be stated as follows: Dickerson owned a picture show in Springfield, Mo., which he had operated several months. Harmon, the plaintiff, was a farmer who lived in Dallas county, and who a short time after moving to Springfield purchased from the defendant the moving picture show. The evidence sustains the verdict of the jury in its finding that Dickerson represented that he was making from \$20 to \$25 dollars a day net profit in operating this show, and that Harmon relied on this statement in buying out the show. The evidence further justifies the finding of the jury that in truth and in fact Dickerson was not making the profit claimed, but on the other hand that the returns were much less than he represented. We must start, then, with the premise that the plaintiff was defrauded in his purchase, and is entitled to a recovery from the defendant. The question therefore becomes important to ascertain what will be the measure of damages in such a case.

Undoubtedly, in Missouri, a defrauded purchaser may recover damages for the benefit of his bargain. *Kaufman v. Davis*, 180 S. W. 1033, and cases therein cited. That is, of course, to be qualified by the statement that damages recoverable in this respect must meet with the other rules governing damage suits, one of which is that although a wrong may damage and injure one he is limited to a recovery of only such damages as can be reasonably and definitely ascertained; he cannot recover damages designated by law-writers as speculative or conjectural—this, for the very good reason that the jury in fixing the amount of the damages must have some reasonable standard to go by in measuring the wrong and remedying it, and where the plaintiff's evidence fails to show with reasonable certainty the amount of his damages, none will be allowed.

What was represented as being transferred by Dickerson to the plaintiff in this case was the established, running show, which included the theater equipment and paraphernalia, a lease, and the good will of the business. There is no charge that the equipment and paraphernalia were misrepresented, nor that the value of the lease, as a lease, was misrepresented, but the action is based on the misrepresentations made by the defendant as to what profits he was making daily.

It is well known that to successfully operate a picture show or any other enterprise of similar nature there is required more than a place of business and the material equipment thereof; it requires experience, diligence, energy, favor of the public, suitable weather, and peculiar adaptability to the business—as much so as to practice law or medicine successfully. To operate such a business successfully therefore depends nearly altogether upon the personal ability and charac-

teristics of the manager or operator. It was this element that must go into this business to make it earn a profit of from \$20 to \$25 a day over and above all expense; and while the defendant is entitled to no moral justification to making the misrepresentation, that does not give the plaintiff the legal justification of holding the defendant for damages where it is not shown and could not be shown in this case that the plaintiff was a person who could successfully operate a business of this kind. As stated, the facts show that Dickerson was not making from \$20 to \$25 net profit a day. It is also shown that plaintiff during the time he conducted the business lost money. There is evidence also that the man who succeeded plaintiff in the business, with a fixed expense of \$100 per month greater than the fixed expense on which plaintiff operated it, conducted the business successfully and profitably, which all finally goes to show that the profits rest in the *management*. Undoubtedly the plaintiff had a right to believe that he was buying a show that was clearing from \$20 to \$25 a day, but his evidence fails to show that he was possessed of that ability and experience with which he together with what he was buying (had it been earning \$20 to \$25 a day) could have continued it at such a profit for himself. The only sure rule of measuring whether one is capable of successfully operating a business venture of this character is *experience*, and *experience* necessarily has reference to the past rather than the future. The rule is well settled not only in this court, but by practically all the decisions and text-books that a recovery of anticipated profits of a commercial business is denied, because they are too remote and speculative and too dependent upon changing circumstances to warrant a judgment for their recovery, and that the only exception to this rule is where the party who seeks to recover the profits of a business lost makes it reasonably certain by competent proof what would be the amount of his profits. And in this connection, running through all the cases, it will be found that they are allowed only to those who can show with reasonable certainty concerning a well-established business. See *Morrow v. Railway Co.*, 140 Mo. App. 200, loc. cit. 213, 214, 215, 123 S. W. 1034; *Gardner v. Gas & El. Co.*, 154 Mo. App. 666, 135 S. W. 1023. It will be found on reading the cases that where profits are allowed as an element of damage, it is only where there is an established business and where the amount of the damage is susceptible of definite ascertainment. See *Glidersleeve v. Overstolz*, 90 Mo. App. 518; *Wolff Shirt Co. v. Frankenthal*, 96 Mo. App. loc. cit. 314, 70 S. W. 378; *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; *Central Trust Co. of New York v. Clark*, 92 Fed. 293, 34 C. C. A.

354; *Wilson & Son v. Russler & Gnagl*, 91 Mo. App. 275; *Central Coal & Coke Co. v. Hartman*, 111 Fed. 93, 49 C. C. A. 244. In all the cases I have been able to find and have examined where profits were allowed as a part of the damages recoverable, they were cases in which the party claiming them had an established business and was seeking to recover them himself, either for breach of contract or a tort. It would be reasonable to suppose, and in fact the presumption would be, that the same man carrying on a business would continue it profitably using the same methods he had used; but in no case reported do I find where a purchaser, who is not only a stranger to the business but wholly inexperienced in it, is allowed to recover anticipated profits on the presumption that he would have managed the business as one skilled, experienced, and peculiarly adapted to the business would have conducted it. Dickerson had operated this business for only a few months, and it would be questionable whether he in the short time that he was in business could have recovered such profits had some one destroyed his business, even though he had been making \$20 to \$25 a day, and this, because the time that he had operated it might be questioned as insufficient to show that he had an established business. The plaintiff knew that Dickerson had been running this business only a short time, but the plaintiff, as stated, was a complete stranger without experience or evidence of having any peculiar ability to manage this business. The hiatus between farming and managing a picture show is great. The general rule is laid down in *Sedgwick on Damages* (9th Ed.) vol. 1, § 183, p. 350, as follows:

"Where the plaintiff was about to embark on a new business venture, which was wrongfully prevented by the defendant, he can recover nothing on account of the expected profits, for there is nothing to prove that a profit would have been made."

Also, *Id.*, p. 351:

"So in the case of fraudulent representations by means of which plaintiff is induced to purchase an existing business, he cannot recover profits which he might have made had a corporation taken over the company by the aid of an underwriting syndicate"—citing *Loewer v. Harris*, 57 Fed. 369, 6 C. C. A. 394, which fully supports the text.

It is held in *Callaway Mining & Mfg. Co. v. Clark*, 32 Mo. 305, where a steamboat was seized, that no recovery could be had for the probable or expected profits or earnings of the boat during the time it was prevented from operating. That case has never been overruled, and is followed in numerous cases dealing with speculative damages. See *Con-noble v. Clark*, 38 Mo. App. loc. cit. 483; *Niemetz v. St. Louis Ag. & Mec. Ass'n*, 5 Mo. App. loc. cit. 63; *Hicks v. National Surety Co.*, 169 Mo. App. 479, 155 S. W. 71; *Sloan v. Paramore*, 181 Mo. App. loc. cit. 625, 164 S. W. 662. See, also, discussing this question, *Stewart v. Patton*, 65 Mo. App. 21;

Manter v. Truesdale, 57 Mo. App. 435. In the case of *Hicks v. National Surety Company*, supra, where profits were allowed, we find that the court said (169 Mo. App. loc. cit. 490, 155 S. W. 71): "The work to be done was almost menial, requiring no high degree of skill or judgment," and (169 Mo. App. loc. cit. 489, 155 S. W. 71) that "the profits did not depend on the favor of the public, the state of the market or weather, the business ability and judgment of the plaintiff, the amount of competition, or any of these things." In our case we have the question of profits depending upon the ability of the plaintiff, the weather, and the favor of the public, all of which are too uncertain to base such damages upon.

Under the facts of this case I do not see how it could even become a question for the jury to determine whether a man reasonably and ordinarily skilled and experienced in running a picture show could have made a profit of from \$20 to \$25 a day out of a place which had been making that much under a different management, because there is no evidence whatever upon which to base an instruction submitting such a theory, the whole proof of the plaintiff showing that he was inexperienced—had never had any picture show experience—and was a farmer.

I am of the opinion that the plaintiff should be restricted in his recovery to that amount which he paid to the defendant for this picture show, and that the judgment should be reversed and the cause remanded, unless the plaintiff will reduce the amount of his judgment—by written remittitur filed with the clerk of this court within ten days from the date on which the opinion is handed down—so as to make that which he will recover over and above the judgment given to defendant on his counterclaim equal to the sum he has paid over to the defendant, bearing interest from the time of payments.

GITHENS et ux. v. BARNHILL et al.
(No. 1497.)

(Springfield Court of Appeals. Missouri.
March 11, 1916. Rehearing Denied
April 8, 1916.)

1. JUDICIAL SALES —47—COLLATERAL ATTACK—CONFIRMATION OF SALE—VOIDABLE SALE.

A deed given to the purchaser of land at a fraudulent sale in partition proceedings is voidable, but not void, and where land was sold to another before the sale was set aside in proceedings to which the subsequent purchaser was not a party, the orders on which the sale was made could not be collaterally attacked by a subsequent grantee who had bought the title of the purchaser at a subsequent judicial sale in an action for breach of warranty.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 89; Dec. Dig. —47.]

2. COVENANTS —118—ACTIONS FOR BREACH—BURDEN OF PROOF.

In an action for breach of warranty by plaintiffs, who had purchased the title of the

purchaser at a subsequent sale in partition after the sale under which plaintiff's grantor claimed had been set aside for fraud, there must be no recovery without proof by plaintiffs of the proceedings to set aside the fraudulent sale.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 211-215; Dec. Dig. § 118.]

3. PARTITION § 109(1)—SALE FOR PARTITION—RIGHTS ACQUIRED.

Where a sale for partition was set aside as fraudulent in proceeding to which the subsequent grantees from the purchaser were not parties, the purchasers at the subsequent sale acquired only the right of the parties to the partition proceedings to sue to recover the land, and public policy forbids trafficking in such rights.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375, 376, 397; Dec. Dig. § 109(1).]

4. COVENANTS § 108(1)—ACTIONS FOR BREACH—ISSUES.

Where defendants who acquired land from the purchasers at a fraudulent sale on partition sold it to plaintiffs before the sale was set aside the question of defendant's participation in the fraud is immaterial in an action for breach of warranty after the former sale was set aside in proceedings in which neither plaintiffs nor defendants were parties.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179, 182-185; Dec. Dig. § 108(1).]

5. COVENANTS § 102(1)—BREACH OF WARRANTY OF TITLE—NECESSITY OF EVICTION.

A grantee in a warranty deed need not submit to eviction before purchasing an outstanding title to protect himself against a loss morally certain to happen, but must act in good faith towards his grantor, and only yield possession to the hostile assertion of a paramount title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 157-159; Dec. Dig. § 102(1).]

Sturgis, J., dissenting in part.

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by D. M. Githens and wife against Maggie Barnhill and another for breach of warranty of seisin. Judgment for plaintiffs, and defendants appeal. Reversed.

E. R. Lentz, of Poplar Bluff, for appellants. Abington & Phillips, of Poplar Bluff, for respondents.

ROBERTSON, P. J. Plaintiffs recovered below for an alleged breach of the covenant of seisin of an indefeasible title contained in a warranty deed executed and delivered by defendants to plaintiffs, November 18, 1905, conveying one acre of land in the town of Neelyville, Butler county. The trial was to a jury. Defendants have appealed.

The recovery is for the sum of \$500 they paid to purchase an alleged outstanding title of one Herbert E. Abington to a portion of the land conveyed to them by defendants. First we will notice defendants' chain of title, going back as far as is necessary for the purposes of this opinion. In September, 1901, a petition was filed for the construction of a will affecting this and other lands, and for a judgment of partition. The court, June 19, 1903, decreed the partition, and at

the sale made, October 12, 1903, in pursuance thereof, the I. M. Davidson Real Estate & Investment Company (incorporated two days thereafter and of which defendant I. H. Barnhill was a subscriber of a large block of stock and secretary) became the purchaser at a wholly inadequate price. The sale was reported to the court and was approved October 22, 1903, at which time a deed was made to said purchaser. By deed dated January 18, 1904, acknowledged November 21, 1905, and recorded on that date, the said I. M. Davidson Real Estate & Investment Company conveyed the land involved in the case at bar to defendant Maggie Barnhill, the wife of said defendant I. H. Barnhill. At the time defendants executed and delivered the deed plaintiffs were in possession of the land as tenants of defendants.

The title claimed to have been purchased from Abington by plaintiffs was acquired by him at a sale under the same judgment in partition after all of the proceedings, subsequent to the judgment by which the I. M. Davidson Real Estate & Investment Company claimed to have acquired the property, had been set aside on account of, among other things, the fraud perpetrated by the officers of said company, including one of the defendants here, I. H. Barnhill. The action resulting in setting aside these proceedings was begun in May, 1906. A full history of that litigation is contained in the opinion of the Supreme Court in the cases of *Laura Carter Davidson v. I. M. Davidson Real Estate & Investment Co.*, 226 Mo. 1, 125 S. W. 1143, and *Mary J. Davidson et al. v. I. M. Davidson Real Estate & Investment Co.* et al., 249 Mo. 474, 155 S. W. 1. Some of the records in the matter before the Supreme Court were introduced in evidence in the case at bar.

In the trial of the case at bar the court instructed the jury, at the request of the plaintiffs, that if it was found defendants executed and delivered the warranty deed to plaintiff, that Abington was asserting title to said land and plaintiffs purchased his title to prevent him from bringing suit to eject them, then the plaintiffs were entitled to recover as damages such reasonable price as was found they fairly and necessarily paid said Abington, limiting it within the proper bounds. In this instruction the jury was told that at the time defendants delivered their deed to plaintiffs said defendants were not the owners of said land, but that the title was then in Abington and his grantors, and was so vested when plaintiffs purchased from him.

The judgment in this case is against both Maggie Barnhill, in whose name the title stood, and I. H. Barnhill, her husband, but no objection is made by appellant based on section 2788, R. S. 1909, which provides that:

"No covenant in any deed, conveying property belonging to the wife shall bind the husband.

* * * except so far as may be necessary to effectually convey from the husband, * * * not owning the property, all the right, title and interest expressed to be conveyed therein."

We simply refer to this point, without considering it, so that we may not be understood as holding that a judgment against both of them is proper, if timely objections are made.

The appellants seek a reversal of this case on the theory that plaintiffs had a title that was good as against Abington's alleged title, and that for anything paid by plaintiffs for a conveyance from him they are not liable on their covenants of warranty.

The respondents meet this attack by the contentions that the deed to the I. M. Davidson Real Estate & Investment Company is void. Other contentions follow from this one, and then it is asserted that Maggie Barnhill took with notice of the fraud of said Real Estate Company, and that Abington had the superior title which plaintiff had to purchase to prevent an eviction. Lastly, it is argued that as the testimony shows plaintiffs gave their notes to defendants to secure a portion of the purchase price, that they cannot in any event be treated as innocent purchasers to the extent of those unpaid notes at the time when the action was commenced to set aside the partition sale.

We must uphold the contentions of the appellants, and in doing so we best approach the consideration of the principles justifying that conclusion by considering the reasons assigned by respondents for an affirmance of the judgment.

[1] I. The idea that the deed to the Real Estate Company, as contended for by respondents, is void accounts for the instructions given for them assuming that Abington had a paramount title. The only reason assigned in respondents' brief for asserting that the deed to said Real Estate Company is void is that the Supreme Court so held in the two cases to which we have referred, but an examination of the first opinion, wherein the validity of that deed was under consideration, will not justify such an assertion. It will be noticed (page 14 of 226 Mo., page 1143 of 125 S. W.) that the petition in the proceedings there involved alleged:

"That the judgment and all subsequent proceedings are void or voidable; that * * * said corporation had not been organized and no title did or could pass."

It is stated (page 33 of 226 Mo., 125 S. W. 1143) that there was no valid sale under the first interlocutory decree because, among other reasons, the reported purchaser, the Realty Company, was not on the date of the sale incorporated. At various places in the opinion it is stated that the attack there under consideration is a direct one on the proceedings subsequent to the interlocutory judgment. In the case reported in 249 Mo. at page 505, 155 S. W. 1, we find the expression, "even though the fee title might not be in the corporation" which was made with

reference to one who had acquired rights from the Realty Company, and thus further disclosing that the opinion in the main was dealing only with a direct attack. The Realty Company was involved in the fraud (226 Mo. at page 38, 125 S. W. 1143) which vitiated these proceedings. Such questions as are sought to be raised by respondents in the case at bar were not there involved. None of the parties to this suit were parties there.

When the plaintiffs purchased the land from the defendants in the case now under consideration there was in the chain of title an interlocutory judgment in partition, an order of sale, a report of sale to the said Realty Company, an order approving the sale and deed to that company, at a time when it was duly organized, and a final judgment. Upon the face of the whole record the proceedings were regular and collaterally, as here, the record speaks absolute verity. Davidson v. I. M. Davidson Real Estate & Investment Co., 226 Mo. 1, 29, 125 S. W. 1143, *supra*. When the plaintiffs purchased the land from defendants no facts were disclosed that suggested any defect. The deed to the Realty Company, as to plaintiffs, was not void.

The plaintiffs assert that the fact that the Realty Company was not incorporated on the date of the sale under the first partition judgment was notice to the world that it had no capacity to buy, and that the deed to it was void. The Supreme Court, as we have pointed out, stated that in a direct attack on the grounds of fraud this, with other facts, rendered the sale invalid. The court approved the sale and ordered the deed made at a time when the corporation was organized and had received its certificate to that effect. Upon the face of these proceedings everything was regular, and in a suit by Abington against plaintiffs to obtain possession of the land conveyed to them by defendants, or in a suit to determine title, this fact would have defeated him. The mere fact that the corporation was not organized on the day of the bid would not have prevented the court from finding that while the bid was reported as having been made by the Realty Company, yet it was as a matter of fact made by some one for it who transferred the bid to the corporation before the sale was confirmed and the deed ordered (226 Mo. 34, 125 S. W. 1143, discussing that sale). Section 2596, R. S. 1909, authorizes a sale of the bidder's interest in the land after confirmation of the sale in partition so that when plaintiffs purchased all defects now urged could have been properly adjudicated and corrected. The judgment of confirmation is such that in this collateral attack it must be held that all objections plaintiffs now urge are finally adjudicated and determined against them.

[2] Another and a conclusive answer to the contention of plaintiffs as to the deed to the Realty Company being void is that no tes-

timony tending to prove that fact was offered in evidence in the case at bar. The plaintiffs had the burden of showing that there had been a breach in the covenants of seisin. To make this proof they must prove that the deed to the Realty Company is void, and to do that they must produce the facts that rendered it worthless. They did not offer the proceedings or any part of the record in the case reported in 226 Mo. 1, 125 S. W. 1143, wherein it is claimed the deed was adjudged to be void. What we have said about that case we have gathered from the opinion of the Supreme Court. The defendants offered in evidence the interlocutory judgment, report of sale, order of court approving sale, and the commissioner's deed. The deed itself would have made a *prima facie* case. *Jordan v. Surghnor*, 107 Mo. 520, 525, 17 S. W. 1009, and *Scharff v. McGaugh*, 205 Mo. 344, 358, 108 S. W. 550. But what they offered failed to disclose any defect in the proceedings. We must hold that there is no proof of the facts upon which plaintiffs base their theory that the deed to the Realty Company, as to these plaintiffs, was void.

The plaintiffs in buying this land from the defendants paid \$200 of the purchase price (\$1,000) in cash and gave to I. H. Barnhill 32 notes of \$25 each due in each of that number of months thereafter. The plaintiffs now contend that only six of these notes were paid when they discovered, or should be held to have discovered, the fraud of the Realty Company in procuring this land, and that to the extent of the then unpaid purchase price they are not bona fide purchasers without notice. In support of that rule they have cited 35 Cyc. 352, and *Tillman v. Heller*, 78 Tex. 597, 14 S. W. 700, 11 L. R. A. 628, 22 Am. St. Rep. 77. We may also add that in cases between the defrauded party and the immediate purchaser of personal property this rule has been recognized in this state for a number of years, as shown by the authorities cited in *Keet-Rountree Dry Goods Co. v. Hodges*, 175 Mo. App. 484, 493, 161 S. W. 862. This rule is also applied to vendees of real estate. *Paul v. Fulton*, 25 Mo. 156, 162, and 163.

[3] II. The consideration of this rule, as applied to the facts in the case at bar, necessarily leads to the consideration of the purchase by Abington and what, if anything, he acquired by his deed. If he acquired no title which he could enforce against the plaintiffs, then the plaintiffs have not acquired anything against which the defendants were bound to protect them under their warranty deed. If Abington acquired no title or right as against the Realty Company, or the defendants, conceding they were not bona fide purchasers without notice, or against the plaintiffs, conceding the same as to them, then it follows that plaintiffs have purchased nothing and defendants are liable for nothing. Holding, as we have,

that the deed to the Realty Company was not void and conceding, as we must, that the legal title to the land was thereby conveyed to the Realty Company, nothing remained with the owners of the land, except the right to maintain a suit to set aside the conveyance on account of the fraud of the grantee. The deed "was not void in the sense that no title passed to the purchaser; it was merely voidable at the election of the parties prejudiced thereby, in case they should seasonably invoke the aid of the court of equity to that end." All that the parties interested in that land had after the deed was executed to the Realty Company, which could affect the title, was the right to elect to rescind and to bring an action to set aside that conveyance. At the time that Abington made his purchase that was all that could have been transferred, and public policy prevents him from acquiring or trafficking in such rights. Such is the uniform and recent holdings of the Supreme Court of this state. *Weissenfels v. Cable*, 208 Mo. 515, 532, and 533, 106 S. W. 1028; *Ryan v. Miller*, 236 Mo. 496, 510-515, 139 S. W. 128, Ann. Cas. 1912D, 540; *Johnson v. United Railways Co.*, 247 Mo. 326, 354, 152 S. W. 362, 374. The opinion in the case of *Conn. Mutual Life Ins. Co. v. Smith*, 117 Mo. 261, 291, 22 S. W. 623, 38 Am. St. Rep. 656, may contain some expressions that cast doubt upon the rule announced by the later decisions of the Supreme Court; but we believe a consideration of the facts in that case will disclose that the rule, as announced by the later decisions, was applied; nevertheless it is our duty to follow the later decisions. They also announce a rule that appeals to us as salutary, and the only one that would properly prevent the right to institute litigation from becoming a subject of commerce. If plaintiffs were, as they contend in the case at bar, purchasers (in part at least, with notice after steps were taken to set aside the proceedings in partition upon which the Realty Company's deed was based), then it would have been possible for the parties interested in the proposition to have so proceeded as to have set aside, in part, the conveyance to the plaintiffs, and thus reinvested in the original owners the title to this land, so that it could have been sold at a second sale. This not having been done, Abington acquired nothing at the sale, and therefore conveyed nothing to the plaintiffs by his deed to him for which they paid him \$500.

[4] III. It is suggested that by reason of the fraud of defendant I. H. Barnhill in connection with the Realty Company, these defendants cannot be allowed to make the defense that plaintiffs are bona fide purchasers for value. The defendants in making their defense here do not rely on any knowledge either of them had of said fraud or upon the participation therein, but they say they con-

veyed a title to plaintiffs good against the world. Defendants stood ready and offered to defend against the claim of Abington. They cannot be held accountable to plaintiffs for any fraud committed against others. The sole question here is as to plaintiffs' title.

[5] A grantee in a warranty deed does not have to submit "to the form of an eviction" before purchasing an outstanding title to protect himself against a loss "morally certain to happen." *Lawless v. Collier's Ex's*, 19 Mo. 480, 483; *Hall v. Bray*, 51 Mo. 288, 292; *Lambert v. Estes*, 99 Mo. 604, 608, 13 S. W. 284. However, a grantee in a warranty deed must act in good faith towards his grantor—"and make the most of the title he has acquired, and only yield possession to the hostile assertion of a paramount title, either by a suit to recover the land, or a distinct assertion of the paramount title and a demand of possession." *Cockrell v. Proctor*, 65 Mo. 41, 47; *Holladay v. Menifee*, 30 Mo. App. 207, 215; *Dickson v. Desire's Adm'rs*, 23 Mo. 151, 163, 66 Am. Dec. 661; *Egan v. Martin*, 71 Mo. App. 60, 64.

At the foundation of this whole case is the decisive fact that Abington did not, as against plaintiffs, even if they be purchasers with notice, have a paramount title, and they should not have yielded to his demands. If they had made "the most of the title" they acquired from defendants, or permitted the defendants to have done so, this suit would have been unnecessary. Their purchase from Abington was worthless, and they must seek recourse elsewhere than from defendants for what they paid him.

We are unable to perceive of any theory upon which plaintiffs should be permitted to recover, and therefore reverse their judgment.

FARRINGTON, J., concurs. STURGIS, J., concurs, except as to paragraph II, and holds that plaintiffs had a good title as against Abington on the ground that plaintiffs being intervening innocent purchasers for value without notice is not debatable since they so assert; that the judgment in the equity case setting aside the prior judgment approving the sale in partition and the deed made thereunder did not have the effect of destroying the intervening title to plaintiffs as bona fide purchasers under a warranty deed. *Jones v. Driskill*, 94 Mo. 190, 200, 7 S. W. 111; *Schmidt v. Niemeyer*, 100 Mo. 207, 13 S. W. 405; *Gott v. Powell*, 41 Mo. 416; *Colburn v. Yantis*, 176 Mo. 670, 682, 75 S. W. 653; *Witte v. Storm*, 236 Mo. 471, 492, 139 S. W. 384.

STUBBLEFIELD v. ST. LOUIS & S. F. R. CO. (No. 13689.)

(St. Louis Court of Appeals. Missouri. March 7, 1916. Rehearing Denied March 28, 1916.)

1. COMMERCE § 8—INTERSTATE COMMERCE—FEDERAL REGULATIONS.

Congress having passed the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379) and the Carmack Amendment (Act

Cong. June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1913, § 8592]), which purport to cover the whole field of interstate commerce, the federal laws are exclusive for determination of controversies arising out of such commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.]

2. COMMERCE § 8—INTERSTATE COMMERCE—RIGHTS OF PARTIES.

The provision of the Carmack Amendment that the holder of any bill of lading issued for interstate carriage should not be deprived of any right of action or remedy he had under the existing laws refers only to existing federal laws.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.]

3. STATUTES § 279—NECESSITY OF PLEADING.

While foreign statutes must be pleaded, it is unnecessary for a defendant carrier to set up in its answer the provisions of the federal laws where the answer showed that the transaction was interstate, as to which the federal laws govern.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 378; Dec. Dig. § 279.]

4. CARRIERS § 154 — CARRIAGE OF LIVE STOCK — INTERSTATE COMMERCE TRANSACTIONS.

Under Interstate Commerce Act 1887, §§ 2, 3 (U. S. Comp. St. 1913, §§ 8564, 8565), an interstate carrier may file two rates, one a regular rate in which its common law liability is preserved, and the other a lesser rate based on an agreed valuation, but such rates must be open to all the public, and where the carrier relied on a limitation of liability in the bill of lading claiming a less rate was charged, an instruction requiring the jury to find as a condition to the limitation that plaintiff received service at a less rate than other persons is improper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 641-645, 667; Dec. Dig. § 154.]

5. PRINCIPAL AND AGENT § 101(2)—EXECUTION OF CONTRACT OF CARRIAGE OF LIVE STOCK.

The agent of a shipper of a horse is bound, before signing a bill of lading, to inform himself as to its contents, and, where he signed the contract limiting the carrier's liability, and there was no fraud his principal is bound regardless of the agent's knowledge.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 258, 346; Dec. Dig. § 101(2).]

6. CARRIERS § 165 — CARRIAGE OF LIVE STOCK—RECITALS OF BILL OF LADING.

A recital in a contract that a reduced rate was charged in consideration of a limited valuation prima facie establishes that fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 729, 730; Dec. Dig. § 165.]

Appeal from Circuit Court, Cape Girardeau County; C. B. Faris, Judge.

"To be officially published."

Action by W. H. Stubblefield, Jr., against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellant. Oliver & Oliver, of Cape Girardeau, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff on account of the negligence of defendant common carrier. Plaintiff recovered, and defendant prosecutes the appeal.

It appears that plaintiff shipped a valuable race horse from Ft. Wayne, Ind., to Oran, Mo., over the Wabash Railroad and subsequent connecting carriers. The evidence tends to prove that the horse was injured through defendant's negligence during the transportation over its road so as to occasion his death. In his petition plaintiff valued the horse at \$7,000, and prayed judgment for this amount. The jury awarded a recovery of \$3,500. The answer incorporates a general denial, and then pleads a special contract entered into between plaintiff by his agent, Rash, on his part and the Wabash Railroad Company for the transportation of the horse from Ft. Wayne, Ind., to Oran, Mo. Among other things, the answer pleads that the Wabash Railroad Company had prepared and promulgated two different rates of freight in respect of such shipments, one with full common-law liability attached, and a lesser or reduced rate based on a valuation declared by the shipper; that on receiving the shipment plaintiff, through his agent, Rash, entered into a written contract with it whereby he chose the lesser of the two rates, and declared the valuation of the horse to be \$100, at which amount the right of recovery for its loss is limited in consideration of such reduced rate of freight. By his reply plaintiff denied that any reduced rate of freight was accorded him in the shipment. The written contract of affreightment is in evidence, and it is admitted that it was executed by plaintiff's agent, Rash. It appears too from the tariffs in evidence, duly authenticated by the proper officer of the Interstate Commerce Commission, that the Wabash Railroad Company had established and promulgated and filed with the commission its rates of freight available to all persons for transportation in this character of shipments. One rate—that is, the higher rate—provided for the full common-law liability of the carrier, while the lesser rate reckons with the valuation declared by the shipper at the time of the shipment, and limits the valuation accordingly. It is clear that the shipment was made at the lesser of the two rates above mentioned, but, notwithstanding the valuation of \$100 declared on the horse in connection therewith and the limitation in the contract to the right of recovery to that amount, the jury awarded plaintiff a recovery of \$3,500.

[1] It is argued that this was error, because the shipment was interstate in character, and in such circumstances it is certain plaintiff may not recover an amount greater than that limited in the contract of shipment, for that the valuation and the limited amount of recovery is indissolubly bound up

in the rate paid. Congress, having manifested its purpose through the enactment of the Interstate Commerce Act to take possession of the subject of the liability of carriers by railroad on account of interstate shipments, as appears by reference to the Interstate Commerce Act and its amendments, including that of June 29, 1906 (34 U. S. Stat. at Large, 584), and especially bills of lading and shipping contracts, through what is known as the Carmack Amendment, incorporated in section 20 of that act (page 595), such legislation and the decisions of the Supreme Court of the United States expounding it supersede all state regulations and rules of decision on the subject. The federal statute touching this matter and the decisions of the Supreme Court of the United States construing them afford an exclusive rule for the determination of the controversies pertaining to the subject.

[2] This is true, too, notwithstanding the provisions of the Carmack Amendment to the effect that the enactment shall not deprive any holder of a bill of lading of any remedy or right of action that he had under the existing law, for this is construed to refer alone to existing federal law. See *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Chicago, etc., Ry. v. Miller*, 226 U. S. 513, 38 Sup. Ct. 155, 57 L. Ed. 323; *Chicago, etc., Ry. Co. v. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 323; *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 192, 156 S. W. 830. There can be no doubt that under the rule of decision evolved in the Supreme Court of the United States with respect to interstate shipments the right respecting the amount and value of the recovery in cases of this character is to be ascertained and determined by reference to the rate at which the shipment is made. Authorities supra.

[3] But it is argued on the part of plaintiff that the Interstate Commerce Law was not invoked here, and therefore the case is to be disposed of without regard to it. The argument proceeds in the view that it is necessary for defendant to specially plead the interstate commerce statute in its answer, but obviously such is not true; for, if the shipment be interstate in character, then the interstate commerce statutes displace all local law on the subject and afford the sole rule of decision. Although it is essential to plead in the answer the statutes of a foreign state in order to invoke the rule they reflect, such is not true in respect of the laws of the United States touching the subject-matter of interstate commerce. The precise question has been pointedly determined by our Supreme Court, as will appear by reference to *Wentz v. Chicago, B. & Q. R. Co.*, 259 Mo. 450, 463, 464, 188 S. W. 1166.

In its answer defendant set forth the facts concerning the special contract of shipment

showing that two rates of freight were provided, and that plaintiff, through his agent, chose the lesser, to which was annexed the valuation of \$100 on the horse declared and stipulated therein. The evidence is that such was and is the contract under which the shipment was made. It expressly provides that the recovery shall not exceed \$100.

[4] At the instance of plaintiff the court instructed as follows:

"Upon the question of the fixed valuation of the horse as stated in the contract offered by defendant, you are instructed that before the defendant can maintain the defense of limiting its liability to the sum of \$100, if liable at all, the jury must find that the plaintiff was, in fact, granted a rate less than that granted to all others for a like service between like points, and that plaintiff's agent knowingly accepted such reduced rate and signed the contract of shipment knowing that it was a reduced rate, and that he had a choice between the contract signed and another at a higher rate in which the horse's value would not be limited, and, unless you find this choice was given him at the time he signed the contract, then plaintiff would not be bound by it, and you are not limited in fixing the value of the horse at \$100, but you may fix his value at such sum as from all the evidence in the case you believe he was reasonably worth."

This instruction is erroneous, in that it informed the jury that in order for defendant to maintain its defense under the special contract it must appear:

"That the plaintiff was, in fact, granted a rate less than that granted to all others for a like service between like points."

Such is violative of the principle reflected throughout the interstate commerce provisions, for that it is designed that the same rates shall be afforded to one and all alike. It is permissible to provide two rates, one with full common-law liability attached, and a lesser rate based on a valuation declared or agreed upon provided such rates are available to one and all, as is the case here. See sections 2 and 3 of the act of February 4, 1887 (24 Stat. at Large, 379).

There is no evidence that plaintiff was granted a rate less than that granted to all others for like services, but, on the contrary, the evidence is the rate was that open to one and all desiring to ship under such contract on such declared valuation. The instruction as worded is misleading and inheres with error touching this. A rate such as that contemplated in the instruction would be discriminative and of no avail whatever.

[5] There is no evidence of fraud or deceit practiced on plaintiff's agent in negotiating the contract, and, of course, plaintiff is concluded thereby, for the law devolved the duty upon his agent, who, it appears, was familiar with such transactions, to read it and ascertain its contents before affixing his signature thereto. See *O'Bryan v. Kinney*, 74 Mo. 125; *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052. Plaintiff's instruction No. 2, above copied, is therefore further erroneous in that it submitted to the jury as

to whether plaintiff's agent knowingly accepted such reduced rate and signed the contract of shipment knowing that it was a reduced rate, for that, in the absence of fraud, deceit, or mistake, of which there is no evidence, he is bound by its provisions.

[6] Plaintiff's instruction No. 5 is as follows:

"The court instructs the jury in this cause that, although you may find and believe from the evidence that William Rash signed the contract offered by defendant and purporting to be signed by said Rash, and that he knew that it specified a reduced rate, yet the recital in the contract that the rate charged was a reduced rate is not evidence of that fact, and it devolves on the defendant to prove to your satisfaction that there was another and different legal rate in existence which it was permitted to charge plaintiff, and, unless it has shown that there was such another rate, your verdict will be for the plaintiff in such sum as you believe from all the evidence the horse was reasonably worth, if you find the horse was injured as heretofore instructed on defendant's railroad."

This instruction is erroneous in that it directs the jury that, although plaintiff's agent signed the contract and knew that it specified a reduced rate, yet the recital in the contract that the rate was a reduced one is no evidence of that fact and that it devolved further on defendant to show such to be the fact. It has been declared in numerous cases that the recital of a reduced rate in the contract alone is prima facie evidence of such fact. See *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052; *McFadden v. Mo. Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

The evidence is that plaintiff's agent was fully informed concerning the rate at the time he entered into the contract of shipment, and that he was familiar with such transactions as he frequently shipped horses for plaintiff. Moreover, plaintiff's agent does not controvert this testimony, but says only that he does not recall the fact.

The judgment should be reversed, and the cause remanded, with directions to enter judgment for plaintiff for \$100, the value agreed upon in the shipping contract.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

ROGERS v. DAVIS. (No. 18727.)

(St. Louis Court of Appeals. Missouri. March 7, 1916. Rehearing Denied March 28, 1916.)

1. JUSTICES OF THE PEACE §58(2) — JURISDICTION—RECORD—PRESUMPTION.

Where the record, in an action before a justice of the peace which was not brought in the township of plaintiff's residence, does not show in what township defendant resided, so that it could be determined whether it was brought in that or an adjoining township as permitted by Rev. St. 1909, § 7399, there is no affirmative showing that the justice had jurisdic-

tion, and there is no presumption or intentment in favor of his jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 210; Dec. Dig. ¶ 58(2).]

2. JUSTICES OF THE PEACE ¶ 39½ — JURISDICTION—REPLEVIN.

Under Rev. St. 1909, § 7759, providing that plaintiff in replevin before a justice of the peace shall state, among other things, that the property is wrongfully detained by defendant at the county in which the suit is brought, the justice's jurisdiction over the subject-matter depends on the location of the property only within the county, not in any particular township.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 235; Dec. Dig. ¶ 39½.]

3. JUSTICES OF THE PEACE ¶ 84(4)—JURISDICTION OVER THE PERSON—WAIVER OF OBJECTIONS.

In replevin, where the justice of the peace had jurisdiction of the subject-matter, the appearance by defendant to move for change of venue and later at the trial before the justice and in the circuit court on appeal, without objection to the jurisdiction, waived the want of jurisdiction over his person.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 271; Dec. Dig. ¶ 84(4).]

4. JUSTICES OF THE PEACE ¶ 84(4)—JURISDICTION OVER SUBJECT-MATTER—WAIVER.

Where the jurisdiction of a justice of the peace is determined by the location of property, or the place of injury, the appearance of defendant in an action not begun in the proper township does not cure the jurisdictional defect.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 271; Dec. Dig. ¶ 84(4).]

5. CHATTEL MORTGAGES ¶ 219—WAIVER—CONSENT TO SALE—STATUTE.

Rev. St. 1909, § 2863, providing for the release of chattel mortgages that have been satisfied, does not prevent a mortgagee from waiving his rights under a chattel mortgage by consenting to a sale or exchange of the chattel.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 473-475; Dec. Dig. ¶ 219.]

6. REPLEVIN ¶ 93 — FINDINGS — UNLAWFUL DETENTION.

In replevin, tried before the circuit court without a jury on appeal from a justice of the peace, a general finding of the issues for the plaintiff is a sufficient finding that the chattel had been wrongfully detained by defendant to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 860-868, 871-875; Dec. Dig. ¶ 93.]

Appeal from Circuit Court, New Madrid County; Chas. B. Faris, Judge.

Replevin by T. O. Rogers against W. M. Davis. Judgment for the plaintiff in the circuit court on appeal from a justice of the peace, and defendant appeals. Affirmed.

Riley & Riley, of New Madrid, and Oliver & Oliver, of Cape Girardeau, for appellant. E. F. Sharp, of Marston, and R. G. Hartle, of Lilbourn, for respondent.

ALLEN, J. This is an action in replevin begun before a justice of the peace in La

Font township, New Madrid county, Mo., to recover the possession of a mare and damages for the alleged wrongful detention thereof by defendant. Plaintiff prevailed below, and the case is here upon defendant's appeal.

One Brown purchased the mare in controversy with funds borrowed from one Hawkins, to whom he was otherwise indebted, and to secure the entire indebtedness executed to the latter a chattel mortgage upon the mare and certain other personalty. The mortgage was duly recorded. Thereafter Brown traded the mare to a negro named Lewis for a horse, having first obtained Hawkins' consent so to do. It appears that this was done with the intention that a mortgage be executed by Brown to Hawkins upon the horse so acquired by the former, but this was never done. Brown testified that he spoke to Hawkins about it several times, but the latter always deferred the matter. Though the negro, Lewis, had represented to Brown that the horse acquired by the latter in exchange for the mare was unincumbered, there was in fact a mortgage upon that animal; and, as Brown testified, he subsequently "lost the horse in the round up." After obtaining possession of the mare, Lewis executed two separate chattel mortgages upon her (which are not here involved), then sold her to Rogers, the plaintiff herein, and left "for parts unknown." Thereafter Hawkins undertook to foreclose the mortgage given him by Brown upon the mare, and at the foreclosure sale defendant Davis (who testified that he was a part owner of the mortgage) became the purchaser. Prior to the sale, plaintiff had surrendered possession of the mare to a constable acting in Hawkins' behalf, in the belief, it seems, that the officer was seizing her under a writ of replevin, though it does not appear that an action in replevin had been instituted. Plaintiff was present at the sale, and by counsel gave public notice that he claimed the animal, and thereafter instituted this action against the purchaser Davis. The action was begun before a justice of the peace in and for La Font township, New Madrid county. The testimony in the case shows that plaintiff resided in Lewis township, of said county; but nothing appears as to the township of defendant's residence. Plaintiff filed a statement in due form before the justice of La Font township, and thereupon the latter issued to the constable of that township an order of delivery and summons; though it appears that the mare was never taken from defendant's possession. The constable's return, upon the order of delivery and summons, is as follows:

"I hereby certify that I executed the within order and summons in the county of New Madrid on the 30th day of April, A. D. 1912, by summons (sic) the said W. E. Davis to trial on the 10th day of May, 1912."

Upon the return day defendant appeared before said justice of La Font township and

filed a verified application for a change of venue, which was granted, and the cause was thereupon transmitted to a justice of the peace of Lewis township in said county. The last-mentioned justice issued a notice of change of venue. It was directed to the constable of Le Sieur township, but appears to have been served upon defendant by the constable of La Font township, who indorsed thereupon the following return, viz.:

"I hereby certify, that I have executed the within writ by reading same to W. E. Davis this 28th day of May, 1912, in Le Sieur adjoining La Font township, New Madrid county, Missouri."

Defendant appeared before the justice of Lewis township, and, after two continuances, the cause went to trial before a jury, resulting in a verdict and judgment for plaintiff. Defendant thereupon prosecuted an appeal to the circuit court, where, upon a trial *de novo* before the court, a jury having been waived, plaintiff again prevailed.

[1] I. The first question demanding consideration relates to the jurisdiction of the justice of La Font township before whom the action was instituted. It is urged that since the action was not brought in the township of plaintiff's residence, with service on the defendant therein, and since it does not affirmatively appear that it was brought in the township of defendant's residence or in an adjoining township, the justice of La Font township was without jurisdiction; and that consequently the justice of Lewis township acquired no jurisdiction by the change of venue, and the circuit court none by appeal.

Section 7399, Revised Statutes 1909, provides as follows:

"Every action recognizable before a justice of the peace shall be brought before some justice of the township, either: First, wherein the defendants, or one of them, resides, or in any adjoining township; or, second, wherein the plaintiff resides, and the defendants, or one of them, may be found; third, if the defendant is a non-resident of the county in which the plaintiff resides, the action may be brought before some justice of any township in such county where the defendant may be found; fourth, if the defendant is a nonresident of the state, or has absconded from his usual place of abode, the action may be brought before any justice in any county in this state wherein defendant may be found; and, fifth, any action against a railroad company for killing or injuring horses, mules, cattle or other animals, shall be brought before a justice of the peace of the township in which the injury happened, or in any adjoining township."

Defendant was served with the notice of change of venue in Le Sieur township, and the constable in his return states that Le Sieur township adjoins La Font township. We are informed by counsel that defendant resides in Le Sieur township, but the record before us is silent as to this.

From an early date (see *State v. Metzger*, 26 Mo. 65) it has been held that since justice courts are of statutory and limited jurisdiction, not proceeding according to the course

of the common law, there is no presumption or intendment in favor of their jurisdiction, but facts showing jurisdiction must affirmatively appear. See *Smith v. Rock Company*, 132 Mo. App. 297, 111 S. W. 831; *Sawyer v. Burris*, 141 Mo. App. 108, 121 S. W. 821; *Barnes v. Plessner*, 162 Mo. App. 460, 142 S. W. 747; *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612.

Respondent relies upon the return of the constable indorsed upon the notice of change of venue issued by the justice of Lewis township, as being a part of the judgment roll, to show that Le Sieur township adjoins La Font township wherein the action was instituted. *Barnes v. Plessner*, supra. But the effect which may properly be given to this return is unimportant here, for the reason that it nowhere appears that defendant resided in Le Sieur township wherein he was served with such notice. The action was not instituted in the township of plaintiff's residence, to wit, Lewis township, but in La Font township; and it does not affirmatively appear that defendant resided either in La Font township or in an adjoining township. It does not appear that the defendant is a nonresident of the county, but the contrary is inferable from all the facts disclosed. In short, it does not affirmatively appear that the provisions of section 7399, supra, respecting the venue of actions generally before justices of the peace, were complied with. It remains to be seen, however, whether this should be held fatal to the validity of the judgment before us.

[2] In an action of replevin before a justice of the peace, in so far as jurisdiction depends upon the location of the property, it is only necessary that the property be found in the county in which the suit is brought. See section 7759, Rev. Stat. 1909; *Yoakum v. Davis*, 162 Mo. App. 253, 144 S. W. 877. In the case last cited, the Kansas City Court of Appeals held that an action in replevin was maintainable before a justice of the peace, where the property was within the county, though plaintiff and defendant were nonresidents of such county, and hence the case was not one within the purview of section 7399, supra, overruling the earlier decision of that court in *Dennis v. Bailey*, 104 Mo. App. 638, 78 S. W. 669. In the case before us, the record affirmatively shows that the property was found within the county, and that the alleged value together with the damages claimed for the taking or detention thereof is within the jurisdiction of a justice in replevin. Section 7758, Rev. Stat. 1909. It seems clear therefore that the subject-matter of the action is one within the jurisdiction of the justice.

"The 'subject-matter of a suit,' when reference is made to questions of jurisdiction, is defined to mean 'the nature of the cause of action and of the relief sought.'" *Hope v. Blair*, 105 Mo. loc. cit. 93, 16 S. W. 595; 24 Am. St. Rep. 363.

[3] Defendant could and undoubtedly did waive all right to complain of want of jurisdiction over his person. Not only did he appear before the justice of La Font township and make application for and secure a change of venue, but he appeared before the justice of Lewis township, applied for and obtained a continuance, and later appeared and went to trial. Thereafter he prosecuted an appeal to the circuit court, where he entered his appearance generally and proceeded to trial on the merits. No question of jurisdiction was raised throughout the case from beginning to end until the filing of defendant's motion for a new trial in the circuit court. Defendant cannot now be heard to complain of lack of jurisdiction over his person; and the jurisdictional question raised, we think, is manifestly one pertaining alone to jurisdiction over the person.

In *Bohn v. Devlin*, 28 Mo. 319, it is tersely said by Napton, J.:

"The defendant in this case did not reside in the township where the suit was brought, and the proceeding, being in this respect irregular, could no doubt have been set aside had the proper steps been taken in time. But the defendant appeared and consented to a continuance. As the justice had undoubted jurisdiction over the subject-matter, and the appearance and consent of the defendant gave jurisdiction over the person, the defects and irregularity in the process must be considered as waived."

Though the opinion in *Smith v. Simpson*, 80 Mo. 634, appears to announce a contrary doctrine, *Bohn v. Devlin*, supra, is cited with approval in *Baisley v. Baisley*, 113 Mo. loc. cit. 551, 21 S. W. 29, 35 Am. St. Rep. 726. In *Trimble v. Elkin*, 88 Mo. App. loc. cit. 236, it is said:

"It was not made to appear at the trial that the defendant resided in Columbia township or any adjoining township, or that plaintiffs resided in said township and the defendant was found therein, or that he was a nonresident of the county. It only appeared that he was served in the township named. If this is a jurisdictional question, and we think it is, then there was a failure upon the part of the plaintiffs to show that the justice had jurisdiction of the person of the defendant. Had he appeared at the trial, the justice having jurisdiction of the subject-matter, he would have waived jurisdiction over his person, unless he had objected for want of jurisdiction."

This was approved in *Meyer v. Insurance Co.*, 184 Mo. 489, 83 S. W. 479, which ruling is followed in *Smith v. Rock Co.*, supra, where it is held that in an ordinary action before a justice of the peace such a jurisdictional defect as is here complained of is waived by appearance. And see *Barnes v. Plessner*, 162 Mo. App. loc. cit. 466, 142 S. W. 747. The effect of the ruling in *Meyer v. Insurance Co.*, supra, in a case where the defendant timely raised the question of the jurisdiction of the justice over his person, but thereafter appealed to the circuit court, need not be here discussed; but see *Powell v. Railroad*, 184 Mo. App. 126, 168 S. W. 319.

[4] As observed in *Smith v. Rock Company*, supra, in a case wherein the juris-

diction of the justice is determined by the location of property, or by the place of injury as in actions for injury to stock by railroads, if the action is not begun in the proper township the personal appearance of the defendant does not waive or cure the jurisdictional defect. This is for the reason that in such cases there is an inherent lack of statutory jurisdiction over the subject-matter which cannot be waived. In this connection, see *Sawyer v. Burris*, 141 Mo. App. 108, 121 S. W. 321; *Severn v. Railroad*, 149 Mo. App. 631, 129 S. W. 477; *Sedalia Milling Co. v. Flour Mills*, 169 Mo. App. 460, 155 S. W. 70; *Barry v. Bannerman*, 175 Mo. App. 142, 157 S. W. 853. This is true in replevin, in so far as the location of the property involved operates to fix the jurisdiction; but, as said above, the only requirement as to this is that the property replevied be located in the county wherein the suit is instituted. And though the case before us is one in replevin, since the property was found in the county the justice was possessed of jurisdiction over it. And as defendant waived any lack of jurisdiction over his person, we are of the opinion that this judgment is not now open to attack upon jurisdictional grounds.

What is said by the Kansas City Court of Appeals in *Barnes v. Plessner*, 121 Mo. App. 677, 97 S. W. 626, that may appear to be contrary to the conclusions reached above, we regard as so far modified by the later decisions of that court in *Smith v. Rock Co.* and *Yoakum v. Davis*, supra, when these two cases are considered together, as to leave no actual conflict between the views of that court and those expressed above on the matter in hand. From the two last-mentioned cases it appears that the Kansas City Court of Appeals has held, on the one hand, that the right to question the justice's jurisdiction on the ground that the suit was not begun in the proper township is waived by general appearance except in those cases where the location of property (or the place of injury to stock) of itself fixes the jurisdiction, and, on the other hand, has fully recognized that in replevin the jurisdiction of a justice, in so far as it is determined by the locus of the property involved, is coextensive with the county.

We therefore rule this assignment of error against appellant.

[5] II. As to the merits, appellant contends that the oral consent of Hawkins to the trade made by Brown did not operate to release the mare from the lien of Hawkins' mortgage. It is conceded that the ruling in *Coffman v. Walton*, 50 Mo. App. 404, is contrary to this contention, but it is pointed out that section 2863, Rev. Stat. 1909, was subsequently enacted, and it is argued that property may now be released from the lien of a chattel mortgage only in one of the ways prescribed by this section. But we regard

this argument as unsound. The statute merely makes provision for releasing of record chattel mortgages that have been satisfied. A mortgagee may fully waive his rights under a chattel mortgage though the same remain unreleased of record. This Hawkins did in the instant case by consenting to the exchange of the mare for the negro's horse. See *Coffman v. Walton*, supra; *Love v. Scott*, 179 Mo. App. 351, 166 S. W. 859; 7 Cyc. 74; *Jones on Chattel Mortgages* (5th Ed.) § 456, and authorities cited.

[8] III. It is argued that the judgment cannot stand for the reason that the court did not specifically find that the mare had been wrongfully detained by the appellant. The judgment recites that the court "doth find the issues for the plaintiff, and finds the plaintiff is entitled to the possession of the property sued for, * * * and assesses plaintiff's damages for the taking and detention of said mare at the sum of \$25." It is true that a verdict in replevin should respond to the issue of unlawful detention, and not alone to that of plaintiff's right of possession. See *Barnes v. Plessner*, 137 Mo. App. 571, 119 S. W. 457; *Grant v. Stubblefield*, 138 Mo. App. 555, 120 S. W. 647. However, it is sufficient if the verdict is in general form, or if the finding by the court sitting as a jury is, as here, a finding of the issues generally in favor of plaintiff. See *Barnes v. Plessner*, 137 Mo. App. loc. cit. 574, 119 S. W. 457. We regard the finding and judgment as sufficient.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

HOLSCHBACH v. HOLSCHBACH. (No. 14114.)

(St. Louis Court of Appeals. Missouri. Nov. 2, 1915. Rehearing Denied March 28, 1916.)

1. DIVORCE \S 184(1) — REVIEW — CONSIDERATION OF EVIDENCE.

On appeal in a suit for divorce, the court may consider all the evidence offered as being before it.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 570; Dec. Dig. \S 184(1); *Appeal and Error*, Cent. Dig. § 584.]

2. DIVORCE \S 37(19) — GROUNDS — DESERTION.

After a divorce had been refused to both husband and wife on the ground that neither had shown a case of faithful demeanor and intolerable indignities within the statute, if the wife offered to return and live with the husband in good faith, with the bona fide intention and desire to restore amicable and proper conjugal relations, the husband, on refusal of such offers, placed himself in the position of the wrongful absentee, but plaintiff's offers must have been made in sincerity to effect a reconciliation, and not merely as a device to keep the law on her side.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 127; Dec. Dig. \S 37(19).]

3. DIVORCE \S 183(3) — SUIT — WEIGHT OF EVIDENCE.

In a suit for divorce, evidence held sufficient to sustain findings that the wife, after their separation, had made bona fide offers to return and live with her husband, which offers he had refused, authorizing a divorce to the wife.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 448; Dec. Dig. \S 183(3).]

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; Irvin V. Barth, Judge.

"Not to be officially published."

Action by Nellie Holschbach against John P. Holschbach. From a judgment for plaintiff, defendant appeals. Affirmed.

El. V. P. Schneiderhahn and James C. Shaner, both of St. Louis, for appellant. Wm. F. Woerner and Emerson E. Schnepf, both of St. Louis, for respondent.

ALLEN, J. This is a suit for divorce. The parties were married in November, 1902, and were finally separated in April, 1907. There had been a prior separation, continuing for some six months, when a suit for divorce was filed by the husband, this defendant. The parties were reconciled, however, and lived together until April, 1907, when the wife, this plaintiff, left defendant and returned to her mother's home taking her infant daughter, the only child born of the marriage, and instituted against defendant a suit for divorce, alleging various indignities offered her by defendant. To that petition defendant filed a cross-bill, also based upon indignities. In that suit there was a decree below, granting plaintiff a divorce and dismissing defendant's cross-bill; but upon defendant's appeal to this court it was held that neither party had made out a case of faithful demeanor and intolerable indignities within the intention of the statute, and the judgment of the circuit court was reversed, and both plaintiff's petition and defendant's cross-bill were dismissed. See *Holschbach v. Holschbach*, 134 Mo. App. 247, 114 S. W. 1035. The cause to which we have just referred to was tried in the circuit court in 1907 and was finally disposed of in this court on or about December 28, 1908. The parties have remained apart, plaintiff residing in her mother's home with the child, and the defendant, who is a dentist, living in quarters in a building belonging to his mother, in which he also has his office. The present suit was instituted by the wife on March 15, 1912, and proceeds upon the theory that the defendant husband, on or about December 29, 1908 (immediately following the final disposition of the former case by this court), abandoned plaintiff and absented himself without reasonable cause from that time to the filing of the petition herein, a period of more than one year. The petition alleges the final separation in April, 1907, the institution

of the former suit by plaintiff, and the disposition thereof below and in the appellate court, averring that on learning of the final decision of this court therein, plaintiff—

"adjusted herself thereto and did, on or about December 29, 1908, and again thereafter on or about April 9, 1909, earnestly request defendant to again live with her in the manner meet and proper between husband and wife; that she has at all times been ready and willing so to do, but defendant did refuse his assent to such proposition, and to every other proposition to live with plaintiff as a husband, but on the contrary; he refused to live with her as husband and wife and has since continued so to refuse, and has continuously, from the said two last-mentioned dates, absented himself without reasonable cause, and declined to receive the plaintiff as his wife or in any way treat her as such, and during all said time deserted and abandoned the plaintiff without reasonable cause."

The petition also sets up as indignities that defendant refused to live with plaintiff for a period of several years prior to the institution of the suit, and failed and refused, during said time, to furnish plaintiff any support and maintenance. Defendant's cross-bill, alleging the institution of the first divorce suit by this defendant, the dismissal thereof upon plaintiff's promise to live with defendant and treat him with kindness and affection, avers that thereafter, on April 16, 1907, plaintiff without cause, abandoned defendant and thereafter absented herself without reasonable cause up to the time of the filing of the cross-bill. Matters are also alleged as indignities offered to defendant by plaintiff; that plaintiff refused to perform her marital duties; that she abandoned defendant in April, 1907; and that plaintiff, at no time since the rendition of the final decree in her former suit, expressed or offered to defendant any sorrow or regret because of her alleged misconduct. The decree below was for plaintiff, and defendant appeals.

Plaintiff testified that immediately upon learning of the final action of this court in her former suit (*Holschbach v. Holschbach*, supra) i. e., about December 29, 1908, through the attorney then representing her she made offer to defendant to again live with him as his wife. But she later admitted that she did not know whether such offer was ever communicated to defendant. Her former counsel did not testify; and the defendant testifies positively that he never received any such communication. The first communication shown to have passed between the parties subsequent to the decision of this court in the former case is a letter written by defendant's counsel of date April 1, 1909, relative to the custody of the child. The custody thereof had been granted to the mother by the divorce decree in the circuit court, with the right of defendant to have the child on certain days. Upon the reversal of this decree the child continued in plaintiff's custody, and the latter, it seems, refused to permit the defendant to have access to it. This letter demanded of plaintiff that an arrangement be made, whereby defendant could have

possession of the child every alternate week, adding that if the proposition was not accepted by plaintiff within a given time, proceedings in court would follow. Plaintiff made no direct reply to this letter, but on April 9, 1909, sent to defendant the following letter, typewritten upon stationery of her counsel, viz.:

"Dr. J. P. Holschbach. Dear Sir: I hereby renew the offer heretofore made through my attorney, to return with our daughter Viola to live with you, if you will provide a suitable home for us, according to your means and station in life. If you persist in your refusal to live with me I shall expect you to provide for the support of the child and myself.

"Respectfully, [Signed] Nellie Holschbach."

To this letter defendant did not reply, but soon instituted a habeas corpus proceeding to obtain the custody of the child. This proceeding came before Hon. Geo. C. Hitchcock, Circuit Judge, shortly thereafter, the custody being awarded to plaintiff, with the right of defendant to have the child at certain times. During the pendency of this proceeding Judge Hitchcock made an effort to effect a reconciliation between the parties, and he testified in this case as plaintiff's witness. The evidence shows that while the habeas corpus proceeding was pending, plaintiff stated to Judge Hitchcock that she was willing to return to and live with defendant, and that, after talking with plaintiff, Judge Hitchcock conversed with defendant over the telephone, and also sent for defendant, who came and discussed the matter with him. Plaintiff was with Judge Hitchcock when he telephoned to defendant, and waited in an adjoining room when defendant came to Judge Hitchcock's chambers. The evidence is that Judge Hitchcock told defendant of the plaintiff's expressed willingness to return to him and live with him, and urged defendant to take steps to effect a reconciliation, but that defendant refused to consider the matter at all, and, upon the occasion of his visit to Judge Hitchcock's chambers, refused to see his wife, and made his exit through a doorway leading into the courtroom in order to avoid meeting her. And it appears that Judge Hitchcock made an effort to prevail upon defendant to take plaintiff riding with him, in order that the parties might have an opportunity to adjust their differences, but that defendant refused.

Judge Hitchcock was asked on cross-examination if he did not recall that defendant had exhibited to him plaintiff's letter of April 9, 1909, as proof that plaintiff's offers to return were not made in good faith. His answer was:

"No; but I think that was the impression that the conversation that I had with him left. Q. That he didn't believe it to be in good faith? A. Yes; something like that; or, in other words, my recollection is that the impression was made that he had tried it so many times, or something of that kind, and he wouldn't do it again."

He said that he did not recall that the letter was exhibited to him, but that this may

have been done. Defendant, in his testimony, admits that Judge Hitchcock sought to effect a reconciliation, and communicated to defendant plaintiff's expressed willingness to return and live with him, and that he refused to consider such offers. He testifies that he told Judge Hitchcock that he could not live with plaintiff; that she had persistently refused to perform her marital duties; that she "fooled" him "into taking her back the last time"; and that he could not again take her back "under those conditions."

Touching defendant's attitude toward his wife after the separation we quote a portion of his testimony on cross-examination, as follows:

"Q. Well, you never offered, in any way, shape, form, or manner, to take her back, did you? A. No sir. Q. You never made any advances toward her? A. No, sir. Q. What advances she made to you, you repudiated, didn't you? A. Yes, sir. Q. The reason why you repudiated them was because you didn't want to live with her? A. Not after I had lost respect for her; no. Q. Well, you have no respect for her, then, have you; have no love for her, have you? A. Not after she broke up the home; no."

In 1910 certain letters passed between the parties, but they have no material bearing upon the issues. Some were occasioned by the child's illness, and others pertained to her education. Defendant has contributed nothing to plaintiff's support and maintenance since the separation in 1907. By the decree in the habeas corpus proceeding, as a condition to the right to have the custody of the little girl at certain times, he was required to pay, and did thereafter pay, \$10 per month for her maintenance. On January 19, 1912, plaintiff wrote defendant a letter in which, after referring to the offer made by her letter of April 9, 1907, she stated that she had since been compelled to "impose upon" her mother and brother for the support of herself and the child, \$10 per month being inadequate for the latter's maintenance, and requested defendant to pay a reasonable sum to her mother or brother by way of reimbursement for such expenditures, and further requested defendant to furnish her with sufficient funds "to supply the necessities of life" if defendant persisted in living apart from her, concluding with a request that defendant send not less than \$50 per month in the future.

[1] The alleged indignities upon which the petition and cross-bill respectively were based in plaintiff's former suit will appear by reference to the opinion of this court therein, *supra*, and it is unnecessary to rehearse them here. Defendant, however, sought in this action to introduce evidence relative to his wife's conduct prior to the separation in April, 1907, though the same matters were involved in the former case, upon the theory that this could be shown in defense as affording reasonable cause for his subsequent refusal to accept her offers to return. The exclusion of this testimony is assigned

as error. Appellant's position is that, though the judgment in the former case may be res adjudicata as to defendant's right to a divorce upon the ground of indignities alleged in the cross-bill in that suit, nevertheless this did not prevent defendant from showing misconduct on the part of the plaintiff prior to the separation, in order to exonerate himself from having refused, without good cause, to live with plaintiff, such alleged refusal being the basis of the charge of desertion upon which plaintiff's petition is based. We have examined very carefully the questions propounded by defendant's counsel to which objections were sustained. Some of the testimony thus sought to be elicited was incompetent upon other grounds, as being hearsay or privileged communications, and appropriate objections were interposed thereto. As to the testimony excluded upon the ground that defendant was precluded from showing plaintiff's conduct prior to the final separation, because of the former adjudication, we deem it unnecessary to pass upon the question of res adjudicata thus raised. For our purposes we may consider all of the testimony sought to be elicited as in evidence. Plaintiff again denied the charges in question, as she did in the former case. Defendant's counsel was permitted to cross-examine her along these lines. Though objections were sustained to some questions asked her, it was not until she had had opportunity to deny the alleged acts of misconduct relied upon by defendant to support his defense. As in an equity case, we may here consider all of this evidence as being before us, and take the case in the light of all thereof. The testimony relative to the prior alleged misconduct of plaintiff, if admissible, could have but little weight under the circumstances, in view of the fact that it was found in plaintiff's prior suit that both parties were at fault; that neither had made out a case of intolerable indignities, and that neither was the innocent and injured party.

[2, 3] Under the circumstances we are chiefly concerned with the conduct and attitude of the parties toward each other subsequent to the final judgment of this court in the former case. If plaintiff's subsequent offers to return and live with defendant appear to have been made in good faith, with the bona fide intention and desire to restore amicable and proper conjugal relations, then by the refusal to entertain such offers defendant, we think, placed himself in the position of the wrongful absentee. And by persisting in such refusal for a period of one year, defendant may properly be held to have absented himself without reasonable cause for the space of one year within the meaning of our statute. See *Creasey v. Creasey*, 168 Mo. App. 68, 151 S. W. 219; *Louis v. Louis*, 134 Mo. App. 566, 114 S. W. 1150. But plaintiff's offers must have been made in sincerity, with the bona fide purpose of

effecting a reconciliation, and not merely as a device to keep the law on her side and to defeat defendant in subsequent litigation. See *Creasey v. Creasey*, supra, 168 Mo. App. loc. cit. 89, 151 S. W. 219; *Messenger v. Messenger*, 56 Mo. 329. And the crucial question before us is whether plaintiff's advances to defendant, subsequent to the final judgment in the former case, are of the requisite character aforesaid.

Had we nothing but plaintiff's letter of April 9, 1907, as an offer on her part to return to the defendant to live with him as his wife, we would perhaps be bound to pronounce the offer insufficient to support plaintiff's action. The letter is a cold, typewritten, formal communication, prepared in the offices of plaintiff's counsel. It expresses nothing of sorrow or regret for the past, nor a word of affection. Moreover, it is an offer to return to defendant upon condition that he provide a suitable home for her and her child, according to defendant's means. While the condition thus attached may express nothing more than the defendant's legal duty, it is significant as harking back to what (as plaintiff admitted on cross-examination) was one of the main causes of the original disagreement between the parties, viz., plaintiff's objection to living in the Rutger street flat. She stated further, on cross-examination, that this was the reason why she put that clause in the letter repeating that the premises in which she formerly lived were unsanitary, though, as will appear by reference to the opinion in the former case, this was not established. However, in this connection the strained relations of the parties, who were then dealing with each other through counsel, should be borne in mind, and plaintiff appears to have been under the impression that her counsel had previously communicated an offer to defendant which he had not accepted.

When the evidence as a whole is considered it appears to be sufficient to justify a decree in plaintiff's favor. At the time of the pendency of the habeas corpus proceeding, plaintiff seems to have shown a genuine desire to effect a reconciliation. She not only expressed to Judge Hitchcock a willingness to return to the defendant and live with him, but was at hand when this was communicated to defendant, waiting for his response. The presumption is that such offers were bona fide, plaintiff expecting to perform the

marital obligations on her part if a reconciliation were effected, in the absence of anything indicating the contrary. Defendant, however, without any inquiry as to plaintiff's good faith in the premises, refused to consider any proposition looking to a reconciliation. He says that he could not live with plaintiff "under those conditions." But there is no evidence that any conditions were attached to the offers by plaintiff through Judge Hitchcock. Defendant was not justified in assuming, without more, that plaintiff intended to pursue the same course of conduct that she had in the past; and this court found that defendant had been likewise at fault. Had defendant taken any steps to ascertain the sincerity of plaintiff in the premises, quite a different situation might have been presented; but he refused to even consider a reconciliation, refused to see his wife, and took special precautions to avoid meeting her. By this conduct defendant put himself in the attitude of refusing to resume conjugal relations with plaintiff upon her offer so to do. Under the circumstances we cannot denounce this offer as not being bona fide; and we think that defendant's attitude, appearing from this and from his own admissions on cross-examination, continuing as it did for more than the statutory period, made him liable to the charge of desertion laid in the petition, as the learned trial judge found.

In respect to the custody of the daughter, and the award of alimony, the decree should not be disturbed.

The judgment of the circuit court will accordingly be affirmed. It is so ordered.

NORTONI, J., concurs.

REYNOLDS, P. J. (dissenting). I cannot concur in the result reached by my learned associates. All that defendant had directly from the plaintiff was the letter set out in this opinion. He undoubtedly had that in mind when he talked with Judge Hitchcock. That was a cold, businesslike letter, imposing terms that a wife has no right to impose. Nor do I think, under the facts, the plaintiff should have any alimony. She, while maintaining the daughter during minority, is possibly entitled to an allowance for that if the husband refuses any. She should have no more than that and nothing by way of alimony.

MARSHALL v. UNITED RYS. CO. OF ST. LOUIS. (No. 14164.)

(St. Louis Court of Appeals. Missouri. Dec. 7, 1915. Rehearing Denied March 28, 1916.)

1. NEGLIGENCE \Leftrightarrow 45 — DANGEROUS CONDITION OF PREMISES—UNGUARDED ELEVATOR SHAFTS.

The leaving of the entrance of an elevator shaft in defendant's building exposed and unguarded at a time when the elevator was not at that floor and the building was rather dark, especially the elevator shaft, was a negligent act sufficient to cast liability upon defendant for injuries thereby proximately caused to any one to whom defendant owed any duty in the premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 60; Dec. Dig. \Leftrightarrow 45.]

2. MASTER AND SERVANT \Leftrightarrow 256(2)—ACTIONS FOR INJURIES—CONSTRUCTION OF PETITION.

In an action for injuries to a schoolboy employed by defendant during certain hours of the day, caused by jumping into an elevator shaft under the belief that the elevator was at the level of a driveway about 14 inches below the level of the floor, a count in the petition alleged that plaintiff was in the building pursuant to the invitation and direction of defendant, and that while so in the building defendant negligently and carelessly permitted the shaft to be open, exposed, and unguarded so as to endanger plaintiff and other persons lawfully in the building, and that as a result of such negligence plaintiff fell into the shaft and was injured. *Held*, that the cause of action pleaded did not proceed upon the theory that defendant was negligent in respect to furnishing plaintiff a safe place to work or a safe means of egress from the building.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 810; Dec. Dig. \Leftrightarrow 256(2).]

3. MASTER AND SERVANT \Leftrightarrow 88(7)—LIABILITY FOR INJURIES—EXISTENCE OF RELATION.

Where a boy employed by defendant during certain hours of the day had not left defendant's building when injured, but was still upon the very floor upon which he performed his chief duties, and had not lingered or loitered, the relation of master and servant was not entirely suspended though he was about to leave the building.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 150; Dec. Dig. \Leftrightarrow 88(7).]

4. MASTER AND SERVANT \Leftrightarrow 88(7)—LIABILITY FOR INJURIES—TIME AND PLACE OF ACCIDENT.

A master's duty to a servant is not necessarily confined to the precise period during which services are actively rendered nor restricted to the identical place of the labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 150; Dec. Dig. \Leftrightarrow 88(7).]

5. MASTER AND SERVANT \Leftrightarrow 284(3)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a boy employed by a street railway company during certain hours of the day, whose main duties were to collect and assort transfers and who was injured when he was about to leave the building for the day by jumping into an elevator shaft under the belief that the elevator was level with a driveway about 14 inches below, for the purpose of assisting in opening a door leading to the driveway evidence *held* to make a question for the jury as to whether his act in going into the shaft to assist his immediate superior was within the scope of his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1005; Dec. Dig. \Leftrightarrow 284(3).]

6. TRIAL \Leftrightarrow 156(2)—DEMURRER TO EVIDENCE—CONSIDERATION.

Evidence on demurrer thereto must be viewed in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 355; Dec. Dig. \Leftrightarrow 156(2).]

7. MASTER AND SERVANT \Leftrightarrow 89(1)—ACTIONS FOR INJURIES—"SCOPE OF EMPLOYMENT."

The "scope" of an employe's duties was to be determined by what he was employed to perform and what, with the knowledge and approval of his employer, he actually did perform while engaged in the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 153; Dec. Dig. \Leftrightarrow 89(1).]

For other definitions, see Words and Phrases, First and Second Series, Scope of Employment.]

8. MASTER AND SERVANT \Leftrightarrow 89(4)—ACTIONS FOR INJURIES—SCOPE OF EMPLOYMENT.

If a boy employed by a street railway company to collect and assort transfers and do whatever he was told to do had been accustomed from time to time to assist in raising a door leading to a driveway with the knowledge and approval of his superiors, and if this fell within the general scope of the duties performed by him from time to time and the circumstances were such as to make it appear to him that the act of assisting in opening the door was reasonably to be expected of him as an employe, his act in going to the assistance of his immediate superior without being specifically told to do so was not wholly beyond the scope of his employment so as to place him in the position of a mere stranger intermeddling in that with which he had no concern.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 156; Dec. Dig. \Leftrightarrow 89(4).]

9. NEGLIGENCE \Leftrightarrow 32(2)—LIABILITY FOR INJURIES TO INVITEES.

A boy employed by a street railway company during certain hours of the day to collect and assort transfers and do whatever he was told to do saw his immediate superior opening a door leading from an elevator shaft to a driveway as he was about to leave the building for the day and jumped into the shaft, believing the elevator was there, to assist in opening the door. *Held* that, even though this was not within the scope of his duties, he was not a mere intruder or bare licensee and was entitled to such protection as would be due an invitee.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 43; Dec. Dig. \Leftrightarrow 32(2).]

10. NEGLIGENCE \Leftrightarrow 136(26) — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

A person suing for injuries is not to be held guilty of negligence as a conclusion of law unless the evidence leaves no room for reasonable minds to entertain different opinions with regard thereto, and, unless it conclusively appears that the injuries resulted from his own negligence, the effect of his conduct is a matter for the consideration of the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 338, 334; Dec. Dig. \Leftrightarrow 136(26).]

11. MASTER AND SERVANT \Leftrightarrow 289(9)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a boy 15 years old, employed in street railway offices to collect and assort transfers and help generally around the place, was injured by jumping into an elevator shaft, believing that the elevator was at the level of a driveway about 14 inches below the level of the floor, to assist his immediate superior in opening a door leading to the driveway. The building was dark, especially the elevator shaft, and he was unable to see whether or not the elevator was there. It was customary for the elevator to be at the level of the driveway whenever the

doors to the elevator shaft were open, or at least when both the doors at the office floor and the door leading to the driveway were open. *Held*, that he was not negligent as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1098, 1099; Dec. Dig. ¶289(9).]

12. NEGLIGENCE ¶85(2) — CONTRIBUTORY NEGLIGENCE—CHILDREN.

The conduct of a boy 15 years old was not to be measured by that of the ordinarily prudent man of mature years as a standard, and his age was to be reckoned with as a factor in determining whether he was negligent.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 123; Dec. Dig. ¶85(2).]

13. NEGLIGENCE ¶141(10) — INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In an action for injuries to a boy 15 years old, the court charged that, in determining whether the injuries were caused by plaintiff's own negligence and carelessness, the jury might consider his age and capacity, and that a child was required to exercise care and caution for his own safety, but only such care and caution as was usually exercised by ordinary children of the same age and capacity. *Held*, that this was not erroneous, as plaintiff was entitled to an instruction of this character, and the instruction was good, at least in its general scope.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 393; Dec. Dig. ¶141(10).]

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

"Not to be officially published."

Action by Lisle Francis Marshall, by Frank B. Marshall, his next friend, against the United Railways Company of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle & Priest and G. T. Priest, all of St. Louis, for appellant. Jones, Hocker, Hawes & Angert, of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries sustained by plaintiff, a minor, by reason of falling into an elevator shaft maintained by defendant in an office building occupied by it in the city of St. Louis. There was a verdict and judgment for plaintiff in the sum of \$2,000, and the case is here on defendant's appeal.

Plaintiff, a young man about 15 years of age at the time of his injury, and who was attending school, was employed by defendant for certain hours during the day, and on Saturdays and during vacation periods. His duties in the main were to collect and assort certain transfer slips, or "transfers," though the evidence is that plaintiff from time to time rendered other services about the building.

It appears that the building, situated at Park and Vandeventer avenues, in the city of St. Louis, is several stories in height; and that in the rear portion thereof defendant maintained a freight elevator. Upon the first floor, or "office floor," the elevator shaft was guarded by two iron doors. That is to say,

the opening leading to the elevator from this floor, about 4½ feet in width, was provided with two narrow iron doors which swung outward upon hinges. It appears that inside of these doors there was a small wooden gate at the left as one approached the elevator entrance, which, when closed, extended halfway across the opening, leaving one-half thereof unguarded when the iron doors were open. The elevator shaft connected directly with a driveway in the rear of the building leading to an alley. The level of this driveway was about 14 inches below the level of the office floor, and at the entrance to the elevator shaft from the driveway was a large sliding door, which was operated by sliding it upward or downward by means of two large handles attached thereto.

On the morning of April 6, 1911, shortly before 8 o'clock, plaintiff, who had completed his regular work of collecting and assorting transfers, was upon the first floor of the building a short distance from the elevator, being about to leave the building to go to school. The evidence is that it was then rather dark in this portion of the building, and particularly in the elevator shaft. The elevator was not in fact at or about this landing, but was somewhere in the upper part of the building. One Williams, who at the time was plaintiff's immediate superior, had opened the iron doors leading from the office floor to the elevator shaft and was within the shaft, supporting himself, in part at least, upon a ledge at one side of the shaft, and was endeavoring to raise the sliding door opening upon the driveway. It appears that when plaintiff came within about 10 feet of the elevator shaft he saw that the iron doors, i. e., the swinging doors at the elevator entrance from the office floor, were open and that Williams was within attempting to raise the outer sliding door. Assuming, because of the open doors and the presence of Williams in the shaft, that the elevator was at the level of the driveway entrance at the rear, i. e., about 14 inches below the level of the floor upon which plaintiff then was, plaintiff entered the elevator shaft to assist Williams in raising the outer door, and fell to the bottom of the shaft in the basement below and was injured.

Plaintiff testified that, when the doors to the elevator shaft were open, the elevator was always at the level of the driveway. That the doors were not, in the usual course of things, opened unless the elevator was at this landing, appears from repeated statements of plaintiff on the witness stand. It seems that for ventilation, if not for other purposes, the swinging iron doors within and the outer sliding door as well would frequently be left open, but only when the elevator was standing at the level of the driveway. Plaintiff testified that, upon the occasion here in question, he saw the elevator doors at the

office floor open, looked into the elevator shaft, and saw Williams therein, the latter being visible because of a white shirt which he wore; and, after hesitating a moment, entered the shaft to assist in raising the outer door. He says that by looking he could not ascertain whether or not the floor of the elevator was in fact at the level of the driveway. He "jumped" into the shaft, i. e., he sprang from the edge of the office floor expecting to alight upon the elevator floor at the level of the driveway, about 14 inches below.

It is conceded that Williams had not called for assistance, and that he did not know that plaintiff was attempting to come to his assistance until he saw plaintiff fall.

Some special phases of the testimony will receive attention in the course of the opinion.

The petition is in two counts. The first count avers that, "under the statute in such cases made and provided," it was the duty of defendant to have the opening to the elevator shaft protected "by good and sufficient trapdoors, self-closing hatches, safety catches, or strong guard rails at least three feet high, and to use diligence to keep the same closed at all times except when in actual use"; and it is alleged that plaintiff was lawfully upon defendant's said premises, as an employé of the defendant, and that, by reason of defendant's violation of the said "duty imposed upon it by statute," plaintiff was caused to fall into the elevator shaft and was injured.

The second count alleges that defendant occupied the office building in question and maintained and operated the elevator therein, and that on April 6, 1911, plaintiff "was in said building pursuant to the invitation and direction of the defendant, and, while so in said building as aforesaid, the defendant negligently and carelessly permitted the wellhole in which said elevator was operated on the first floor of said building to be open, exposed, and unguarded, so as to endanger plaintiff and other persons lawfully in said building, and that, as a result of said negligence of the defendant, the plaintiff fell into the elevator shaft or wellhole," whereby he was injured.

The answer to each count is a general denial coupled with an averment that plaintiff's injuries, if any, "were caused by his own carelessness and negligence."

Certain ordinances of the city of St. Louis were offered in evidence by plaintiff. Upon objections being interposed thereto by defendant, all of the ordinances offered were excluded except section 447 of article 4 of chapter 6 of the Revised Code of St. Louis (1912). The latter, which was read in evidence, is as follows:

"Every hoistway, hatchway, stairway, or wellhole in every building, shall hereafter be securely guarded by means of proper gates, railings or guards, or other inclosures, which may be approved by the commissioner of public buildings. Such guards or railings shall not be less than three feet in height nor more than one

foot above the floor, and shall be so constructed as to effectually prevent persons from falling into such hoistways, hatchways, stairways, or wellholes. The owners, lessees, or occupants of any building in the city of St. Louis, in which hatchways or wellholes exist, or shall hereafter be constructed, shall cause the same to be effectually barred or inclosed, as provided in sections 450, 451, 452, 453 of this article, for the prevention of accidents therefrom."

At the close of plaintiff's case, the court, at the instance of defendant, gave a peremptory instruction to the effect that under the law and the evidence plaintiff was not entitled to recover on the first count of his petition. A like instruction offered by defendant as to the second count was refused. The cause was submitted to the jury, under the second count of the petition, upon instructions which need not be here set out. But one instruction is challenged, and that will be noticed later.

[1] I. No point is made here as to the admissibility of the ordinance read in evidence. It was objected to below on the ground that it had not been specially pleaded, but the court held that it was admissible under the general allegation of negligence. As to the effect of the ordinance, it may be said that, ordinance or no ordinance, the leaving of the entrance to the elevator shaft exposed and unguarded was a negligent act sufficient to cast liability upon defendant for injuries thereby proximately caused to any one to whom defendant owed any duty in the premises. The question is: What, if any, duty did defendant owe to this plaintiff with respect to guarding the shaft at the time and under the existing circumstances? And there is the question of plaintiff's own negligence to be reckoned with.

It is earnestly contended by learned counsel for appellant that the latter's demurrer to the evidence should have been sustained, as to the cause of action counted upon in the second count of the petition, upon which the case went to the jury, for the following reasons, to wit:

"(a) Because plaintiff's employment was from day to day, and, the moment his duties for the day ceased, the relation of master and servant ceased, and whatever he did after that service ceased was not as a servant for the master, and the master was not under any duty to protect him as a servant and to furnish him a safe place within which to work. (b) Because at the time plaintiff was injured he was not acting within the line of his duty or the scope of his employment and was a mere volunteer and occupying no better position than that of a stranger. (c) Because plaintiff was guilty of contributory negligence in running and jumping into an elevator shaft which he knew to be unguarded, without stopping and looking to ascertain the real condition of affairs. (d) Because the record shows that the unguarded wellhole was not the proximate cause of plaintiff's injuries. The proximate cause of the plaintiff's injuries was his voluntary act in running and jumping into the elevator shaft."

[2-4] As to the first of these, it may be said that the cause of action pleaded in the second count does not proceed upon the theory that the defendant, as a master, was neg-

ligent in respect to furnishing plaintiff a safe place to work, or a safe means of egress from the building. That the relation of master and servant had not become entirely suspended, for all purposes, we think is clear, in view of the fact that plaintiff had not left the building, and had not lingered or loitered thereabout on his own business or for his own pleasure or convenience. He was still upon defendant's premises, and upon the very floor upon which he performed his chief duties. Had he been injured by reason of defendant's neglect in respect to keeping reasonably safe that portion of the premises over which he might be required to go in passing from the office, without fault on his part, no doubt would exist as to defendant's liability. And the master's duty to the servant is not necessarily confined to the precise period during which services are actively rendered, nor restricted to the identical situs of the labor. See *Jackson v. Butler*, 249 Mo. 342, 155 S. W. 1071; *Behncke v. Mitchell Min. Co.*, 189 Mo. App. 639, 175 S. W. 271. But the question here, for immediate consideration, is rather one pertaining to the scope of plaintiff's duties as defendant's servant.

[5] Whether plaintiff's act of entering the elevator shaft to assist Williams was one wholly outside of and entirely beyond the scope of his employment, to be so declared as a matter of law, is a question requiring for its solution a consideration of all the evidence adduced touching the character of plaintiff's employment and the duties devolving upon him thereunder.

Plaintiff, in his examination in chief, testified that upon reporting for duty each morning he would go to certain car sheds and get the "transfers," which were in sacks, and bring them to the building at Park and Vandeventer avenues; that "generally on Wednesday, Thursday, Friday, and Saturday mornings" he would go to the car shed at about 7 o'clock, bring the transfers to the building at Park and Vandeventer avenues, and "sort them out"; and that then Mr. Lindsay, "who was the boss down there," would tell him what to do. Plaintiff said:

"One car line I had to count every Saturday morning. That was the Cass avenue line; and, after I got finished counting this line, I was supposed to do whatever he told me to. Q. And did he from time to time tell you to do things? A. Yes, sir. Q. And did you do them? Generally help around the place? A. Yes, sir. Q. How long had you been employed there that way? A. Well, almost a year before I got hurt. * * * Q. State what other work you did, other than the work in connection with those transfers. A. Well, I worked there during vacation. About 5 o'clock Mr. Lindsay told some of the boys to pull up the elevator, to pull down this door that leads to the driveway; and when that door was pulled down we walked off and closed the inner door then. Whatever we were told to do, we had to do that."

It appears that Mr. Lindsay, referred to in the evidence, was "the manager or superintendent of the transfer department"; that

at the time of plaintiff's injury Lindsay was away upon a vacation, and Williams, who was in the elevator shaft when plaintiff was injured, took his place.

On cross-examination plaintiff testified that he had finished his duties that morning, had deposited his transfers at the regular place, and was "about ready to go to school" when he was injured.

"Q. You had no other duties to perform in the building that day? A. Unless I was told to. Q. Unless you were told to; and nobody told you to do anything? A. Not this day."

On redirect examination plaintiff testified that he had on other occasions assisted others who were engaged in opening these outer doors of the elevator, and that in doing so he stood on the elevator platform.

"Q. Now when you assisted Mr. Lindsay or Mr. Williams or others about that place in doing other work than that connected with the transfers, did you render that assistance only on Saturdays, or on other days when you were there? A. Other days. Q. On all days when you were there? A. Yes, sir."

On further cross-examination plaintiff's testimony is as follows:

"Q. I understood you to say yesterday, in your direct examination and upon cross-examination, that your work was finished that morning, before this accident occurred? A. Yes, sir. Q. Your services were no longer required there? A. Not that morning."

On further redirect examination, plaintiff gave the following testimony:

"Q. Lisle, you said, in answer to Mr. Priest, a few moments ago, that your services were no longer required there; you had finished your work. What you had finished that morning was the work that you had to do with respect to the transfers? A. Yes, sir. Q. And you were on your way to school? A. Yes, sir. Q. Passing through the office? A. Yes, sir."

[6] Considering this testimony as a whole, which is all that the record contains touching the matter, and viewing it in the light most favorable to plaintiff, as it must be viewed upon demurrer, we are led to the conclusion that it sufficed to take plaintiff's case to the jury, as affording a sufficient basis for a finding by the triers of the fact that plaintiff's act in going into the shaft to assist his immediate superior was one comprehended within the scope of his duties as defendant's servant. This testimony does not appear to justify us in saying, as a conclusion of law, that plaintiff, at the time of his injury, was engaged in the performance of an act entirely beyond the scope of his employment, whereby he became a mere volunteer or interloper. To so hold we must be prepared to say that no other rational conclusion may be drawn therefrom; that the question of fact involved is one as to which reasonable minds could not differ.

[7] Though plaintiff's chief duties were those in connection with the transfers, he says that he did whatever his immediate superiors told him to do, and helped generally "around the place." He reiterates that, aside from his work with the transfers, his

duties were to do whatever his superiors told him to do. And appellant's counsel lays much stress upon the fact that, on the morning in question, no one told plaintiff to do that which resulted in his injury. But we must view plaintiff's testimony in its entirety, having regard to the full import thereof, and the legitimate inferences arising therefrom. It appears that plaintiff had been previously directed to assist in closing this sliding door. He had theretofore assisted others in opening the door, just as he was attempting to assist Williams when injured. And from his testimony it is to be inferred, at least, that such services were rendered from time to time at either the special or general direction of his superiors. It thus appears that the act in which he was engaged at the time of his injury was one which he had frequently performed before, not only with the knowledge and approval of his superiors, but at their direction. The scope of plaintiff's duties is to be determined by what he was employed to perform and what, with the knowledge and approval of his employer, he actually did perform while engaged in the service. *Rummell, Adm'r, v. Dilworth, Porter & Co.*, 111 Pa. 343, 2 Atl. 355, 363; 26 Cyc. 1090; *Millisap v. Beggs*, 122 Mo. App. loc. cit. 9, 97 S. W. 956; *Morley, Adm'r, v. Railway Co.*, 105 Iowa, 46, 74 N. W. 751.

[8] While plaintiff says that, aside from his duties in connection with the transfers, he was to do whatever he was told to do, this does not necessarily mean that he was required or expected to always await explicit orders to perform each specific act. At any rate, the evidence cannot be said to be conclusive as to this; and if he had been accustomed from time to time to assist in raising this door, with the knowledge and approval of his superiors representing defendant, his act in going to the assistance of Williams at the time of his injury, when it appeared to him that assistance was needed, cannot well be said to be one wholly beyond the scope of his employment so as to place him in the position of a mere stranger intermeddling in that with which he has no concern. He should not be denied a recovery for the reason alone that the act was one which he had not been specifically told or required to perform, if in fact it was one which fell within the general scope of the duties performed by him from time to time, and the circumstances were such as to make it appear to him at the time to be an act reasonably to be expected of him as an employé.

[9] The second count of the petition proceeds upon the theory that plaintiff was in the position of an invitee, or at least entitled to such protection in the premises as would be due an invitee. We regard the evidence as sufficient to support the allegations of this count. Plaintiff was upon the "office floor" in the capacity of an employé. His act of entering the elevator shaft, under the cir-

cumstances, we think may properly be found to be one within the scope of his duties as such employé. In any event, plaintiff, in going into the shaft, in our opinion, did not become a mere intruder or even a bare licensee. And the duty was cast upon defendant to guard this dangerous pitfall, situated in a darkened position of the building, so that persons lawfully upon the premises for purposes connected with defendant's business might not fall therein.

[10] II. But appellant insists that in any event plaintiff, in rushing into the elevator shaft when it was so dark that he could not see what were the real conditions present, and without taking precautions to investigate further, was guilty of such negligence as to preclude his recovery. In considering this phase of the case, and, for the present, leaving out of consideration the fact that plaintiff was a boy 15 years of age, it is to be borne in mind that he is not to be held guilty of negligence, as a conclusion of law, unless the evidence bearing upon the matter is such as to leave no room for reasonable minds to entertain different opinions with regard thereto. Unless it conclusively appears that plaintiff's injuries resulted from his own negligence, the effect of his conduct is a matter for the consideration of the jury.

[11] As shown above, the iron doors leading from the office floor to the elevator shaft had been opened by defendant's servant Williams, who was within the shaft, with his back turned to plaintiff, supporting himself upon a ledge at the side thereof, and endeavoring to raise the sliding door in the rear. He wore a white shirt, and on this account was visible to plaintiff as the latter approached the open doorway. According to plaintiff's experience, the open doors, and the presence of Williams within the shaft attempting to raise the sliding door, indicated that the elevator was at the level of the doorway. Appellant says that, according to the evidence, it was customary for the elevator to be at the level of the driveway only when both the iron doors at the office floor and the sliding door at the rear were open, and says that such was not the case when plaintiff approached the shaft on the occasion in question. It is unnecessary to state in detail the evidence touching this matter. It is sufficient to say that, had the sliding door, as well as the iron doors, been open, the situation could not have been one more likely to lead plaintiff to believe that the elevator was at the driveway level than the circumstances which were actually present; for the iron doors were open and Williams was seen within the shaft in the very act of attempting to open the rear, sliding door. Under such circumstances, it was quite reasonable for one to suppose that the elevator was at the level of the driveway, and that Williams was standing upon the floor thereof. The act of Williams in thus entering the elevator shaft, leaving the iron doors open behind him, was a negligent act,

particularly in view of the darkness at this place, likely to cause any one approaching the elevator to believe that the latter was at this landing. And though plaintiff, being unable, on account of the darkness, to see whether or not the elevator floor was in fact where he thought it to be, entered the shaft without taking precautions to investigate further, we think that we could not, under the circumstances, pronounce him guilty of contributory negligence as a matter of law, nor hold, as a conclusion of law, that his injuries proximately resulted from his own negligence. In view of all of the attendant facts, the question of plaintiff's negligence, we think, became one for the jury.

In *Barfoot v. White Star Line*, 170 Mich. 349, at page 355, 136 N. W. 437, at page 439, it was held that an adult should not be held guilty of negligence as a matter of law, in entering an elevator shaft under circumstances similar to those here involved. The court said:

"It is not conclusive of the question of plaintiff's negligence that he used care, and, as he believed, sufficient care, to ascertain that the elevator was where, within his experience, the open gate indicated it to be, although he knew the gate did not operate automatically. * * * Whether, under all the circumstances, plaintiff was careless, was a question for the jury." And see *Nouck v. Williams et al.*, 175 Mich. 15, 140 N. W. 956.

[12] The open iron doors, the presence of Williams within the shaft attempting to open the sliding door, indicated, in plaintiff's experience, that the elevator was at the level of the driveway. In conjunction with this, the darkness of the place operated to prevent plaintiff from seeing that the elevator was absent. Under such circumstances, we doubt very much the propriety of holding that even an adult ought to be regarded guilty of negligence as a matter of law. But in the case before us plaintiff's conduct is not to be measured by that of an ordinarily prudent man of mature years, as a standard. He was a boy 15 years of age, and this is to be reckoned with as a factor in the case.

In *Moeller v. United Rys. Co.*, 242 Mo. 721, 147 S. W. 1009, our Supreme Court refused to hold that a boy 12 years of age ought to be declared guilty of contributory negligence as a matter of law in jumping from a moving car. Among other things, the court, through Valliant, C. J., said:

"A court is justified in taking a case from the jury only when from the evidence adduced there can be but one reasonable conclusion drawn. Can there be no two opinions on the question of whether this boy was possessed of sufficient experience to enable him not only to see what a person of mature years would have seen, but also to appreciate the danger into which he was plunging? The court cannot specify the age to which a child when he has attained it shall be held as liable in such case as a person of full maturity, because there are other facts to be taken into account: The peculiar circumstances of the particular case, the knowledge and experience of the child in reference to those circumstances, and his capacity to appreciate the danger."

And in *Jackson v. Butler*, supra, in an opinion by Faris, J., after a review of many of the cases in this state and of other authorities as well (249 Mo. loc. cit. 368 et seq., 155 S. W. 1071), the court declined to hold that a boy, more than 17 years of age, was to be declared guilty of contributory negligence as a matter of law; though the court prefaced the discussion of that phase of the case by saying:

"We deem it reasonably clear upon the facts before us that, if plaintiff's conduct is to be weighed in the same scales and measured by the same rule by which we weigh and measure the acts of an adult, he was guilty of such contributory negligence as bars recovery."

Touching this question, we might refer to many other decisions of our courts. We do not say that, upon the facts involved, they may be all harmonized; but, however this may be, the recent controlling cases to which we have just referred furnish us ample authority for holding that the conduct of this plaintiff is not to be measured by the rule applicable to adults under like circumstances. And with this in mind we are constrained to hold, under the facts disclosed by this record, that the trial court properly refused to take the case from the jury upon the ground that plaintiff's negligence was such as to preclude his recovery herein, as a conclusion of law.

[13] III. An instruction given for plaintiff is assailed, but this assignment of error is virtually disposed of by what we have said above. The portion of the instruction here pertinent is as follows:

"In determining whether plaintiff's injuries were caused by his own negligence and carelessness, the jury may consider the age and capacity of the plaintiff at the time of his injury. And in this connection the court instructs you that under the law a child is required to exercise such care and caution for his own safety, but only such care and caution, as is usually exercised by ordinary children of the same age and capacity."

In view of the facts of the case, we perceive no error in the giving of this instruction. Plaintiff, we think, was entitled to have an instruction of this character given, and that given appears to be good, at least in its general scope.

The judgment should therefore be affirmed, and it is so ordered.

NORTONI, J., concurs. REYNOLDS, P. J., dissents in an opinion filed, and as he deems the decision herein to be contrary to the decision of the Supreme Court in *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903, and *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576, the cause at his request is hereby certified to the Supreme Court.

REYNOLDS, P. J. (dissenting). On a very careful reading and consideration of the testimony in this case. I find myself unable to agree to the conclusion reached by my learned associates. The plaintiff, referring to the minor, as I read the testimony, was not, in going to assist in raising the outer door of

the elevator shaft, in the position of an invitee, nor even licensee; not then in such a position as imposed any duty toward him by defendant. *Kelly v. Benas*, 217 Mo. 1, loc. cit. 9, 116 S. W. 557, 20 L. R. A. (N. S.) 903; *Glaser v. Rothschild*, 221 Mo. 180, loc. cit. 185, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576. He was not at the time going through the building and in his progress falling into an unprotected trap; was not using a passageway or any part of the premises for exit from them; but voluntarily undertook to do something not in the line of his duty or of his employment, and to do which he was not acting upon the request or under direction, express or implied, of any one. His own testimony is conclusive that his duties were in connection with the sorting out of transfers and that while he occasionally did other things, among them sometimes helping to raise the outer doors, the doors leading into the alleyway from this elevator shaft, he had only done so when specifically requested by a superior. At the time when this accident happened no one requested him to do anything connected with the lifting of the outer doors of the shaft. Without any thought or attention whatever, seeing Williams, who was engaged about the shaft, standing over it with one foot inside the elevator shaft, attempting to raise the door leading into the alley, he rushed to assist him. He saw that where Williams was standing was dark. Boy that he was, then about 15 years old, he must have known that it was not safe to jump into a dark place without knowing the depth or where he was to land; nevertheless he appears to have done that very thing, that is rushed into an unknown, dark opening, without the slightest attempt to ascertain the conditions. In my judgment his carelessness, which produced his injury, was the proximate cause of that injury and should so have been declared as a matter of law. I do not think that on its facts this case is analogous to *Moeller v. United Rys. Co.*, 242 Mo. 721, 147 S. W. 1009. No knowledge of the law of physics was here needed. This boy of 15 years shows by his own testimony that he knew it was hazardous to jump into a dark place without looking. He was at least three years older than young Moeller; his testimony and manner of giving it shows a well-developed mind. Nor was the situation here as in *Jackson v. Butler et al.*, 249 Mo. 342, 155 S. W. 1071. As said by Judge Lamm in *Bender v. Weber*, 250 Mo. 551, loc. cit. 560, 157 S. W. 570, 46 L. R. A. (N. S.) 121, in considering cases, we must interpret them in the light of the facts in each case, "differentiating and distinguishing our case from another closely allied to it."

As the facts here appear to me, plaintiff knew that this elevator shaft was there and jumped into it, without any attempt to see whether the elevator was there. The slightest, even momentary or less, investigation,

would have shown him that the elevator was not down; that to step in the shaft invited disaster. Without stopping to look, when to look was to see, without invitation or order to help Williams, he "jumped" into the opening, not merely stepping off to the platform of the elevator from the level of the floor, but jumping. The very fact that it was dark in this elevator shaft, demanded caution, and the very slightest investigation would have shown him that the elevator was not down at that level.

In IX Ruling Case Law, p. 1257, § 23, giving the divergence of opinion as to when contributory negligence, connected with accidents in or from elevators, is to be treated as a question of law or of fact, it is said (loc. cit. 1258):

"Where the entrance is dark, it would seem that ordinary care would condemn the act of a person who steps into an elevator shaft without satisfying himself that the elevator is there."

The authority for the above quotation is *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308, 15 Am. St. Rep. 370. There the elevator shaft and place in which it was located was dark. That was the case here.

In *Barfoot v. White Star Line*, 170 Mich. 349, 136 N. W. 437, cited by my able colleague, there was a light spot which plaintiff mistook for the elevator floor, and assumed that the elevator was there. That fact distinguished it from *Bedell v. Berkey*, supra. These two cases illustrate the difference in the application of the rule of due care.

I think the judgment of the circuit court should be reversed.

FOSTER v. WEST et al. (No. 1506.)

(Springfield Court of Appeals. Missouri. March 11, 1916. Rehearing Denied April 3, 1916.)

1. RAILROADS ⇨ 398(4) — INJURIES TO PERSONS ON TRACKS — INJURIES UNAVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

In an action for the death of plaintiff's intestate while a trespasser on the defendant railroad's tracks, it being conceded that the deceased, who was deaf, was negligent both in using the defendant's track and in not giving proper attention to approaching trains, evidence held sufficient to warrant a finding that a reasonably prudent engineer would have realized that the deceased was not aware of the approach of his train before it was too close to be stopped, and to sustain a verdict on this ground.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1360, 1361; Dec. Dig. ⇨ 398(4).]

2. DEATH ⇨ 104(6) — ACTION FOR — INSTRUCTIONS.

In an action for the death of a trespasser on a railroad track, under Rev. St. 1909, § 5425, providing in part that where the death of a person is caused by the negligence of an employé in operating a locomotive or train, the railroad shall forfeit and pay as a penalty not less than \$2,000 and not more than \$10,000, in the discretion of the jury, an instruction which directed an award of not less than \$2,000 nor more than \$10,000 in the discretion of the jury, consider-

ing on the one hand the evidence showing pecuniary loss such as the age and earning capacity of the deceased and on the other the facts and circumstances attending the killing and showing the degree of negligence or culpability of the defendant, was properly given.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 145, 147; Dec. Dig. ¶104(6).]

3. DEATH ¶104(6)—ACTION FOR—INSTRUCTIONS.

In an action for the death of a trespasser on a railroad track, under Rev. St. 1909, § 5425, where there was evidence that the deceased was an able-bodied man, other than his defect in hearing, and a farmer, sufficient to warrant compensatory damages, an instruction limiting recovery to \$2,000 as a penalty was properly refused.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 145, 147; Dec. Dig. ¶104(6).]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by Dicie Foster against Thomas H. West and others, receivers of the St. Louis & San Francisco Railroad. From a judgment for the plaintiff, defendants appeal. Affirmed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. Ward & Collins, of Caruthersville, for respondent.

STURGIS, J. The plaintiff recovered a judgment for \$3,000 for the death of her husband who, while a trespasser on defendant's railroad track, was run down and killed by defendant's train. The receivers of the "Frisco Railroad" then operating such road are the defendants, but for convenience we will speak of the railroad company as defendant. The plaintiff concedes that the deceased was negligent, both in using defendant's track as a footpath for travel and in not giving proper attention to trains approaching from his rear. The cause of action is based solely on the humanitarian doctrine in that defendant's servants operating this train saw the deceased in abundant time to have avoided his injury and negligently failed to do so after they realized, or as reasonably careful and skillful employes should have realized, deceased's peril. This is practically the only point in the case, as defendant insists that a verdict should have been directed for it, and the objection to plaintiff's instruction, submitting the case to the jury on this theory, goes to the question of there being no evidence sufficient to sustain the instruction.

In determining the issues the physical facts become important, though such facts are practically undisputed. The train causing this injury was a light one, consisting only of engine and caboose, equipped with air brakes and was a special not running on a regular schedule time. It was traveling north approaching the station of Micola, in Pemiscot county, some mile or more from the place of the accident. The deceased was also traveling north toward this same station,

walking in the middle of the track. The train came around a curve about a half mile south of the place of the accident, and from this on north the track was straight, unobstructed and almost level. The deceased was in plain view from the time the train rounded the curve, and both the engineer and the fireman saw and observed him from that point until the train struck him. It was a clear dry day and the train was under perfect control. There was a road crossing near the end of the curve and another about a quarter mile further north. The usual whistle signals were given for both these crossings, to which the deceased gave no apparent heed. The train, when at this second crossing, was following the deceased, and near a quarter mile from him. On passing the second crossing and the deceased showing no indication that he was aware of the approaching train, the engineer began sounding the alarm signals and continued to do so until the engine was within 200 or 300 feet of deceased. When the deceased still continued walking down the track with no indication, so far, that he was aware of the approaching danger or was intending to leave the track, the engineer shut the throttle and put on the emergency brakes. The train was not stopped in time to avoid striking the deceased, and the engine came to a stop some 85 to 120 feet beyond. The deceased's conduct is explained by the fact that he was hard of hearing, though of course the trainmen did not previously know this fact.

The engineer testified: That he was in charge of the train, consisting of an engine and caboose, running north from Turrell, Ark., to Chaffee, Mo. That after coming around the curve south of Micola, he saw a man walking north in the center of the track. That he was on the right-hand side of his engine and the fireman was on the left-hand side, and the conductor and two brakemen were in the caboose. That after coming around the curve, he whistled two or three road-crossing whistles, which consist of two long blasts and two short blasts of the whistle. That the man just kept walking up the track. That after sounding the road-crossing whistle, he blew the stock alarm, which is a succession of short blasts of the whistle, and he continued to do so until he got within 200 or 300 feet of the man, who had not yet looked around or changed his gait or direction, but was walking in the middle of the track, and saw he wasn't going to get off, and he then closed the throttle and shut off the steam from the cylinders and applied the brakes in emergency. That the air brakes were all right and in good working order. That after shutting off the steam and applying the air in emergency, he did not sound any danger signal. That at the time he shut off the steam and applied the air in emergency, his train was running about 30 miles an hour, and it had checked down to about 15 miles an hour at the time the man

was struck. That just before he was struck, he seemed to be kind of walking off to the side of the track, had his foot off the rail out on the ties, had already stepped over the rail and was in the act of stepping off the track, when the pilot beam struck him. That the engine, tender, and caboose were about 80 or 90 feet in length. That when the train stopped, the rear end of the caboose was from 15 to 30 feet past where the man was lying on the ground. That at the time he had been a locomotive engineer for about 4 years, and prior to that had about 5 years' experience on trains. That after realizing that the man did not hear the train running or the danger signal, he could not have stopped his train any quicker than he did because he gave the emergency at that time, shut off the steam and applied the emergency. That when he applied the air in emergency the train was going about 30 miles an hour. That it takes a couple of seconds to shut off the engine and three to five seconds after the air is applied until the brakes take effect on the wheels, and that during this time the train is still moving at 30 miles an hour. That after applying the air in emergency and shutting off the engine there is nothing else he could do toward stopping the train, unless he reversed the engine, but at that rate of speed you might tear the engine all to pieces and slide the wheels and you couldn't stop as quick as if you didn't reverse it. That to reverse an engine at a speed of 30 miles an hour would tear the running gear up or slide the wheels. That he did not know deceased and had never seen him before this day, and did not know anything about his being deaf; that he did not know there was anything wrong with him until he saw he wasn't going to get off the track.

The fireman testified: That he first saw Foster on the track just after the train came around the curve south of Micola; that they were a little more than a quarter of a mile from him at that time. That as they came around the curve the engineer blew the crossing whistle, and after they got around the curve he began blowing the stock alarm. That the engine was about 250 to 300 feet from the man when the engineer shut the throttle and applied the brakes in emergency; that *at that time the man was between the two rails*, and when they got a bit closer it seemed like the man turned and looked over his left shoulder, but he didn't get all the way off. He looked as though he saw the train, and then started diagonally off toward the right-hand side. That he did not see him hit, because the front end of the boiler blocked his view. That when the engine stopped, the front end of the engine was about 85 feet past the man, and the rear end of the caboose about 30 feet past where he was lying.

There was evidence on behalf of plaintiff

that this train could have been stopped with safety in 100 to 150 feet. But this seems rather incredible, and plaintiff at the argument stated that this evidence is not relied on for an affirmance. This difference, however, may largely arise from not taking into account the time lost and distance covered in putting on the brakes and their taking effect on the wheels. The fact that the trainmen say the speed was reduced from 30 to 15 miles per hour in passing over the 200 to 300 feet before striking the deceased and was then brought to a stop in 85 to 100 feet more, supports this theory. But however this may be, the engineer, skilled in handling trains and engines, must be held to have known approximately in what distance this train could be stopped under the existing conditions and, if it be true that this train could not be stopped within the distance it was from deceased when he first tried to stop it, he knew that fact and should have taken it into consideration when his engine was gradually approaching the deceased. According to his own evidence, it took at least five seconds to put on the brakes and have them take effect, and in that time the train running 30 miles per hour would pass over at least 200 of the 250 to 300 feet between the engine and deceased. Should not a skillful and prudent engineer have taken this fact into consideration in determining when to put on his brakes? It is well said in *Dutcher v. Railroad*, 241 Mo. 137, 165, 145 S. W. 63, 70:

"Care to be due requires that alarm signals be given when they would be effective. And due care required that the attempt to stop should be made, as a last resort, when it would be effective; for if defendant owed any duty to stop at all that duty must begin when it amounts to something worth while. It must not be pretermitted until it amounts to nothing whatever."

The defendant insists that no liability is shown for the reason that, stated in various language, there is no proof of actionable negligence on the part of the engineer *after he realized* that the deceased did not hear the oncoming train; that *after becoming aware* of the imminent peril of the deceased, the engineer did all in his power to stop the train; that the duty to exercise ordinary care did not devolve upon the engineer until he *became aware* of deceased's peril, and if he did all he could after that time there is no negligence; that where the engineer did all he could to avert the injury after he *saw* the perilous situation of deceased, the humanitarian doctrine does not apply; that plaintiff's instruction is wrong which predicates liability on the fact, if found, that the engineer did not use care in stopping the train, after the engineer saw and realized deceased's peril, and that deceased did not know of his danger.

The argument is that the engineer, not knowing of any infirmity of the deceased, had a right to rely on the fact that he would

observe the train and leave the track on its approach; that the engineer testified that he did not know or realize that deceased was not going to leave the track, and therefore was in danger until the engine was within 200 to 300 feet and too close for him to stop his train; that this fact is not, and cannot well be, contradicted, for in the nature of things the engineer is the only one who knows at what point he becomes aware of or realizes that a man on the track is in peril. Is it true that the jury is bound to accept the engineer's statement as true as to when he realized the deceased's peril? Is not an engineer, as other persons, to be held to know facts, inclusive of when he realized the danger to deceased, which a prudent man, under the circumstances, should know? When the facts, including the engineer's statement, are not conclusive either way, is it not a question for the jury to say when a reasonably prudent engineer should know, and therefore find that he did know, that the deceased was, at a particular time, in peril? Any other rule would permit an engineer in all cases, at least where he did not have personal knowledge of the person's infirmity in seeing or hearing, to rely on the person on the track getting off and out of danger till his engine was too close to stop it, and then there would be no use to stop it. The defendant goes so far, and so his logic leads him, as to say that the engineer did not owe the deceased the duty to even give the warning signals. The trouble is that defendant's premises are wrong, and the conclusion reached is not the law. In *Lynch v. Railroad*, 208 Mo. 1, 34, 106 S. W. 68, 78, it is said:

"But even if he had been guilty of contributory negligence, running as he was for a half mile or two-thirds of a mile in plain view of the engineer and fireman on this engine and having indicated in no way to them his knowledge of their approach, it was their plain and obvious duty to exercise reasonable care for his safety and not run over him. From the time they saw him and observed, as alleged in the defendant's answer, that he was not looking back and was ignorant of their approach, it was their duty to warn him and to slow down the train and stop if necessary in order to save his life."

In *Chamberlain v. Railroad*, 133 Mo. 587, 606, 34 S. W. 842, 843, the court, speaking of an instruction defining the engineer's duty when seeing a trespasser on the track ahead of his engine, uses this language:

"But the instruction would not be proper in all cases, as the signal if given in time would be all that was required to apprise a trespasser, until it is seen he *apparently does not hear it*. The engineer is not required to stop his train if the trespasser is far enough away to warn him, and a timely warning is sufficient until it is seen that for some cause it is not heeded; then it is his duty to avoid killing even a trespasser, if by the exercise of ordinary care it can be done."

The *Dutcher Case*, *supra*, quotes with express approval from 2 *Shear. & Red. on Negligence*, §§ 483, 484, the following:

"Thus, a locomotive engineer or motorman, after becoming aware of the presence of any

person on, or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to *anticipating injury* before it becomes imminent, and the utmost care and diligence of which he is personally capable, after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train and will step off the track in ample time to avoid all danger, without any diminution of the speed of the train. * * * In general, an engineer has the right to assume that a person walking upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence; but *when the conduct of the traveler is such as to excite a doubt of this*, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary."

See, also, *Degonia v. Railroad*, 224 Mo. 564, 595, 123 S. W. 807. In *Smith v. Railroad*, 129 Mo. App. 413, 419, 107 S. W. 22, 23, it is said:

"It was further shown by the defendant's engineer himself that he saw plaintiff upon the track, and while he stated that after he sounded the alarm he noticed that plaintiff stepped over the rail as though to get off, he further stated the engine was then within 50 or 60 feet of him. Shortly further on in his testimony he stated that he did not apply the emergency brake until 'about the time when I struck him.' It seems quite apparent that the evidence tends to show that defendant's servants after becoming aware of (or as ordinarily reasonable and prudent men they should have realized) plaintiff's peril, they did not use ordinary care to save him. It was not necessary to plaintiff's case that defendant's servants should have had absolute knowledge that plaintiff was in peril, for such state of information could scarcely exist in such situation. So therefore defendant will not be permitted to indulge in unreasonable suppositions as to the probability of plaintiff moving out of danger, although apparently oblivious to it, with the engine nearly upon him. An engineer ordinarily has the right to assume that one on the track will leave it at the approach of a train. But that assumption is based upon the person being aware of the train's approach, and if the situation is enough to suggest to a reasonably prudent person that he is not aware, then the assumption should not be indulged."

In the same case, page 421, the court quotes with approval from *Railway v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442, as follows:

"To require proof that the engineer actually knew that the deceased would inevitably be killed unless the engine was stopped, and that he nevertheless continued his course, would be to require that a case of murder be established, and in our opinion it is not necessary that the proof should fasten upon the engineer any act or omission involving moral turpitude. Nor, on the other hand, do we allow the proposition that he may speculate on the chances of one leaving the track until too late for the effective use of the means at hand after knowledge of peril. To allow such a doctrine would abrogate the rule of liability in all cases, save where the situation of the person on the track rendered it manifestly impossible for him to do aught for himself. If it appears from the evidence that the engineer realizes that deceased was

ignorant of the approach of the train, and therefore would not probably leave the track, the new duty thereby arose, and for the engineer's failure to discharge it the company is liable."

In *Sinclair v. Railway*, 133 Mo. 233, 243, 34 S. W. 76, 78, the case most favorable to defendant, the court said:

"In other words, the charge is that the engineer was negligent in not stopping the train in time to avoid striking deceased. This duty of the engineer arose as soon as he knew, or by proper care *ought to have known*, that deceased did not regard the warning signal."

In *Reyburn v. Railroad Co.*, 187 Mo. 565, 86 S. W. 174, the court held that though a pedestrian enters upon the fenced track of a railroad and uses it as a footpath and walks in it apparently heedless of the danger entailed, yet if the railroad's servants in charge of the locomotive see him and realize his danger, it then becomes their duty to exercise ordinary care to do what they can with the means at hand to avoid injuring him, and if they fail in that duty the railroad company is liable for his consequent injuries, notwithstanding his negligence. And, as showing the defendant's liability, stated:

"* * * the engineer and fireman saw the man, saw that he was walking with his back towards them never once looking around, manifesting by his every movement that he was unmindful of the approaching train, yet without so much as even lifting their hands to touch the bell or whistle they ran on him and killed him."

In *Johnson v. Traction Co.*, 176 Mo. App. 174, 161 S. W. 1193, this court held, to quote from the syllabus, thus:

"Where there is an unobstructed view of a wagon either on a street railway track or so near thereto as to be in the danger zone, so that the jury is warranted in finding that the motorman either saw, or by due care could have seen, such wagon in the place of danger in time to stop the car and avoid the collision, then the time and place where his duty in this regard arose is somewhere between the first place of vision and the collision, and is determined by the phrase 'in time to avoid the collision.'"

In *Quinley v. Traction Co.*, 180 Mo. App. 287, 304, 165 S. W. 346, 352, this court approved an instruction that:

"If you find that plaintiff was approaching said track and that she was unconscious of the approach of said car, and that it was apparent to a *reasonably prudent* person that she was unmindful of danger and was going upon said track, then it was the duty of the motorman to at once have taken precaution to avoid the collision."

See, also, a review of cases on this point in the concurring opinion on page 308 of 180 Mo. App., 165 S. W. 346.

[1] We think that there was ample evidence here to warrant a finding that a reasonably prudent engineer would have realized that deceased was not aware of the approach of this train, and therefore oblivious to his own danger, before the train was too close to be stopped. In such a case the engineer could no longer rely on the deceased going out of the danger of which he was not apparently aware. The engineer seems to have scented danger on passing the last

crossing from the fact that deceased was giving no heed to and apparently had not heard the crossing signal. He then began sounding the shrill danger signals and ringing the bell. Notwithstanding this the deceased kept walking leisurely down the track with his back to the train, not turning his head to look or giving any heed, though the train was fast approaching, giving these shrill danger alarms. The deceased's action was so unnatural and extraordinary for a normal human being as to have suggested that he was either demented or substantially deaf. The deceased's every action indicated that he was oblivious to the approaching danger. The alarms were such that they attracted the attention of every person within a radius of a mile. The engineer and fireman acknowledged that the deceased was apparently oblivious to his danger and gave no indication of his knowledge of the approaching train. This state of facts commenced near a quarter of a mile from the point of the accident and continued till the train was too close to deceased to be stopped. To hold that the engineer could maintain the speed of the train till too close to avert striking deceased and be held not guilty of negligence as a matter of law under these facts is a proposition to which we do not assent.

[2] We believe that the appellate courts are now all agreed that an instruction fixing the measure of damages under section 5425, R. S. 1909, when more than \$2,000 is sued for, is proper, which directs the jury to award an amount not less than \$2,000 nor more than \$10,000 in the discretion of the jury, taking into consideration on the one hand the evidence showing pecuniary loss such as the age, earning capacity, etc., of the deceased, and on the other the facts and circumstances attending the killing and showing the degree of negligence or culpability of the defendant; and so, in effect, was the jury instructed here. *Kiser v. Met. Ry. Co.*, 188 Mo. App. 169, 172, 175 S. W. 98, and cases cited. Also *Loomis v. Railroad*, 188 Mo. App. 203, 205, 175 S. W. 143; *Baldwin v. Harvey & Durham (Mo.)* 191 Mo. App. 233, 236, 177 S. W. 1087; *Holmes v. Railroad*, 176 S. W. 1041, 1042; *Roberts v. Trunk*, 179 Mo. App. 358, 361, 362, 166 S. W. 841; *Harding v. Railroad*, 248 Mo. 663, 668, 164 S. W. 711.

[3] The defendant assigns as error the refusal of the court to give an instruction limiting the amount of plaintiff's recovery to \$2,000. It cites the case of *Lasater v. Railway Co.*, 177 Mo. App. 534, 160 S. W. 818, in support of this contention. It will be noted, however, that in the *Lasater* Case a divided court held that defendant in a case like this was entitled to an instruction limiting the amount to be recovered as a penalty to \$2,000, but here the instruction seeks to limit the entire recovery to \$2,000. If the amount of recovery is limited in such cases to \$2,000 as a penalty and the balance, if any, must be compensatory, there was evidence in this

case that deceased was an able-bodied man, other than the defect in his hearing, was a farmer, and the evidence is sufficient to warrant an additional \$1,000 as compensation. The instruction, therefore, was properly refused. *Baldwin v. Harvey & Durham*, 191 Mo. App. 233, 237-239, 177 S. W. 1087.

The judgment will be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

STATE v. FREDERICI. (No. 14078.)
(St. Louis Court of Appeals. Missouri. Dec. 7, 1916.)

1. HUSBAND AND WIFE — 313 — ABANDONMENT AND NONSUPPORT — ELEMENTS OF OFFENSE.

In a prosecution against a husband for abandonment and nonsupport, it is incumbent on the state to prove, not only abandonment with the intention not to resume cohabitation, but also the failure to maintain and provide for the wife, and that this was of such character as to carry with it the criminal intent necessary to complete the offense.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. — 313.]

2. HUSBAND AND WIFE — 313 — ABANDONMENT AND NONSUPPORT—EVIDENCE.

In a prosecution against a husband for abandonment and nonsupport, evidence held insufficient to show that after defendant ceased making weekly payments to his wife she was left without means of support or that he ceased to make such payments with criminal intent.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. — 313.]

3. HUSBAND AND WIFE — 304 — ABANDONMENT AND NONSUPPORT—ELEMENTS OF OFFENSE.

A husband cannot be convicted of abandonment and nonsupport of his wife so long as she is living on means furnished by him or derived from the proceeds of his property left in her possession.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1102; Dec. Dig. — 304.]

4. HUSBAND AND WIFE — 313 — ABANDONMENT AND NONSUPPORT — EVIDENCE — ADMISSIBILITY.

In a prosecution of a husband for abandonment and nonsupport it was error to exclude cross-examination of the wife as to an exchange by her of a piano left in her possession for a more expensive one, as affecting the question whether she was left without means of support.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. — 313.]

5. HUSBAND AND WIFE — 302 — ABANDONMENT AND NONSUPPORT—ELEMENTS OF OFFENSE—INTENT.

To constitute the offense of wife abandonment the element of criminal intent must enter into the failure to support.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1100; Dec. Dig. — 302.]

6. HUSBAND AND WIFE — 313 — ABANDONMENT AND NONSUPPORT—BURDEN OF PROOF.

In a prosecution of a husband for abandonment and nonsupport, the burden is on the state to establish every element of the offense.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. — 313.]

Norton, J., dissenting.

Appeal from St. Louis Court of Criminal Correction; Calvin N. Miller, Judge.

"Not to be officially published."

Frank C. Frederici was convicted of abandonment of his wife and failure to maintain and provide for her, and appeals. Reversed, and defendant discharged. Cause certified to Supreme Court for final determination.

H. M. Wilcox and Oliver J. Miller, both of St. Louis, for appellant. Howard Sidener, of St. Louis, for the State.

ALLEN, J. This is a prosecution under section 4495, Revised Statutes 1909, for the alleged abandonment by defendant of his wife and his failure to maintain and provide for her. Defendant was convicted, and his punishment assessed at a fine of \$500, and he appeals.

Defendant and his wife, the prosecuting witness were married in 1910. On July 4, 1912, they were living together in the city of St. Louis, on which date the separation occurred; defendant leaving his wife in the possession of the residence in which they were living, owned by him, and in possession also of the household furniture, a piano, and some chickens.

On behalf of the state there is evidence tending to prove that the defendant had not good cause for the abandonment; while defendant's evidence tends to show conduct on the part of the wife justifying, perhaps, his leaving her. Under the evidence the question whether defendant abandoned his wife "without good cause," which must be shown to authorize a conviction (*State v. Greenup*, 30 Mo. App. 299; *State v. Loving*, 184 Mo. App. 82, 168 S. W. 339), became a question for the jury. And it may be said that there is sufficient evidence from which it may be found that the abandonment was with the intention not to resume cohabitation, and with the necessary criminal intent in the premises. See *State v. Linck*, 68 Mo. App. 161-163; *State v. Loving*, supra.

[1] But it is incumbent upon the state to also prove the subsequent alleged failure to maintain and provide for the wife, within the meaning and intentment of the statute, and that this was of such character as to carry with it the criminal intent necessary to complete the offense denounced by the statute. See *State v. Loving*, supra, and authorities cited. And the important questions involved in this appeal are whether the alleged failure to maintain and provide for the wife was of such character as to bring the case within the statute, and whether there is any substantial evidence to establish a criminal intent on the part of defendant in respect thereto.

[2] The house and premises in which defendant and his wife lived had been purchased by defendant, and were being paid for by monthly installments. It appears that de-

defendant had paid something more than \$400 upon the property, including interest, and had expended thereon about \$200 for improvements. According to defendant his "equity" therein amounted to \$700 or \$800. The state admitted that all of the household goods had been purchased and paid for by defendant. Defendant purchased the piano at the price of \$265 upon the installment plan, and at the time of the separation \$241 had been paid thereon. The wife claims to have paid \$25 on the piano, but this is denied by defendant.

It appears that in August, 1912, the defendant instituted an action for divorce against his wife, and that during the pendency thereof in the circuit court of the city of St. Louis the court allowed the wife \$5 per week as alimony pendente lite. It is said that this suit was dismissed shortly thereafter, and it appears that defendant discontinued making these payments. The wife thereupon sought the assistance of the prosecuting attorney of the city of St. Louis, who interviewed the defendant regarding the matter. The evidence is that defendant thereupon began to pay to his wife \$5 per week, and continued such payment from November 11, 1912, to January 25, 1913. On the last-named day defendant paid his wife the sum of \$5, but thereafter made no further payments up to the time of the filing of the information herein, to wit, March 18, 1913. It appears that defendant's income was from \$75 to \$85 per month, with perhaps some deduction for expense.

The evidence is that from July 4, 1912, to January 25, 1913, defendant paid to his wife approximately \$98. The prosecuting witness denied that she had received more than \$65, but the record shows that checks were given to her by the defendant during this period aggregating more than \$98, though the checks themselves are not in evidence. And the evidence shows that after the separation the prosecuting witness sold a typewriter belonging to the defendant for \$10, a kitchen cabinet for \$10 or \$15, a bookcase for \$5, and that she sold other household goods, lawbooks, and clothing of the defendant, though the amount that she received therefor does not appear.

The evidence tends with much force to show that the wife exchanged the piano, upon which \$241 had been paid, and which was therefore nearly completely paid for, for a new piano, a "player piano," the price of the latter being \$725, she receiving credit for \$241 thereon. The wife denied that she had thus disposed of the piano, but upon being cross-examined in regard thereto she flatly refused to answer questions of defendant's counsel. The court, upon request of counsel, declined to compel her to answer these questions, stating that the matter was immaterial. She testified that the new piano which was in the house had been purchased by her daughter—a daughter by a former hus-

band. The daughter, however, testifying as a witness for the state, stated that she had nothing to do with the transaction whatsoever, but that her mother had exchanged the piano as above stated. And defendant's evidence is that such exchange was made by the wife.

The information, filed as aforesaid on March 18, 1913, alleges that on January 19, 1913, "and on divers other days and times between that date and the date of the filing of this complaint," the defendant "unlawfully, willfully, and without good cause did abandon, and did fail, neglect, and refuse to maintain and provide for his lawful wife," etc.

It is conceded that the defendant continued his payments of \$5 per week up to and including January 25, 1913. It is clear, therefore, that the offense became complete, if at all, subsequent to the last-mentioned date; and it must, of course, have been complete on or prior to the filing of the information on March 18, 1913. See *State v. Fuchs*, 17 Mo. App. loc. cit. 461.

[8] The prosecuting witness did not testify that she was without means of support after January 25, 1913, nor is there any testimony in the record to show that she was destitute after that time and prior to the filing of the information, or that she did not or could not live upon the means provided her by the husband or derived from the sale or use of the property in her possession. Defendant cannot be convicted of the criminal offense denounced by the statute so long as the wife is living on means furnished by the husband or derived from the proceeds of his property left in the wife's possession. *State v. Fuchs*, supra. It is true that a witness for the state, a Mrs. Ray, in testifying as to the facts of the separation, said that the wife "was destitute and without means of support." This is the only testimony of this character in the case, and it refers to the time of the separation. It does not show that the wife was destitute and without means of support at the time here in question, and it is conceded that the wife continued to live in the defendant's house, and that certain means, though not abundant, were supplied by the husband, and that she received certain moneys, the amount of which is very indefinite, from the sale of personalty. There is no attempt to show that the offense was complete prior to January 25, 1913, but the prosecution is predicated upon the failure of the defendant to keep up his payments of \$5 per week thereafter, prior to March 18, 1913. And there appears to be no evidence that the wife could not and did not support herself during this period upon the means derived from the husband as aforesaid.

In *State v. Fuchs*, supra, it is said by Thompson, J.:

"The testimony on the part of the wife is that the husband did not give her a cent since

he left her, but she fails to state that he left her without means; while he states, and his testimony is uncontradicted, that a few days before he left her he divided with her the proceeds of some of his furniture, her share amounting to some \$30 or \$40. She testifies that, after her husband left her, she lived on the proceeds of her furniture, for all that the testimony shows, until after the information was filed. One of the witnesses for the state testifies that her husband gave her \$6 some time after he left her, and presumably before the information was filed; and another witness on the part of the state testifies that the husband told her that he would give his wife \$6 a week while the divorce suit was pending, which was commenced after the date of the illegal abandonment. We cannot hold that the charge of this offense is made out, while the wife is living on means provided by her husband. The willful abandonment and failure to support must concur, as they are used conjunctively, and not disjunctively in the statute. The evidence for the state having been insufficient in law to make out the offense charged in the information, the defendant was entitled to a verdict of not guilty at the hands of the jury."

What is said by the learned author of the opinion from which we have just quoted is applicable here. The doctrine may appear to be somewhat extreme, but it is to be borne in mind that the statute is designed to reach such dereliction on the part of the husband as should make him a criminal before the law. It is not enough that the husband's failure to fully perform his marital obligations may be such as to justify the wife in invoking civil remedies available to her, but the facts must be such as to fasten upon the defendant criminal responsibility in the premises. And in this connection another phase of the case should be considered. Defendant testified, without objection, that his counsel had been informed by counsel for the wife that the wife had sold the piano for \$100. It appears that the defendant learned that the piano had been taken from the house, and upon inquiry in regard to the matter was informed that his wife had sold the same for the sum of \$100. In point of fact it appears that this was not the case, but that the piano had been exchanged for another piano as above stated. However, defendant's testimony is to the effect that he stopped his payments on January 25, 1913, because of the information received by him to the effect that his wife had received \$100 for the piano which she had in her possession, by reason whereof she was not without means of subsistence for the time being. And there is no countervailing testimony. Defendant also undertook to testify that in stopping his payments he acted upon the advice of counsel, but this, upon the state's objection, was excluded. Defendant also testified that prior to the exchange of the piano as aforesaid he had offered to pay to his wife \$100 if she would surrender the piano to him. On the other hand, there is a letter in evidence from defendant to his wife telling her to allow the Baldwin Piano Company to take the piano as it had not been fully paid for.

[4] The fact that the prosecuting witness had, without consulting the defendant, exchanged the piano for a more expensive one, was a matter, we think, not immaterial to the issues herein, and we are of the opinion that the trial court should not have restricted the cross-examination of the prosecuting witness as to this matter, but should have compelled her to answer the questions propounded to her in this connection. The fact that the wife exchanged the piano for a more expensive one, undertaking to pay the difference in installments, was a circumstance to be considered on the question whether she was left without means of support.

Whether the court should have permitted the defendant to show that he acted under advice of counsel at the time when it is said that his counsel imparted to him the information above mentioned is a matter which we need not decide. While the rule obtains that it is no defense to a criminal prosecution that one acts under advice of counsel, nevertheless such testimony has been held to be admissible in mitigation of punishment. See 12 Cyc. 156. But if in fact, defendant ceased his payments at the time mentioned above upon the information and in the belief that the wife was provided with funds from the sale of his property sufficient to supply her needs for the time being, and with no intent or design to deprive her of the means of support, it would seem that the element of criminal intent was wholly lacking. While it is conceded that the wife did not, in fact, sell the piano, it is a fact that it disappeared from the home; and the evidence is that defendant learned this, and upon further inquiry obtained apparently reliable information to the effect that his wife had received \$100 therefor. His payments had been suspended about six weeks when the information was filed against him; and, if the wife had, in fact, obtained \$100 additional from the sale of property, she would not then have been in want.

[5] In 12 Cyc. p. 156, it is said:

"Where one in ignorance or mistake as to fact commits an act which but for such mistake would be a crime, there is an absence of the malice or criminal intention which is generally an essential element of crime, and the general rule therefore is that such ignorance or mistake of fact will exempt one from criminal responsibility."

While there are exceptions to this (see 12 Cyc. 157), this case, we believe, is within the general rule, in view of the fact that a criminal intent must here appear. See *State v. Broger*, 44 Mo. App. 393; *State v. Loving*, supra. It is true that in prosecutions for certain misdemeanors the intent with which the act is done is not material; the doing of the act itself constituting the offense. See *Haggerty v. Ice Mfg. & Storage Co.*, 143 Mo. loc. cit. 246, 247, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647, and authorities cited. However, if the prior decisions of our court are correct as to what must be shown

in order to make out the offense of wife abandonment under the statute, the element of criminal intent must enter into the failure to support.

We do not say that all of defendant's testimony in this connection was admissible if met by proper objection. But the fact that defendant acted upon certain information which he believed to be true, if properly shown or coming into the case without objection, would go to negative the existence of criminal intent. Where the character of the act depends upon the intent with which it was done, there is much authority to the effect that the defendant may testify as to the intent with which he committed the alleged criminal act. See *State v. Banks*, 73 Mo. 592; *State v. Palmer*, 88 Mo. 568; *State v. Torphy*, 78 Mo. App. 206; *State v. Partlow*, 90 Mo. loc. cit. 626, 627, 4 S. W. 14, 50 Am. Rep. 31; *State v. Nelson*, 118 Mo. loc. cit. 126, 23 S. W. 1088. And in this connection see *Wheeler v. Chestnut*, 95 Mo. App. 546, 69 S. W. 621, and cases cited in note to *Jarrell v. Young, Smith Field Company*, 105 Md. 280, 66 Atl. 50, 23 L. R. A. (N. S.) 367, 12 Ann. Cas. 1 et seq. In the case before us defendant did not undertake to directly testify as to his intent, but to matters going to show a want of criminal intent in failing to provide for his wife after January 25, 1913.

[8] As the state failed to show that the wife was, in fact, deprived of means of support by reason of the cessation by defendant of his payments for a period of time, and as defendant's evidence tends to show that he acted in good faith, under a mistake of fact, in the belief that she was possessed of present means of support, it appears that evidence is lacking to show a criminal intent on the part of the accused in ceasing to make such payments. The burden was upon the state to establish every element of the offense. And we think that the state did not make out a case of failure to maintain and support the wife, with criminal intent, such as the statute denounces and makes a criminal offense. We do not mean to say by any means that defendant has fully performed his marital obligations. We are here concerned only with his criminal responsibility for his acts under the facts disclosed by the record. While we may condemn his conduct in certain respects, we are forced to the conclusion that the state failed to establish the criminal charge laid against him.

The judgment will therefore be reversed, and the defendant discharged.

It is so ordered.

REYNOLDS, P. J., concurs. NORTONI, J., dissents, and, as he deems the decision herein to be contrary to the decision of the Supreme Court in *Gannon v. Laclede Gaslight Company*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 48 L. R. A. 505, the cause, at his

request, is hereby certified to the Supreme Court for final determination.

NORTONI, J. (dissenting). It may be that the judgment in this case should be reversed and the cause remanded for erroneous rulings on the reception and rejection of evidence during the trial, but I dissent from the conclusion that there is no substantial evidence to sustain the verdict.

It is argued the evidence does not sufficiently disclose the essential criminal intent on the part of defendant. It appears the parties were married about two years before the abandonment. They resided in a suburb of the city of St. Louis, where defendant owned a small residence. After the marriage he purchased this property on the installment plan at about \$1,900, and expended a couple of hundred dollars thereafter on improvements. He had paid about \$400 on the property in installments, and it is said his equity therein was worth about \$700. Defendant was engaged by a chemical company, and received a salary therefrom of \$65 per month. He also conducted a collecting business which the evidence for the state tends to prove paid him about \$200 per month, but, according to defendant's evidence, it paid him on an average of about \$20 per month. Among other articles of furniture of the household defendant had purchased a piano from the Baldwin Piano Company, and this, too, was being paid for on the installment plan. Defendant's wife, the prosecuting witness, says she made the first payment on the piano of \$25 with her own money, while defendant says he made all of the payments thereon, which amounted to the sum total of \$201.

There is some evidence that the parties disagreed at times and quarreled because defendant did not pay the grocery bills. However, the evidence preponderates to the effect that there was no serious trouble between defendant and his wife, and it tends with great force to prove that he was not justified in leaving the home. There is some evidence tending to prove that defendant drank excessively at times and stayed out late at nights. There is evidence, too, to the contrary. A neighbor of the parties who lived in the house and cared for defendant's wife while she was sick immediately before he abandoned her says that the wife treated defendant well, and another witness says, too, she performed the duties of a housewife in proper fashion. There seems to be no controversy here concerning the facts that the evidence is abundant to sustain the finding that defendant was not justified in leaving the home in the first instance. It appears that on July 4, 1912, he packed his suit case, and, without ceremony, took his leave. Thereafter for some considerable time he made no contribution whatever for the support of his wife. She kept a few chickens, between 25 and 50, and

sold some eggs; also she sold a secondhand typewriter in the house for \$10 and a kitchen cabinet for \$10. From these sources and her own labor she eked out an existence for awhile, but finally called upon the prosecuting attorney for assistance. He interviewed defendant and insisted that he should contribute to his wife's support. Defendant denies his income was as large as that testified to by the prosecuting witness, but admits it was from \$75 to \$85 per month. After his interview with the prosecuting attorney, defendant commenced making weekly payments to his wife for her support by means of checks in the amount of \$5 per week. This he continued for some time. Defendant says that he contributed in all about \$98 for the support of his wife through weekly payments, while the prosecuting witness says she received only \$65 from him, and the checks are not in evidence. There is evidence that she was without means of support and destitute, except for the fact that she continued to reside in the house and enjoyed the use of the household furniture together with the income from the chickens on the place. During the time defendant instituted a suit for divorce against his wife, but subsequently dismissed it, and about the same time he discontinued his payments of \$5 per week to her support. These payments of \$5 per week which defendant had made for a time were discontinued about January 18 to 25, 1913, and this fact is conceded.

The information was preferred against defendant on March 18, 1913. It charges him with having abandoned his wife, and that he refused to support and maintain her on and after January 18, 1913. The evidence is conclusive, and, indeed, defendant admits, that he made no contributions to the support of his wife whatever after January 25, 1913, and prior to the filing of the information on March 18th of the same year. But in defense he says that the payments which he made theretofore were discontinued because his attorney was informed by the attorney of his wife, the prosecuting witness, she had sold the piano in the house for \$100, and that on taking legal advice he was given to understand that, while she had this money in hand, he was not further required to contribute to her support.

The principal argument put forward for a reversal of the judgment here proceeds on this phase of the evidence. The information is predicated on section 4495, R. S. 1909. The state of the law as adjudicated under this section of the statute is well stated in *State v. Loving*, 184 Mo. App. 82-86, 168 S. W. 339, 340, by Judge Allen as follows:

"To authorize a conviction for wife abandonment under the statute, it is incumbent on the state to prove beyond a reasonable doubt that the alleged abandonment was without good cause and with criminal intent, and that defendant with such intent failed to provide for his wife. *State v. Doyle*, 68 Mo. App. 219. Evidence of

a mere abandonment and a subsequent failure and refusal of support does not prove the criminal offense denounced by the statute. The state must show that the defendant had not 'good cause' for the abandonment (*State v. Greenup*, 30 Mo. App. 299), and that the abandonment was with intention not to resume cohabitation (*State v. Linck*, 68 Mo. App. 161, 163), and that his failure to provide for her was not due to his lack of means or lack of ability to provide (*State v. Linck*, supra; *State v. Broyer*, 44 Mo. App. 393; *State v. Weise*, 156 Mo. App. 135, 136 S. W. 238)."

The evidence, though conflicting, is ample tending to prove that defendant abandoned his wife without good cause, and this proposition does not seem to be seriously controverted. The fact that defendant shortly thereafter instituted divorce proceedings against her tends to prove along with the other circumstances in the case, that he intended to rid himself of the wife and not resume cohabitation with her. See *State v. Hendrix*, 87 Mo. App. 17. According to the testimony of the wife, who says she aided her husband before the abandonment in keeping his books, his income was about \$200 per month from a collection business and \$65 per month from a chemical company for which he performed some service. According to the evidence of defendant, his entire income was from \$75 to \$85 per month. It is clear on these facts that his failure to provide for the wife's support to the extent of \$5 per week at least, as theretofore, was not because of the want of means or lack of ability to so provide. But it is argued, though such be true, that in order to sustain the conviction there must be substantial evidence tending to prove he failed or refused to provide for her support with criminal intent, and as to this the evidence is insufficient. Touching this it is to be said that in September, after defendant quit the home in July, he wrote his wife a letter to the effect that he did not intend to make further payment of the installment notes on the house in which she lived. However, he proposed:

"If you will deed the place to me I will pay the interest notes and give you \$100.00 in cash. I want an answer to this at once, so I will know what to tell Mr. French. Yours very truly, F. C. Frederici."

On July 18, 1912, after leaving the home, defendant wrote his wife concerning the piano:

"I will not be able to make any more payments on the piano, so I ordered the Baldwin people to get it. If they call leave them have it, as it is their property."

The piano, as before stated, had been purchased on the installment plan at the price of \$265, and \$201 had been paid thereon. Subsequently the Baldwin Piano Company took the piano. According to the evidence of the wife, they took it because it was not paid for, while there is evidence tending to prove, though by no means conclusive, that the prosecuting witness exchanged the piano to the Baldwin people for \$245 on the purchase price for a new inside player piano which

cost \$725. The prosecuting witness denies this, and says that, though she had a new player piano in the house, it was there on trial only, at the instance of her daughter, and that she had neither exchanged nor sold the piano originally purchased. Defendant learned that the piano on which he had paid \$201 was no longer in the house where his wife resided, and says that upon inquiry through his attorney made to his wife's attorney he was informed by his attorney she had sold it for \$100. It is not conceded that the piano had been sold for any price. On acquiring this information, through inquiry of his attorney, defendant discontinued further contribution toward the support of his wife and refused thereafter to aid her, asserting that she was provided for by the money derived from the sale of the piano which he had purchased. The argument is that on defendant's evidence concerning this matter it appears he acted in good faith, and we should therefore declare there is no evidence tending to support a finding of a criminal intent with respect to his discontinuing the support theretofore furnished. But obviously this is a question for the jury; for in any view of the case it is not conceded that the wife had means of support derived from the sale of this piano at the time. Neither is it conceded that she purchased another piano and a more expensive one through exchanging that theretofore in possession of the parties. Indeed, the evidence concerning the matter last mentioned is meager on the part of defendant, and the fact is expressly denied by the prosecuting witness. No one can doubt that the credibility of the witnesses and the weight and value to be given to their testimony is a question for the jury, and it is certain we cannot declare here as a matter of law that defendant acted in good faith in discontinu-

ing the payment of \$5 per week to his wife on being informed by his attorney that her attorney said she had sold the piano for \$100, when the fact of such sale is not only not conceded, but positively denied. Neither of the attorneys was placed on the witness stand concerning this matter, and the question, at best, turns on the fact of the alleged sale of the piano by the wife for \$100, supported alone in defendant's testimony when the same fact is expressly denied in that of the prosecuting witness. Moreover, it appears from defendant's letter, which is admitted, that he wrote plaintiff he had instructed the piano company to take the piano as their property. On conflicting evidence of this character and the disclosures of the letter, the jury were authorized to find the prosecuting witness had not sold the piano, but rather that it had been taken by the piano company as she said and in accordance with defendant's instructions.

I regard the question concerning defendant's intent in discontinuing the payment theretofore made for support as one for the court who tried the facts. In this view I dissent from the conclusion announced in the majority opinion that the judgment is without substantial evidence to support it. This conclusion, it seems to me, is reached by my Associates in accepting as true and conclusive evidence given by defendant which is not expressly contradicted, and therefore impinges the rule of decision announced in *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. I deem the judgment of the court to be in conflict with the decision of the Supreme Court in the opinion last cited, and therefore request that the case be certified to the Supreme Court for final determination.

**BARNHART v. KANSAS CITY, M. & O. RY.
CO. OF TEXAS. (No. 2446.)**

(Supreme Court of Texas. March 15, 1916.)

1. TRIAL. ⚡194(19) — INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action for injuries to a servant, an instruction that the burden is on the defendant to show its defense of assumed risk by a preponderance of the evidence, no matter by which side adduced, to be considered in its entirety, is not objectionable as invading the province of the jury or requiring the jury to consider all the evidence when it was within their province to exclude any portion from their consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⚡194(19).]

2. MASTER AND SERVANT ⚡265(13)—INJURIES TO SERVANT—BURDEN OF PROOF—ASSUMPTION OF RISK.

In an action for injuries to a servant, the burden is on the employer to show its defense of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 892, 907; Dec. Dig. ⚡265(13).]

3. MASTER AND SERVANT ⚡295(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS—DUTY OF SERVANT.

Where the court has fully charged in behalf of a defendant railroad on the defense of assumed risk, it was proper to instruct that plaintiff, in entering the defendant's employ, had the right to assume that the railroad track was free from obstruction so near the track as to expose him to danger, and he was not required to make any investigation or examination to see if it was free from obstruction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168, 1169, 1179; Dec. Dig. ⚡295(1).]

4. MASTER AND SERVANT ⚡226(1)—INJURIES TO SERVANT—RISKS ASSUMED—NEGLIGENCE OF MASTER.

A servant assumes the risk ordinarily incident to his employment, but not the risks arising from the master's negligence in failing to furnish a safe place to work, unless the danger is obvious and he has actual knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⚡226(1).]

5. MASTER AND SERVANT ⚡100(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EXPRESS CONTRACT—VALIDITY.

An application by an employé entering the service of a railroad reciting that there are numerous obstructions which will endanger his life and limb and that he assumes the risk is void as against public policy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 166; Dec. Dig. ⚡100(1).]

6. MASTER AND SERVANT ⚡291(1)—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK.

An instruction that an application by the employé of a railroad assuming the risk of injury from obstructions is void and should be considered for no purpose except as it shows that plaintiff knew of the danger and risks arising from the proximity of the obstruction, which caused his injury, to the track of the defendant is not objectionable as tending to minimize the effect of the document as evidence of notice of the existence of the obstruction in question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133; Dec. Dig. ⚡291(1).]

7. CONTINUANCE ⚡26(1) — GROUNDS — ABSENCE OF WITNESS—DISCRETION OF COURT.

Where an application for continuance to procure a witness recited that defendant's counsel had the impression that the case would not be called at the time it was, but did not show that the evidence to be obtained from him could not have been obtained from other sources, and in fact the case was called on the day it had been set, and the witness had not been subpoenaed, the denial of the continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 74; Dec. Dig. ⚡26(1).]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by David Barnhart against the Kansas City, Mexico & Orient Railway Company. The Court of Civil appeals (145 S. W. 1049) reversed a judgment for plaintiff, and he brings error. Judgment of Court of Appeals reversed, and judgment of district court affirmed.

Hardwicke & Hardwicke, of Abilene, Woodruff & Woodruff, of Sweetwater, and Theodore Mack, of Ft. Worth, for appellant. H. G. McConnell, of Haskell, and H. S. Garrett and Blanks, Collins & Jackson, all of San Angelo, for appellee.

YANTIS, J. The plaintiff in error, David Barnhart, recovered a judgment in the district court of Nolan county, Tex., for personal injuries received by him while working as a brakeman for the defendant in error in its yards at Sweetwater, Tex. At the particular time of the injury which was received by him he was descending a ladder on the side of a box car, and while doing so he came in contact with an iron standpipe several inches in diameter which had been constructed by the defendant in error near the track on which the plaintiff in error was riding. The injury resulted in the amputation of his arm. He alleged that the defendant railway company was guilty of negligence for a failure to exercise ordinary care to furnish him a reasonably safe place in which to work, in that it constructed said standpipe in such close proximity to its track along which plaintiff was required to discharge his duties as to bring him in contact therewith, and that in the exercise of ordinary care the defendant railway company should have placed the same a sufficient distance from the track to avoid injuring him while engaged in the discharge of his duties; that by reason of this negligence on the part of said railway company, while descending said ladder in the discharge of his duties, he came in contact with said standpipe, and was thereby thrown from said ladder, and fell under the moving train, causing the injuries complained of.

The defendant railway company answered with a general denial; also with a special denial that the standpipe had been erected or permitted to stand in close proximity to its tracks; that said standpipe was erected

by it for the purpose of obtaining water with which to operate its engines; and that it was properly constructed in said yards, and was erected a reasonably safe distance from each of its tracks. The defendant railway company further alleged that, if Barnhart did come in contact with said standpipe, it was the result of his own negligence in projecting his body an unreasonable and unnecessary distance from the side of the car. The defendant railway company further pleaded as one of its defenses that the injury which was received by Barnhart was assumed by him as one of the risks ordinarily incident to his employment. It further pleaded as another defense that the location of the standpipe was patent and obvious, and that the plaintiff had observed the same, and was familiar with its location, and that he expressly assumed the risk of his injuries. The defendant in error offered no evidence in support of its defenses thus pleaded, except such as may have been adduced by the plaintiff himself while testifying on the witness stand in his own behalf, and Barnhart's application for employment, which was introduced by the defendant in error, by which Barnhart agreed that he would be exposed to great danger in the course of his employment, and that he assumed for himself the risk of such danger.

The case was tried by a jury, and Barnhart was allowed damages. The case was submitted to the jury on a general charge, and not upon special issues. From the judgment of the district court the defendant railway company appealed to the honorable Court of Civil Appeals for the Second District. In that court the case was reversed and remanded; that court sustaining several of the assignments of error presented therein by the defendant railway company. One of its holdings was that the following portion of the court's main charge was erroneous:

"You are further charged that the burden is upon the defendant to show its defense of assumed risk by a preponderance of the evidence, no matter by which side adduced, to be considered in its entirety."

The honorable Court of Civil Appeals held in relation to said charge that it was erroneous in that it commanded the jury to consider the evidence in its entirety, and thereby compelled the jury to consider all the evidence, when it was within their province to exclude any portion of the evidence from their consideration. This court granted a writ of error on the application of Barnhart, on the ground of conflict; said holding being in conflict with the holdings of other Courts of Civil Appeals in the cases of *M. K. & T. Ry. Co. v. Rothenberg*, 131 S. W. 1157; *Railway v. Worcester*, 45 Tex. Civ. App. 501, 100 S. W. 990; *Railway v. Lester*, 84 S. W. 404; and *Electric Co. v. Murray*, 32 Tex. Civ. App. 226, 74 S. W. 51.

[1] We think the honorable Court of Civil Appeals was in error in its holding in this case on said question. We do not think the

court's direction to the jury, contained in said charge compelled the jury to give effect to any portion of the evidence. Clearly it would have been error to do so. The court commanded the jury to consider the evidence in its entirety, no matter by which side adduced. The plain purpose of this charge was to protect the defendant railway company from an injustice which might otherwise have resulted to it. Without this charge the jury might have conceived it to be their duty to exclude, when considering the defenses, any evidence not introduced by the defendant. The defendant had specially pleaded the defense of assumed risk in two separate pleas, and in two different forms—one as a risk ordinarily incident to the employment; the other as a risk that was obvious, and known to Barnhart. It had not placed a witness upon the stand to establish either of said defenses. It contends now, and had a right to contend in the trial court, that a portion of the evidence of the plaintiff himself was sufficient, in connection with Barnhart's application and contract of employment, to establish said defenses. Yet the jury, unless specially instructed upon it, might have fallen into the error of excluding, while considering such defenses, the evidence given by the plaintiff himself, because he was not introduced as a witness by the defendant railway company. It was to guard against this that the trial court, in a spirit of fairness towards the defendant in error, charged the jury to consider the evidence on the question of assumed risk, no matter by which side adduced, in its entirety. We do not think the expression "to be considered in its entirety" in any way invaded the province of the jury. It was not a command to them to give effect to any portion of the evidence. It was merely a command to consider the evidence. This is not equivalent to a direction that the jury should give effect to the evidence in its entirety. The charge allowed the jury to discard any of the evidence which they might believe, after considering it, was entitled to no weight, and to exclude all testimony that the jury might consider was not credible, and at the same time to give effect to any evidence they considered of value. It would seem to us difficult, if not impossible, for the jury to pass upon the credibility of the witnesses, and the weight to be given to their testimony, as the law requires them to do, without first considering it. In considering the evidence under this charge they were allowed the utmost freedom in giving or not giving effect thereto in arriving at their verdict. It is worthy of note that the charge complained of is immediately followed by that portion of the court's charge which told them that they were the "sole judges of the credibility of the witnesses, the weight to be given to the testimony, and of the facts proved." We think the charge complained of, when prop-

erly construed, and especially in the light of the specific instruction to the jury that they were the sole judges of the credibility of the witnesses, and the weight to be given to their testimony, was not misleading, and that, instead of being harmful to the defendant railway company, by its plain meaning it was beneficial to it in directing the jury to consider in behalf of the defendant some of the evidence that was introduced by the plaintiff which they otherwise might not have felt it their duty to do.

[2] The further contention is made by the defendant in error that said charge is erroneous in placing the burden of proof upon the defendant to show its defense of assumed risk. This contention was made by counsel for the defendant in error in oral argument, which has been supplemented by an exceptionally able printed argument. We have given the most careful attention to the question, and have reached the conclusion that it is without merit. The defendant in error voluntarily pleaded assumed risk as a defense, and the burden was upon it to establish its defense. With the plea and defense of assumed risk it sought, as was its legal right to do, to overcome the plaintiff's charge against it of negligence. It sought to prove by this defense that the injuries did not result to the plaintiff in error from its negligence. This defense of assumed risk, if established, would defeat a recovery by the plaintiff in error. Under such circumstances we do not think that the burden of proof was upon the plaintiff, as contended by the defendant in error, to disprove its defense of assumed risk. It is true that, if the plaintiff's own evidence established that his injuries resulted from a risk which the law required him to assume, he would be denied a recovery. But this does not arise because the burden of proof was upon him to disprove assumed risk, but the defeat of his recovery in such instance is required because he did, in fact, prove that his injuries resulted from assumed risk. The question has been passed upon many times in this court where it arose out of the question of contributory negligence. The earlier cases tended to hold that the burden of proof was upon the plaintiff in a negligence case to prove that his injuries did not result from contributory negligence, but the later uniform holdings of this court upon that question have been that, though the plaintiff is required to remove or overcome a serious taint of contributory negligence which his own case has developed, yet the burden of proof does not shift to him, but is properly placed upon the defendant. He may be denied a recovery because his own case shows that his injuries resulted from contributory negligence, but this is because of that fact, and not because the burden of proof was upon him to disprove contributory negligence. If he presents a case which does not suggest

contributory negligence on his part, he need not affirmatively establish, in order to recover, that his injuries did not result from his own contributory negligence. It remains the privilege, however, of the defendant in such a case to plead as a defense that his injuries did result from contributory negligence. But when thus voluntarily presenting the issue as a defense in its favor the defendant in a negligence case has the burden of proving such defense, and the court properly so charges the burden upon it. *Houston & Texas Central Ry. Co. v. Harris*, 103 Tex. 425, 128 S. W. 897; *Houston & Texas Central Ry. Co. v. Anglin*, 99 Tex. 354, 89 S. W. 966, 2 L. R. A. (N. S.) 386. The rule should be the same as applied to the defense of assumed risk. As the reason is the same, the rule should be the same; and, when the defendant in a negligence case has voluntarily pleaded assumed risk as a defense to the plaintiff's case, the burden should be upon it to establish its defense, and the court should so direct the jury.

[3, 4] The honorable Court of Civil Appeals held that there was error in giving the plaintiff in error's special charge No. 2. We think it was proper to give this charge. The substance of it was that the plaintiff, in entering the employ of the defendant, had the right to assume that the track of the defendant company was free from obstruction so near the track as would expose him to danger, and that he was not required to make any investigation or examination of the track to see that it was free from obstruction along and near thereto. The court had charged fully in behalf of the defendant in error on its defense of assumed risk. We think the duty then arose, in order that the jury might not be misled, for the court to advise them that it did not devolve upon the plaintiff to make an inspection of the place which had been provided him in which to work to ascertain if the defendant in error had been guilty of negligence in placing some obstruction so near the track as that he might be injured. The plaintiff had the right to rely upon the master to furnish him a safe place to work, and he need make no inspection to ascertain whether the master had discharged this duty. He assumed the risks ordinarily incident to his employment, but he did not assume the risks arising from the master's negligence in failing to furnish a safe place in which to work, unless the danger was obvious, or unless he had actual knowledge thereof. We think the charge was proper in form, and appropriate, under the evidence, to be given.

On entering the employment of the defendant in error Barnhart signed an application containing, among other things, the following stipulation:

" * * * As chief dispatcher has this day informed me of the duties connected with the employment I am about undertaking, viz., that of condor. or brakeman, and has explained to

me that the performance of said duties will expose me to great danger, the risk of which I assume for myself, and that I must use proper and constant care to avoid injury to myself and others. I have received a copy of the time table containing the printed rules and regulations of said railway, with which I am to make myself familiar, and by them and such additions thereto as may be made from time to time, agree to be governed. And I hereby acknowledge that I have been notified that there are numerous bridges, buildings, tunnels, viaducts, stockyard chutes, platform and coal chutes and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree in consideration of my employment to familiarize myself with same and use due care for my safety without further notice from the railway company, and I accept the notice from said railway company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on the top or side of a car, and that I am to use constant care for my safety in working about same."

[5, 6] The court charged the jury, in substance, that said application was void, and could be considered by the jury for no purpose, except in so far as the same might show or tend to show that plaintiff knew of the danger or risks, if any, arising from the proximity of the standpipe to the track of the defendant. It is contended by the defendant in error that this charge was erroneous because misleading, and having a tendency to minimize the effect of the document as evidence of notice to the plaintiff in error of the existence of the standpipe. The honorable Court of Civil Appeals sustained this view. We think this was error. We do not think there is any merit in the contention of the defendant in error in relation to this charge. It is the settled law of Texas that a contract of this nature is void because against public policy. The effect of this contract was to relieve the defendant in error from damages growing out of its negligence in placing an obstruction too near the track, and to require its servant to assume the risk of injury. This would be transferring by contract the burden which rested in law upon the defendant in error to the shoulders of its employé. It would be to entirely relieve the defendant in error from the consequences of its tortious act, and to impose by contract upon its servant the burden of bearing the loss which did not by law rest upon him, but by the law of the land did rest upon the defendant in error. The injustice of this is so abhorrent that it is held to be in violation of public policy and void. This being true, it follows that it was not error to charge the jury that, so far as the contract imposed such purpose, it was void. If the court had not so charged the jury, what would have been the probable result upon Barnhart's case? It is plain to us that the jury might probably have decided against him, on the illegal ground that he had contracted his cause of action away; that he had agreed to assume the loss which he was then suing to recover. It was to avoid this injustice which made it incumbent

upon the trial court to instruct the jury that said contract was void, except in so far as it tended to show that the plaintiff knew of the danger or risk arising from the proximity of the standpipe to the track.

[7] Very earnest complaint is made here by the defendant in error against the action of the trial court in overruling its application for a continuance. The application for a continuance presents only an equitable showing, and does not purport to be a statutory application. It fails to show that Webster, the witness desired by it, had been summoned as a witness, or that any process had ever issued for him. It fails to aver affirmatively that his evidence was material. It fails to allege his place of residence. It fails to show that it had used due diligence to secure his attendance upon the trial, and fails to allege any facts whatever from which it might be concluded that it had exercised due diligence. It only states that he was called to Kansas City on April 12th, where he was a witness in a civil suit against it pending at such place. It does allege that he was defendant in error's chief engineer, and that the defendant expected to prove by him that the standpipe was a usual and proper appliance for the purpose for which it was used, and constructed at a safe distance from the cars and ladders, and that there was ample space between said cars and standpipe to enable plaintiff to pass between said cars and standpipe with safety if he had used ordinary care in the performance of his work. It does not allege what he would have testified as to the distance between the standpipe and the track. It does allege that it was impossible for the defendant in error to procure such testimony as desired from any other source.

The main insistence is that the defendant in error's counsel were taken by surprise by the court in calling the case for trial at the time it did. It is alleged in the application for a continuance that the case had been pending about six months prior to the trial, but that there were several other cases against the defendant on the same docket, but none of them were tried during the first week of court, but that several of the cases were reset for April 11th, April 12th, and April 14th, and that "no resetting of the Barnhart case having been brought at that time to the notice of the defendant, or any of its counsel, but, on the contrary, counsel for the defendant were of the impression that the court had reset the Barnhart case for the 14th, with directions that it should follow in regular order the Hall and Polk cases, and so understood the court to announce"; that the defendant's counsel acted upon such assumption and made no preparation for trial of the Barnhart case during that week, because they were under the impression that the other cases would be tried first, and that, if they were, it would

not be possible to try the Barnhart case that week.

The application nowhere alleges that the case had not been set for the day upon which it was called for trial, but the allegation is that no resetting had been brought to their notice, and that they were under the impression that the case had been set for the 14th. The record shows that the application for a continuance was presented on April 13th, and the trial was not had until April 14th. It is probable that accurate measurements of the distance between the standpipe and the track could have been taken after the adjournment of court on the 13th of April, or before court convened the next morning. It appears from the record that the plaintiff proved by G. P. Russell that he had taken such measurements, and that the standpipe was 53½ inches from the south rail of the track, and that the average box car would extend over the rail on either side about 30 inches, not including the step.

The court's explanation to the bill of exceptions which presents this question shows that the case was reset in the presence of counsel for the defendant for the very day it was called for trial. It also shows that the defendant's witness J. H. Webster was never subpoenaed as a witness, and that he was in attendance upon court, and left just the day before the trial of the case. The application was addressed, as an equitable application, and not a statutory one, to the discretion of the trial court, and, there being nothing to indicate an abuse of that discretion, we find no error in its refusal.

We have carefully examined the other questions presented for review, and find no reversible error in the rulings of the trial court. For the errors indicated by the honorable Court of Civil Appeals in reversing the case, its judgment should be reversed, and the judgment of the district court should be affirmed; and it is so ordered.

MISSOURI, K. & T. RY. CO. OF TEXAS v. CASSADY et al. (App. No. 9380.)

(Supreme Court of Texas, March 29, 1916.)

MASTER AND SERVANT \S 265(5)—**INJURIES TO SERVANT—NEGLIGENCE—PROOF BY CIRCUMSTANCES.**

The circumstances of an accident to an employé may themselves furnish proof of the employé's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 881, 898, 955; Dec. Dig. \S 265(5).]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Emma A. Cassady and others against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which affirmed the judg-

ment. 175 S. W. 796. To review its judgment, defendant petitions for writ of error. Writ refused.

C. O. Huff, A. H. McKnight and J. M. Chambers, all of Dallas, and Garnett & Garnett, of Gainesville, for plaintiff in error. Stuart, Bell & Moore, of Gainesville, for defendants in error.

PHILLIPS, C. J. We deem it proper to say that we do not subscribe to the statement in the opinion of the honorable Court of Civil Appeals that it is a general holding of this court that the doctrine of *res ipsa loquitur* applies, as a rule, in cases of injury sustained by a servant in the services of a master. *McCray v. Railway Company*, 89 Tex. 168, 34 S. W. 95, recognizes that in such cases the doctrine does not apply. We think the facts of the present case bring it within the rule, equally announced in *McCray v. Railway Company*, that the circumstances of a particular accident may themselves furnish proof of negligence; and it is for this reason that the writ of error is refused.

WAPLES et al. v. MARRAST. (No. 2826.)
(Supreme Court of Texas. March 22, 1916.)

1. ELECTIONS \S 120—**PRIMARY ELECTION—STATUTE—CONSTITUTIONALITY.**

That the Presidential Primary Act (Acts 33d Leg. c. 46 [Vernon's Sayles' Ann. Civ. St. 1914, art. 3175a]), is impracticable, unworkable if literally observed, and deficient for failing to provide for the legal number of presidential electors does not render it unconstitutional.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \S 120.]

2. ELECTIONS \S 126(1)—**PRIMARY ELECTIONS—AUTHORITY OF LEGISLATURE.**

The Legislature has authority to require the holding of a primary election by the political parties of the state, to enable their members to vote for party nominees for elective offices, state or national, and to express their preference in the selection of delegates to party conventions.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \S 126(1).]

3. ELECTIONS \S 21—**CLASSIFICATION OF PARTIES—PRESIDENTIAL PRIMARY LAW.**

The Presidential Primary Act, applying only to political parties polling 50,000 votes for Governor, is not invalid because it applies at present to only the Democratic party, since the Legislature had the right to reasonably classify in respect to parties subject to the law, which cannot be regarded as having been enacted for the present day alone.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 15; Dec. Dig. \S 21.]

4. TAXATION \S 2—**PUBLIC PURPOSE—"TAX."**

The sovereign power of the state may be exercised in the levy and collection of "taxes," burdens imposed for the support of the government, only on condition they shall be devoted to public purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 2; Dec. Dig. \S 2.]

For other definitions, see Words and Phrases, First, and Second Series, Tax.]

5. STATES —1—POWERS AS SOVEREIGNTY.

The powers of the state as a sovereignty exist only for governmental purposes.

[Ed. Note.—For other cases, see States, Cent. Dig. § 1; Dec. Dig. —1.]

6. ELECTIONS —120 — PRESIDENTIAL PRIMARY LAW — CONSTITUTIONALITY — "POLITICAL PARTY" — "PUBLIC PURPOSE."

The Presidential Primary Act, imposing upon political parties polling over 50,000 votes for Governor the duty to hold a presidential primary, and providing that the expense of the election shall be paid out of the county treasury, is violative of Const. art. 8, § 3, declaring that taxes shall be levied and collected by general laws and for public purposes only, since a "political party" is merely a body of men, associated for the purpose of furnishing and maintaining the prevalence of political principles or beliefs in the public policies of the government; and the conduct of an election, whereby a political party selects its candidate, is not a "public purpose."

[Ed. Note.—For other cases, see Elections, Dec. Dig. —120.

For other definitions, see Words and Phrases, First and Second Series, Political Party; Public Purpose.]

Certified Questions from Court of Civil Appeals, First Supreme Judicial District.

Petition for mandamus by E. K. Marrast against Paul Waples and others, composing the Democratic State Executive Committee. The writ was awarded, and respondents appealed. On certification of questions from the Court of Civil Appeals.

James B. Stubbs, of Galveston, Cecil H. Smith, of Sherman, and Walter Collins, of Hillsboro, for appellants. John W. Campbell, Chas. H. Theobald, Co. Atty., and Walter Cranford, and Marion J. Levy, Asst. Co. Attys., all of Galveston, for appellee.

PHILLIPS, C. J. The case involves the constitutionality of what is familiarly known as the Presidential Primary Act of the Thirty-third Legislature, Chapter 46, General Laws of 1913. The terms of the act require the holding of precinct primary elections in the counties of the State on the fourth Tuesday in May in presidential election years by the respective political parties of the State polling as many as 50,000 votes for their respective candidates for Governor at the last preceding general election,—obedience to it being optional with parties so polling a less number of votes,—for the expression by their qualified electors of their preference of candidates for the party nomination to the offices of President and Vice President of the United States and presidential electors, and likewise their choice of party candidates for the places of delegates to the National conventions of such parties.

The expense of such primary election of a party whose candidate for Governor at the last preceding general election received as many as 50,000 votes, it is provided by the act, shall be paid out of the county treasury of each county, no provision being made for

the expense of the primary election of other parties, if held under the act.

It is further provided that the votes cast at the election shall be counted, canvassed and returned as required by the general primary law of the State in relation to party nominations for the offices of Governor and Lieutenant Governor.

In respect to the number of presidential electors to be nominated in the primary election, the act is deficient. It provides only for the nomination of one elector from each congressional district, whereas the State is required to elect at the general election a number equal to its whole number of Senators and Representatives in Congress.

Under the agreed facts of the case, the operation of the act at the present time is to require only the Democratic party to hold the primary election provided for, since it is, at present, the only party in the State whose candidate for Governor at the last general election received as many as 50,000 votes. It is furthermore agreed that the cost of such a primary election as the act requires, will be not less than \$300,000, and will probably exceed that amount.

The requirement of the general primary law in respect to the time for the canvassing by the state executive committee of the votes cast for candidates for party nominations for Governor and Lieutenant Governor, is that it shall be at a meeting held on the second Tuesday in August of the election year. The Democratic National Convention, it appears from the statement of the agreed facts, has been appointed to meet on June 14, 1916. If the primary election should be held and the act literally observed, the votes cast for delegates could not be canvassed in time for that convention.

The suit was a mandamus proceeding by E. K. Marrast to require the appellants, who compose the Democratic State Executive Committee, to hold the primary election contemplated by the act. In the trial court the writ of mandamus was awarded, the learned trial judge in an able written opinion holding the act valid against the attack made upon it by the respondents. An appeal was prosecuted to the honorable Court of Civil Appeals, which has certified to us the following questions:

1. Is the Act, approved March 27, 1913, Art. 3175a Vernon's Sayles' Texas Civil Statutes, void upon the ground that it is in conflict with one or more of the provisions of the Constitution of this State or of the Union as is claimed by appellants?
2. If not void, has the State Democratic Executive Committee authority to disregard its requirements in so far as they are impracticable and to supply such regulations as they may deem proper and necessary?

[1] We shall consider only the question of the constitutionality of the act. That it is impracticable, unworkable if literally observed, and is deficient because of the omis-

sion to provide for the nomination of the legal number of presidential electors, are not matters which, if true, affect the power of the Legislature to enact the law.

[2, 3] The authority of the Legislature to require the holding of a primary election by the political parties of the State for the purpose of enabling their members to vote their choice for party nominees for elective offices, whether State or National, and likewise express their preference in the selection of party delegates to party conventions, is undoubted. The legislative right in such an enactment to make, according to their numerical strength, a reasonable classification in respect to the political parties subject to the law, is equally clear. The act is not invalid under the classification adopted because it applies at the present time to only the Democratic party. It is not to be regarded as having been enacted for only the present day. It was within the province of the Legislature to determine whether the numerically weaker parties should be relieved from its compulsory observance; and, if so, to provide a classification according to the voting strength of the parties. The selection of a voting strength of 50,000 votes as the test does not create an unreasonable classification, and the act is not, upon this account, to be overturned.

The only serious constitutional question involved by the act is its requirement that the expense of the primary election shall be borne out of the public treasury of the counties. This presents, nakedly, the question, whether it is within the power of the Legislature to devote the public revenues of the State to the payment of the primary election expenses of political parties. The general primary law relating to the nomination of party candidates for state, district and county offices imposes such expense upon the candidates. Article 3104, Rev. St. 1911. In the legislative history of the State, this is the first effort, so far as we are aware, to make the expense of a party election a charge upon the public revenue.

Section 3, Article 8 of the Constitution declares:

"Taxes shall be levied and collected by general laws and for public purposes only."

By section 52, Article 3 it is provided:

"The Legislature shall have no power to authorize any county, city, town or other political corporation * * * of the State, to lend its credit or to grant public money * * * in aid of, or to, any individual, association or corporation whatsoever," etc.

The funds possessed by the counties of the State and available for the payment of the expense of the primary election provided for by this act, are only those which are derived by taxation. If the payment of such expense is, within the meaning of the Constitution, "a public purpose," the act is valid in its provision that it shall be borne out of the public treasury of the counties; otherwise it is not.

[4] Taxes are burdens imposed for the support of the government. They are laid as a means of providing public revenues for public purposes. The sovereign power of the State may be exercised in their levy and collection only upon the condition that they shall be devoted to such purposes; and no lawful tax can be laid for a different purpose. Whenever they are imposed for private purposes, as was said in *Brodhead v. Milwaukee*, 19 Wis. 670, 88 Am. Dec. 711, it ceases to be taxation and becomes plunder.

[5] It is not easy to state in exact terms what is "a public purpose" in the sense in which that term is employed as a limitation upon the State's power of taxation. The framers of the Constitution were doubtless sensible of this difficulty, for they did not attempt to define it. Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish them. The powers of the State as a sovereignty exist only for governmental purposes. They may be freely exerted in the discharge of all the governmental functions of the State; but cannot be applied to uses, though public in aim and result, which are not governmental in their nature. As the means provided for the support of the government in its administrative duties and existing alone for that end, the taxing power may be employed for no purpose save that which in a true and just sense is related to the performance by the State of its governmental office. The appropriation of the public revenue is a legislative power, and the Legislature must necessarily be allowed a large discretion in determining to what uses public moneys may be put. Subject to the constitutional limitation that the public revenue shall be applied to only public purposes, to the prudent husbandry of the Legislature as well as its provident foresight has been committed the public trust of making such use of it as will afford the economical administration of the government which both the spirit and the letter of the Constitution enjoin. The term "public purpose" as used in this relation is not, therefore, to be construed narrowly, so as to deny authority to the Legislature to make such provision for the administration and support of the government in its several branches and subdivisions as will faithfully subserve the present and future interests of the people. The limitation imposed by the Constitution upon the power is, however, imperative. And it is essentially true that it does not permit taxation for all purposes which in a broad and general sense may be regarded as public, but expressly confines its exercise to only those public purposes with which the State, as a government, invested with high and sovereign powers, but only as a grant from the people and therefore to be solely used for the common benefit of

all of them, and not as a paternal institution, may justly concern itself, and to which, for that reason, the public revenues may be rightfully devoted.

[8] As to what is a public purpose within the meaning of Section 3, Article 8 of the Constitution, no better test can be presented than the inquiry: Is the thing to be furthered by the appropriation of the public revenue something which it is the duty of the State, as a government, to provide? *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *People v. Town of Salem*, 20 Mich. 452, 4 Am. Rep. 400. Those things which it is the duty of the State to provide for the people, it is equally the right of the State, by means of the public revenue, to maintain. Within this category fall the general instrumentalities of the government, the public schools, and other institutions of like nature. But the State is wholly without any power to levy and appropriate taxes for the support of those things which, either by common usage or because they are in no proper sense the instrumentalities of government, it is the duty of the people to provide for themselves. It is not all things which answer a public need or fill a public want that it is within the authority of the State to furnish for the people's use or support at the public expense. Manufacturing industries, railroads, public enterprises of many kinds, private schools and private charitable institutions all afford a service to the public, but the State is without any power to maintain them. Religion is generally esteemed a helpful influence for public morality. But the Constitution expressly declares that no public money shall be granted in aid of any religious organization.

General elections are essential to the public welfare and are distinctly related to the discharge of an important governmental duty, because it is only by their means that the organic law may be amended and in the elective offices public officials be supplied for the various administrative agencies of the State. But is it any duty of the State to provide the people with nominees of political parties for the elective offices of the government? Is it in any just sense a concern of the State, that those offices be filled by only the nominees of political parties? And is there any right in the State to devote the public revenues of the State derived by taxation from the people at large in aid of the purposes of such parties?

A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord with their political principles and the administration of those agencies by their

own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression by their members of their preference in the selection of their nominees, the State may regulate such elections by proper laws, as it has done in our general primary law, and as it was competent for the Legislature to do by a proper act of the character of the one here under review. But the payment of the expenses of purely party elections is a different matter. On principle, such expenses cannot be differentiated from any other character of expense incurred in carrying out a party object, since the attainment of a party purpose—the election of its nominees at the general elections through the unified vote of the party membership, is necessarily the prime object of a party primary.

The great powers of the State,—and the taxing power is the one to be always the most carefully guarded,—cannot be used, in our opinion, in aid of any political party or to promote the purposes of all political parties. They are no more to be made the objects of governmental bounty or favor than any other class of public organizations into which groups of citizens may form themselves. Expenses incurred in the furtherance of their objects can no more be defrayed out of the public treasury than the expenses of other associations of individuals. If it is constitutional to use the public revenues to pay the cost of their primary elections, it would likewise be constitutional to pay the cost of their candidates' campaigns. If the constitutional barrier is removed in the one case, it cannot be restored in the other; but it will have to be admitted that any and all kinds of expense of political parties may be lawfully imposed as a part of the public burden of taxation.

For a stronger constitutional reason than would apply to other kinds of public organizations is it the clear duty of the State to withhold the use of its public revenues as an aid to political parties, and particularly as an aid in the holding of their party elections. The object of such parties is the political control of the government; and we regard it as a fundamentally sound proposition that no power of the government can be constitutionally used in furtherance or

aid of the effort of any class or kind of organization, political or otherwise, to obtain the control of the government.

To provide nominees of political parties for the people to vote upon in the general elections, is not the business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. If it is not the business of the State to see that such nominations are made, as it clearly is not, the public revenues cannot be employed in that connection. To furnish their nominees as claimants for the popular favor in the general elections is a matter which concerns alone those parties that desire to make such nominations. It is alone their concern because they alone are interested in the success of their nominees. The State, as a government, cannot afford to concern itself in the success of the nominees of any political party, or in the elective offices of the people being filled only by those who are the nominees of some political party. Political parties are political instrumentalities. They are in no sense governmental instrumentalities. The responsible duties of the State to all the people are to be performed and its high objects effected without reference to parties, and they have no part or place in the exercise by the State of its great province in governing the people.

We have been pointed to but one authority holding that the public revenues may be used to pay the cost of the primary elections of political parties, *State v. Michel*, 121 La. 374, 46 South. 430, but in that case the question received only a casual consideration, and we do not feel at liberty to adopt the conclusion there announced.

Holding an act of the Legislature to be unconstitutional is never a welcome duty, and this court has never performed it except with reluctance. It is a duty, however, plain and unmistakable when upon mature consideration such is the conviction of the court. The Constitution is the supreme law of the State, and no consideration should be suffered to stand in the way of its enforcement. Tested by legal principles which are clear and established, the payment of the expenses of primary elections of political parties is not a public purpose for which public revenues may be used; and in our opinion the act in question is therefore unconstitutional and unenforceable.

HAWKINS, J. (concurring). I concur in the conclusion and also in the general course of reasoning upon which it has been reached, and in nearly all that our CHIEF JUSTICE has said so well, above. However, I consider it proper for me to say this:

Undoubtedly "common usage" is one very valuable test, or measure, by which the courts may determine whether a given expenditure of public funds is or is not for "a

public purpose," and to that effect are the authorities; but I do not regard it as the only test, in any instance.

The distinction between the "maintenance" and the "regulation" of primary elections is drawn, and properly so, in said opinion, and that, indeed, is as far as it is necessary to go in answering the certified question; but, as this is a pioneer case of public importance, I wish, by way of making my own views clear, to emphasize, if possible, said distinction, and, in that connection, to say that said opinion, as I understand it, does not question the power and authority of the Legislature to direct payment, out of public funds raised by taxation, of any and all reasonable expenses which may be incurred in the mere regulation—but not in the maintenance—of primary elections. *De Walt v. Bartley*, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814.

DUPREE et al v. GALE MFG. CO.
(No. 2449.)

(Supreme Court of Texas. March 15, 1916.)

JUDGMENT ~~886~~(2)—ACTION ON JUDGMENT—LIMITATION—STATUTE.

Under Rev. St. 1911, art. 5696, providing that a judgment in any court of record where execution has not issued within 12 months after the rendition thereof may be revived by *scire facias* or an action of debt brought thereon within 10 years after the date of such judgment, and in the absence of any statute expressly prescribing the period of limitations for an action to revive a judgment upon which an execution has duly issued, an action on a judgment on which execution issued within a year is, by analogy, subject to the same limitation period of 10 years, to be reckoned from the date of the issuance of the last execution, and hence an action to recover on a judgment on which execution issued within a year, brought more than 10 years from the issuance of such execution, was barred, and the running of the statute is not postponed until the judgment should become dormant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1604-1607; Dec. Dig. ~~886~~(2).]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by the Gale Manufacturing Company against W. E. Dupree and others. From a judgment of the Court of Civil Appeals (146 S. W. 1048), affirming a judgment for plaintiffs in part and in part reversing and rendering reviving the plaintiff's former judgment and authorizing execution to issue thereon, defendants bring error. Judgment, in so far as reviving the judgment, reversed, and judgment of district court affirmed.

Sleeper, Boynton & Kendall, of Waco, for plaintiffs in error. H. C. Lindsey, of Waco, for defendant in error.

PHILLIPS, C. J. The Gale Manufacturing Company recovered a judgment against W. E. Dupree in the District Court of McLennan county on June 21, 1897. An execution issued on the judgment within a year, being

the only execution upon the judgment. After more than ten years from the issuance of the execution, but within fourteen years from that date, recovery upon the judgment was sought by the plaintiff in the present case, which action the trial court held was barred by the ten years statute of limitation. On the appeal it was held by the honorable Court of Civil Appeals for the Third District that the action was not barred, since it was brought within four years from the date the judgment became dormant. Its holding, in other words, is that the cause of action upon the judgment did not accrue until it was dormant, and the limitation applicable is that prescribed by the four years statute,—Article 5690.

The question is not a new one. It was determined in *Willis v. Stroud*, 67 Tex. 516, 3 S. W. 732, following *Fessenden v. Barrett*, 9 Tex. 475. But it is announced in the opinion of the Court of Civil Appeals that it declines to follow these decisions.

We have never had a statute, and have none now, expressly prescribing the period of limitation for an action to revive a judgment upon which an execution has duly issued. The only statute upon the subject relates to judgments upon which execution has not so issued. It was enacted at an early day, in 1841, being present Article 5696, and reads:

A judgment in any court of record within this State, where execution has not issued within twelve months after the rendition of the judgment, may be revived by *scire facias* or an action of debt brought thereon, within ten years after the date of such judgment, and not after.

Such was the state of the statutory law when in *Barrett v. Fessenden* the court was confronted with the question as to what period of limitation should be applied to a proceeding to revive a judgment where execution had been duly issued. Making use of the principle, that where a statute has fixed a bar to one action in a particular case, the remedy in analogous cases, not provided for by statute, should be restricted to the same period, it was there held,—and the correctness of the holding is in our opinion not open to question,—that the period of limitation should be the same as that declared in the existing statute for the exercise of the same remedy in respect to judgments upon which execution had not issued, that is, ten years, to be reckoned from the date of the issuance of the last execution,—the last act of legal diligence for the enforcement of the judgment. It was not recognized that the running of limitation in such cases was to be postponed until the judgment should become dormant. Nor in the decision of the question was the consideration that, in a technical sense, a cause of action for the revival of a judgment does not arise until it is dormant, allowed any force. The statute expressly relating to judgments upon which no execution had issued, which it was held

should, by analogy, furnish the rule, put limitation in motion, as it does now, though the judgment was in full force; and in adopting its period for the rule, the time for the commencement of the limitation was fixed likewise without regard to whether the judgment was then dormant.

In *Willis v. Stroud* the question was again presented and decided, the opinion being delivered by Chief Justice Willie. Notwithstanding the four years general statute of limitation, now Article 5690, was then in force, as was also the Act of November 9, 1866, which extended the period within which a judgment should not become dormant after the issuance of execution, from one year, as was the provision of the early laws, to ten years (*Wilcox v. National Bank*, 93 Tex. 333, 55 S. W. 317), which latter act was urged in the argument as a reason for abandoning the rule announced in *Barrett v. Fessenden*, the rule was re-affirmed. After quoting the statute, now Article 5696, above set out, the opinion reads:

"This Article is in the same language as that used in the statute of February 5, 1841, in force at the time this judgment was rendered. That Act, like the present law, made no express provision as to limitation upon a judgment where execution had duly issued; but under the decisions of this court, made during its existence, such a judgment was held barred at the expiration of ten years from the date when the last execution issued thereon. *Fessenden v. Barrett*, 9 Tex. 475."

Meeting the contention that as applied to an action to revive a judgment, limitation does not commence to run until the judgment becomes dormant, this is also said:

"It is, however, urged by the appellants that since the passage of the third section of the Act of November 9, 1866, found in *Paschal's Digest*, Article 7007, in force when this judgment was obtained, the foregoing rule does not prevail, and a judgment could not be barred under that act until ten years had elapsed from the time it becomes dormant. The foregoing section reads: 'No judgment of a court of record shall become dormant unless ten years shall have elapsed between the issuance of executions thereon.' The plaintiff's claim is that this law, having postponed the time at which a judgment became dormant to a date later than that fixed by the former law, necessarily postponed the date from which limitation would commence to run against a revival of the judgment.

"There would be much force in this idea if limitation upon a judgment necessarily commenced to run from the date when it became dormant. But this is not the rule, either by statute or the decisions of this court. For instance, although a judgment upon which an execution has not issued does not become dormant till the end of one year after it was obtained, yet limitation is made by statute to commence running from the date when it was obtained. Again, a judgment upon which execution has issued did not, under former laws, become dormant till one year had expired from the day when the last execution issued; yet our decisions made limitation to run from the date of the issuance of the last execution, and not from one year thereafter. *De Witt v. Jones*, 17 Tex. 620; *Fessenden v. Barrett*, supra; *Spann v. Orummerford*, 20 Tex. 216.

"It is apparent from these citations that the period of dormancy is not taken into consideration in fixing the date when the statute begins

to run. There may be reasons why it should be, but these can not prevail against the plain provisions of the statute, and the equally clear adjudications of the Supreme Court which have sufficient reasons to support them."

Through Chief Justice Gaines the holding in *Fessenden v. Barrett* was again affirmed in *Wilcox v. National Bank*, in this language:

"The limitation is express where execution has not issued within twelve months; but where execution has so issued, no period of limitation is expressly prescribed. But no reason is seen why the Legislature should prescribe a limitation in the one case and not in the other; and therefore it has been repeatedly held that where execution has been sued out within twelve months from the date of a judgment, an action upon it will not be barred until the lapse of ten years from the date of the last execution or the last act of diligence. *Fessenden v. Barrett*, 9 Tex. 475; *Willis v. Stroud*, 67 Tex. 516 [3 S. W. 732]; *Low v. Felton*, 84 Tex. 378 [19 S. W. 693]."

Willis v. Stroud was decided in 1887. With the knowledge that by the decision the statute now constituting Article 5696 was held as also furnishing the rule of limitation where an execution had duly issued upon the judgment, the Legislature, in the two subsequent revisions of the general statutes, has re-enacted it without change. By no legislation upon the particular subject has a different statutory rule been provided. The holding has stood unquestioned in the decisions of this court and has been repeatedly followed. *Millican v. Ware*, 84 Tex. 308, 19 S. W. 475; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693; *Wilcox v. National Bank*, 93 Tex. 322, 55 S. W. 317; *Stevens v. Stone*, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861. Beginning with *Fessenden v. Barrett*, for more than sixty years it has been the law of the State upon the question. We are satisfied with it and again reaffirm it.

In so far as it revived the judgment in question, the judgment of the Court of Civil Appeals is reversed; and the judgment of the District Court is fully affirmed.

CARPENTER v. TRINITY & B. V. RY. CO. (No. 2445.)

(Supreme Court of Texas. March 29, 1916.)

1. CARRIERS \S 22 — PASSENGER — PAYING FARE—ACTS PENALIZED.

Acts 30th Leg. c. 42, \S 1, makes it an offense for a railroad to knowingly carry persons free of charge, or to give a free pass, frank, privilege, or substitute for pay or a subterfuge to be used instead of the regular fare for transportation. Section 3 makes it an offense for any person to offer to use any permit or frank which has been issued to any other person, or to improperly apply for any pass, etc., for pay. By section 6 any person is punishable "who uses any such free ticket, free pass or free transportation, frank or privilege. * * *"
Pen. Code 1911, art. 9 (Vernon's Ann. Pen. Code 1916, art. 9), provides that no person shall be punished for an offense not made penal by the plain import of the words of a law. *Held*, that the provision of section 6, does not make it an offense to merely board a train and to

seek to ride without paying fare, in the absence of an attempt to use some character of free transportation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 56, 1010; Dec. Dig. \S 22.]

2. APPEAL AND ERROR \S 1064(1)—REVIEW—PREJUDICIAL ERROR—INSTRUCTION.

In an action by a passenger who had provided no ticket for a child above the free age limit to recover for nervous injuries produced by the threatening language of a conductor, the giving of the erroneous instruction that the law penalized and made punishable by fine the avoiding of the payment of fare by a passenger and that the conductor had the right, in a reasonably courteous and respectful manner, to explain to plaintiff that such was the law, in which event the defendant would not be liable, even though plaintiff became excited and nervous therefrom as alleged, was prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4219; Dec. Dig. \S 1064(1); Trial, Cent. Dig. \S 475, 525, 553.]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by W. W. Carpenter against the Trinity & Brazos Valley Railway Company. From a judgment of the Court of Civil Appeals (146 S. W. 363) affirming a judgment for defendant, plaintiff brings error. Reversed.

Collins & Cummings, of Hillsboro, for plaintiff in error. Morrow & Morrow, of Hillsboro, for defendant in error.

PHILLIPS, C. J. This was an action for damages on account of certain treatment to which it was alleged that plaintiff's wife was subjected while a passenger upon a train of the defendant railway company. According to her testimony upon the trial, she boarded the train at Hillsboro, accompanied by her little daughter, who was five years and ten months old, for the purpose of going to Mexia. She had a ticket for herself but none for the child because she did not think fare would be charged for the latter on account of her age. This explanation was made to the defendant's conductor when he demanded a ticket for the child. In the course of the conversation which ensued, the conductor, according to her statement, spoke to her harshly, saying that he would put the child off the train unless her fare was paid, and that she, the mother, was guilty of a penitentiary offense in getting on the train without a ticket for the child. She paid for the child's passage, and with the child proceeded on her journey.

The trial court advised the jury in the charge that at the time of the occurrence "the law declared it to be an offense, punishable by fine, for a person subject to the payment of a fare to avoid the payment of such fare on a railway passenger train." In this connection the charge further instructed the jury that the conductor "had the right, in a reasonable, courteous and respectful manner, to explain to Mrs. Carpenter that such was the law, and if he did so in a rea-

sonably courteous and respectful manner, the defendant would not be liable, even though she may have become excited and nervous therefrom as alleged in the petition." The correctness of this charge is the only question we shall consider.

[1, 2] On the first appeal of the case it was held by the honorable Court of Civil Appeals for the Fifth District that the Act of the Thirtieth Legislature, Chapter XLII, Acts of 1907, did not make it an offense for one to merely attempt to ride upon a railway passenger train without the payment of fare. 55 Tex. Civ. App. 627, 119 S. W. 335. On the second appeal a different view was expressed, (Civ. App.) 132 S. W. 837; and this latter ruling was adhered to on the present appeal. An examination of the Act convinces us that the first view of the court on the question was correct, and accordingly, that the charge was erroneous. The first section of the Act makes it an offense for a railway company, or any officer, agent or employé thereof, to knowingly carry any person "free of charge," or to give to any person, etc., "a free pass, frank, a privilege or a substitute for pay or a subterfuge which is used or which is given to be used instead of the regular fare or rate for transportation." By Section 3 it is likewise made an offense for any person to "present, or offer to use in his own behalf, any permit or frank, whatsoever, to travel, pass or to convey any person * * * which has been issued to any other person," or, knowing that he is not entitled thereto under the provisions of the Act, to apply to any railway company, officer, agent, lessee or receiver thereof for any free pass, frank, privilege or a substitute for pay given or to be used instead of the regular fare or rate for transportation. By Section 6, any person, other than those excepted by the provisions of the Act, is made punishable "who uses any such free ticket, free pass or free transportation, frank or privilege over any railway or other transportation line." This latter section is the only provision in the Act which, by any construction, can be said to have the effect of making it an offense for one to merely seek to ride on a railway train without the payment of fare, but it is manifest that it does not do so in terms. The specific act which it denounces as a crime is the use of a free ticket, a free pass or free transportation for the purpose of carriage on a railway train by one in possession of such evidence of the right to such carriage. It does not, in terms, purport to deal with an attempt to ride without paying fare by one who makes no effort to use some token or evidence of the right to be transported. If such an act is within its intentment, it is only by inference. It is not made

penal by the plain import of the words of the law. Article 9 of the Penal Code 1911 (Vernon's Ann. Pen. Code 1916, art. 9) provides:

"No person shall be punished for an offense which is not made penal by the plain import of the words of a law."

The rule governing the scope to be given a penal act is thus stated by Mr. Sutherland in his work on Statutory Construction, section 521:

"To constitute the offense the act must be both within the letter and spirit of the statute defining it. Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms. 'Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law.'"

Further, in Section 520, the same author says:

"Nothing is to be regarded as included within them (penal statutes) that is not within their letter as well as their spirit; nothing that is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the Legislature."

If it was the purpose of the Legislature to make it a crime for a person to merely seek to ride upon a railroad train within this State without the payment of fare, no difficulty would have been experienced in so writing the law in plain terms. It is at least doubtful that this was the intention of the Legislature in the enactment of this statute, since in this section it is only persons who attempt to use free passes or free tickets, or other evidence of right to transportation that are dealt with. Whatever may have been the legislative purpose in this particular, it is manifest that the terms of the law do not make it an offense to merely board a train, without attempting to use some character of free transportation, and seek to ride without paying fare. We cannot do otherwise than take the statute as we find it and be governed by its terms as written. We are not at liberty to extend its scope by implication.

The charge of the court was in our opinion clearly prejudicial to the plaintiff. Its plain effect was to justify the conduct of the conductor if it was found by the jury as a fact that he told the plaintiff's wife she was guilty of a penitentiary offense in boarding the train without a ticket for the child, as she testified he did at the time he demanded a ticket for her. She had committed no crime in so doing, under the written law of the State; and, if he made the statement, she was subject to no such accusation.

The judgments of the Court of Civil Appeals and the District Court are reversed and the cause is remanded to the District Court.

SEGAL v. McCALL CO. (No. 2452.)

(Supreme Court of Texas. March 29, 1916.)

1. COMMERCE §40(1) — CONTRACT IN RESTRAINT OF TRADE.

A contract for the purchase of patterns between a New York fashion company and a Texas buyer, which obligated the buyer to sell only the seller's patterns and at no prices other than the catalogue retail prices of the seller, there being no reservation of title to the patterns in the fashion company, was violative of the Texas Anti-Trust Act (Acts 28th Leg. c. 94) as an agreement in restraint of trade, the illegal stipulations of the contract affecting the goods only in Texas and after they ceased to become merchandise in interstate commerce, so that the exclusive jurisdiction of Congress as to such commerce did not deprive the state act of application.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. §40(1).]

2. MONOPOLIES §23—BREACH OF CONTRACT IN RESTRAINT OF TRADE—RIGHT OF ACTION.

A New York fashion company which contracted to sell its patterns to a Texas buyer, the contract, fixing prices, etc., being in part violative of the Texas Anti-Trust Act, could not recover for breach of such contract, the partially illegal character of the contract rendering it entirely unenforceable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. §23.]

Certified Questions from Court of Civil Appeals of Sixth Supreme Judicial District.

Suit by the McCall Company against J. J. Segal. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which certifies questions. Questions answered.

See, also, 126 S. W. 918.

R. R. Taylor, of Jefferson, for appellant.
Armistead & Benefield, of Jefferson, for appellee.

YANTIS, J. The case is presented on certified questions from the Court of Civil Appeals for the Sixth District. The statement of the honorable Court of Civil Appeals, and the questions certified, are as follows:

"The McCall Company, plaintiff in the court below, is now, and was at the date of the institution of this suit, a private corporation with its residence and place of business in the state of New York. The record shows that in May, 1905, it entered into the following written contract with J. J. Segal, defendant below, who was at the time a resident of the state of Texas:

"City or Town, Jefferson. State, Texas.

"Date, May 15, 1905.

"The McCall Company, 113-115-117 West 31st Street, New York:

"Please deliver to Morgan Line at New York City, addressed to me, a stock of McCall patterns, at the uniform price of 7½ cents for each pattern (excepting those retailed for 10 cents, the price of which is 5 cents each), amounting to \$200.97 net, including the July issue \$42.42 payable thirty days after shipment; \$33.55 to take up exchange credit of like amount; and the balance \$125.00 is to remain as a standing credit, which, together with the \$75.00 now on hand, makes a total of \$200.00, which is to remain as a standing credit during the term of this contract-order, upon which interest is to be paid by me at the rate of four

per cent. per annum, semiannually, January and July 1. When this contract is closed as herein provided, patterns unopened and not defaced and in good salable condition, purchased of you under this contract-order, may be returned, at prices stated above in payment for said standing credit. Also ship me each month by Morgan Line not exceeding an average of \$20.00 per month of your own selection of the new monthly patterns, at same prices as above, commencing with August issue; also fashion sheets and other publications in quantities, and at prices specified below, during the term of this contract, commencing with July issue. (Then follows a list of items and details not material.)

"We will reorder at the prices named, once each week or oftener, all patterns sold, thus keeping patterns on hand as above specified. The patterns are not to be sold for other than catalogue retail prices, and the stock of patterns is to be kept and offered for sale on the first (main) floor. We will send you an inventory of our stock of patterns on hand at your request, not exceeding twice each year. All goods ordered for delivery are to be paid for on or before the 5th day of the month succeeding date of shipment; if not then paid, subject to sight draft. All prices quoted are net. We will not sell any other patterns than the McCall patterns received from you during the term of this contract-order. We will not transfer the stock of McCall patterns from Jefferson, Texas, without your written consent, and we will pay all transportation charge to and from your New York office.

"Discarded Patterns.—All patterns purchased from you under this contract-order that are reported discarded by you semiannually—January and July—can be returned by us at 100% contract price, in exchange for other patterns at full contract price, at any time within sixty days from the date such discarded patterns are respectively reported by you, provided this contract shall be in force at the time of such return. All patterns returned by us under any such discard report are to be credited to a special account, to be known as our discard exchange account, the credit to same to continue for a period of six months from the date of such discard report, unless this contract shall be sooner terminated; and all patterns ordered by us within such period of six months and while this contract is in force, excepting our monthly standing order, shall be charged to such discard exchange account unless our credit to the same is earlier exhausted.

"If either of us shall intentionally break this contract or shall refuse or fail promptly to perform the same after two weeks' notice in writing given by the other, then the other shall have the right to exercise the option of being released from all future obligations under it, and to recover and receive as liquidated damages, and not as a penalty, a sum equal to the agreed charge for fashion sheets during the entire term of this contract. Failure to require compliance with the strict letter of this contract-order shall not forfeit nor prejudice any right thereunder, nor constitute a waiver thereof. This contract is to remain in force from date, and for five years after first shipment of patterns, and thereafter until the expiration of three months' notice given by either party in writing, subsequent to the expiration of such five years. All terms are in printed or written form. Signed in duplicate after being read. Date, May 15, 1905. Purchaser's name, —,

"Guarantee Against Loss in Patterns.—It is agreed that at the end of five years and three months from date of first shipment of patterns, provided this contract shall have continued in force so long, the above purchaser may take an invoice of the stock of patterns on hand, pur-

chased under this contract, and if the result of the business shows that the above purchaser has paid us more cash for patterns purchased under this contract than has been received for them, we will, upon demand made by such purchaser and receipt of the patterns at our New York office within thirty days after the expiration of such five years and three months, pay such loss in cash, provided all terms of this contract have been complied with. The above contract-order is accepted subject to the approval of the home office. The McCall Company (Incorporated State of New York), by James E. H. Cawall, Auditor. Date, May 13, 1905.

"Approved and accepted, New York, N. Y., May 19, 1906. The McCall Company, by James E. H. Cawall, Auditor. (2022.)

"Date, May 15, 1905.

"It is further understood and agreed as a part of and supplement to the provisions of the annexed contract that if, at any time in the months of January and July, in any year during the term of the said annexed contract, after the discarded patterns reported by you are taken from our stock in accordance with the conditions of the annexed contract, the stock of patterns purchased of you then remaining in our hands exceeds \$400.00, at cost price, then we shall have the privilege (provided all the terms of the annexed contract have been fully complied with by us), after such discards are taken out, of returning to the McCall Company any patterns we may select from such remaining stock, to an amount sufficient to reduce our stock to such sum of \$400.00; and same is to be credited to our current account at full cost price, in payment for our monthly standing order for patterns under said contract or for any other patterns that we may order until such credit is exhausted; it being the purpose of this clause to provide that we may, if we so elect, reduce our stock on hand, twice each year, to the sum of \$400.00, exclusive of all discards. In consideration of the foregoing concession, the McCall Company shall have the right, with our assistance, to take an inventory of our stock at any time on demand, and we agree that when our stock on hand at cost price shall have reached the said amount of \$400.00, we shall not allow the amount thereof to be reduced below said sum of \$400.00 during the remaining term of the annexed contract; and if at the termination of said contract, it shall be found that the value of our stock amounts at cost to less than said sum of \$400.00, we will either order and pay for a sufficient quantity of new patterns to bring the total to said sum of \$400.00, or pay the difference to the McCall Company in cash.

"Accepted. The McCall Company (Incorporated State of New York), by James E. H. Cawall, Auditor.

"Signature, J. J. Segal [W]."

"In 1910, the McCall Company instituted this suit against Segal, in which it seeks to recover the sum of \$742.10 claimed as the sum due upon an itemized and verified account for goods sold and delivered under the terms of the above contract. It also seeks to recover in the same action the sum of \$411.88 as liquidated damages for the breach of the contract. Among the defenses interposed by Segal it was urged that the contract was illegal and void because in violation of the provisions of both the federal and state anti-trust laws. The portions of the contract specifically designated as being in violation of those laws are the following: "The patterns are not to be sold for other than catalogue retail prices, and the stock of patterns is to be kept and offered for sale on the first (main) floor. * * * All goods ordered for delivery are to be paid for on or before the 5th day of the month succeeding date of shipment, if not then paid subject to sight draft. All prices quoted are net. We will not sell any

other patterns than the McCall patterns received from you during the term of this contract-order."

"We are inclined to hold that this latter provision of the contract is in violation of the Texas anti-trust statute, under the rule announced in the case of Fuqua et al. v. Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29 [750, 35 L. R. A. 241]. But in view of a contrary holding in the recent case of McCall Co. v. J. D. Stiff Dry Goods Co. [Civ. App.] 142 S. W. 659, in which the honorable Court of Civil Appeals for the Fifth Supreme Judicial District was called upon to construe a contract practically the same as this, we have concluded to certify to your honorable court the following questions:

"1. Did this contract contain stipulations violative of either the federal or the state anti-trust statutes?

"2. Did those provisions of the contract quoted in the above excerpt defeat the right of the McCall Company to recover in this suit?

"3. If you should determine that the contract was not void and unenforceable, then we desire an answer to the following question: Does the contract disclose the transaction of business in this state in such a manner as to require the McCall Company to procure a permit from the secretary of state under the provisions of article 745 of the Revised Civil Statutes as a condition upon which it can maintain this action in a court of this state?"

[1] We answer the first question in the affirmative. The contract is violative of the state anti-trust statutes. In this view, and according also to the plain meaning of the first question, we need not determine whether the contract is violative of the federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1913, §§ 8820-8830]). We think the provisions of said contract which obligated Segal to sell no kind of patterns except the McCall patterns, and to sell at no price other than the catalogue retail prices, are in restraint of trade within the meaning of the Texas Anti-Trust Act (Acts 28th Leg. c. 94). It will be noted that the contract is not in any sense an agency contract. Neither is the title to the patterns reserved or attempted to be reserved in the McCall Company. The contract is for a naked sale of the goods, with no reservation of title, or restrictions upon the sale thereof, except the provision which fixes for the vendee his selling price to the consumer, and the provision which prohibits the vendee from selling other patterns than the McCall patterns. Such a contract is a plain violation of the Texas Anti-Trust Act. If the contract had exclusive relation to interstate commerce it would not violate the Texas anti-trust statute, for the reason that under the federal Constitution, Congress alone has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The state Anti-Trust Act was not intended to encroach upon a field of legislation over which it had no jurisdiction. A state has no power to regulate interstate commerce, and is prohibited from so doing by the federal Constitution. Only Congress may occupy this field. *Albertype Co. v. Gust Feist*, 102 Tex. 219, 114

S. W. 791. But the provisions of the contract which are obnoxious to the Texas Anti-Trust Act constitute no part of interstate commerce. They apply to acts to be performed by the vendee after the interstate commerce involved in the transaction has been completed. For a citizen of New York to sell and transport to a citizen of Texas goods and merchandise is to engage in interstate commerce; but when the sale and transportation has been completed, and the property has been delivered in Texas to a citizen of Texas, the interstate transaction has ended. The use to which the property may then be put in Texas, and the acts of the vendee in relation to it while in Texas, come under the jurisdiction of the Texas laws. When the contract relates wholly to interstate commerce, only the federal Anti-Trust Act could apply; but when the contract contains more, as in this case it does, than a contract for interstate shipment, and embraces acts to be performed after the completed sale and shipment, which are not essential ingredients of an interstate shipment, it falls within the regulation of state law. The federal law alone controls contracts covering interstate commerce, it is true; but when the contract embraces ingredients necessary to cover interstate commerce, and ingredients not pertaining to interstate commerce, but pertaining to the use of the property after the interstate shipment has been completed, the interstate feature of the contract will not nullify the power of state laws to govern on the features of the contract which are not interstate. Texas laws govern as to such features. This contract is twofold, in that it embraces a full contract for interstate commerce between a citizen of New York and a citizen of Texas, and other provisions for acts to be performed in Texas after the interstate feature of the contract has been entirely fulfilled. The contract fixes the price at which the vendee shall sell at retail in Texas, and provides that he shall refrain from selling at retail in Texas any other pattern than the McCall pattern. This brings it under the jurisdiction of the Texas laws. This was the holding of this court in *Fuqua, Hinkle & Davis v. Pabst Brewing Company*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241, which we think announces the correct rule. This holding is not in conflict with the case of *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791, though it might appear so from a casual reading of the opinion in that case. The opinion in that case was by Mr. Justice Brown, and its holding was that the restraint of trade which appeared from the facts to exist in that case was not prohibited by the Texas Anti-Trust Act, it having relation alone to interstate commerce. As governed by the facts of that particular case, the holding was correct. The provision of the contract in that case,

which was charged to be in violation of the state Anti-Trust Act, was, that the Albertype Company, of the state of New York, would not sell the souvenir albums to any citizen of the city of Galveston other than the Gust Feist Company, whose place of business was in Galveston. For the Albertype Company, of the state of New York, to sell and deliver the albums to a citizen of Galveston, Tex., was interstate commerce. For it to refrain from so doing was to refrain only from engaging, to that extent, in interstate commerce. This would be in violation of only the federal Anti-Trust Act. If the contract had required the vendee, after receiving it in Texas, to sell it at a certain price, or to refrain from selling any other kind of album, then such provision of the contract would have been in violation of the Texas Anti-Trust Act, because having relation to certain restricted uses of the property after the interstate shipment had been completed. So that case, when understood in the light of its own facts, is in harmony with the holding of this court in *Fuqua, Hinkle & Davis v. Pabst Brewing Co.*, supra, and other kindred cases, and the holding in this case is in agreement therewith.

[2] These obnoxious provisions of the contract defeat the right of the McCall Company to recover in its suit. Being in part in violation of law, the taint renders the entire contract illegal and unenforceable. The law will not give effect to a contract of this nature, or give aid to its enforcement, it being in violation of public policy so to do. We therefore answer the second question in the affirmative.

The third question becomes immaterial, and is not answered.

CARRELL v. STATE. (No. 3974.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

1. FORGERY — 29(4) — INDICTMENT — SUFFICIENCY.

An indictment charging that the defendant knowingly passed a check against "available school funds" with a forged indorsement of the name of the payee, which did not either by explanatory averments or otherwise show that the check was legally drawn, was insufficient.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 80; Dec. Dig. —29(4).]

2. CRIMINAL LAW — 784(1) — TRIAL — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

Where the defendant's connection with a forged check was to be deduced from circumstances, so far as any alteration or knowledge of the fact that it was altered was concerned, the court improperly refused to give an instruction on circumstantial evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883, 1960; Dec. Dig. —784(1).]

3. CRIMINAL LAW — 372(12) — EVIDENCE — ADMISSIBILITY — EXTRANEOUS DOCUMENTS.

In a prosecution for passing a forged instrument extraneous checks or vouchers should

not be admitted, in the absence of proof that they were forgeries, and that the defendant was connected therewith.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372(12).*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

W. J. Carrell was convicted of passing a forged instrument, and he appeals. Reversed.

D. W. Odell, of Ft. Worth, and Johnson & Harrell, of Cleburne, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. The indictment contains two counts, one charging forgery of the following instrument, and the other passing the same instrument, to wit:

"Cleburne, Texas, April 24, 1912. No. —.

"The National Bank of Cleburne: Pay to C. C. Thomas or order \$637.00, six hundred and thirty-seven and no/100 dollars. (Available school funds.)

Fred T. Vickers.

"Loula Rogers."

It also alleges the forgery consisted in the fact that the name of C. C. Thomas was written across the back of said check, and this was a fraudulent alteration, charging that appellant made the alteration. This count, however, was not submitted to the jury, but the following count was: Omitting formal parts, the second count charges that:

"On or about the 25th day of April, A. D. 1912, W. J. Carrell did then and there willfully, knowingly, and fraudulently pass as true, to one J. T. Jordan, a false and forged instrument in writing which had theretofore been made without lawful authority, and with intent to defraud; and was then of the tenor following [which instrument is set out above], indorsed on the back thereof 'C. C. Thomas,' which indorsement, to wit, 'C. C. Thomas,' on the back of said instrument, the said W. J. Carrell then and there well knew to be forged, and did then and there so pass the same as true, with the intent to injure and defraud, against the peace and dignity of the state."

This is signed by the foreman of the grand jury.

[1] It will be noticed from reading the above count that it does not anywhere by innuendo, explanatory averments, or otherwise allege that Fred T. Vickers and Loula Rogers, either or both, had any authority to draw a check against the available school funds of Johnson county. On the face of the instrument it purports to be drawn by two individuals, Fred T. Vickers and Loula Rogers, against the available school fund, to be paid by the bank specified, and drawn in favor of an individual, C. C. Thomas. If we should go to the first count to assist the second count, which we do not believe here can be done, then the explanatory averments are still insufficient, because Loula Rogers, who is alleged to have signed the document, was not, and could not be, deputy county treasurer, and as such would have no authority to issue a check. If Fred T. Vickers, treasurer, had authority to issue the check,

he might doubtless authorize her to sign his name to the check, but it is alleged to be signed by her in an official capacity as deputy county treasurer. However, confining ourselves, as we think we should, to the second count charging the passing, there are no averments of any sort that would tend to show authority on the part of Vickers and Miss Rogers to draw the check against the available school fund. Before this money can be paid out the proper steps must be taken and approved by the county superintendent. It may be the correct rule to state that it is unnecessary that the voucher or check or means of drawing money from the county available school fund should have gone through all of the steps legally prescribed in order to make it the subject of forgery. If one legal step is taken that would be calculated to deceive, and that could be used even as evidence to sustain further steps that might be necessary, under the authorities this might be sufficient. But it is useless to discuss those matters. This count does not undertake anywhere to allege anything in the way of innuendo or explanatory averments which shows the check to be legal. It is not the purpose of the writer to go into a discussion of just what innuendo or explanatory averments may be called for to make a valid indictment, or even that it can be made valid by explanatory averments. The purpose of the opinion, so far as the writer is concerned, is that whatever steps may be required by statute must be followed.

[2] There are several questions suggested for revision. Many exceptions were taken to the charge, and errors presented. One of these will be noticed. The case is one of circumstantial evidence. Appellant's connection with it is to be deduced entirely from circumstances, so far as any alteration of the instrument is concerned, or knowledge of the fact that it was altered. This called for a charge on circumstantial evidence, which was not given by the court. Exceptions were timely and properly reserved to this omission. This is noticed in passing, because upon trial under another indictment, should it be obtained, under the facts of this case it would be necessary for the court to charge on circumstantial evidence.

[3] Several bills of exception were reserved to the introduction of a great number of checks to show system, intent, etc., as stated by the court qualifying the bills. As presented, these exceptions are well taken. Before these extraneous checks or vouchers can be admitted it must be made to appear they were forgeries as well as connect appellant therewith. *Fry v. State*, 182 S. W. 331, recently decided by this court. It is not necessary to discuss these bills further.

The other matters may not arise, and are therefore not discussed.

The judgment is reversed, and the prosecution ordered dismissed.

CHANDLER v. STATE. (No. 3995.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

CRIMINAL LAW — 1184—APPEAL—REFORMING SENTENCE.

The sentence, not conforming to the indeterminate sentence law, but being for a definite term, will be reformed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3199, 3200; Dec. Dig. — 1184.]

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Lonie Chandler was convicted, and appeals. Reformed and affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at 4 years in the penitentiary.

He contends that the evidence is insufficient to sustain the conviction. We have carefully read and studied all the testimony. In our opinion, it was sufficient. We see no good purpose which could be served by reciting the testimony.

The court, as the law requires, submitted his charge to appellant's attorney before it was read, and gave him the opportunity to object thereto. At the time he made certain objections thereto and requested some special charges. The court gave the only two of his special charges which should have been given, and correctly refused the others. Evidently the court must have made some changes in his charge after seeing and considering appellant's objections, and with the specially requested charges given must have met appellant's objections, for he did not present any bill to the court's charge, nor afterwards insist upon his objections.

The evidence, in addition to raising the question of assault with intent to murder, also raised that of aggravated assault and of self-defense. Upon the whole, the court submitted all of these questions in apt and proper charges. The trial judge correctly held that the evidence did not raise any issue of appellant acting in defense of either or both of his brothers, and properly refused to give appellant's charge on that subject.

Under the evidence, the court correctly refused to give either of his requested peremptory charges, instructing the jury to acquit him of an assault with intent to murder. Upon the whole, the case was correctly tried. The evidence was amply sufficient to sustain the verdict, and the charge of the court, together with those of the appellant given, correctly submitted every issue raised by the evidence properly to the jury.

The sentence does not conform to our indeterminate sentence law. It requires con-

finement of the appellant for four years straight. The judgment will here be reformed, so as to conform to the law.

The judgment will be reformed and affirmed.

AUSTIN v. STATE. (No. 3984.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

CRIMINAL LAW — 1124(3)—APPEAL—RECORD—QUESTIONS PRESENTED.

Where no statement of the evidence heard on the trial accompanies the record, and the record contains no bill of exceptions to the admissibility of any testimony, there is no question presented in a motion for new trial which the Court of Criminal Appeals can review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2948; Dec. Dig. — 1124(3).]

Appeal from District Court, Houston County; John S. Prince, Judge.

Hart Austin was convicted of robbery, and appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of robbery, and his punishment assessed at 10 years' confinement in the state penitentiary.

No statement of the evidence heard on the trial accompanies the record, and the record contains no bill of exceptions to the admissibility of any testimony. Under such circumstances there is no question presented in the motion for a new trial we can review.

The judgment is affirmed.

LLOYD v. STATE. (No. 3986.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

WEAPONS — 17(6) — UNLAWFUL DISPLAY — PROSECUTION—INSTRUCTIONS.

In a prosecution for unlawfully and rudely displaying a pistol in a public place in a manner calculated to disturb the inhabitants, it appeared that accused went to the rear of a store and fired his pistol out of the door several times. Accused contended that he brought the pistol to the store to trade for a shotgun and fired it to exhibit its quality to the storekeeper, and there was evidence that persons frequently discharged firearms from such rear door. Held that, in view of accused's contention, a charge that to hold a pistol in the hand and fire it in a public place is to rudely display it was improper, as taking from the jury the question whether it was customary to discharge firearms from the rear door which led only into uninhabited woods.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 32; Dec. Dig. — 17(6).]

Appeal from Wise County Court; J. W. Walker, Judge.

Coke Lloyd was convicted of unlawfully and rudely displaying a pistol in a public place in a manner calculated to disturb the inhabitants, and he appeals. Reversed and remanded.

R. E. Carswell and L. D. Ratliff, both of Decatur, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted under an indictment charging him with unlawfully and rudely displaying a pistol in a public place in a manner calculated to disturb the inhabitants of said public place.

Mr. Mann testified: That about 9 o'clock at night he was in the store of Foster & Best, in the town of Greenwood, and that appellant came in with a pistol, or part of a pistol, in his hands, and he, appellant, and Foster walked to the rear door. He heard them talking, but did not understand what was said. That while they were at this door, appellant fired the pistol out of the door several times, and said:

"Foster, come and fix this thing. Where is your damned constable? If any one turns me in, I will put one in him."

That witness, Clint Kingsly, appellant, and Mr. Foster were the only persons in the store. This is the state's case, and would perhaps sustain a verdict that appellant was guilty of the offense charged.

Mr. Foster, one of the proprietors of the store, testified that appellant had been trying to trade him the pistol for a shotgun, and that night appellant went to the store of J. P. Rudd to get the pistol and bring it over to trade to him; that the pistol was made to shoot steel cartridges, and he wanted to see if it would shoot lead cartridges; that when appellant returned with the pistol they went behind the counter and got several kinds of cartridges and went to the back door of the store to try the pistol; that he and appellant both fired the pistol out of the back door; that his store was 120 feet long, and at the rear door there was nothing but woods, and the pistol was fired into the woods; that the firm of Foster & Best sold cartridges, pistols, and other firearms, and people frequently tried them by shooting out of the back door into the woods; that the town was not an incorporated town.

J. P. Rudd testified that the pistol of appellant had been in his store some three months or more; that he had it to trade for a shotgun; that on the night appellant shot it out of the back door, appellant came and got the pistol, stating he had a chance to trade it off.

Clint Kingsly, the only other person in the store, says he heard appellant and Foster talking of trading the pistol for a gun; that he saw appellant and Foster go to the back and shoot the pistol out of the back door.

This is all the testimony. At the request of the state the court instructed the jury:

"To hold a pistol in the hand and fire the same in a public place, as herein defined, is to rudely display the same, as contemplated by law."

Appellant excepted to the giving of this special charge, insisting it was upon the weight to be given the testimony, and we think such exception well taken. The state relies on the case of Gozy v. State, 34 Tex. Cr. R. 147, 29 S. W. 783, as sustaining the charge. Under the peculiar facts of that case, the court does say that the shooting of the pistol in the air would justify a finding that it was rudely displayed. In that case Gozy had gone near a church, while services were in progress, and fired his pistol. It was a willful and wanton act, without excuse or justification, under the evidence in that case. It might be the state's witness makes this just such another case, but the defendant's witnesses certainly do not, and it is a question of fact, to be determined by the jury, whether or not his conduct amounted to rudely displaying the pistol in a manner calculated to disturb the inhabitants of the public place. The court in this charge takes this issue from the jury, and instructs them, as a matter of law, that his conduct amounted to rudely displaying a pistol. Had he submitted the issue to the jury and they had so found, we might sustain the verdict as we did in the Gozy Case, supra, but it is a matter to be determined by the jury, under the evidence, in every case whether or not one is guilty of rudely displaying a pistol in a manner calculated to disturb the peace, and is not a question of law to be determined by the trial court. On account of this error, it will be necessary to reverse the cause, and on another trial the court in his charge, if he gives a charge, should submit the defense's theory; that is, if the jury should find, under the evidence, it was customary to shoot firearms out of the back door of this store, in trying them out, as testified to by Mr. Foster, and appellant and Foster were on a trade involving the pistol, and they fired it for the purpose alone of determining whether or not it would shoot leaden cartridges, and appellant at the time he fired the pistol had no intention of disturbing the inhabitants of the public place, and they were not in fact disturbed, the appellant would not be guilty of the offense charged.

The judgment is reversed, and the cause remanded.

STONE v. STATE. (No. 3981.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

CRIMINAL LAW §857(3) — FAILURE OF DEFENDANT TO TESTIFY—EFFECT.

Code Cr. Proc. 1911, art. 790, allows an accused person to testify, but provides that his failure shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on. In a prosecution for arson, where the state principally relied on tracks leading from the burned building to accused's home, accused did not take the stand, but relied on evidence of alibi. Before verdict was rendered

ed, one of the jurymen remarked that he wondered why defendant did not go on the stand and testify, and that had he done so, he might have viewed the matter differently. Other of the jurors stated that, while they did not comment on defendant's failure until they had reached a verdict, they commented on it thereafter, and that they considered it. *Held*, that the conviction must be reversed it appearing the jury considered, whether they commented on the matter or not, accused's failure to take the stand; this being true though an incidental reference to accused's failure to take the stand will not work a reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §857(3).]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Jesse Stone was convicted of arson, and he appeals. Reversed and remanded.

A. E. Hampton, of De Leon, and Smith & Palmer, of Comanche, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of arson, and his punishment assessed at five years' confinement in the state penitentiary.

Appellant earnestly insists that the circumstances are insufficient to sustain the verdict. We have read and re-read the testimony; and, while the only circumstances depended upon to show appellant guilty are: (1) That appellant had ill will towards the person who had the house rented; and (2) tracks leading from the building to appellant's house, and his conduct when he saw the officers following the tracks—yet, taking the tracks as shown by the plot and the way they were made, their direction and course, we would hardly feel authorized to disturb the verdict on this ground alone.

Appellant contends that the jury discussed his failure to testify while considering the case, and asks for a reversal on this ground. Ten of the jurymen testify, and some of them say that all that occurred was that, while the jury was discussing the case, some one of them remarked "that he wondered why the defendant did not go on the stand and testify; that he would love to have heard him testify, and had he done so, they might have viewed the matter differently." That the foreman then promptly informed the jury they were instructed not to consider nor discuss the failure of defendant to testify, which stopped the talk. They virtually all agree that this much did take place, some saying it occurred at night, and others say it occurred just before they agreed on the verdict next day. And all seem to agree that as soon as the verdict was agreed on and written up, a general discussion took place about defendant not testifying. This took place after the verdict was signed, but before they left the jury room. It is thus made apparent that the failure of defendant to testify was in the mind of the jury, whether discussed or not. All 10 of the jury agree this much was said before the verdict was agreed on: "If he had gone on the stand,

it might be different, or something like that." The verdict in this case depends on the tracks for conviction. The evidence of the state's witnesses show the defendant was at this house about noon of the day it was burned at 8 o'clock that night, and went from this house to his home, but this witness says the defendant did not get into the Hanson field, where the tracks were found upon which the state depends for conviction. When the officer was following this track, the defendant told him he had made those tracks, but that he was not guilty of burning the house. The evidence shows he was frequently in this section hunting, and in going to work. This is doubtless what they wanted him to explain—when he made those tracks. Instead of taking the stand and endeavoring to explain those tracks, he relied on an alibi, sworn to by his wife and wife's sister, and other witnesses. Mr. Randall testifies that at the time the jurors who were for a conviction were around him and Mr. Chilcoat trying to get them to agree on a verdict of guilty, some one said he would have loved to have heard the defendant testify, and he (Randall) replied:

"I would like to have heard the defendant—it might have changed my opinion of the case. Yes; I had it in my mind about the defendant not going on the stand to testify, and wanted to hear him testify. I do not know what effect it had on my mind as to what the juror, whoever, he was, said about the defendant not going on the stand and testifying. Of course if he had gone on the stand and testified my vote might have been different, and I expressed myself that way in the jury room, and others expressed themselves something similar to that."

However, he says this did not influence him in rendering the verdict. On cross-examination he said:

"I do not know who made the first remark; there were two or three said something about him not testifying."

Mr. Chilcoat says he heard some remarks made, but he himself said nothing about the matter, but—

"that his failure to go on the stand and explain about these tracks was in my mind while we were deliberating on the case."

Code Cr. Proc. art. 790, allowing a defendant to testify, if he elects to do so, but providing that a failure to testify shall not be taken as a circumstance against him, nor shall the same be alluded to nor commented on since its enactment, has been frequently before this court, and it is the rule that a mere incidental reference to it in the jury room will not be cause for reversal, where it is apparent that the failure of the defendant to testify was not considered by the jury. *Probest v. State*, 60 Tex. Cr. R. 608, 133 S. W. 263; *Powers v. State*, 154 S. W. 1020; *Espinosa v. State*, 13 Tex. Cr. R. 237, 165 S. W. 208; *Coffman v. State*, 73 Tex. Cr. R. 295, 165 S. W. 939; *Howard v. State*, 174 S. W. 607; *Walling v. State*, 59 Tex. Cr. R. 279, 128 S. W. 624.

In the cases of *Jones v. State*, 72 Tex. Cr. R. 497, 162 S. W. 1142, *Clark v. State*, 177

S. W. 84, *Portwood v. State*, 71 Tex. Cr. R. 417, 160 S. W. 345, *Huddleston v. State*, 70 Tex. Cr. R. 260, 156 S. W. 1168, *Richards v. State*, 59 Tex. Cr. R. 203, 127 S. W. 823, *Thorpe v. State*, 40 Tex. Cr. R. 349, 50 S. W. 383, and *Wilson v. State*, 30 Tex. Cr. R. 365, 46 S. W. 251, it is held that where the allusion to the failure of the defendant to testify was more than an incidental reference, and perhaps had some influence in the rendering of the verdict, it was held to present error.

In this case at least one of the jurors swears the reference was made when the other jurors were around those voting not guilty, and trying to get them to agree to a verdict of guilty. Some say the reference was made at night, some 15 or 18 hours before the verdict was finally reached; others say the reference was made in the afternoon of the second day just before the verdict was reached, and in addition to this, it is shown that as soon as the verdict was agreed on and written, and while still in the jury room, the jury as a whole entered into a discussion of the failure of the defendant to testify, and said if he had taken the stand and explained about the tracks the witnesses testify he admitted he had made, the verdict might have been different, and we cannot say that his failure to testify was not, in the language of the statute, taken by the jury as a circumstance against him when alluded to in the jury room before the verdict was agreed on. To our mind it appears that this circumstance was, as testified to by Mr. Chilcoat, "His failure to go on the stand and explain about those tracks was in my mind while deliberating on the case," was also in the minds of the others, and the reference, allusion, or discussion of the matter was of such a nature that it might, and probably did, result in a verdict of guilty, when otherwise such a result might not have been reached. Viewing the matter in this light, we are of the opinion the case should be reversed and remanded.

The judgment is reversed, and the cause remanded.

DUNCAN v. STATE. (No. 3972.)

(Court of Criminal Appeals of Texas. March 8, 1916.)

1. CRIMINAL LAW § 956(10)—JURY—IMPARTIALITY—EVIDENCE.

Evidence on hearing of a motion for new trial held insufficient to show that one accused of cattle theft was tried by an impartial jury, one of the jurors having expressed an opinion as to the guilt of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2386; Dec. Dig. § 956(10).]

2. CRIMINAL LAW § 1158(1)—APPEAL AND ERROR—REVIEW—POWERS OF COURT.

The court, on appeal from a conviction of cattle theft, is not authorized by law to pass on the question of sufficiency of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3070, 3071, 3074; Dec. Dig. § 1158(1).]

3. JURY § 29(2)—TRIAL BY JURY—WAIVER.

The provision that the defendant cannot waive a jury in a felony case means that he cannot waive trial by jury of men who have expressed no opinion as to his guilt.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 198; Dec. Dig. § 29(2).]

4. JURY § 97(1)—TRIAL BY JURY—"IMPARTIAL."

The provision of the Bill of Rights requiring that the accused shall have a fair trial by an impartial jury, means that the jury must be not partial, not favoring one party more than another, unprejudiced, disinterested, equitable, and just, and that the merits of the case shall not be prejudged.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431, 435, 436; Dec. Dig. § 97(1).]

For other definitions, see Words and Phrases, First and Second Series, Impartial.]

Appeal from District Court, Parker County; F. O. McKinsey, Judge.

John Duncan was convicted of cattle theft, and he appeals. Reversed and remanded.

Hood & Shadle, of Weatherford, and Peden & Lipscomb, of Ft. Worth, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of cattle theft, and his punishment assessed at two years' confinement in the state penitentiary.

[1] There are several bills of exception in the record, but after a careful review of them we are of the opinion none of them present error, unless it is the bill contending that William Golden was not a competent juror. It appears that on the voir dire examination of the jury this juror answered that he heard there was such a case, but he had formed no opinion as to the guilt or innocence of the defendant. Upon the hearing of the motion for a new trial, under allegations that this juror had formed and expressed an opinion prior to the time he was selected on the jury, evidence was heard and is embraced in the eighth bill of exceptions. The juror was called as a witness, and his testimony would tend to show that he had formed and expressed no opinion, and what he said to Will Hughes about sending appellant to the penitentiary was said in a joking way, and the way he explains it no serious consideration should be paid to it. However, the defendant introduced M. A. Kyle, who testified that shortly after Mr. Chew had lost his cattle, he and young Robert Chew were passing Golden's house and had a conversation with Golden, and in that conversation Chew told Golden they had found two of the cattle, and his father was going to West Texas after the other two, and appellant had been arrested, charged with the theft of the cattle. That the juror then said two of his cattle had been taken out of his pasture, and "it might have been Duncan (appellant) trying to get my cows," and remarked, "Duncan is the man who

stole your pa's cows, and we don't want that kind of a man around here." Mr. Hughes testifies that after this, and a week before the trial, he was working with Mr. Golden at a sorghum mill and the juror told him he was on the jury for the next week, and they got to talking about the Duncan Case, and "he said he would not have to sit on Mr. Duncan's trial because he had already formed an opinion." The juror was again called to the stand and admitted he had a conversation with Kyle and young Robert Chew, and said he did not recollect what was said, but he had no recollection of saying that "Duncan is the man that got your pa's cattle." Young Chew was not called as a witness by either the state or the defendant.

If Kyle and Hughes' testimony is worthy of credit, certainly the juror was not a competent juror. We have appellant's testimony denying a portion of their testimony, admitting other portions, and not remembering as to the remainder. The trial court overruled the motion on this ground, and we are loth to disturb his finding, as this is a matter largely addressed to his discretion. However, under the laws of this state, a man is entitled to a trial by a fair and impartial jury, and where the question of whether he has been accorded such a trial is raised, and there is a question of grave doubt raised, we are of the opinion the doubt should be resolved in his favor. If others had been present and testified that no such conversation took place that Kyle and Hughes swear did occur, we would not disturb the finding of the judge on the conflict of the testimony. But when we take the testimony of Mr. Golden on this hearing, he states he answered, when being examined as to his qualifications as a juror, that he had no opinion as to the guilt or innocence of the accused; yet on this hearing he testifies: "I had an opinion, of course, in one way, but I did not have a fixed opinion." He also admits that he made the statement testified to by Mr. Kyle about Duncan running his cattle out, trying to get them.

[2-4] Under such a state of facts we cannot say that appellant has been tried by a wholly fair and impartial jury. This is a case depending on circumstantial evidence, and while the evidence, in our opinion, is of that force and cogency to authorize a verdict of guilty, yet we are not the ones authorized by law to pass on that question. Our laws provide that even the defendant cannot waive a jury in a felony case, and, of course, this means a jury of men who have no fixed opinion as to the guilt of the person on trial. In *Sorrell v. State*, 74 Tex. Cr. R. 505, 169 S. W. 303, this court, speaking through Judge Williams, says: "One improper juror destroys the integrity of the verdict."

In White's Ann. Proc. § 4, it is said:

"Among English-speaking peoples, 'the right of trial by jury' has always been considered, and Sir William Blackstone justly denominates it, 'the palladium of civil right.' Our Constitution requires that it 'shall remain inviolate.' Bill of Rights, § 15. As an essential factor in the protection of the life and liberty of the citizen, it is considered so important that our laws declare that 'the defendant to a criminal prosecution for any offense may waive any right secured to him by law except the right of trial by jury in a felony case.' But he is not only entitled to a trial by jury, but our Constitution characterizes the kind of jury which is to try him, and says, 'the accused shall have a speedy public trial by an impartial jury.' Not only so, but it is also the will and policy of the law that the 'trial shall be alike fair and impartial to the accused and the state.' An impartial jury and a fair trial is what the state demands, and in her demands she is no respecter of persons. She has one law for all—the high and the low, the rich and the poor, the friendless, the most debased and hardened of criminals. *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771; *Massey v. State*, 31 Tex. Cr. R. 371, 20 S. W. 758. The language of the provision of the Bill of Rights is that the accused, 'shall have a fair trial by an impartial jury.' 'Impartial' means 'not partial: not favoring one party more than another, unprejudiced, disinterested, equitable, just.' To be impartial means the party, his cause or the issues involved in his cause, should not—must not—be prejudged. The accused is entitled to a fair trial by an impartial jury, and there is no other method provided by which he can be tried and punished."

The judgment is reversed, and the cause is remanded.

REDWINE v. STATE. (No. 3892.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

1. WITNESSES — 52(7) — COMPETENCY — HUSBAND AND WIFE.

In a prosecution for rape, census affidavits of prosecutrix's mother, the wife of defendant, showing the age of prosecutrix, introduced as original evidence, and taken out of the hearing and knowledge of defendant, are inadmissible, though they might have been used for corroboration or impeachment of the mother if she had testified.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 132-134; Dec. Dig. —52(7).]

2. WITNESSES — 52(7) — COMPETENCY — HUSBAND AND WIFE.

In a criminal prosecution, the state cannot use the testimony of defendant's wife, nor call her as a witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 132-134; Dec. Dig. —52(7).]

Appeal from District Court, San Saba County; N. T. Stubbs, Judge.

S. W. Redwine was convicted of rape, and appeals. Reversed and remanded.

Faver & Allison, of San Saba, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of rape on a girl under 15 years of age; his punishment being assessed at 28 years' confinement in the penitentiary.

[1, 2] Among other questions presented for

review, bills of exception recite that certain named witnesses were permitted to testify they took the school census for 1911, 1912, 1913, and 1914, at least for two or three years, and that name of the prosecutrix appears upon the census roll, as does the names of the brother and sister of the prosecutrix. These reports show that prosecutrix was born August 16, 1900, making her less than 15 years of age at the time of the alleged rape, the last act being shown as having occurred on the 20th of December, 1914. These census affidavits were made by the mother of the prosecutrix; appellant being the stepfather of the prosecutrix. This was used as original testimony, and therefore illegitimate. The mother did not testify, being the wife of the defendant. He did not see proper to call her as a witness. The state could not use her testimony, nor call her as a witness. Had she taken the witness stand and testified, under a proper predicate, these affidavits could have been used to impeach or corroborate, owing to how the question would arise. This matter has been the subject of decision in our courts on the question of impeachment and sustaining the impeached witness. *Walton v. State*, 178 S. W. 358; *Hopkins v. State*, 180 S. W. 1094. These census affidavits were used as original testimony, were made by the wife, and all but one were taken out of the hearing of the defendant, and of which he seems to have had no knowledge; at least he was not present when those matters occurred. There is doubt as to the remaining one as to whether he heard it or not. If he heard this, it might be introduible, but the issue is there as to whether he heard it or not, and the jury should be guarded against using the statements unless it be shown that appellant heard them.

There is also a question with reference to the introduction of the Bible and the supposed erasures, showing the birth of the girl. It is unnecessary to pass upon the matter as to whether the bill was proper and the Bible admissible. There were changes in the entry. These matters can be properly adjudged upon another trial.

The judgment is reversed, and the cause remanded.

ROSBORO v. STATE. (No. 3994.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

CRIMINAL LAW §1090(1)—APPEAL — BILLS OF EXCEPTIONS—STATEMENT OF FACTS.

Without a statement of facts or bills of exceptions, no question is presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2805-2807, 3204; Dec. Dig. §1090(1).]

Appeal from District Court, Camp County; R. M. Smith, Judge.

Mid Rosboro was convicted of incest, and he appeals. Affirmed.

O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for incest, but without a statement of facts or bills of exceptions. In the absence of these, no question is presented which we can review. The case must necessarily, therefore, be affirmed.

LARGE v. STATE. (No. 3975.)

(Court of Criminal Appeals of Texas. March 8, 1916.)

CRIMINAL LAW §1090(1) — QUESTIONS PRESENTED FOR REVIEW.

Where there was nothing in a motion for new trial that could be considered in the absence of the testimony, and neither a statement of facts nor a bill of exceptions was in the record, there was nothing to review on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2058, 2807, 3204; Dec. Dig. §1000(1).]

Appeal from Dallas County Court, at Law; T. A. Work, Judge.

Charley Large was convicted of aggravated assault, and he appeals. Affirmed.

O. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of aggravated assault; his punishment being assessed at a fine of \$25.

There is nothing in the motion for new trial that can be considered in the absence of the testimony, and nothing presented by bill of exceptions. In fact, there is neither a statement of the facts nor a bill of exceptions in the record.

There being nothing to review in this appeal, the judgment will be affirmed.

FYKE v. STATE. (No. 3980.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

1. INDICTMENT AND INFORMATION §111(1)—SUFFICIENCY OF INDICTMENT—NEGATIVE ALLEGATIONS.

Under Pen. Code 1911, art. 748, making it unlawful for any physician to prescribe, for the use of any habitual user of the same, any cocaine or morphine, provided physicians may prescribe in good faith for habitual users of narcotic drugs such substances as they may deem necessary for the treatment of the habit, an indictment need not allege that the drugs were not prescribed as a cure for the habit.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 296; Dec. Dig. §111(1).]

2. POISONS §4 — PRESCRIBING NARCOTICS — WHEN PROHIBITED.

Pen. Code 1911, art. 748, making it unlawful to prescribe a narcotic drug for an habitual user thereof, does not prohibit the prescribing of such drug when necessary to alleviate pain or cure the drug habit.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. §4.]

3. POISONS — PRESCRIBING NARCOTICS — EVIDENCE — ADMISSIBILITY.

In a prosecution under Pen. Code 1911, art. 748, prohibiting the prescribing of narcotic drugs to habitual users thereof, it is error to exclude defendant's evidence that he gradually reduced the size of the dose, and finally ceased it altogether; that being material to show that the drug was prescribed in an effort to cure the habit.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. —9.]

4. POISONS — INSTRUCTIONS — ISSUES — PURPOSE OF ADMINISTERING NARCOTIC.

Where there is evidence that a drug was prescribed to relieve pain, it is error, in a prosecution under Pen. Code 1911, art. 748, prohibiting prescribing narcotic drugs to habitual users thereof, to refuse to charge that if the drug was administered in an effort to relieve pain the defendant physician was not guilty.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. —9.]

5. POISONS — INSTRUCTIONS — PURPOSE OF EVIDENCE.

In a prosecution under Pen. Code 1911, art. 748, prohibiting the prescribing of narcotic drugs to habitual users thereof, where there was evidence that the defendant prescribed such drugs to alleviate pain and suffering, it was error to instruct that the drug user's evidence could be considered only on the question whether the physician was treating her for the drug habit; the alleviation of pain and suffering being included within the exception of the act.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. —9.]

6. POISONS — INSTRUCTIONS — INTENT — ADMINISTERING NARCOTIC.

Refusal of defendant's requested instruction on purpose of the prescription in prosecution for prescribing narcotic drug to habitual user thereof held erroneous under the evidence.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. —9.]

Davidson, J., dissenting in part.

Appeal from Tarrant County Court; Jesse M. Brown, Judge.

E. D. Fyke was convicted of prescribing morphine for a habitual user thereof, and he appeals. Reversed and remanded.

Baskin, Dodge, Baskin & Eastus, of Ft. Worth, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. The indictment charges appellant, under article 748 of the Penal Code, with being then and there a lawfully authorized practitioner of medicine, and, as such, did then and there unlawfully prescribe morphine for the use of Maud Smith, who was then and there an habitual user of morphine, contrary to the statutes, etc. That article provides that it shall be unlawful for any practitioner of medicine, dentistry, or veterinary medicine to furnish to, or prescribe for the use of, any habitual user of the same, any cocaine or morphine, or any salts or compound of cocaine or morphine, or any preparation containing cocaine or morphine or their salts, or any opium or chloral hydrate, or any preparation containing opium or chloral hydrate, etc., "provided, however,

that the provisions of this section shall not be construed to prevent any lawfully authorized practitioner of medicine from prescribing in good faith for the use of any habitual user of narcotic drugs such substances as he may deem necessary for the treatment of such habit."

[1, 2] Various objections are urged to the sufficiency of this indictment, all growing out of and incidental to the proviso above quoted. The indictment does not set out the proviso, or negative the fact that he was treating the woman for the morphine habit. The writer believes the indictment insufficient under the following authorities: Blair v. State, 50 Tex. Cr. R. 225, 96 S. W. 23; Blair v. State, 97 S. W. 89; Brown v. State, 74 Tex. Cr. R. 498, 168 S. W. 861; United States v. Carney (D. O.) 228 Fed. (Advance Sheet No. 2, February 10, 1916) 163. The majority of this court, however, do not agree with the writer, and thinks the indictment is sufficient, and that it is not necessary to negative this proviso in the indictment. The writer does not care to discuss the matter, inasmuch as it would be unnecessary, in view of the fact that the majority of this court does not agree with his views. It will be observed, from a casual reading of article 748 of the Penal Code, that its denunciations are leveled at practitioners, or prohibits practitioners from administering morphine to habitual users of that drug or any of the drugs mentioned. It is also discernible on the face of the statute that it was not intended to prevent practitioners from administering this drug in case of sickness, or to alleviate pain, or to cure the habit of using morphine. In other words, its provisions seem to be directed against the named physicians or practitioners with a view of prohibiting them from prescribing or administering these mentioned drugs to habitual users of the same in order to continue their use. The statute was intended to prohibit these practitioners from administering those drugs to those who are addicted to the habit of using them for the purpose of continuing that habit. It does not interdict the administration of these drugs where it is necessary to alleviate pain or to cure the habit. Therefore, if the practitioner administers it to alleviate such pain, or uses it in good faith where the party is sick, or as a means of finally curing the habit, it is not within the statutory denunciation.

Under the facts, briefly stated, Maud Smith had been a morphine fiend, addicted to the use of it, and had become emaciated and confined to her bed. Appellant, as physician, administered the morphine for two purposes: First, to relieve her of her present suffering; and, second, to cure her of the habit. The evidence of the woman, Maud Smith, makes it apparent that he succeeded in both. She

testified that appellant prescribed morphine, and that she at the time was bedridden; that when she first called appellant in he had to visit her at her house, and treat her for peritonitis and swollen condition of the groins and inflammation of the bowels, and continued sick for some considerable length of time. She was not able to carry her own prescriptions and have them filled. She was not able to get out of bed, and her sister frequently went and got the prescriptions filled for her and brought the medicine to her, and she took it according to appellant's direction. He informed her what he was treating her for, and gave her other medicine in addition to morphine. It was a very painful disease she had, and she said her side is not entirely well yet. He performed operations on her. He opened up one of those abscesses on the inside of her somewhere and let out the pus in these places; once on the inside and twice on the outside in the groin at these afflicted places, and it was during that time he gave her the morphine. She says:

"Certainly the morphine had the effect of easing the pain while this treatment was going on. That is what he gave it to me for—to ease the pain. I was in that condition for some time, and during all of that time Dr. Fyke gave me two different kinds of medicine, as well as performing these operations on me that I have mentioned. I finally got up under his treatment. I am not well yet, and I still suffer with those pains; but I am a whole lot better—able to be up all the time. This peritonitis condition on the inside where he opened it and let out this pus, that has been relieved largely, and those glands that were affected and the groin have been relieved a whole lot, and under his treatment I have practically recovered from these diseases that I have had. At the time that Dr. Fyke began to treat me, I did not weigh very much. I was sick in bed and did not weigh very much—not more than 75 or 80 pounds."

Her present weight is 125 to 126 pounds. She says:

"I am not using this drug now. I remember the doctor giving me some medicine that he called the Lambert Treatment. It was a kind of reddish-brown medicine. He gave me that medicine before I came before the grand jury. I was taking that when I was up before the grand jury, but I did not know what it was. I am not now using the drug, and Dr. Fyke cured me of the habit. I have sworn that I am not using morphine now, and I am not mistaken about that."

The testimony further shows that she has been cured by appellant's treatment of the morphine habit and is not now using this medicine or drug.

[3] Among other things, it was offered to be shown by the appellant that the size of the dose of morphine gradually grew less, until it altogether ceased, under his treatment. This was excluded, and proper exception reserved. This testimony should have gone before the jury. It bore directly upon the case, and was pertinent to show his good faith in using the morphine to cure the habit of using that drug.

[4, 5] If appellant administered the drug

to relieve Maud Smith of the pain from peritonitis and from the swollen glands in the groin, not for the purpose of continuing her habit, but for relieving, for the time being, her suffering, in the course of treatment of his patient, it was legitimate and proper. Appellant sought to have this charged to the jury. The court not only refused to do so, but charged the converse of the proposition. This was error. The court charged the jury in this connection, and limited their consideration of the matter to the fact that defendant in prescribing the morphine did so in good faith, deeming it necessary for the treatment of the morphine habit. That was one phase of the case. Appellant insisted, and correctly so, that, if he gave the medicine to relieve her of pain at the time he was called in, this should not have been made the basis of a conviction. The court further charged the jury:

"You cannot consider the evidence of the witness Maud Smith with reference to her physical condition, except for the purpose of showing that the defendant was treating the said Maud Smith for the habit of using morphine; and you are further instructed that you cannot consider the evidence of the said Maud Smith to the effect that since the indictment in this case was returned she had quit using morphine, except for the purpose of showing that, at the time the defendant gave her the prescription mentioned in the indictment, he did so in good faith, deeming the same necessary for the treatment of said habit of using morphine."

This was the court's charge. We think it was erroneous. It applies the law only to curing the woman of her habit of using morphine. Appellant asked the court to instruct the jury that if appellant prescribed morphine for Maud Smith, an habitual user of such drug, as charged in the indictment, but they further find and believe that the said Maud Smith was suffering at the time from a disease known as peritonitis and from another disease described as abscesses in the groin, and that defendant prescribed such drug in good faith, believing the same to be necessary in the treatment of such diseases, or if they had a reasonable doubt as to whether or not such was the case, it would be the duty of the jury to acquit. This charge should have been given.

[6] He also asked the court to charge the jury that if appellant prescribed morphine for the use of Maud Smith, but further find and believe that Maud Smith was suffering at the time from a disease known as peritonitis and from another disease described as abscesses in the groin, and that the defendant prescribed such drug in good faith, believing the same to be necessary in the treatment of such diseases, or if they had a reasonable doubt as to whether or not such was the case, appellant was entitled to the benefit of the doubt and should be acquitted, although they should find and believe that Maud Smith was an habitual user of said drug. These charges should have been given.

It is unnecessary, we think, to follow up this matter, for under the general view of

the statute it was only intended to prevent the prescribing of morphine to a party addicted to the habit. It was not intended to prevent a lawful practitioner of medicine from administering morphine, or such drugs, if necessary in the treatment of the disease from which a patient is suffering, or to relieve from pain at the time. If appellant, as a lawful practicing physician, administered to his patient, Maud Smith, morphine, who was suffering with peritonitis and those abscesses mentioned, and it was known to defendant, and he did it for that purpose, he would not be violating the statute. Nor would he be guilty of a violation of the statute if, in treating or curing her of the habit itself, he administered it in such way as it assisted in curing the habit. These matters should have been submitted to the jury under the testimony adduced from the state's witness Maud Smith. This treats the statute in a general way. There are a great number of exceptions presenting these matters in different ways, as well as exceptions to the ruling of the court, who took the opposite view from that which has been announced as the true purpose and intent of the statute. Upon another trial these matters should be charged to the jury, and they should be plainly told that if appellant administered this drug to relieve Maud Smith's pain, when first called in, and further that he continued to use it in curing the habit, they should not convict him. The evidence seems to be uncontroverted that in his treatment he finally cured her of the habit; that he found her in an emaciated and run-down condition, weighing 75 or 80 pounds, and had cured her of the habit, and her strength had increased until she was up and going about and able to go about and her weight had increased from 75 or 80 pounds up to 125 or 126 pounds. Without going into details, or mentioning all the exceptions and taking them up seriatim, this is the general view which we think to be correct, and these matters will be observed upon another trial.

The judgment is reversed, and the cause remanded.

GAY v. STATE. (No. 3964.)

(Court of Criminal Appeals of Texas, March 1, 1916. On Motion for Rehearing, March 29, 1916.)

1. INDICTMENT AND INFORMATION \S 110(30)—PHYSICIANS AND SURGEONS—PRACTICING WITHOUT A LICENSE—SUFFICIENCY OF INFORMATION.

A complaint and information, charging that defendant resided in the county and did unlawfully engage in the practice of medicine therein, and as a regular practitioner did prescribe for, visit professionally, and treat certain patients named for diseases without having first registered in the district clerk's office a certificate from some authorized board of medical examiners, or a diploma from some accredited medical college, and without having filed for record in such office a verification license from the state board

of medical examiners, followed the law and were sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 291-294; Dec. Dig. \S 110(30).]

2. PHYSICIANS AND SURGEONS \S 5(4)—AUTHORITY TO PRACTICE—LICENSES.

A license issued to defendant by a member of a medical examining board in 1892, certifying that defendant had been examined by such member of the board and was thereby licensed to practice medicine and surgery until the next regular meeting of the board, showed on its face that it was a mere temporary license, good only until the next regular meeting of the board, and under no circumstances could be considered the verification license required to be filed under the present law.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 5; Dec. Dig. \S 5(4).]

3. PHYSICIANS AND SURGEONS \S 2—REGULATION OF PRACTICE—STATUTORY PROVISIONS.

The Legislature had the power and authority to enact Acts 30th Leg. c. 123, regulating the practice of medicine.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 2; Dec. Dig. \S 2.]

4. CONSTITUTIONAL LAW \S 70(3)—LEGISLATIVE AND JUDICIAL FUNCTIONS.

The wisdom of a statute was for the Legislature, and not for the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 131; Dec. Dig. \S 70(3).]

On Motion for Rehearing.

5. PHYSICIANS AND SURGEONS \S 5(1)—AUTHORITY TO PRACTICE—LICENSES.

Acts 30th Leg. c. 123, \S 4, provided that "from and after the passage of this act" it should be unlawful for any one to practice medicine who had not registered in the district clerk's office his authority for so practicing. Section 6 provided that, "within one year after the passage of this act," practitioners who, practicing under the provisions of previous laws, or under the diplomas of a reputable and legal college of medicine, had not received a license from a medical examining board, should present to the state board of medical examiners documents establishing the existence and validity of such diplomas or license theretofore issued by previous examining boards, or exemption existing under any law, and should receive from the board a verification license, which should be recorded in the district clerk's office. These sections, omitting the quoted words, are now articles 750 and 752 of the Penal Code of 1911. Section 15 provided that all certificates theretofore issued under any former law should continue in force for one year, but not afterwards, and that any person then practicing medicine under existing laws or any exception contained therein, but without a license, might continue in such practice for one year but not longer, and that all such certificates and rights to practice should be subject to that act. This section is not in the Penal Code, but in place thereof article 757 provides that the provisions of that chapter shall not apply to any person regularly engaged in the practice of medicine for five years prior to January 1, 1875, nor to any person legally qualified under a prior act therein specified, nor to those practicing medicine prior to January 1, 1885, or who began the practice of medicine thereafter, and have complied with the laws regulating the practice of medicine in force. *Held*, that this article does not abrogate article 752, and relieve the classes of practitioners therein mentioned from procuring and recording a verification certificate, but merely authorizes them to procure such verification li-

cense, though the year originally given for that purpose has expired.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. 511.]

Appeal from Comanche County Court; J. H. McMillan, Judge.

L. W. Gay was convicted of unlawfully practicing medicine, and he appeals. Affirmed.

A. B. Haworth, of Comanche, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for unlawfully practicing medicine, and his punishment assessed at a fine of \$50 and one hour in jail.

[1] The complaint and information aver that appellant resided in and was a resident of said county, and that:

He "did then and there unlawfully engage in the practice of medicine upon human beings for pay in said Comanche county, and the state of Texas, and as a regular practitioner did prescribe for, visit professionally, and treat patients for diseases, to wit, did visit, prescribe for and treat Mrs. H. J. Moore, Beulah Renfro (daughter of W. R. Renfro), and divers other persons to the affiant unknown, without having first registered in the district clerk's office of Comanche county, Tex., the county of said defendant's residence, a certificate from some authorized board of medical examiners for the state of Texas, or a diploma from some credited medical college, and without having filed for record in the district clerk's office of Comanche county, Tex., a verification license from the state board of medical examiners of the state of Texas."

These pleadings followed the law and are unquestionably sufficient. The court did not err in overruling appellant's motions to quash the pleadings nor in overruling his motion in arrest of judgment.

The uncontradicted testimony clearly sustained all of the allegations and showed appellant's violation of the law.

[2] The only authority to practice medicine which appellant had registered in the district clerk's office of Comanche county was a certified copy from the district clerk of Wilson county dated December 7, 1914. The document thus certified was as follows:

"L. W. Gay, M. D. The State of Texas, County of Wilson. Know all men by these presents (presents) that L. W. Gay, of the county of Wilson and state of Texas has been this day examined by (by) me I. H. Brewton, M. D., a member of the Medical Ex. Board of Twenty-Fifth Judicial District and is hereby licensed to practice medicine, surgery and obstetrics (obstetrics) until the next regular meeting of the Medical Board of this Judicial District. In testimony whereof I hereunto affix my hand and seal this 8th day of December, 1892. Isaac H. Brewton, Member of Medical Board."

This, on its very face, showed that it was a mere temporary license issued December 8, 1892, by a member of the medical board under the old law as it then existed, and by its own terms was good only until the next regular meeting of the medical board of the district mentioned. Under no circumstances

could it be the verification license under the law as it has been since 1907.

The act of the Legislature approved April 17, 1907 (page 224), now contained in our Revised Civil Statutes as articles 5733-5746, inclusive, and most of them also in our Penal Code as articles 750-756, inclusive, repealed all other laws on the subject of licensing physicians. One section of said act, now article 757, P. C., expressly exempted all persons who had been regularly engaged in the general practice for five consecutive years prior to January 1, 1875, and others who had legally qualified themselves to practice under the provisions of the act of May 16, 1873, and those who were practicing in Texas prior to January 1, 1885, and since, "who have complied with the law of this state regulating the practice of medicine in force," meaning, of course, all such otherwise exempted persons who have complied with said act of 1907. And another section of said act (article 752, P. C.) expressly requires that all of said exempted persons by said article 757 shall present to the board of medical examiners under said act of 1907 all documents, or legally certified transcripts of such, sufficient to establish the existence and validity of their diplomas or the valid and existing licenses theretofore issued by any previous examining board or exemptions existing under any law, and, in effect, when they do this and show that they are embraced within any of said exemptions, that the present board, under said act of 1907, shall issue to them a verification license, which verification license shall be recorded in the district clerk's office of the county in which the licensee resides. It is unnecessary to enumerate the further provisions of said article. The act and the said several sections thereof clearly show that, in order for any one who is exempted by the act to thereafter legally practice medicine in this state in any of its branches, he shall present his credentials to the said board as it now and since 1907 has existed, and procure from such board a verification license and record that; and, if they do not do so, but practice medicine without it, they violate the law and are subject to the penalties thereof.

The unquestioned evidence shows that appellant did not procure said verification license and record it, but practiced without it, and hence unquestionably has violated the law.

These exemptions, and none of them, would authorize appellant, without getting the verification license and recording it, to practice medicine. Hence all of appellant's charges and other points raising said issue were correctly refused by the trial judge, and none of his bills show any error.

Because of the law above stated, the court did not err in refusing to permit appellant to testify, in substance, that he was practicing medicine in Texas prior to January 1, 1885, and had graduated in the State Uni-

versity of Louisiana in the Medical Department, in 1868, and came to Texas and immediately thereafter engaged in the general practice of medicine in its various branches and continued therein from 1868 until the complaint was filed against him herein. No such testimony by him, under the circumstances, would be any defense whatever. Nor did the court err in refusing the testimony of others along the same line.

[3, 4] We think it wholly unnecessary to take up and discuss any of appellant's bills of exceptions and requested charges separately. What we have said as to the law of the case, and the application thereof to the uncontroverted facts, disposes of all of them, against appellant. His contention and all of his points hinged around the same to the effect that, under the law as it now is, appellant was not required to get a verification license and record it in order to entitle him to practice medicine, which he had been doing all these years. Unfortunately for him, it seems, the law is against him, and none of his contentions can be sustained. He may think that the law should not embrace him, and that it is a hardship upon him that it does. Yet we are bound by the law as well as he, and we cannot exempt him as we otherwise might want to do. The said law has been held constitutional by the United States Supreme Court and many times by this court. The Legislature had the power and authority to enact it. Its wisdom was for the Legislature and not for the courts.

It therefore becomes our duty to affirm the case, which is, accordingly, ordered.

On Motion for Rehearing.

Appellant claims that article 757, P. C., was not a part of the act of 1907, and not a law in whole or in part from the passage of said act until it was placed in the revision of 1911, and contends that ever since then it has been lawful for any physician of any of the classes mentioned therein to practice without any verification, or other, license, and, as he is embraced within said exemptions, that article 752 is therefore inapplicable to him, and he can legally practice without any license and the record thereof. His whole defense was based on that idea. If his contention had been correct, this case should necessarily be reversed, because he offered, and the court excluded, his, and other, testimony, as shown in the original opinion, which would have brought him within the exemptions of article 757.

In view of his urgent insistence, we will further discuss the question. To do so, it will be proper to mention briefly but generally the legislation on the subject, and the reasons therefor.

To protect the lives, and preserve the health, of the people, is one of the chief objects and duties of government. In order to help do this, our Legislature, since the establishment of our state government, has

all along, and from time to time, enacted laws to prevent the incompetent person, the faker, and the fraud, from deceiving the sick and afflicted under their false claim to "cure all" and from fleecing them of their money, and at the same time fully provide for the proper license of those who prepare themselves by a thorough study and knowledge of the human body, and the diseases and ailments to which it is subject, and thus prepare themselves to properly administer to, and treat, the sufferer. One of the best methods theretofore devised to accomplish this, and let all the people know who were competent and authorized, was to require, as a prerequisite to practice, a proper authority duly recorded in the district clerk's office of the county of the residence of the practitioner, which any and every one could see for himself, and that method still prevails. At an early day, a diploma from a reputable medical college, duly so recorded, was required, and perhaps was all that was then required. It was not long till the faker and fraud took advantage of this, and procured and recorded diplomas from medical colleges, which sold diplomas outright to any and every one who paid the price, and without any previous study or preparation. Also, it developed that many young men, for lack of means or other reasons, were unable to attend colleges and procure a diploma, but who studied at home and under the instruction and assistance of local physicians fully prepared themselves to practice as well as those who attended colleges and procured a diploma. For all such the Legislature provided medical examining boards, where such young men could stand examinations and procure license to practice without any diploma. In the course of time, another class had grown up, which consisted of those worthy and competent practitioners who, without license or diploma, by many years of study and practice, had demonstrated their competency to practice. All three of these classes were duly provided for and protected by the various enactments of the Legislature, from time to time; but some or all persons in these classes were required to do certain things in order to evidence, or establish, the fact of their being embraced within one or the other of these exemptions. It is unnecessary to cite these various acts of the Legislature.

As stated in the original opinion, the said act of 1907 repealed all previous legislation on the subject, and by that act regulated the whole matter.

[8] Section 4 of that act is:

"(From and after the passage of this act) it shall be unlawful for any one to practice medicine in any of its branches upon human beings within the limits of this state who has not registered in the district clerk's office of the county in which he resides his authority for so practicing, as herein prescribed, together with his age, postoffice address, place of birth, school of practice to which he professes to belong, sub-

scribed and verified by oath, which, if willfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be indorsed by the district clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate."

In said revision, that section is made article 750, P. C., literally, except the words, "from and after the passage of this act," are omitted, and is preceded by these words: "Authority to practice registered in district clerk's office; change of residence recorded, where."

Section 6 of that act is:

"(Within one year after the passage of this act) all legal practitioners of medicine in this state, who, practicing under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a state medical examining board of this state, shall present to the board of medical examiners for the state of Texas documents, or legally certified transcripts of documents, sufficient to establish the existence and validity of such diplomas or of the valid and existing license heretofore issued by previous examining boards of this state, or exemption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. Such verification license shall be issued for a fee of fifty cents to all practitioners who have not already received a license from the state board of medical examiners of this state. It is especially provided that those whose claims to state licenses rest upon diplomas from medical colleges recorded from January 1, 1891, to July 9, 1901, shall present to the state board of medical examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall be decided by the board of medical examiners before they are entitled to a certificate from said board. This board may, at its discretion, arrange for reciprocity in license with the authorities of other states and territories having requirements equal to those established by this act. License may be granted applicants for license under such reciprocity on payment of twenty dollars."

In the revision, that section is made article 752 literally, except the omission of these words, "Within one year after the passage of this act," and is preceded by these words, "Practitioner of medicine to receive verification license."

Section 15 of that act is:

"All certificates heretofore issued by any board of medical examiners in this state under any former law shall be and continue in full force and effect for one year after this act shall take effect, but not afterward, and any person who may, when this act shall take effect, be practicing medicine within this state under the provisions of existing laws or under any exception contained therein, but without license, may, for one year thereafter, but not longer, continue in such practice, without license; and all such certificates and all such rights to practice medicine shall be in all respects subject to the provisions of this act as though issued or acquired under its provisions."

In the revision, in place of that section is article 757, reading:

"The provisions of this chapter shall not apply to any person who has been regularly engaged in the general practice of medicine, in any of its branches or departments, in this state, for five consecutive years prior to January 1, 1875; nor to any person who may have legally qualified himself to practice medicine under the provisions of an act, entitled, 'An act to regulate the practice of medicine,' passed May 16, 1873; nor to all those who were practicing medicine in Texas prior to January 1, 1885; nor to all those who began the practice of medicine in this state after the above date, who have complied with the laws of this state, regulating the practice of medicine, in force."

While the language of the two are not the same, fully the same exemptions are embraced in each. If appellant's contention should prevail, then article 752 would be a dead letter as to all those embraced in article 757, and the door to those unlicensed practitioners thrown wide open. No such intention by the Legislature can reasonably be drawn from said articles, nor the whole act, nor the law as now contained in the revisions only.

Said articles must be construed together so that both shall stand, if that can be, and they must be considered in connection with the previous legislation, and the whole law now on the statute books. We think it clear, not only from all previous legislation, but also from said act of 1907, and even the Codes as now revised only, that no one can legally practice medicine, or the healing art or science, on human beings, by any system or method, with or without administering medicines, and charge therefor, without first procuring a license to do so and recording it in the district clerk's office of his residence; and that this was the clear intent of the Legislature. It is seen that by said section 15 all the old physicians were there given a year, but no longer, to get the new verification license from the board created by it, without standing any examination. However, by placing said article 757 in the revision, instead of said section 15, it was intended, and only intended, they should still not be cut off entirely, as section 15 provided, but given another opportunity to get a verification license by complying with said article 752, and they still have that opportunity. Appellant not having availed himself of the opportunity within the year after the act of 1907 went into effect, and still not doing so after the law was re-enacted in the revision giving him still the opportunity, but practicing contrary to and in the face of the law, must suffer the consequences of his own acts.

Appellant now, for the first time, complains of what he claims are some informalities in the judgment. But we think the judgment sufficiently complies with the statute and the decisions. Articles 866-868, C. O. P.; Terry v. State, 30 Tex. App. 408, 17 S. W. 1075; Ex parte Dickerson, 30 Tex. App. 448, 17 S. W. 1076.

The motion for rehearing is overruled.

MEREDITH v. STATE. (No. 3946.)

(Court of Criminal Appeals of Texas. Feb. 23, 1916. Rehearing Denied March 22, 1916.)

1. EMBEZZLEMENT ⇐30—INDICTMENT—SUFFICIENCY.

In a prosecution under Pen. Code 1911, art. 691, making an insurance agent who collects premiums and converts them to his own use guilty of larceny, it is not necessary to allege the ownership of the money in any particular person; the statute being provided to cover the condition wherein actual ownership cannot be alleged.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 44, 45; Dec. Dig. ⇐30.]

2. STATUTES ⇐118(1) — ENACTMENT—SUFFICIENCY OF TITLE.

Acts 31st Leg. c. 108, § 51 now (Pen. Code 1911, art. 691), entitled "an act to regulate the business of insurance companies and providing penalties for violations of the provisions of the act," is not void because of insufficient title; the title properly including prosecutions of insurance agents for larceny by embezzling premiums paid.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 158, 159; Dec. Dig. ⇐118(1).]

3. EMBEZZLEMENT ⇐30 — INDICTMENT — DESCRIPTION OF PARTIES—SUFFICIENCY.

While an indictment for larceny by embezzlement must allege that the defrauded party was a corporation, if that was the fact, it is not necessary to allege that other corporations interested but not defrauded were corporations.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 44, 45; Dec. Dig. ⇐30.]

4. INDICTMENT AND INFORMATION ⇐61—ALLEGING MATTERS JUDICIALLY NOTICED—DESCRIPTION OF PARTIES.

An indictment for larceny by embezzlement, alleging that the accused was an agent for a life insurance company lawfully doing business in the state, was equivalent to an allegation that it was a corporation, since the act regulating insurance companies and requiring their incorporation is a general law of which the courts must take judicial notice.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 183; Dec. Dig. ⇐61.]

5. EMBEZZLEMENT ⇐42—EVIDENCE—ADMISSIBILITY.

Where one accused of larceny by embezzlement testified that the applicant for insurance called on him and he told him that his application had been canceled and he would have to see the state agent for a return of the premium, the state agent could testify that the applicant called and did receive the premiums.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 64; Dec. Dig. ⇐42.]

6. EMBEZZLEMENT ⇐38—EVIDENCE—ADMISSIBILITY.

In a prosecution for larceny by embezzling insurance premiums, the contract under which the accused was working for the insurance company was admissible; its terms being binding upon him.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 61, 65, 66; Dec. Dig. ⇐38.]

7. CRIMINAL LAW ⇐400(7)—BEST EVIDENCE—ADMISSIBILITY.

While an agent cannot testify as to the contents of his contract, he may testify that he

did make a contract of employment with the principal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 879-886; Dec. Dig. ⇐400(7).]

8. CRIMINAL LAW ⇐447—PAROL EVIDENCE TO VARY WRITINGS—ADMISSIBILITY.

Where a contract of employment is in writing and specifically stipulates the amount of commissions to be paid, oral testimony as to the amount of commissions is inadmissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1029-1081; Dec. Dig. ⇐447.]

9. EMBEZZLEMENT ⇐38—EVIDENCE—ADMISSIBILITY.

Where one accused of having embezzled insurance premiums testified that he had received a premium and had paid it to no one, it was not error to admit testimony of his superior that he had not received it or permitted defendant to appropriate it.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 61, 65, 66; Dec. Dig. ⇐38.]

10. EMBEZZLEMENT ⇐14—ELEMENTS—OFFENSES.

An insurance agent receives premiums under the conditions of his employment, and under no circumstances may he appropriate them to his own use, so that failure of the applicant to sign a new application as required by the company would not affect his guilt in appropriating the premiums.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 13-15; Dec. Dig. ⇐14.]

11. EMBEZZLEMENT ⇐48(2)—INSTRUCTIONS—ISSUES.

In a prosecution for embezzlement of insurance premiums, where the agent himself testified that he had received them and had paid them to no one but had spent the money, the issue of good faith in retaining the money was not involved, and an instruction thereon was properly refused.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 78; Dec. Dig. ⇐48(2).]

12. EMBEZZLEMENT ⇐22—CHARACTER OF OFFENSE—MITIGATION.

Although an insurance agent accused of embezzling premiums could have retained 40 per cent. thereof, had the policy been issued, that would not reduce the crime from a felony to a misdemeanor, where the policy was not in fact issued and he never became entitled to any of the premium.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 30; Dec. Dig. ⇐22.]

13. EMBEZZLEMENT ⇐47—CHARACTER OF OFFENSE—MITIGATION.

In such case, the question of joint ownership of the premium by the insurance company and the accused was not involved and was properly withheld from the jury.

[Ed. Note.—For other cases, see *Embezzlement*, Dec. Dig. ⇐47.]

Appeal from District Court, Medina County; R. H. Burney, Judge.

W. R. Meredith was convicted of larceny by embezzlement, and he appeals. Affirmed.

De Montel & Fly, of Hondo, and John R. Storms, of San Antonio, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted under an indictment, omitting formal parts, alleging that:

Appellant "was an insurance agent and solicitor, to wit, an agent and solicitor for the Aetna Life Insurance Company, of Hartford, Conn., which was then and there a life insurance company lawfully doing business in the state of Texas, and of which J. N. Houston was the manager for the state of Texas; and the said W. R. Meredith, as such agent and solicitor, did then and there collect premiums and was authorized to collect premiums for the said Aetna Life Insurance Company; and he, the said W. R. Meredith, as such agent and solicitor aforesaid, did then and there collect and receive from one Frank Posey the sum of \$68 in current money of the United States of America, of the value of \$68, as a premium on a policy of life insurance in said Aetna Life Insurance Company; and he, the said W. R. Meredith, did then and there unlawfully and fraudulently convert, misapply, and appropriate to his own use the said money so received and collected by him as such agent and solicitor as aforesaid, contrary to the instructions of and without the consent of the said Aetna Life Insurance Company, and contrary to the instructions and without the consent of the said J. N. Houston, who was then and there the manager for the state of Texas for said Aetna Life Insurance Company, which said money had theretofore come into the possession of and was under the care of the said W. R. Meredith by virtue of being such agent and solicitor for said Aetna Life Insurance Company, as aforesaid, against the peace and dignity of the state."

This indictment was brought under article 691 of the Penal Code, which reads:

"Any insurance agent or solicitor who collects premiums for an insurance company lawfully doing business in this state and who embezzles or fraudulently converts or appropriates to his own use, or with intent to embezzle, takes, secretes or otherwise disposes of or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies, any money or substitutes for money received by him as such agent or broker, contrary to the instructions or without the consent of the company, for or on account of which the same was received by him, shall be deemed guilty of theft of property of the value of the amount involved in either case and shall be punished accordingly."

Appellant was agent of the Aetna Life Insurance Company, and collected from F. M. Posey the sum of \$68.34, issuing to Posey the following receipt:

"Hondo, Tex., Oct. 15, 1914.

"Received from F. M. Posey, of Hondo, Texas, cash (\$68.34) sixty-eight and ³⁴/₁₀₀ dollars, to be applied to payment of the first premium under a policy of \$2,000.00 this day applied for in the Aetna Life Insurance Company, when said policy is issued. It is hereby understood and agreed that insurance under said policy shall commence at the time it is issued, and that in case the application shall not be approved by the company, and a policy is not issued, the said payment shall be returned on surrender of this receipt within sixty days from the date hereof; and said company shall not be bound to any contract of insurance until a policy is issued.

"Not binding unless countersigned by a duly authorized agent of the company.

"Countersigned at Hondo, Tex., this 15th day of October 1914.

"[Signed] W. R. Meredith, Agent.

"C. E. Gilbert, Secretary.

"In every instance when the entire first premium is paid either in cash or by note, pending the issue of a policy, this form must be executed in duplicate, the applicant retaining the original, the duplicate being forwarded at once to the company."

[1] It was the appropriation of this money by appellant to his own use upon which the indictment is based. It is thus seen that appellant received this money as agent of the life insurance company upon the express condition that he would pay it to the company when the policy was issued, or, if no policy was issued on Posey's application, he, as agent of the company, would return it to Posey upon the surrender of the receipt in 60 days. Under the contract he had with the company, and the receipt he issued to Posey, he held this money in trust upon the given conditions named, and under the contract the life insurance company did not become absolute owner of it until a policy was issued to Posey on the application, nor could it maintain suit for it until the happening of that condition. However, while Posey had a reversionary interest in the money, in case no policy was issued on the application, yet he had no control over it, nor right to demand its return until the application for insurance was refused by the company. Under such circumstances, it was an impossibility to allege the ownership of the money in any one individual, and the Legislature adopted the above statute to reach just such conditions, and under this statute it is unnecessary to allege in the indictment specifically who was the owner of the money, but to allege, as was done in this indictment, that as agent of the life insurance company appellant had collected from Posey the money as premium on a policy, and while holding it as such agent did fraudulently convert to his own use the money so held without the consent of the life insurance company. Appellant could not and would not have any personal interest in the money, at least, until the policy was issued, under the terms of his contract with the company, and the money would be in his hands merely as a trust fund; it to belong to the company in case it accepted the application for insurance and issued a policy thereon. Then, and not until then, would appellant be entitled to any of it as commission. In case no policy was issued on the application, he was entitled to and would receive no commission out of the money; but, by the terms of the contract under which he received the money, he, as agent of the company, bound himself to return all of the money so received to Posey, the applicant for insurance, and the Legislature had the authority to declare the conversion of the money to his own use by the person holding same under such circumstances to be an offense, and has done so.

[2] The contention that the act of 1909 is unconstitutional and void, on the ground that the caption is insufficient, cannot be sustained. The caption is on page 192, Acts of 1909, it being chapter 108, and is, in effect, a codification of the laws governing and regulating the doing of a life insurance business in this state. The section defining this offense is section 51 of that act, and, among other

things, the caption declares that it is intended "to regulate the business of such companies, and providing penalties for violations of the provisions of the act."

[3, 4] The only other serious contention as to the validity of the indictment is based upon the contention that it failed to allege whether or not the *Ætna Life Insurance Company* was a joint-stock company, partnership, or corporation. This question has been frequently before this court, and at one time it was held that it was not necessary in any case to allege that the injured party was a corporation. The case of *Price v. State*, 41 Tex. 215, was a case in which Price was charged with the theft of a bale of cotton from the Houston & Texas Central Railroad Company, and our Supreme Court, in an opinion by Chief Justice Roberts, held:

"It was not necessary to set out the charter in the indictment, or to allege it to be a chartered company otherwise than by name, as was done in this case."

In the case of *Holloway v. Memphis R. Co.*, 23 Tex. 467, 76 Am. Dec. 68, Chief Justice Wheeler discusses at length when it is necessary to allege in the pleadings and prove that the plaintiff is a body corporate. He held that if the general laws of the state so declared, and the court in consequence must of necessity take judicial notice of it, it was not necessary to so allege and prove; but if incorporated by private act it must be alleged to constitute good pleading and proven on the trial. Since its organization the question came before this court in a theft case, in the case of *White v. State*, 24 Tex. App. 234, 5 S. W. 859, 5 Am. St. Rep. 879, and the court discussed it at some length, and held:

"We are of the opinion that such allegation is requisite, and, to say the least of it, it is beyond doubt the better practice."

Since the decision in that case, it seems to have become the settled law in this state that, where the alleged injured party is a corporation, it must be alleged that it is a corporation, or words of equivalent import used. In *Thurmond v. State*, 30 Tex. App. 540, 17 S. W. 1096, an indictment was held defective because it failed to allege that the *Lexington Ranch Company*, from whom the property was stolen, was a corporation. See, also, *Stallings v. State*, 29 Tex. App. 220, 15 S. W. 716; *Hutton v. State*, 38 S. W. 209; *Roby v. State*, 41 Tex. Cr. R. 152, 51 S. W. 1115.

On the other hand, it has become equally well settled that such rule is not applicable where the failure to allege it was a corporation was in regard to a corporation other than the defrauded one. In *Reeseman v. State*, 59 Tex. Cr. R. 480, 128 S. W. 1126, the question was again before the court, and the authorities were reviewed, and the distinction drawn when it is and when it is not necessary to allege in the indictment that the named company is a corporation, part-

nership, or joint-stock company. Under all the decisions of this court, it seems to be the settled rule that it was necessary to allege that the *Ætna Life Insurance Company*, as it was the company alleged to be defrauded, was a corporation, unless the statutes of this state give us judicial knowledge that it was an incorporated company. The insistence of the state is that the general statutes of this state do give this and all other courts judicial knowledge that only an incorporated company can legally do a life insurance business in this state, and when the indictment alleged that appellant was "an agent for the *Ætna Life Insurance Company*, which was then and there a life insurance company lawfully doing business in the state of Texas," it was equivalent to an allegation that it was an incorporated company, for no company other than an incorporated company could lawfully do a life insurance business in this state; and chapter 108 of the Acts of the Thirty-First Legislature (Sess. Acts, p. 192) seems to support such contention. We are therefore of the opinion the court did not err in refusing to quash the indictment, nor in refusing to sustain the motion in arrest of judgment. The act in question is a general law, and this court and all courts must take judicial cognizance of its provisions. Article 463 of the Code of Criminal Procedure (1895) provides that "matters of which judicial notice is taken need not be stated in an indictment." For a citation of authorities, see section 373, *White's Ann. Code of Crim. Proc.*

[5] In two bills of exception appellant complains of the court permitting J. N. Houston, state agent of the *Ætna Life Insurance Company*, and F. M. Posey, to testify that he (Houston) had paid Posey back the \$68.34 collected by appellant from Posey. Appellant himself testified that, when Mr. Posey called on him about the matter, he told him his contract with the company had been canceled, and he (Posey) "would have to take the matter up with Mr. Houston." Under such circumstances, it was permissible for Posey to testify he did take it up with Mr. Houston, and received his money back.

[6] Nor was there any error in permitting Mr. Houston to testify he and appellant entered into a contract, and identify the contract. It was dated at Austin, Tex., March 24, 1913, signed, "J. N. Houston, manager," and indorsed:

"I hereby accept the foregoing appointment, subject to all its terms and conditions, W. R. Meredith, Agent."

It is also indorsed:

"The *Ætna Life Insurance Company* hereby agrees to this appointment. [Signed] *Ætna Life Insurance Company*, by Frank Bushnell, Agency Secretary"—and dated April 14, 1913.

This is the original contract under which appellant was working, was accepted by him, and its terms are binding on him, and there was no error in admitting it in evidence.

[7] As to the contract between Mr. Houston and the Aetna Life Insurance Company, he was not permitted to testify as to its contents, but only that he was state agent of the company. There was no error in permitting him to so testify. Of course, had he undertaken to testify as to the contents of the contract under which he was appointed state agent, then the contract would have been the best evidence. But the contents of the instrument were not sought to be proved; only the fact that he was state agent, and had entered into a contract with appellant, and then prove up the contract which appellant had entered into.

[8] As the contract was in writing and specifically stipulated the amount of commission appellant was to receive upon each character of policy, there was no error in refusing to admit oral testimony as to the amount of commission he was to receive. Appellant himself testified, "As to the commission allowed, it is defined in the contract."

[9] Nor was there any error in permitting Mr. Houston to testify that appellant had paid him no money on the Posey application. Appellant himself testified that he received the money from Mr. Posey, and issued him the receipt hereinbefore copied; that he had not paid the money to any one. He said:

"As to what I did with that money, I was waiting until the application, the examination, was finished. I had the money all the time. As to whether I still have the money, no; I have no recollection of what became of that particular money."

Nor was there any error in permitting Mr. Houston to testify that he had not given appellant permission to appropriate the \$68.34. Appellant, in the contract he entered into with Mr. Houston as manager of the Aetna Life Insurance Company, over his signature had agreed:

"That all moneys collected by you under the terms of this appointment shall constitute a trust fund, separate and distinct from your other funds and not subject in any case to personal or any other use by you, and that such moneys shall be immediately paid over to the said manager of said company."

Mr. Houston was the manager named in that contract and under this contract it was permissible for the manager named in the contract to testify that appellant had not paid him the money, and he had not given appellant permission to appropriate it to his own use.

The evidence was ample to sustain the verdict, and the court did not err in so holding.

[10] As appellant received the money from Posey in his capacity as agent of the insurance company, and issued to him the receipt hereinbefore copied, the fact that Posey failed to sign the second application, if he did do so, would not alter the conditions under which appellant held the money; and the court did not err in refusing to instruct the jury that if Posey did not sign the second

application they would acquit appellant. Appellant had received the money as agent of the company under given conditions, and he, under no circumstances, would have the right to appropriate it to his own use.

[11] If there was any testimony that appellant was holding the money until the Aetna Life Insurance Company had passed on Posey's application for insurance, the charge presenting that issue should probably have been given. But there was no testimony presenting such issue. Appellant himself testified he did not have the money, he was not keeping it, and he did not know what he had done with that specific money. He admitted he did not pay it to the insurance company or its manager, and did not give it back to Posey; and that he did not have it. Under such circumstances, there could be no question of his right to keep the money in his possession until Posey signed the application, and keep it in his possession to pay to the life insurance company when the policy was issued. He admitted he had not kept it, but spent it for some purpose he could not name. The facts in this case show that appellant received the money from Posey while agent of the company, and issued him a receipt as agent of the company. He never sent an application to the company to act on, and if, in fact, Posey did not sign the application (although Posey swears he did), this would not and could not alter the capacity in which appellant held the money, and, when the evidence goes further and shows that he had violated the trust and converted to his own use and benefit the money, there could be no question of good faith on appellant's part, when both Mr. Houston and Mr. Posey testify they gave him no permission or authority to use the money for his own benefit. If he still had the money in his possession, and he contended he was holding it in good faith under his construction of the contract, then such an issue might be in the case. But when he testifies he had spent the money without authority to do so from any one, the question of good faith in the retention of the money does not arise on the evidence.

[12] Appellant also contends that under the contract he was entitled to retain 40 per cent. of the premiums collected as his commission, and if he did appropriate the \$68.34, as he was entitled to 40 per cent. of the amount, if guilty of any offense, he would only be guilty of a misdemeanor, and the court should have so instructed the jury. If the condition had arisen whereby appellant was entitled to a commission, there would be merit in his contention. But under the contract, under the receipt, and under appellant's own testimony, he became entitled to no commission until a policy had been issued and delivered to Mr. Posey. As appellant at no time ever sent an application of Posey for insurance to the company, and he knew that

no policy had been issued, he, under his contract, was entitled to no commission on this \$68.34, and therefore, if he was guilty of any offense, it was a felony and not a misdemeanor, and the court did not err in so holding.

[13] There was no question in the case of appellant and the insurance company being the "joint owners of the money collected by appellant from Posey." The money was paid by Posey to appellant for a specific purpose, and he in his contract had agreed to hold it as a trust fund to be paid to the company if a policy was issued on Posey's application; if no policy was issued, to repay it to Posey. It is true, if the policy had been issued to Posey, he would then have been entitled to 40 per cent. of the amount as commission for his services. But as no application of Posey's was ever sent to the company by appellant, he could and would under no circumstances be entitled to any part of the money, and the court did not err in refusing to submit that issue to the jury.

We have carefully reviewed the exceptions to the charge of the court, and they nor neither of them present any error. They have been sufficiently discussed in disposing of the foregoing questions and do not necessitate nor require further discussion of the propositions.

The judgment is affirmed.

ODELL v. STATE. (No. 3961.)

(Court of Criminal Appeals of Texas. March 8, 1916.)

1. WITNESSES \S 346—IMPEACHMENT—EVIDENCE.

The infant daughter of a farm lessee who occupied premises belonging to accused's father was assaulted with intent to rape, but neither she nor her younger brother and sister contended that accused was the guilty person. According to the statements of one of the children, it appeared that the assault was committed by another. About ten days thereafter the girl's father returned and shortly instituted criminal proceedings against accused, the latter's father sequestering his property at about the same time. The girl's father subsequently offered to compromise the case and to leave the state in return for slight compensation. *Held* that, as all of the children were under his influence and domination, evidence of his conduct was admissible to discredit their testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1183; Dec. Dig. \S 346.]

2. CRIMINAL LAW \S 1166½(1)—TRIAL—CONDUCT OF TRIAL.

In a criminal prosecution, after the evidence was closed and argument begun, accused's wife, who had been under the rule, took her place beside him inside of the bar. There was no impropriety in her conduct, and she was not conducting herself so as to interfere with the business of the court; but the judge refused to allow her to sit by accused, and later, when accused's young child came to the rail and accused took it up, the court directed the removal of the child. *Held* that, in view of the fact that the jury did not assess the minimum penalty, the action of the court was prejudicial as

tending to indicate a belief in accused's guilt, and that he was using members of his family to affect the jury's sympathies; this being so though the trial court may regulate procedure in the courtroom and preserve order, particularly as there is no general rule as to where either accused or spectators may sit, and it is the custom for the family of an accused person to sit beside him inside the bar.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8119-8122; Dec. Dig. \S 1166½(1).]

Prendergast, P. J., dissenting.

Appeal from District Court, Callahan County; Thomas L. Blanton, Judge.

Willie Odell was convicted of assault to rape, and he appeals. Reversed and remanded.

J. F. Cunningham, of Abilene, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of assault to rape, his punishment being assessed at four years' confinement in the penitentiary.

[1] The state's testimony is to the effect that the alleged assaulted girl, Emily Smith, was over 14 years of age. Appellant and his wife were at his father's residence, and had been for a short time, appellant working about the country at various jobs. The father and mother of the prosecutrix were in Wilbarger county, and had been for three or four weeks. The father of prosecutrix was a renter of the elder Odell, occupying a small house on the property and about 400 yards east from the residence of Mr. Odell. During the absence of her father and mother, prosecutrix and her brother and sister were guests of the senior Odell. On the morning of the alleged assault, which was Sunday, appellant took a gun with a view of going wolf hunting. His course lay westward. The house where prosecutrix went, and which was the home of the father of prosecutrix, was about 400 yards east of the senior Odell's residence. The defendant's version as to his whereabouts, proved by several witnesses, was that he was something like 1,300 or 1,400 yards west of the house at the time of the alleged assault, at a wolf den; that he had gone with a view of catching young wolves. He was seen by the various witnesses at that point. Later he went from that point north, then east, hunting wolves. Without going into detail as to his perambulations, about 9 o'clock that morning, or half past 9, he was at the residence and spent a couple of hours with Mr. Peterson and two or three other parties, having his gun with him, presenting no appearance of being agitated or excited, and from there he returned to his father's residence, reaching there about noon.

The state's version as given by the girl, in the main, is slightly corroborated as to one or two matters by her brother and sister, who were present at the little house where

the assault is said to have occurred. The prosecutrix testified: That it was her custom to go in the morning from the residence of the elder Odell to the little place where the family lived to feed the chickens, and on this particular morning it was something like 8 or 8:30 o'clock when she went to the house. As she entered the house, somebody unrecognized by her threw a quilt over her head, tied it around her neck so that she could not see, threw her down, tied her wrists together with a string, and undertook to have intercourse with her; among other things, tore the left leg of her drawers from the bottom up to or near the waistband. About that time one of the children on the outside began calling a kitten and came to the door and knocked, whereupon her aggressor jumped through the window. The window was a small one in the north side of the house, the door being in the east, and these two being the only apertures in the house. The panes of glass in the window seem to have been broken. Under the window there were ashes, thrown from the fireplace or stove. In these ashes were found no tracks by the parties who investigated the place after the girl had returned to the elder Odell's home. She said the ashes were hard; the other witnesses contradicted her as to that. There were no tracks found going from the house, and the state introduced some evidence to show that the ground was hard. The brother of appellant's wife and one or two children and the small baby of appellant had followed the prosecutrix to within 75 or 100 yards of the little house where the assault is alleged to have occurred, and were there at the time trying to get a rabbit out of a hole in a tree. She made no outcry at the house, but accounts for this by reason of the quilt being over her head. She says, when the party attacking her went out of the window, she remarked, "Wille Odell, you will be hung for this." That he then looked at her, and she recognized him. One of the children who was with her testified that he heard that statement, but neither one of these children seemed to have seen anybody. The brother of appellant's wife, who was trying to get the rabbit out of the hole, testified that the girl came where he was and that her wrists were tied together by a string, and that he cut the string. This witness testified that in discussing the matter with prosecutrix she stated that somebody had tried to smother her to death, but that she did not know who it was. In fact, the whole record shows that it was about ten days before her father returned, and that in talking with the people who discussed the matter with her she always stated she did not know who it was. She accounts for this by stating that these people were in some way related to appellant, and she did not want to tell them because she did not know what they would do to her. The witness who was 75 yards or 100 yards away

saw nobody leaving the house. The prosecutrix further testifies that when her father and mother returned she told them about the transaction, and that it was appellant who made the assault on her. They returned on Saturday, some ten days after the occurrence. On the following day, or Sunday, a friend and neighbor, Miss Gillett, visited prosecutrix after the return of her parents, and the matter came up for discussion between prosecutrix and Miss Gillett. In that conversation she told Miss Gillett that she did not know who had made the assault on her. This was the day subsequent to the time she says she told her father and mother that it was appellant. She says the reason she did not tell Miss Gillett about the matter was that she was related to appellant, and she was afraid Miss Gillett would tell things prosecutrix did not say or state. There is also testimony by some ladies, to the effect that, on Sunday evening after this alleged assault should have occurred Sunday morning, that they in company with prosecutrix went in swimming, and they saw prosecutrix undress and go in bathing, and that her drawers were not torn. There were no other persons than ladies present at that time.

Tuesday following the Sunday on which Miss Gillett and prosecutrix had the conversation, the father of prosecutrix filed a complaint against appellant charging him with assault to rape. On the same day the senior Odell filed sequestration proceedings against the father of prosecutrix on a debt, sequestering some horses and other property. There is some question as to which suit was filed first, although they were both filed the same day and within a short time of each other. This brings one of the serious questions in the case. The bill is lengthy, and in view of what has been said it is unnecessary to reproduce it. The bill practically rehearses the substance of the case. The defendant then offered the witness Thomas H. Floyd, who testified he was justice of the peace of precinct No. 1, Callahan county, and defendant offered to prove by him, and could have proved by him, that on the 10th day of August, 1915, subsequent to this alleged assault, defendant's father filed a suit in the justice court for sequestration against the father of state's witness Emily Smith, the father's name being D. H. Smith, and that said suit for sequestration and the writ issued, seizing two horses and a wagon of the father of prosecutrix, and the suit was then pending; and the defendant would have further proved by the witness Floyd that, on the same day that said suit was filed, said D. H. Smith filed a complaint against the defendant charging him with assault to rape upon his daughter Emily Smith, and the defendant procured from said witness the writ of sequestration, the affidavit, and bond for sequestration, and the docket entries of said suit were also offered in evidence in connec-

tion with the foregoing evidence of the witness—all of which was objected to by the state for the reason that it was irrelevant and immaterial and not proper evidence by which to show the bias or feeling or prejudice of the state's witnesses Bessie Smith, Emily Smith, and Uel Smith. Whereupon counsel for the defendant stated to the court that this evidence was offered to show bias and ill will and prejudice of said witnesses against the defendant, and was further admissible as a circumstance tending to show that said witnesses might have been or were biased and influenced in their testimony by their father against whom said sequestration suit was filed; they being of tender years, very young, and under the control of their parent. The court sustained the objection of the state and excluded the testimony from the jury.

In another bill in this same connection, which is very full and recites practically the main facts of the case, it is shown defendant offered W. F. Collins as a witness, who testified: That he lived in Callahan county, and was acquainted with D. H. Smith, and also acquainted with the father of appellant. That on or about the 26th day of October, 1915, he was in the town of Baird, in Callahan county, at the wagonyard, and there said D. H. Smith had a conversation with witness Collins, detailing the conversation. Appellant then offered to prove, and if permitted would have proved by him, that D. H. Smith told him (the witness) that he was the very man he was looking for; that he wanted to effect a compromise with Wm. Odell, the father of the defendant; that he asked him what sort of compromise, and he said that, if Odell would give him back his wagon and mules and black horse and give him \$100, he would leave the state and carry the state's witnesses with him; that after some talk it was agreed that witness would see Odell and see if said compromise could be arranged; that he afterwards saw Odell and arranged for a meeting between Odell and Smith in the office of one of the lawyers for the defendant; and when they met witness wrote out an agreement, which is as follows:

"Baird, Texas, 10-26-1915. Dear Sir: I have concluded to compromise with you and your son Willie Odell and stop all court proceedings now pending against your son. If you will give me back my wagon and mule and your black horse, the one you call old negro also collars and bridles and the sum of \$100.00 one hundred dollars, we agree to leave the state of Texas immediately on receipt of same."

That when they got to said office he read the proposition over to Smith in the presence of Odell. That said Smith said it was all right, and in the presence of William Odell signed his name thereto. That Odell then stated that he would not consider it unless the wife of D. H. Smith also signed it. That Smith then took the instrument and left, and in a short while returned with his wife's name signed to it. That Odell then stated

that he wanted to see his attorneys before he agreed to it, and that witness and said Odell then went to Abilene and submitted the matter to defendant's counsel, J. F. Cunningham, and also submitted to him the question as to whether or not \$50 would be a reasonable fee for witness' time and trouble in the matter. Counsel stated the fee was reasonable, but that the compromise would not bind Smith and his wife; that they could take the money and horses and leave the state and then return and testify; that the agreement was an improper one, and advised Mr. Odell to reject the proposition. That thereafter witness and said Odell returned to Baird, and witness saw D. H. Smith and told him what Cunningham had said, and that Mr. Odell declined the proposition; whereupon said Smith became very angry and said he intended to swear that he and his wife never signed the instrument, and asked witness if he would stay with him in the matter. That witness told Smith if he had to testify that he would swear the truth. The state objected to all this testimony for the reason that it was irrelevant and immaterial and not legitimate and competent testimony to be used for any purpose; whereupon counsel for the defendant stated that they offered the evidence to show a bias, prejudice, and ill feeling on the part of the children of said Smith who had testified in the case, and as a circumstance to be considered by the jury in determining whether or not the evidence of said three children of D. H. Smith had not been influenced, prejudicially to the defendant by their father, they being of tender years and under the control and influence of their father; and they offered it for the purpose of showing that the prosecution had been instigated by said D. H. Smith for the purpose of extorting money from the father of the defendant, and as a circumstance to show that he was using his children as witnesses for that purpose. But the court sustained the objections of the state and excluded all of said testimony from the jury.

The contention of appellant is that in view of the fact that the state relies for a conviction on the evidence of the three small children of Smith, and that the said children were under his care and control, the testimony offered was admissible to be considered by the jury in determining the extent of the bias, prejudice, ill feeling, etc., which the children might have against the defendant by reason of the suit filed by the father of the defendant in which the mules and team and other property of their father were seized and taken from him, and for the further purpose of showing that the father of said witnesses instigated the prosecution in the first instance, he having sworn to the complaint for the purpose of extorting a compromise from the father of the defendant, and having failed in that he became angry, and further that he exercised undue influence over his children in regard to their testimony. Appel-

lant cites in support of this several cases, among others: *Edwards v. State*, 172 S. W. 227; *Wade v. State*, 171 S. W. 713; *Burnam v. State*, 148 S. W. 759; *Earles v. State*, 64 Tex. Cr. R. 537, 142 S. W. 1181; *Pope v. State*, 143 S. W. 611. In addition, they also cite *Pope v. State*, 143 S. W. 612, and *Earles v. State*, 64 Tex. Cr. R. 537, 142 S. W. 1182, and authorities collated in those cases; 33 Cyc. p. 1455, and notes; 23 Am. & Eng. Ency. of Law, p. 880, and notes.

We are of opinion that the court was in error. This testimony was admissible under the circumstances of this case. Neither D. H. Smith nor his wife, father and mother of the prosecutrix, testified in the case. They are, however, the only parties to whom Emily Smith, prosecutrix, testified that she told who it was that made the assault on her. The state did not use them. To all other witnesses she denied any knowledge of the identity of her assailant. On Tuesday after the conversation with Miss Gillett on Sunday in which prosecutrix denied knowing the identity of the party, and after on the previous Saturday she testified she told her father and mother about it, her father filed this complaint charging appellant with assault to rape. The same day the sequestration suit was filed. There may be some question as to which was filed first, but that is not very material. They were filed about the same time and on the same day. Smith, father of prosecutrix, was indebted to Odell, the father of appellant. If Smith filed that complaint, anticipating or believing that the elder Odell was going to bring the sequestration suit, and they were in Baird, the county seat, at least it was before the justice of precinct No. 1, some 20 miles or such matter from where the assault is said to have been committed, it would be a circumstance to indicate that the complaint was filed on a compromise basis. Smith is the party who offered to compromise, and put it in writing, signed it, and had his wife to sign it. This was rejected by the elder Odell. These children were young, living with their father, and, of course, under his domination and control; the prosecutrix being the oldest one, who had just passed 14, the others being perhaps under 10 years of age. These offers of compromise did not come from appellant's side of this case, but came from the prosecution side, the father of the prosecutrix. He and his wife were important witnesses for the state. If she told him that appellant was her assailant, he could have so stated. Instead, he filed complaint for assault to rape. The prosecutrix did not file it. Under these circumstances, we are of opinion this testimony was legitimate. It certainly tended to show that these witnesses were or could have been influenced by their father, especially in view of the fact that he failed, as did his wife, to take the stand and testify in corroboration of the girl's statement that she had informed him that it was appellant

who assaulted her, and this was also emphasized by the fact that, after she stated she told her father and mother, she denied any knowledge as to who her assailant was. Appellant did take the witness stand and deny the whole transaction, proving a complete alibi for himself, in which he was supported by practically all the testimony except that of the prosecutrix. This testimony was legitimate, and would show, as contended and set out in the bill of exceptions, that Smith instigated the whole thing to avoid the result of the sequestration suit and to thus pay his debt, and further realize from it the wagon, mules, horses, and collars, etc., and \$100 in money.

We have not reviewed all of the bills in this connection, but they are practically along the same general line as those we here mention. This testimony should have gone to the jury, and, because it was excluded, the judgment will be reversed.

[2] There is another question in the case, which is somewhat novel, and upon which the writer finds no authority directly in point. After the testimony was in, the wife of appellant entered the bar where appellant was sitting in front of the jury and took her seat, having with her her baby, something like a year old. The court suspended proceedings, retired the jury in charge of an officer, and instructed that the wife of appellant and his baby be excluded from sitting by her husband in front of the jury inside of the railing of the bar. When this was accomplished, the jury was brought back and the argument proceeded. During the argument, and while Mr. Cunningham was addressing the jury for appellant, the appellant's little child approached the railing near where he was sitting. Appellant reached down and picked up the little fellow and set him on his knee, whereupon the court again suspended the proceedings and retired the jury and had the child removed from the father and sent back to its mother. The court signs this with the qualification, in substance, that he had a rule in substance and effect that friends and relatives, especially female part of them, should not sit with their husband, brother, or relatives during the trial of a case. The wife had been under the rule, and had testified in the case. Of course, this all occurred after the case had been concluded so far as the evidence is concerned. This was the rule by the court, there being no statute in regard to the matter. The bill of exceptions recites further, which is not in any way qualified by the court, that the wife was sitting by the side of her husband, having the little child with her; that the child was not crying nor the wife weeping, and nothing unusual between them or in connection with them occurred, but they were simply sitting there by the side of appellant. The court seems to further think that this would have an undue influence upon the jury and arouse their sympa-

thy for the defendant, and might affect their verdict either in acquittal or in minimizing the punishment. Defendant, whatever else may be said about it, did not get the minimum punishment; they gave him four years when the jury could have given him only two. It might be stated in a general way that courts and lawyers—bench and bar—of this state have been accustomed to the custom of relatives sitting by the defendant during the trial. Of course, the court would have the right to enforce discipline or decorum in court, and prevent manifestations of an unseemly character; but, so far as this case is concerned, there seems to have been no ill effect, except on the defendant, as he received an enhanced punishment above the minimum. It will be difficult for this court to lay down a rule that would arbitrarily say to the trial court that he can or cannot permit witnesses or friends or relatives to sit by an accused person during his trial, and, if so, upon whom the choice should fall who could sit by him and those who should be rejected. It certainly would not be held that he can exclude counsel. Besides, the statute does not require that the accused shall sit in any particular place inside or outside of the bar or railing of the courtroom, should the room be so constructed. The statute does require, in felony cases and in misdemeanor cases, where there is imprisonment attached to the punishment, that defendant shall be present during the trial in the courtroom; but the statute does not specify any particular point at which he shall sit. The usual practice has been that the accused shall sit near his counsel, but this is the practice or custom and not the law; at least, no such statute or provision has been pointed out, and the writer has failed to find any provision of law in reference to it.

Until the recent statute allowing the accused to go on bond during his trial, upon announcement of ready for trial he was taken from the bondsmen and placed in the custody of the sheriff; but under the recent statute this is not the rule. He must be present, however, during his trial, and the case will not proceed otherwise. Appellant may sit in the bar or inside of the railing, if there is such, or he may sit out on one of the benches in the audience. He still would be in the courtroom and would be present at his trial, and to the mind of the writer there seems to be very little force as to the position in the courtroom the accused occupies. If his wife is not permitted to sit with him inside of the railing, he might get outside of that and sit on a bench in the audience with her. Of course, he would have a right to do this, unless there is some rule of law which requires them to be separate and apart during the trial. The court might interfere if the wife was giving exhibition of her feelings that might undignify the court or influence the jury. She might be required to desist, and if she refuses she might

be separated from her husband, but that would be upon the theory that it was unseemly in court like any other demonstration from the audience, but there ought to be something to indicate that the due order of the trial and dignity of the court was impeached or trespassed. The writer is not in harmony with the ruling of the court on that proposition under the facts detailed in the bill of exceptions and as shown by this record. What effect it had upon the jury we could only speculate outside of the fact that he received four years instead of two. This action of the court may have tended to impress the jury with the fact that he thought the wife was placed there, and that defendant subsequently took up his little child for the purpose of affecting their finding, and thus place the jury in rebellion against appellant's cause. This act of the court may have influenced the jury against him. The judge is prohibited from discussing facts or commenting on the weight of the evidence. While this is not a comment in words and language on any fact introduced, or on the weight of the testimony, yet it still is a criticism of the defendant, in that he had his wife sitting by him in front of the jury while the argument was in progress. It cannot always be told what affects the jury in the trial of a case. We are of opinion, however, that under the circumstances of this case the court should not have done what he did.

The judgment is reversed, and the cause remanded.

PRENDERGAST, P. J. (dissenting). The opinion herein opens the door too wide and permits collateral evidence which is wholly inadmissible. No principle heretofore established would authorize the introduction of evidence that appellant's father had brought a sequestration suit against the witnesses' father, with which the witnesses had no connection, and especially that said fathers had agreed to compromise the prosecution and civil suit, with which the witnesses had no connection. And no precedent can be found for any such holding. On the contrary, both principle and precedent are against the holding. *State v. Calvert*, 96 Kan. 813, 153 Pac. 499.

The judge's action in removing, as he did, appellant's wife and child, was correct and presents no error. An accused should always be tried, as the law expressly requires, according to the law and the evidence, and not according to the effect and influence his wife and children may have on the jury. I think the judgment should be affirmed, not reversed.

HARPER, J. (concurring). In agreeing to a reversal of the case, I want to state that the general rule of law is that the acts of a third person who is not a witness cannot be introduced as evidence to affect the credit of a person who testifies in the case. As

stated in Vernon's Cr. Statutes 1916 (note 89, p. 688):

"When the evidence fails to show the defendant's connection (or witness' connection) with the matter, it is improper and inadmissible to adduce in evidence against him the prejudicial acts and declarations of third persons, though such acts and declarations were offered in the interest of or in the behalf of the accused"—citing *Favors v. State*, 20 Tex. App. 161, and other cases.

However, there are some exceptions to the rule, as when the defendant authorizes the third person to act for him. *Burge v. State*, 73 Tex. Cr. R. 505, 167 S. W. 63. The question is: Where the evidence shows that the minor child is living with the father and under his control, and where the father offers to take the child beyond the jurisdiction of the court for a given consideration, is evidence of that fact admissible on the theory that the father may have influenced the child to testify as the child has testified, when the testimony is different from that first statement made by the child? Uel Smith is shown to be only seven years of age. On the trial he testified to hearing his sister say, "Willie Odell, you will be hung for this," and that he looked up and saw Willie Odell running off. On cross-examination, he admits that, on the day of the occurrence, he told them he thought it was Crazy Adams whom he saw running off. "At that time I thought it was Crazy Adams. I had seen Crazy Adams before. I know how he was dressed. When I saw him last, he had on a blue shirt and blue overalls. At that time I thought the party I saw running off was Crazy Adams." So far as this record is concerned, the first time this boy ever said it was appellant running off was when he testified on this trial, which was after appellant's father had brought suit against the girl's father, and after the girl's father, according to the witness W. F. Collins, had approached him, and they together had gone to appellant's father, and the girl's father had agreed, if appellant's father would give him the team sequestered, the black horse, and \$100, he would carry the witness out of the state, and, when appellant's father refused to pay this amount, he became very angry. If the seven year old boy, Uel Smith, before this occurrence had said appellant was the person he saw running off, we would hold the testimony of Collins inadmissible. But inasmuch as Uel Smith, according to this record, had claimed Crazy Adams was the man whom he saw running, and never changed this testimony until after appellant's father refused to pay his father, the writer thinks, when the record shows the child was only seven years old, lived with, and was under the control of, his father, and the child on the stand gave no explanation of his change in his testimony, the evidence that the father, between the time witness said it was Crazy Adams and the time he

testified it was appellant, had sought to obtain money and other considerations to suppress testimony, and when he failed to do so got angry because he could not obtain it, ought to have been admitted to aid the jury in determining whether the father was instrumental in having the little boy change his testimony. This was offered as a motive for the father to have influenced the child to change his testimony, to be considered by the jury. It may be of but little weight, unless the other facts and circumstances should convince the jury that the father had unduly influenced the child to change his testimony.

LAKE v. STATE. (No. 3989.)

(Court of Criminal Appeals of Texas. March 15, 1916.)

1. CRIMINAL LAW § 792(2) — AIDING IN CRIME—"PRINCIPAL"—EFFECT.

Under Pen. Code 1911, art. 74, making all persons guilty of acting together in the commission of an offense principals therein, and article 75, providing that, when an offense is actually committed by one, another who is present knowing the unlawful intent and aids by acts or encourages by words or gestures the one actually engaged in the commission of the offense is a principal, and article 78, providing that any person who advises or agrees to the commission of an offense is a principal, whether he aids or not, when the evidence shows any one of such conditions the court must charge and apply the law of principals and submit such question to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792(2).]

For other definitions, see Words and Phrases, First and Second Series, Principal.]

2. HOMICIDE § 281—MURDER—PRINCIPALS—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for murder held to justify submission to the jury of the issue of the law of principals where defendant stood by and knew the unlawful intent, but failed to prevent the commission of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 573; Dec. Dig. § 281.]

3. HOMICIDE § 281—MURDER—PRINCIPALS—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for murder held insufficient to warrant submission of the issues whether defendant kept watch so as to prevent interruption of the one committing the offense by which under Pen. Code 1911, art. 75, he would have been a principal, or whether he procured arms to assist in the commission of the offense by which under article 76 he would have been a principal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 573; Dec. Dig. § 281.]

4. HOMICIDE § 118(2)—DEFENSES—SELF-DEFENSE—RETREAT.

Where one armed with a shotgun is pursued by another who is unarmed, and whom the first person knows to be unarmed, it is the duty of the first to retreat or to use any other means to prevent an injury to himself, rather than to shoot and kill the pursuer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 169; Dec. Dig. § 118(2).]

5. HOMICIDE §244(1)—MURDER—DEFENSES—PROVOKING THE DIFFICULTY—EVIDENCE.

Evidence held insufficient to raise the issue of provoking the difficulty in a prosecution for murder.

[Ed. Note.—For other cases, see 'Homicide, Cent. Dig. § 507; Dec. Dig. §244(1).]

Appeal from District Court, Wood County; R. M. Smith, Judge.

J. T. Lake was convicted of murder, and he appeals. Reversed and remanded.

Harris & Britton, of Quitman, and J. H. Beavers and W. G. Russell, both of Winnsboro, for appellant. O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. From a conviction of murder, with 12 years in the penitentiary assessed as the punishment, this appeal is prosecuted. Because the case must be reversed, we will not specially discuss the testimony. We will make merely a general statement. On some points the testimony is in direct conflict; that of appellant himself contradicting the other disinterested eyewitnesses. It will not be necessary to state this conflict.

The killing occurred late one evening. About 3 o'clock that evening appellant took his neighbor and friend Mr. Black from Quitman, where they both lived, in his buggy about a mile east, to his farm, to get roasting ears and peas. In going they met deceased, Louis Thorn, who, with Mr. Chreitzbergh, was in deceased's buggy going towards Quitman. Chreitzbergh was quite drunk and sick therefrom. Appellant suggested to them not to go to Quitman in that condition, for they might be arrested. He asked deceased if he had any whisky. Deceased said not, but that, if he and Mr. Black would take Chreitzbergh and go to a certain designated point and wait, he would go get some liquor and meet them there in a few minutes, which he did. Deceased also told them if they met Moore and Kendrick, to tell them to go to said meeting point, which was at or near Dr. Conger's pasture. Deceased soon met all these parties at the designated place, bringing with him raw alcohol. At appellant's suggestion, deceased and Mr. Black went to a negro's house nearby, who was appellant's tenant, where they divided the alcohol in two bottles, diluted one with water and sugar, and returned with both to the crowd. They all, except Chreitzbergh, proceeded to drink the liquor freely, and the evidence justifies the conclusion that they all became more or less affected thereby. After drinking and talking some time, Chreitzbergh and Kendrick got in one of the buggies and left the others.

Soon afterwards trouble arose between appellant and deceased, which resulted in a fight. From the testimony of the state's witnesses Moore and Black it was caused by ap-

pellant calling deceased a G—— d—— s—— of a b——. Deceased resented this, and struck appellant in the face with his fist. Moore got hold of deceased, and Black of appellant and tried to keep them apart and from further fighting. Appellant took the little end of the buggy whip and repeatedly attempted to strike deceased with the butt end of it, but was prevented and the whip taken from him by Black. He then got an iron pin or rod out of his buggy and attempted to strike deceased with that, but was prevented, and this also taken from him by Black. However, in the mêlée deceased struck appellant at least twice more in the face with his fist. The licks bruised appellant's face, and one lick broke the skin above the eye and caused blood to flow. More or less talk was indulged between the parties at the time; appellant telling deceased that he was not able to fight him and had nothing to fight him with. Deceased replied that he could whip him and the whole d—— Lake family, repeating this a time or two. Appellant got in his buggy, started off and said: "I will see if you can whip the whole Lake family." Deceased in a friendly manner tried to pacify appellant, but without success.

Appellant alone in his buggy, leaving his friend Black, drove rapidly back to his home at Quitman, about a mile. He there procured his double-barreled shotgun, put it in his buggy, and drove up to his son Elbert's tailor shop for him. He found his son's shop closed and locked, and then started directly back to the scene of the fight, where he had left deceased. Elbert, his son, had been out east to his pasture to procure and drive back his milk cow. They met, Elbert on horseback, and appellant in his buggy with his shotgun. They stopped and talked some considerable length of time; appellant telling his son why his face was bruised and bleeding, and that deceased caused it. While talking, the sheriff, Williams, and his deputy, Butler, going east from Quitman, came upon them. They stopped and talked with appellant and his son some time. After the four parleyed some time the sheriff told them he would go and investigate the matter. They all went back together to where the fight occurred. When they reached the gate leading into Dr. Conger's pasture, the sheriff got down off of his horse, opened the gate, when all the parties, it seems, went in. The sheriff left his horse there unhitched, took the gun out of appellant's buggy, and walked up the road, meeting deceased and Chreitzbergh in deceased's buggy, and Kendrick and Moore following behind in another buggy. However, Elbert rode on from the gate, meeting these parties just ahead of the sheriff. When he met Chreitzbergh and deceased, he asked, in substance, who had beaten up his father. They both told him that deceased had. Appellant had already told him this. The sheriff, walk-

ing, reached these parties about this time, and ordered Chreitzbergh, who had gotten out of the buggy, to throw up his hands and consider himself under arrest. Chreitzbergh immediately complied, and the sheriff searched him, finding no arms upon him. He thereupon ordered deceased out of the buggy and to throw up his hands and consider himself under arrest, which deceased promptly did, and he searched him, finding two pocket-knives in his pocket, and took both of them off of deceased. He then proceeded back further to the next buggy, where Moore and Kendrick were. He ordered Moore to throw up his hands and consider himself under arrest, with which Moore promptly complied; and he then proceeded to search Moore, finding no arms upon him. Moore inquired why he was arrested and searched. The sheriff responded because of his being drunk and fighting. Moore denied that he had had any fight or was drunk. Then a controversy arose between them. The sheriff presented the gun which he had in his hands towards Moore as if to shoot him. Deceased and Moore, seeing this, evidently believed that the sheriff intended to shoot and kill Moore. Deceased thereupon grabbed the barrel of the shotgun and shoved it so that, if it was discharged, it would not strike Moore. Thereupon the sheriff pulled his pistol, he said, with the intention of killing deceased. Moore and deceased then grabbed the sheriff's pistol and hand in which he held it, in the struggle holding it in such a way that, if discharged, it would strike neither of them; they declaring at the time that they had no intention of hurting the sheriff, but were seeking to prevent him from killing either of them. While all this struggle was going on, Chreitzbergh succeeded in wrenching the gun from the sheriff, and, when Elbert attempted to interfere, threw the gun down on him and stopped him. In the meantime the appellant and the deputy, Butler, had reached the scene, and saw and heard, most of what occurred at the time. Butler attempted to get the sheriff's pistol; and, when he did, Moore and deceased ceased their struggle for it. Elbert at this time had wrenched the gun from Chreitzbergh, presented it as if to shoot Moore, Chreitzbergh, and deceased, and ordered them to scatter, telling them that, if they did not, he would kill all of them. They promptly scattered. Butler appealed to him for God's sake not to shoot. He thereupon lowered the gun. Deceased at once ran to his buggy, jumped in it, put whip to his horses, ran out said gate to the road running north, evidently only intending to avoid being killed. Elbert and his father took after him; Elbert having the shotgun. It is not certain whether Elbert's horse was right there at the time or not, but, if not, Butler's was near by, and he got on Butler's horse and took after deceased. Appellant also soon reached the horse Elbert had ridden

to the scene, mounted him, and rapidly followed Elbert, after deceased. Deceased ran up this road a few hundred yards, whipping his horses and seeking to avoid being killed. Elbert soon caught up with the buggy and waved the gun in towards deceased in the buggy. The buggy top and side curtains were up. Elbert was a part of the time alongside deceased's buggy, and sometimes behind it, appellant following rapidly on his horse; and he testified that he saw his son and the buggy of deceased the whole of the time, the collision of the buggies, and the killing.

Mr. Cowan, a wholly disinterested witness, was coming from the west in his no top buggy along the road which intersected the road running north and south, intending to go this road north. Mr. Wright's place was in the corner of these roads. His house fronted north. Just as Cowan turned from the east and west road into the north and south road, and before his buggy had passed the corner clear, the deceased's buggy and team ran into and broke down his left hind wheel. The collision threw deceased's right horse down, his feet becoming entangled in Cowan's buggy wheel, so that he could not get up, and deceased's other horse got out from under the trace and reversed his position, both buggies immediately stopping when the crash occurred. Cowan jumped out of his buggy, went back a few paces south, and saw and testified to all that occurred thereafter. He said: That Elbert jumped off of his horse, ran around to deceased's buggy, and, as deceased was in the act of getting out of his buggy, with one hand hold of the buggy top, and the other on the dashboard, or wheel, Elbert, with the shotgun in both hands, struck deceased therewith an overhand lick on the center of his head, staggering deceased to his knees, and then ran south. Deceased ran, following. The lick made a ghastly wound on the head of the deceased, cutting the skin for some inches, from which blood flowed. Both parties ran south some 30 or 40 steps as fast as they could, deceased getting no nearer than about 10 steps from Elbert. That after they had run this distance, and were still running, Elbert wheeled and shot deceased in his stomach in the left side, from which he instantly fell, and a few hours later died. That deceased, in running, following Elbert, had nothing in his hands, and was saying nothing and doing nothing except running. Elbert said nothing to deceased after he struck him in the head with the gun. Mr. Cowan testified:

"The next thing that was done the defendant came running up and said: 'Let me have that gun; let's get that other white faced s— of a b—,' " (evidently referring to Moore). That appellant was on his horse and rode up there. That Elbert then went to and got his horse, and they both rode back down south together. "In going from there defendant passed where the deceased was lying, and he said to him: 'Oh, yes, you white headed s— of a b—,' you

said you could whip all three of the Lakes. Now, we have got you where we want you. They then rode on down the lane, going south."

Mrs. Wright testified that she saw the collision, and that, when Elbert got off his horse, he said:

"G— d— you, we have got you now. See whether you can whip all three of the Lakes."

At this time she said Elbert was running towards deceased and had the barrel of the gun pointing towards deceased. She was standing in the door of her house, and said she then closed the door, and did not see the parties again until after the shot was fired, which was soon afterwards. Soon after the shot was fired she looked out of the window and saw deceased on the ground. She phoned to town, then proceeded to get water and went out to deceased's assistance.

Appellant denied that he went up to the scene of the killing, and denied saying what Cowan swore he said. He claimed that he stopped back in the lane near the negro house and saw the race between deceased and his son, the collision with Cowan's buggy and all the other occurrences, including the shooting, and there awaited Elbert, and that, when Elbert reached him, they went back further south, meeting the sheriff, his deputy, and Moore, who were some distance back down the lane walking north.

The indictment, in the usual allegations, in the first count charged that the appellant killed the deceased. In the second count he was charged as an accomplice in the killing. The second count was abandoned and dismissed, and he was tried only on the first. The court submitted murder, manslaughter, and self-defense. He also charged the law of principals, or attempted to do so, and provoking the difficulty. The court's charge is attacked by appellant on these points on many grounds. It is unnecessary to take them up separately.

[1, 2] The statute is (P. C. art. 74) "all persons are principals who are guilty of acting together in the commission of an offense"; and (article 75) when an offense is actually committed by one, and another is present, and, knowing the unlawful intent, aids by acts, or encourages by words or gestures, the one actually engaged in the commission of the unlawful act, he is a principal; also (article 78) any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act. These articles of our Code have been construed and applied many times by the decisions of this court. Where the testimony, positive and circumstantial, one or both, in behalf of the state, as it does in this case, sufficiently raises the question that an accused has conspired with another to kill a person, or, knowing his unlawful intent to kill, aids him by acts, or encourages him by words or gestures, to kill, he may be convicted as a

principal, even though he may not at the time of the killing be bodily in the immediate presence of the actual slayer, it becomes the duty of the trial court to charge and apply the law of principals and properly submit the issue to the jury for a finding. In the recent cases of *Serrato v. State*, 74 Tex. Cr. R. 413, 171 S. W. 1144, *Gonzales v. State*, 74 Tex. Cr. R. 480, 171 S. W. 1148, and *Dillard v. State*, 177 S. W. 104, and others, we have reviewed and discussed many of the cases and charges on this subject, and expressly sustained charges wherein the jury were told under what circumstances an accused would be a principal, even though he was not bodily present when the fatal shot was actually fired. We think it altogether unnecessary to again discuss this question herein or review the cases.

The testimony rather forcibly tends to show that appellant may have advised his son, Elbert, to kill deceased, or agreed thereto, and that they conspired to kill him, and acted together in doing so, and that by his acts and conduct he aided and encouraged him in the killing, and thereby became and was a principal in the killing. What we say herein is not to be taken nor used in another trial that the jury should so find, but merely that the evidence raises these issues, and that they should be properly submitted to the jury for their finding. We think the testimony of the eyewitnesses to the killing would show, if believed by the jury, that appellant was in such proximity to his son at the time of the killing as, in contemplation of law and in fact, to be actually present at the time, even if his own testimony itself would not so place him. But, as stated above, the testimony would authorize and require the court to submit the question of whether or not he was a principal, even if it could be claimed he was not bodily present at the exact time and immediate place of the killing, under the circumstances of this case.

[3] It is true article 75, P. C., provides that any one who keeps watch so as to prevent the interruption of the one committing the offense, and article 76 provides that any one who procures arms to assist in the commission of an offense, is also a principal; but, having carefully studied the testimony herein, we are of the opinion that it raises neither of these issues, and, as the court submitted both of them, and authorized the jury to convict appellant if they believed either, such charge is a material and fatal error to this conviction, and necessarily results in a reversal.

The testimony, positive and circumstantial, was sufficient to show that appellant became angry and entertained malice against deceased because deceased had struck him in the face with his fist, etc., in the fight, that he deliberately went to his home, got his gun, procured and lured his son to return to

the scene of where the fight occurred for the purpose and with the intention of wreaking his vengeance on the deceased to the extent of killing him or having his son do so, and that what was said between him and his son when he met him and their going back together, and what they both and each did after again getting to deceased, and what he did and said just after his son killed him, was sufficient to raise the issue and require the submission of the question to the jury of whether or not he was a principal.

[4] It is very doubtful if self-defense by appellant's son, Elbert, was raised by the evidence so as to authorize or require the court to submit that question to the jury. The uncontradicted testimony shows that, when the sheriff told deceased he was under arrest, he searched him, and found no arms whatever upon him except two pocketknives, and that he then took possession of them and took them from deceased. This was done in the immediate presence of appellant's son, Elbert. When deceased fled, it is evident that he did so for the sole purpose of avoiding being killed by Elbert or the sheriff. From that time on, until he was killed it was not shown that he attacked Elbert in any way or with anything. The utmost that he did was because of the unprovoked and brutal act of Elbert in striking him in the head with the shotgun as he was in the act of getting out of his buggy and staggering him to his knees thereby, and then running to take after him. He is shown positively to have had nothing in his hands or about his person with which he could have inflicted death or any serious injury upon Elbert, and that he got no nearer in the chase than 10 steps from him, when he was shot and killed. So that, if the question of self-defense was raised at all, it was Elbert's duty under the law to have resorted to all other means for preventing any injury upon him by deceased before he had the right to shoot and kill him, and the evidence fails to show that he resorted to any other means whatsoever. P. C. art. 1107; *Kendall v. State*, 8 Tex. App. 509; *Freeman v. State*, 40 Tex. Cr. R. 545, 46 S. W. 641, 51 S. W. 230; *Vinson v. State*, 55 Tex. Cr. R. 493, 117 S. W. 846; *Foster v. State*, 11 Tex. App. 109; *Jordan v. State*, 11 Tex. App. 450; *Hunnicut v. State*, 20 Tex. App. 645; and many other cases to the same effect.

[5] The evidence did not raise the issue of provoking the difficulty. Even if self-defense was raised, it was error in the court to submit any question of provoking the difficulty.

Appellant's bills to the exclusion of certain testimony and to the questions asked by the district attorney as presented by his bills show no error. It is unnecessary to state or discuss them.

For the error of the court in submitting

to the jury that they might find appellant guilty if he kept watch or furnished the gun to Elbert with which the killing was done, and provoking the difficulty, if self-defense was raised, the judgment is reversed, and the cause remanded for a new trial.

CARRELL v. STATE. (No. 3973.)

(Court of Criminal Appeals of Texas. March 8, 1916.)

1. INDICTMENT AND INFORMATION \S 150—VALIDITY—AVERMENTS OF INDICTMENT.

In determining the validity of an indictment, the court must necessarily take its allegations as true.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. \S 497; Dec. Dig. \S 150.]

2. FORGERY \S 7(2) — PROSECUTION—OFFENSE —“ANOTHER.”

Pen. Code 1911, art. 925, declares that one who, without lawful authority and with intent to injure or defraud, shall alter any instrument in writing, in such manner that the alteration would increase, diminish, discharge, or defeat any pecuniary obligation, shall be guilty of forgery, while article 933 declares that it is forgery to make a writing with intent to defraud or injure by inscribing on the opposite side of the paper a signature appearing as an indorsement. Articles 924, 926, 929, and 931, respectively, declare that he is guilty of forgery who, without lawful authority and with intent to defraud, shall make a false instrument in writing, purporting to be the act of another, which will affect pecuniary liability or affect property; that the false making or alteration must be done with intent to injure or defraud; that the term “another” includes the government or a body corporate or person or firm other than the writer; and that every species of a conveyance or undertaking in writing, which supposes a right in the person purporting to execute it, or to dispose of or change the character of property, and which could have such effect when genuine, shall be deemed an instrument affecting property. By Rev. St. 1911, arts. 2759-2762, as well as Act March 6, 1911 (Acts 32d Leg. c. 26 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 2849a-2849b]) the county superintendent of schools was empowered to control and draw out school funds. Such officer drew a check on a bank holding school funds, and falsely signed the name of the payee. Held that, the check being an instrument affecting pecuniary liability, the false signing of the name of the payee constituted “forgery.”

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. \S 10, 11; Dec. Dig. \S 7(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Another*; *Forgery*.]

3. FORGERY \S 12(4)—OFFENSES—WHAT CONSTITUTES.

In such case, whether the check was valid or not, the county superintendent was guilty of forgery, as the indorsing of the payee's name and negotiation of the check would have affected the payee's pecuniary liability.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. \S 39, 40; Dec. Dig. \S 12(4).]

4. FORGERY \S 29(3)—INDICTMENT—VALIDITY —INNUENDO.

An indictment, charging that accused, as county superintendent of public schools, drew a check and forged the name of the payee, is insufficient, in the absence of an innuendo showing that in drawing such check he was acting

in his official capacity as county superintendent of public instruction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 79; Dec. Dig. ¶ 29(3).]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

W. J. Carrell was convicted of forgery, and he appeals. Reversed, and cause dismissed.

D. W. Odell, of Ft. Worth, and Odell, Johnson & Harrell, of Cleburne, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of forgery, and his punishment fixed at 2 years and 6 months' confinement in the penitentiary.

In view of the disposition we make of the case on this appeal, we will not discuss nor pass upon the matters of evidence, or attack on the charge of the court, as they are neither necessary nor proper to its disposition.

The indictment was in two counts, each alleging a forgery of the same instrument. We will copy such portions of the second count only, which we deem proper or necessary in passing upon its validity. After the necessary preliminary allegations in an indictment, this second count avers:

That, on or about February 23, 1914, "one W. J. Carrell, who was then and there the duly and legally elected and qualified county superintendent of public schools in and for Johnson county, Tex., without lawful authority and with intent to defraud, did then and there willfully and fraudulently alter an instrument in writing, then and there already in existence, and which had theretofore been made by the said W. J. Carrell, county superintendent of public schools, and which at the time it was so made and before it was altered by the said W. J. Carrell was to the tenor as follows:

"Cleburne, Texas, Feb. 23, 1914.

"The National Bank of Cleburne County Depository Please pay to E. M. Wilson or bearer \$994.00 Nine hundred & ninety four & no/100 Dollars out of the S & Co Fund collected for School District No. Transfers for Teaching Incidental expenses. W. J. Carrell

"County Superintendent of Public Schools"—and the said W. J. Carrell did then and there alter the said instrument in the manner following, to wit: The said W. J. Carrell did then and there write and indorse the name of E. M. Wilson across the back of said instrument so as thereby to make said writing appear as an indorsement of the said instrument by the said E. M. Wilson, and in such manner that the said false indorsement so made would, if the same were true, have created a pecuniary obligation, and have transferred said instrument, and the said instrument after the said alteration by the said W. J. Carrell, as aforesaid, thereby became and then and there was of the tenor following:

"Cleburne, Texas February 23, 1914.

"The National Bank of Cleburne County Depository Please pay to E. M. Wilson or bearer \$994.00 Nine hundred & ninety four & no/100 Dollars out of the S & Co. Fund collected for School District No. Transfers for Teaching Incidental expenses. W. J. Carrell,

"County Superintendent of Public Schools."

"Indorsed across the back of it: 'E. M. Wilson.'

"That the following part of said instrument: 'out of the S & Co Fund collected for School District No. Transfers for Teaching Incidental

Expenses,' meant out of the state and county school fund apportioned for Johnson county, Tex., for the year A. D. 1914, and that the said sum of \$994.00, mentioned in said instrument, was to be paid to the said E. M. Wilson, payee in said check, out of said fund for transfers."

Then follow averments, to the effect that the bank named meant said bank in Cleburne, Johnson county, Tex., and that said bank had been legally incorporated by virtue of the laws of the United States, and was then engaged in the banking business in Cleburne, and that it had been duly selected depository of the public school funds thereof, and that said bank had accepted said office and duly executed the bond required by law, which bond had been duly accepted and approved—"and which said bank had, previous to said date mentioned in said instrument, received from the state of Texas the public school funds belonging to the public schools of Johnson county, Tex., for the year A. D. 1914."

The appellant attacked the validity of this indictment, and each count of it, on every conceivable ground that experienced and able attorneys, it looks like, could think of or imagine. It is wholly unnecessary to specify all of them. They all hinge around, or are bottomed upon, two propositions, in substance: (1) That the said instrument was illegal and void, and therefore could not be the subject of forgery; (2) that there was no such office as that of county superintendent of public schools of Johnson county, but that the office was that of superintendent of public instruction of said county. It is only these two questions we will discuss and decide, as the decision of these embraces all others.

[1, 2] In discussing the validity of any indictment, the court must necessarily take the allegations as true. Let us first, from the statute, see what forgery is, and what instruments are the subject of forgery, and how they can be forged. Article 925, P. C., is:

"He is also guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall alter an instrument in writing, then already in existence, by whomsoever made, in such manner that the alteration would (if it had been legally made) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever."

Article 983 specifically says:

"It is forgery to make, with intent to defraud or injure, a written instrument, * * * by writing on the opposite side of a paper so as to make the signature appear as an indorsement."

The indictment herein was based specially on these two articles in connection with the others we now mention. Article 924, P. C., is:

"He is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever."

Article 926 provides that the false making or alteration must be done with intent to injure or defraud—

"and the injury must be such as affects one pecuniarily, or in relation to his property."

The next article defines an "instrument in writing," in the broadest and most comprehensive sense which language could do as:

"Every writing purporting to make known or declare the will or intention of the party whose act it purports to be, whether the same be of record or under seal or private signature, or whatever other form it may have."

Article 929, in defining what is meant by the act of "another," enumerates the United States; this state; every other state or territory of the United States; all the several branches of the government of either; all public or private bodies, politic and corporate; all courts; all officers, public or private, in their official capacity; all partnerships in professions or trades; and then concludes:

"And all other persons, whether real or fictitious, except the person engaged in the forgery."

The next article says that pecuniary obligation not only means every instrument having money for its object, but every obligation, for the breach of which a civil action for damages may be lawfully brought. Then the next article, in further definition of what is meant by an instrument which would have transferred or in any manner have affected property, says:

"Every species of conveyance, or undertaking in writing, which supposes a right in the person purporting to execute it, to dispose of or change the character of property of every (any) kind, and which can have such effect when genuine."

It would be difficult, if not impossible, to find language more comprehensive, and at the same time more specific, to define forgery than is used in our statute, and, if the law be properly enforced, succeed in punishing the forger, and thus protect the innocent and unsuspecting from his wiles in his attempted, or consummated, fraud, or injury, by his forgery. This was the purpose, object, and intention of the Legislature in the enactment and repeated re-enactments of said statute. It was well and aptly said by Judge Ramsey, speaking for this court, in *Forcy v. State*, 60 Tex. Cr. R. 210, 131 S. W. 586, 32 L. R. A. (N. S.) 327:

"In these times, as we know, but a small per cent. of commercial transactions are carried on and completed in any other form than by note, bond, checks, orders and drafts. While having due regard for the safety of the individual citizen who may be prosecuted for forgery of any of the manifold instruments" which would in any way affect any pecuniary obligation, or would transfer, or in any manner affect any property whatever, "it is essential that at least some fair regard shall be had to the protection of the great body of our people who are interested in the honesty and integrity of these instruments."

The language of the statute is so plain, clear and unequivocal it needs no construction—all it needs is a true and correct ap-

plication. It should not, and cannot lawfully, be construed away.

In discussing whether or not said instrument (we will herein call it a "check") is such as can be forged, we will assume that appellant's official name is averred therein, "County Superintendent of Public Instruction," or that proper innuendo or explanatory averments are made to the effect that "County Superintendent of Public Instruction" was meant, understood, intended, etc., when and where "County Superintendent of Public Schools" instead is used.

It is proper to here state, in a general way at least, how the available school fund is handled, and the county superintendent's connection therewith and control over it. The state school board, on August 1st of each year, apportions the state school fund for the succeeding year to the various counties, based on the scholastic population. The state superintendent certifies this to the county depositories (treasurers). It is unnecessary to detail how this fund is collected and finally reaches the county depository, except to say that it is paid to it monthly through the comptroller's, state superintendent's and state treasurer's departments, as the taxes are collected. In addition to this fund from the state, the county may get a fund direct from its school lands, or interest on the proceeds thereof, and from other sources also. All of it, however, reaches the county depository during the year, and is held by it to be transferred, or paid out, in maintenance of the county public schools, and all together it is the state and county school fund. The county superintendent's powers, authority, and duties are prescribed by statute. To sum them up generally, they are what the name indicates. He is in truth superintendent of the county public schools. Said schools are taught, managed, controlled, operated, and maintained under his superintendence. Not a dollar of the money in the depository can be paid out, or transferred therefrom, without his action. Every dollar can be paid out, or transferred therefrom, with his proper action. The indictment avers that prior to the time appellant drew said check, the depository had received from the state said school fund belonging to the public schools of said county for 1914, and that the check was drawn in favor of said Wilson and to be paid out of said fund for transfers. Hence we will state how said fund can be transferred. It will be unnecessary to state how the fund can be otherwise paid out or withdrawn.

Article 2759, R. S., authorizes the county superintendent to transfer the whole number of children, when less than 20, from one district to another in his county; and the next article authorizes him to transfer individual children, without restricting the number, from one district to another in his county. And by article 2761 he is authorized

to transfer children and their proportion of the fund to another county. In articles 2760, 2761, he is given express authority to also transfer the child's, or children's, proportion of the school fund. This authority to also transfer the fund, we think, would necessarily be implied, if not expressly given, in the case provided for in article 2759. It is true article 2759 provides the transfers of children should be made before the apportionment is made, and the next articles provide they shall not be transferred after August 1st, yet if the children are transferred in time, it does not follow that the fund may not later be transferred; but, on the contrary, we think, the fund may not only, but in fact should be, transferred later, if not done at the time the child or children are transferred. It is only in this way that the object, intention, and purpose of the law can be carried out, and the fund be properly used for the benefit of the child or children entitled thereto. Again, article 2762 provides for the consolidation of school districts in two or more counties, on the county line, and the transfer of all the children and their fund from one county to the other in which the principal school building is situated. And this article also further provides that all children in one district may be transferred to another, upon such terms as the trustees of the respective districts agree upon. In case this is agreed upon by the trustees, the county superintendent would, of course, make the transfer, both of the children and the funds. And yet, again, the Thirty-Second Legislature, by an act approved March 6, 1911, p. 34 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 2849a-2849o) passed an act which was in force in 1914, providing for rural high schools in the county, to be composed of one or more common school districts. The "general management and control" of the schools were vested in five county school trustees therein provided for, and they were made a body corporate, but they were expressly required to make the county superintendent "their secretary and executive officer." The provisions of this act are somewhat general, but they clearly contemplate and embrace the transfer of both children and their proportion of the school fund, from the common school districts to the rural high school districts. Otherwise the rural high schools could not have been carried on at all. And while the county school trustees, as a body corporate, under their general management and control of the schools, probably could, and should, order transfers of children and funds, yet it certainly was not contemplated that they should themselves, individually or collectively, make the specific transfer of the children or their funds, but clearly this would be done upon their order by the county superintendent, their secretary and executive officer. This would comport with the method of the transaction of busi-

ness by every other corporation. And said act clearly contemplated that the business of said corporate body of trustees should be executed by their said executive officer as county superintendent, and not otherwise.

Thus we have shown the many ways and contingencies wherein and whereby the county superintendent is authorized and required by law to transfer the school fund of his county from one district to another, and from his county to another county, and he alone can do this. No other person or official can. The depository in this instance was a bank, and it had already collected and had the fund on hand on deposit. We know, as every other person knows, that the usual, if not practically the exclusive, way to get money on deposit in a bank out of it is by check. This is the universal and daily and hourly practice, and has always been so. Then every one would expect, and have no other idea, than that when the county superintendent went to transfer this fund, or any part of it, when it had already been collected and on deposit, he would do so by check, as in this instance, and not otherwise. And doubtless the bank would have required him to have drawn a check, if he had attempted to make the transfer otherwise. We, therefore, think it clear and certain and hold that the check in this instance, under our forgery statute could, in no event, be held void so as to prevent it from being subject to forgery.

[3] But suppose we are mistaken in holding that the county superintendent could legally have drawn said check under all or some of the contingencies mentioned, and it should be conceded or held that he had no power or authority to draw it, and that it be conceded or held, as drawn, the depository had no power or authority to pay it, and thereby transfer the fund, then the question would be, Are the averments in the indictment sufficient under our statute to charge forgery? We will discuss the indictment from that standpoint. It avers that appellant drew said check, and as he first drew it, it was thus already in existence. He "did then and there write and indorse the name of E. M. Wilson across the back of it so as thereby to make said writing appear as an indorsement of it by the said Wilson, and in such manner that the said false indorsement so made would, if the same were true, have created a pecuniary obligation and have transferred said check"; it also, of course, being averred that appellant did this willfully and fraudulently and without lawful authority and with intent to defraud. There can be no question whatever that if Wilson, a real person, had, in fact, indorsed his name on the back of said check and procured the money thereon from the Cresson Bank, that would have transferred the check to the Cresson Bank. And if the Cresson Bank had then presented said check to the Cleburne Bank, the depository, and that bank

had refused payment because appellant had no authority to draw it, or it had no authority to pay it as drawn, then unquestionably Wilson's indorsement on said check would have affected him peculiarly and have created a legal pecuniary obligation on his part for the repayment of said amount to said Cresson Bank. And said Cresson Bank, if Wilson had refused or failed to repay said check to it, by reason of his indorsement, could, without doubt, have maintained a suit against Wilson, and recovered a judgment against him in a civil action for the amount of the check. All this is so evident and clear and certain it would be idle to discuss it. The averments in the indictment as drawn, so clearly and fully and distinctly, follow the statute, and are in such strict conformity therewith, no further illustration or application is necessary. The indictment, even on the theory that the check was drawn by appellant without authority of law and contrary to law, and that on the same theory, as drawn, the depository had no authority in law to pay it, and it would have been contrary to law to have paid it, is valid and legal, because the forgery is based entirely on the forgery of Wilson's name by appellant by indorsement on the back of it of his name.

What we decide is no new doctrine, but is in strict accordance with our statute. Neither is it in conflict with any of the well-considered cases heretofore decided by this court. We have failed to find any case exactly in point. It is true many of the cases lay down the general proposition, in effect, that when an instrument is void on its face, it is not the subject of forgery. They also lay down the correct proposition that, even though void on its face, it is subject to forgery, if extrinsic facts are alleged showing that the holder might be enabled, by reason thereof, to defraud another. In all the cases where this first proposition is laid down and stressed the forgery of the instrument itself solely was under discussion, not a forged indorsement of such an instrument. Our statute makes the indorsement of an instrument forgery under the circumstances therein mentioned, regardless of whether the instrument itself is valid or void. We think it unnecessary to cite or discuss these various cases.

[4] This second count of the indictment pointedly avers that appellant was the duly and legally elected and qualified "County Superintendent of Public Schools," and as such drew said check, etc. That was not his official and legal name, but "County Superintendent of Public Instruction" was. He had drawn and signed the check as "County Superintendent of Public Schools," and purported to act in his official capacity. There is no innuendo or explanatory averment whatever to the effect that in drawing and

signing said check as "Superintendent of Public Schools," it was meant, intended, understood, etc., that he did so as "Superintendent of Public Instruction." It is by reason of the fact that said check was drawn and signed in an official capacity on another official that it enabled the payee as holder to defraud another. Hence, under the authorities and in reason, it was necessary and essential to make the innuendo or explanatory averments showing that it was meant, intended, understood, etc., to be his official act, and that in using "Schools" was meant, etc., "Instruction," and without this the indictment is fatally defective. In 17 Enc. of P. & P. p. 240, it is said:

"An indictment or information against a public officer must contain averments as to the official capacity of the defendant, and so characterize him that it may be seen that the offense charged is one denounced by statute * * * as an offense committed by the defendant as an officer, and not as an offense denounced generally" (citing in the notes several decisions).

See, also, *Allison v. State*, 45 Tex. Cr. R. 596, 78 S. W. 1065; *Naill v. State*, 59 Tex. Cr. R. 484, 129 S. W. 630, Ann. Cas. 1912A, 1268.

On this ground alone will this case be reversed and dismissed.

We think it unnecessary to pass upon the first count. It may be sufficient otherwise than the same fatal defect we have pointed out in the second.

The judgment is reversed, and the cause dismissed.

BURKHALTER v. STATE. (No. 3941.)
(Court of Criminal Appeals of Texas. Feb. 16, 1916. Rehearing Denied April 5, 1916.)

1. CRIMINAL LAW §419, 420(4)—EVIDENCE—HEARSAY.

In a trial for murder, where a witness who, with the ex-sheriff, had investigated the case, who was asked no questions in regard to such matter, the statement of the ex-sheriff that such witness had brought him a gun which he had found at the house of another and had said it was the gun that killed deceased, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980-983; Dec. Dig. § 419, 420(4).]

2. HOMICIDE §250 — CONVICTION — SUFFICIENCY OF EVIDENCE.

Evidence in a trial for homicide held sufficient to sustain a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.]

3. CRIMINAL LAW §770(2), 1173(2) — ISSUING—COMMISSION OF OFFENSE BY ANOTHER—INSTRUCTIONS.

In a trial for murder, where the defendant's testimony placed another in the neighborhood of the killing, who had had several fights with the deceased and showed his ill will toward the deceased, the refusal of defendant's specifically requested charge that if the jury believed from the evidence, or if they had a reasonable doubt whether such other person or defendant killed deceased, or if the circumstances did not exclude the idea that such other person

killed deceased, they should find defendant not guilty, was reversible error; notwithstanding the negative presentation of such issue by a charge that the circumstances taken together must be of a conclusive nature tending to produce a reasonable and moral certainty that the "accused and no other person" committed the offense charged, and that if there was a reasonable doubt as to whether defendant was present when deceased was shot they would give him the benefit of the doubt and acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1806, 3165; Dec. Dig. ☞ 770(2), 1173(2).]

4. CRIMINAL LAW ☞ 775(2)—HOMICIDE—INSTRUCTIONS—ALIBI.

In a trial for homicide, where defendant admitted that he was within 250 yards of the scene of the homicide at the time of its commission, the issue of an alibi should be fully presented by the charge and made applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1833; Dec. Dig. ☞ 775(2).]

5. CRIMINAL LAW ☞ 407(2), 448(12)—ADMISSION OF EVIDENCE — CONVERSATIONS WITH DEFENDANT.

It is permissible for the state to introduce conversations with the defendant while not under arrest relative to the crime for which he is on trial and prove statements made to him calling for a denial, and that he made no denial or made a qualified admission, but witnesses should not be permitted to testify that "they told appellant a great many things damaging to him," etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 899, 900, 902, 949, 968, 970, 971; Dec. Dig. ☞ 407(2), 448(12).]

Appeal from District Court, Nacogdoches County; L. D. Guinn, Judge.

John Burkhalter was convicted of murder, and he appeals. Reversed and remanded.

Woods & King, of Houston, and King & Seale, of Nacogdoches, for appellant. Beeman Strong, of Nacogdoches, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the murder of Tellie Manning, and his punishment assessed at ten years' confinement in the state penitentiary.

There is in the record some 25 bills of exception. We have read and considered each of them, but as the case will be reversed, we do not deem it necessary to discuss those that, in our opinion, present no error.

On the trial of the case the state called Miss Oda Grace as a witness, and she testified that on Sunday preceding the homicide she had heard appellant say that if deceased ever crossed his path he (appellant) would kill him. On cross-examination by defendant she testified she was a sister of Porter Grace; that her brother, Porter Grace, and deceased, Tellie Manning, had had three or four fights, and they were mad at each other, and did not like each other at all. She further testified:

"It may be that there at appellant's house on the Sunday before Manning was killed, and at the time he said, if he ever crossed him he would kill him, that I made the remark that we were afraid of Manning, deceased, and if my father

had let Porter alone one day down in the bottom, he would have killed Manning."

She further testified that shortly after Manning was killed some officers came to her brother's and looked at a gun there, and they were about to lay this killing off on Porter Grace, her brother, because he had had several fights with Manning, and she then told them what appellant had said about killing Manning if he ever crossed his path.

[1] The defendant introduced H. C. Rich, who was sheriff of Nacogdoches county at the time Manning was killed, as a witness, and Mr. Rich testified that he and Mr. Spradley, who is now sheriff of that county, were investigating the killing of Manning; that he (Rich) was at the home of appellant and examined a gun at appellant's residence, and in his opinion the gun had not been fired for some time. He furthermore says that Mr. Spradley brought him a gun that he (Spradley) had obtained at the residence of Porter Grace, and said, "This is the gun that killed Tellie Manning." It is further shown that Porter Grace lived at Waterman, and worked in a planing mill at that place; that deceased had gone to Waterman the morning of the killing, and when killed was returning home from Waterman, and in about a mile of that town. Miss Grace testifies that her brother, Porter, was at Waterman that day, so she had been informed by her brother. Porter Grace was not called as a witness either by the state or defendant. No witness testifies as to the whereabouts of Porter Grace at the time of the killing. The defendant's testimony had placed him in this neighborhood, in less than a mile of the scene of the killing; that he and deceased had had several fights some time prior to the homicide, and just before deceased was sent to the epileptic asylum at Abilene—he having just returned from that place on Sunday before he was killed on Tuesday—that a gun was obtained at the home of Porter Grace, which Mr. Spradley said in his opinion was the gun used in killing Tellie Manning. As Mr. Spradley was a witness in the case, and no question asked him in regard to the matter, the testimony of ex-sheriff Rule as to what Mr. Spradley said was inadmissible, and an objection to it should have been sustained.

[2] No one saw the shots fired that killed Manning. The case against appellant was one depending on circumstantial evidence, and we will say here that we do not think the contention of appellant that it is insufficient to sustain a conviction should be sustained. We would not reverse the case on that ground, but we are of the opinion that when the evidence of Rev. Mr. Martin and Mrs. Jones is considered, together with the other facts and circumstances in the case, the evidence would support the verdict of the jury. But the fact it would do so does not alter the rule that the case must be re-

versed if the court did not submit all the issues made by the testimony.

[3] The appellant, when the court's charge was presented to him, excepted to the charge:

"Because the court nowhere instructs the jury in his main charge that if they believe from the evidence or if they have a reasonable doubt therefrom that Porter Grace or Earnest Burkhalter killed deceased or if the circumstances do not exclude the idea that Porter Grace or Earnest Burkhalter killed deceased, then they will find the defendant not guilty, and defendant now requests that the court give to the jury his special charge No. 8, submitting said issue."

In his special charge No. 8 he specifically requested the court to submit that issue, which charge was by the court refused. So if the issue was raised by the evidence that Porter Grace may have killed the deceased, the failure of the court to submit it is raised in a way that we must and should consider it. The court in his charge, in submitting the law governing a case depending on circumstantial evidence, instructed the jury that:

"The circumstances, taken together, must be of a conclusive nature, tending on the whole to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused and no other person committed the offense charged."

He also instructed the jury:

"If you have a reasonable doubt as to whether or not the defendant, John Burkhalter, was present at the time and place that Tellie Manning was shot, if he was shot, you will give the defendant the benefit of such doubt and acquit him."

And then gave the law governing the presumption of innocence and reasonable doubt.

And if this was an original proposition, the writer would be inclined to the opinion that the jury could not be misled as to the law governing the case when thus instructed; but it appears that this identical question has been before this court, and it was held such error as to require a reversal of the case, to fail to charge the jury that if they believe from the evidence that Porter Grace may have shot and killed the deceased, or if they had a reasonable doubt about the matter, to acquit appellant. In the case of *Wheeler v. State*, 56 Tex. Cr. R. 547, 121 S. W. 167, in discussing the identical question here presented, the court said:

"The charge upon alibi and that upon circumstantial evidence negatively, perhaps, presents the issues. It has been, as before stated, the universal rule in Texas to hold that wherever a defensive matter is set up, and supported by facts, the accused is entitled to an affirmative charge on that defensive matter. The law is not satisfied with a negative presentation, and it has been held directly that where there is evidence that another, or others, may have committed the crime, and not the accused, the court must submit this issue to the jury. *Kirby v. State*, 49 Tex. Cr. R. 517, 93 S. W. 1030. For a discussion of the matter generally, see *Harrison v. State*, 47 Tex. Cr. R. 393, 83 S. W. 699; also *Hart v. State*, 15 Tex. App. 204, 49 Am. Rep. 188; *McInturf v. State*, 20 Tex. App. 325; *Leonard v. Washington Territory*, 2 Wash. T. 396, 7 Pac. 878; *Kunde v. State*, 22

Tex. App. 97, 8 S. W. 325; *Coffelt v. State*, 19 Tex. App. 436; *Murphy v. State*, 36 Tex. Cr. R. 24, 35 S. W. 174; *Sawyers v. State*, 15 Lea (Tenn.) 694."

The state insists that in the case of *Brown v. State*, 74 Tex. Cr. R. 356, 169 S. W. 437, this court to some extent modified the rule as announced in the *Wheeler Case*, supra, but from a reading of that case we do not think it will bear any such construction. In the *Brown Case* it was pointed out that the testimony did not place the other *Brown* in such proximity to the place where the offense was committed that he could have committed the offense, and for that reason no charge presenting that issue was required. We cannot so hold in this case. The evidence and all the evidence places Porter Grace in such proximity to the place where the offense was committed that he could have committed the offense. In the *Brown Case* the state, when the defendant sought to raise the issue that the other *Brown* might have committed the offense, introduced evidence as to the location of the other *Brown* and placed him in *Comanche county*, a long ways from the scene of the homicide in *Brown county*. In this case when the defendant sought to raise the issue that Porter Grace may have committed the offense, and by his testimony placed him in at least a mile of the scene of the homicide, the state made no effort to account for the whereabouts of Grace at the time of the homicide.

It seems to have become a settled rule of law in this state, that when the testimony of a defendant, in addition to his plea of not guilty, introduces evidence setting up a distinct defense, that such defense must be affirmatively presented in the charge of the court, and a negative presentation of such an issue is insufficient. *Davis v. State*, 63 Tex. Cr. R. 485, 141 S. W. 43; *Holt v. State*, 57 Tex. Cr. R. 434, 125 S. W. 43; *Coleman v. State*, 54 Tex. Cr. R. 396, 112 S. W. 1072.

[4] The charge on alibi is criticised by appellant, and a special charge requested on that issue. In a case like this, one where the defendant admits that he was in 250 yards of the scene of the homicide at the time of the commission thereof, it would be better to more fully present that issue and on another trial make it applicable to the evidence adduced on the trial.

[5] While it is always permissible for the state to introduce conversations had with the defendant, while not under arrest, relative to the crime he is on trial for having committed, and prove statements made to him calling for a denial, and that he made no denial, or made a qualified admission, yet witnesses should not be permitted to testify "they told appellant a great many things damaging to him," etc. The court endeavored to keep such expressions out, and admit only legitimate testimony along this line, but we call attention to this matter so that

on another trial such expressions as that above will not be allowed to creep into the record.

As before said, we have read each bill of exception in the record, but do not deem it necessary to discuss any of the others. Some of the matters complained of will not occur on another trial, and the others present no reversible error.

The judgment is reversed, and the cause remanded.

TAYLOR v. STATE. (No. 4002.)

(Court of Criminal Appeals of Texas. March 22, 1916.)

1. CRIMINAL LAW §595(9)—CONTINUANCE—ABSENT WITNESSES.

Where defendant's wife would have testified that on the day of the alleged offense he and she spent the day at the home of another, and defendant denied the commission of the offense, a continuance to procure the testimony of his wife, who was ill with typhoid fever, was improperly denied; it appearing that defendant's alleged hosts testified that defendant spent a different Sunday with them than the one claimed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1323; Dec. Dig. §595(9).]

2. WITNESSES §318 — CORROBORATION — ADMISSIBILITY.

Where accused claimed that on the day of the offense he was not at home, and a witness testified that on such day, while on his way to visit a neighbor, he saw and conversed with accused, the state is not, the witness not having been impeached, entitled to introduce evidence showing that the witness did on the day mentioned visit the person claimed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. §318.]

3. CRIMINAL LAW §440—EVIDENCE—ADMISSIBILITY.

Where in a rape case the parents of prosecutrix testified she was born one year after their marriage, the record of the marriage license, being properly proven, is admissible to establish the date of the marriage, and show the age of the prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1026; Dec. Dig. §440.]

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Gus Taylor was convicted of rape, and he appeals. Reversed and remanded.

Greenwood & Short, of Seguin, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of rape, and his punishment assessed at five years' confinement in the state penitentiary.

[1] The most serious question in the case is presented on the application for a continuance. That diligence was used is unquestioned. The subpoena had been duly issued and served, and the affidavit of one doctor and the certificate of another are attached to the application, certifying that appellant's wife had been sick with typhoid fever and was unable to attend court. The date of the alleged offense is fixed as the third Sunday

in May, 1915. Appellant on this trial swears that on this day he was not at home, and that he and his wife spent that day at the home of Henry Neal. If he was at the Neal place on that day, it would disprove the case as made by the state's witness Bertha Duhart. In the application for a continuance he swears that his wife would also testify that they spent that Sunday at Henry Neal's. Henry Neal and his wife swear that they did not do so, but that it was the first Sunday in May that appellant and his wife spent with them. He also swears in the application for a continuance that his wife will testify she was with him each Sunday in May, 1915. It is thus seen there is a direct conflict in this testimony, and, if his wife had been present, she would have supported his testimony.

Jarvis Dale, upon whose place appellant lived (as did the prosecuting witness), Jim Jones, a deputy sheriff, J. W. Jones, J. A. Lynch, R. Imhoff, and J. C. White all testify that they knew appellant, and that his reputation as a peaceable, law-abiding citizen is good. The prosecuting witness swears positively to the act of intercourse. Appellant just as vehemently denies it. No other witness can or does testify to that fact. Under such circumstances we think appellant was entitled to have his wife's testimony on this contested issue, and the court erred in not granting a new trial, when the materiality of the wife's testimony became so manifest.

[2] Again, Henderson Duhart, the father of the girl, testified that he passed the place appellant was living on the third Sunday in May, and talked with appellant. Appellant denies that he saw Henderson Duhart on that day, and in this he would be supported by his wife. There was no impeachment of either of these witnesses, but testimony was admitted supporting the state's witness. Henderson Duhart said when he passed appellant's house and talked with him he went and spent the day with Nannie McKnight. After appellant testified denying seeing state's witness and talking with him that day, the state was permitted to call Nannie McKnight and prove by her that Henderson Duhart and his wife did spend the third Sunday in May with her. She knew nothing as to the facts, but was called to prove the fact as tending to support Henderson Duhart's testimony. This supporting testimony should not have been admitted.

[3] Under the record in this case the marriage license, if properly proven up, is admissible, as Henderson Duhart and his wife fixed the age of the girl by the fact that she was born one year from the date of their marriage. Then any proper evidence showing the date of the marriage would be admissible as affecting the age of the girl. However, the record should be properly

proven up before being introduced in evidence.

The other bills in our opinion present no error.

The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

CANTRELL v. STATE. (No. 3998.)

(Court of Criminal Appeals of Texas. March 22, 1916.)

CRIMINAL LAW ¶1095, 1102—**STATEMENT OF FACTS—BILLS OF EXCEPTION—TIME FOR FILING.**

Where appellant from a conviction of misdemeanor did not file his statement of facts until 85 days after adjournment of the county court for the term at which he was convicted, and the bills of exception did not show when they were filed, but merely that they were approved by the judge within the time by law in which they could have been legally filed, the state's motion to strike the statement and bills must be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2847; Dec. Dig. ¶1095, 1102.]

Appeal from Ball County Court; W. S. Shipp, Judge.

Cotton Cantrell was convicted of misdemeanor, and he appeals. On motion to strike the statement of facts and bills of exception from the transcript. Motion sustained.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. This is a misdemeanor conviction. The term of court at which appellant was convicted adjourned November 30, 1915. The statement of facts contained in the record was not approved until January 3d, and, after being approved on that date, was not filed until February 13, 1916—some 85 days after the adjournment of county court for the term. The bills of exception contained in the record do not show when filed with the clerk of the county court, but the date of approval by the judge shows they were approved within the time allowed by law in which they could be legally filed. Therefore the motion of the Assistant Attorney General to strike the statement of facts and bills of exception from the transcript must be sustained. *De Friend v. State*, 153 S. W. 881; *Durham v. State*, 155 S. W. 222.

The judgment is affirmed.

DAVIDSON, J., absent.

LEONARD v. STATE. (No. 4000.)

(Court of Criminal Appeals of Texas. March 22, 1916.)

CRIMINAL LAW ¶945(2)—**NEW TRIAL—EVIDENCE—SUFFICIENCY.**

Where, after conviction on unsatisfactory evidence for theft of a hog, the accused attached to his motion for new trial affidavits of three

persons that they had, subsequent to the trial, seen the hog alleged to have been killed and taken by accused in the river bottom, where it was allowed to run, refusal of new trial was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. ¶945(2).]

Appeal from District Court, Angellina County; L. D. Guinn, Judge.

Loss Leonard was convicted of theft of a hog, and from an order denying new trial, he appeals. Reversed and remanded.

I. D. Fairchild, of Lufkin, and W. J. Townsend, Jr., of Jacksonville, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of theft of a hog, and his punishment assessed at two years' confinement in the state penitentiary.

The state's case, as testified to by its witnesses, is that J. E. Lee owned some hogs that run at large in the Neches river bottom, one of the hogs being a black-listed sow, the list consisting of a white streak covering its left hind foot and extending up over the thigh and to near the center of the back. He says his hogs were marked over square and two underbits in right ear, and a crop and underbit in the left ear. Mr. Lee says he had seen this hog in the bottom frequently prior to the alleged theft, but had been unable to find her since that time. Allen Ashworth testified that he, appellant, and Bert Lester went hog hunting, appellant claiming to own hogs in the bottom; that they looked at several droves of hogs, finally coming to the drove in which was the sow that was killed, Ashworth shooting the hog at the request of appellant. The hog was cleaned, its head cut off, and when appellant cut the head off Ashworth says he told appellant "it was a penitentiary offense to cut the hog's head off after sundown in the woods"; that this was his understanding of the law. Appellant replied, "If there is ever going to be any question about it, I had just better cut the ears off to show it is my hog," and appellant did cut the ears off and put them in his pocket. Ashworth says the sow they killed was a black sow with one white foot, the white extending up over her thigh; that he did not notice the mark. This is the proof relied on to show that the hog killed was the hog of J. E. Lee.

Appellant introduced testimony that he owned a number of hogs that also ran in the bottom, and that he owned one "listed" virtually the same as the hog testified to by J. E. Lee; that his hogs were marked crop and split in right ear and two underbits in left. Bert Lester testified that the hog killed was in the mark of appellant, and not in the mark of Lee. The ears that appellant claimed he cut off the hog killed were introduced in evidence, and Mr. Lee testified, "If these ears came off the hog killed by defendant, it was

not my hog;" that the mark was not his mark. And it seems to be proven beyond question that the ears introduced in evidence were in appellant's mark, and it is also shown beyond question that appellant owned hogs that ran in the bottom. To say the least of it, the evidence is very unsatisfactory to show that the hog killed was the hog of Mr. Lee, from whom it is alleged the hog killed was stolen. All the evidence on this point is that Ashworth says they killed a black sow with some white spots, the white extending up on the side. Lee says he lost a sow about this time of this general description, and he had not been able to find it since that time, and that his hog was in a certain mark; no witness testifying that the hog killed was in that mark. On the contrary, Bert Lester, who was present when the sow was killed, says the hog was not in Lee's mark, but in appellant's mark, and appellant so testifies. In addition to this, all the witnesses say appellant cut the ears off under the circumstances hereinbefore recited, and these ears, according to his testimony, are produced in court, and Mr. Lee says, if these are the ears cut off the hog killed, it is not his hog. With the evidence in this unsatisfactory condition as to the ownership of Lee of the hog killed, to the motion for a new trial appellant attaches the affidavit of W. H. Crager, V. I. Stringer, and Artie Crager, who swear that since the trial and conviction of appellant they went to the Neches river bottom to search for the hog of Mr. Lee, and that some two miles below the accustomed range they found the hog of Mr. Lee alive, with another hog belonging to him; that "they saw the sow Mr. Lee claims to have lost on last Saturday (after the trial of appellant), and the sow was in the mark of Mr. Lee; that she had one white foot and the white streak extended over her hip up on her back." Under such circumstances we are of the opinion a new trial should have been granted. This testimony may not be true, but, if not, these three witnesses committed perjury; but, there being no evidence that they did not see this sow alive since the conviction of appellant, we are of the opinion the court erred in not granting a new trial on this newly discovered testimony. *Crockett v. State*, 14 Tex. App. 229.

The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

SIMMONS v. STATE. (No. 3993.)
(Court of Criminal Appeals of Texas. March 15, 1916. Rehearing Denied April 5, 1916.)

1. CRIMINAL LAW §406(4)—SECRECY OF PROCEEDINGS—EVIDENCE OF GRAND JUROR.

The admission of a grand juror's testimony as to what the accused testified to before the grand jury when subpoenaed and required to an-

swer, without being informed of her privilege, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 920-927; Dec. Dig. §406 (4).]

2. ADULTERY §7—INDICTMENT—SUFFICIENCY—SURPLUSAGE.

In charging the crime of adultery, the indictment need not allege the name of the accused's spouse, and, if alleged, it may be treated as surplusage.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 12-16; Dec. Dig. §7.]

3. ADULTERY §10—MARRIAGE OF ACCUSED—PRESUMPTIONS.

The state need not prove that the alleged adulterer's spouse was actually living at the time of the offense charged, but from proof that he was alive within one year prior thereto, the rebuttable presumption that he still lived arises.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. § 19; Dec. Dig. §10.]

Appeal from Ellis County Court; W. M. Tidwell, Judge.

Lizzie Simmons was convicted of adultery, and she appeals. Reversed.

W. H. Fears and J. C. Lumpkins, both of Waxahachie, for appellant. Tom Whipple, Co. Atty., of Waxahachie, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction for adultery, with the lowest fine assessed.

[1] Appellant's bill of exceptions No. 3, in substance and in effect, shows that, while the grand jury was investigating this case, they had appellant brought before them on a subpoena. They administered to her the oath required by law, and at the time explained to her the nature of that oath, and told her that she had to tell the truth to whatever question that was asked her, and, if she did not tell the truth, they would send her to the penitentiary. They did not warn her that she had the right to testify or not as to anything that would implicate her in the offense. They then asked her whether she was a married woman, and she thereupon answered that she was, and told to whom and when she was married. Immediately upon the close of her testimony, they delivered her to the constable, the officer who had summoned and brought her before them, with instructions to lock her up in jail, which was done. Soon afterwards the grand jury returned the indictment in this case against her. On this trial, they introduced the foreman of the grand jury and permitted him, over her objections, to testify what she had testified before the grand jury. The admission of the grand juror's testimony was clearly erroneous, and must result in the reversal of the judgment. *Wood v. State*, 22 Texas App. 431, 3 S. W. 336; *Gilder v. State*, 35 Tex. Cr. R. 360, 33 S. W. 867; *Calloway v. State*, 55 Tex. Cr. R. 262, 116 S. W. 575; *Fry v. State*, 58 Tex. Cr. R. 169, 124 S. W. 920. It is unnecessary to cite other cases.

[2] In the offense of adultery, it is unnecessary for the indictment to allege the name of the person to whom an accused is married. Even, if alleged, it may be treated as surplusage. *Bodkins v. State*, 172 S. W. 216; *Goodwin v. State*, 70 Tex. Cr. R. 600, 158 S. W. 274. However, it would be better not to allege the name of the husband or wife to whom an accused is married.

[3] When proper evidence that one or the other of the parties to the offense of adultery is married as alleged, it would not be necessary for the state to prove that the husband or wife, by positive proof, was actually living at the time of the alleged offense, especially when proof is made that the husband or wife, as the case may be, was living within a year prior thereto. Both the presumption in law and in fact would be that the party was still living, unless other proof was introduced to show the death of the party before the offense was committed.

It is unnecessary to discuss any of the other questions raised, for the error in admitting the testimony of the foreman of the grand jury will cause the reversal of this case.

STATE v. GALVESTON, H. & S. A. RY. CO.*
(No. 5533.)

(Court of Civil Appeals of Texas. Austin.
Jan. 26, 1916. Rehearing Denied
March 1, 1916.)

1. RAILROADS \S 226 — ACCOMMODATIONS FOR WHITE AND COLORED PASSENGERS — PENALTY.

Rev. St. 1911, art. 6746, requires carriers of passengers to provide separate coaches or compartments for white and negro passengers, equal in all points of comfort and convenience. Article 6748 requires the separate compartments to be lettered indicating the race for which each is set apart. Article 6749 provides the penalty for noncompliance. Article 6750 provides an exception that railroad companies may haul sleeping cars, dining or café cars, or chair cars to be used exclusively by either white or negro passengers separately, but not jointly. Article 6753 requires conductors to refuse admittance or eject passengers not entitled to ride under the above provisions. *Held* that, if the carrier furnishes the accommodations required, no penalty can be recovered from it, although the passenger or conductor may be subject to penalty for riding or permitting one to ride in the wrong car.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 740; Dec. Dig. \S 226.]

2. RAILROADS \S 254(6) — OPERATION — ACCOMMODATIONS — PENALTY — BURDEN OF PROOF.

In an action to recover the penalty under such statutes, the burden is on the state to show that the required accommodations were not provided.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. \S 254(6).]

3. RAILROADS \S 254(6) — OPERATION — ACCOMMODATIONS — PENALTY — EVIDENCE.

Evidence that white and negro passengers occupied together a particular Pullman coach is insufficient to show that other coaches properly marked and fitted, as required by such statutes, were not provided.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. \S 254(6).]

4. COMMERCE \S 62 — CARRIAGE OF PASSENGERS — NEGROES — ACCOMMODATIONS.

Neither the railroad nor the conductor has, under such statutes, the right to compel an interstate negro passenger to leave the coach in which he was riding and go into another, though equal in point of comfort and convenience.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 81; Dec. Dig. \S 62.]

5. RAILROADS \S 254(6) — OPERATION — ACCOMMODATIONS — PENALTY — BURDEN OF PROOF.

Under such statutes, if it be conceded that they apply to Pullman coaches, the burden is on the state to show that no other Pullman coaches in the train were equipped as prescribed, in the absence of which showing no penalty could be recovered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. \S 254(6).]

6. RAILROADS \S 254(6) — OPERATION — ACCOMMODATIONS — PENALTY — BURDEN OF PROOF.

In an action for the penalty under such statutes, the fact that the railroad proved proper accommodations in day coaches and made no proof as to the condition of accommodations in Pullmans is insufficient to shift to it the burden of proving compliance as to Pullman coaches.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. \S 254(6).]

7. RAILROADS \S 226 — OPERATION — ACCOMMODATIONS — PENALTY.

Under such statutes, if the train contained Pullman coaches properly marked and fitted, the fact that a negro was permitted to ride in a Pullman not so marked or equipped would not entitle the state to recover the penalty from the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 740; Dec. Dig. \S 226.]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by the State of Texas against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for defendant, and the State appeals. Affirmed.

B. F. Looney, Atty. Gen., and Luther Nickels, Asst. Atty. Gen., for the State. H. M. Garwood, J. H. Tallichet, and Baker, Botts, Parker & Garwood, all of Houston, for appellees.

KEY, C. J. In this case there was a non-jury trial, and the judge filed the following conclusions of fact:

"(1) It was admitted upon the trial and in the answer of the defendant, and the court concludes as a fact, that the defendant was a railway corporation organized and existing under the laws of the state of Texas at the time referred to in the petition; that it owned, controlled, and operated a line of railway extending from the Rio Grande river west of the city of El Paso, through the cities of El Paso and San Antonio to Houston, Tex.; that on said date it operated passenger trains over said line between the places aforesaid; and that on said date it operated its passenger train No. 10, which was equipped with passenger coaches. The defendant also admitted, and the court concludes as a fact, that said train No. 10 also carried Pullman sleeping cars, and that a negro or negroes rode in said Pullman tourist car No. 3197 from a point outside of the state of Texas to San Antonio, Tex.

"(2) The court concludes from the evidence that the negro passengers in said Pullman tourist car No. 3197 consisted of a woman and three

children, who took passage from San Francisco, Cal., and a man, who took passage from Los Angeles, Cal., said passengers having both sleeping car and railway transportation from said points into and through the state of Texas, and to points in other states beyond the state of Texas.

"(3) That said train No. 10 was a through interstate train, moving in continuous transit from San Francisco, Cal., through the states of California, Arizona, New Mexico, Texas, and Louisiana to the city of New Orleans, La., over the railway line of the Southern Pacific Railway Company to the Rio Grande at a point about four miles west of the city of El Paso, and over the line of the Galveston, Harrisburg & San Antonio Railway Company from said Rio Grande river to Houston, Tex., and over the line of the Texas & New Orleans Railway Company to the Texas state line, and over the line of the Louisiana Western Railway Company to Lafayette, La., and thence over the line of Morgan's Louisiana & Texas Railway & Steamship Company to New Orleans, La., and that said Pullman tourist sleeper No. 3197, in which said colored passengers were transported from San Francisco and Los Angeles, respectively, was a through interstate sleeping car, moving in said train from San Francisco, Cal., over said railway lines to New Orleans, La.

"(4) That there were no separate compartments for the white and colored races in said sleeping car.

"(5) That defendant's said train No. 10 from the Rio Grande river to San Antonio was provided with coaches which were divided into separate compartments for the white and colored races, other than said Pullman tourist car No. 3197."

In addition to the facts found by the court, it was alleged by the plaintiff and admitted by the defendants that there were several other sleeping cars in the train referred to, but the evidence fails to show whether or not any of the other sleeping cars were set apart and marked for the different races. It was also shown that the Pullman company had its own conductor in charge of the Pullman coaches, who collected the fares for that company from passengers riding in sleeping coaches, and who did not collect any fares for the railroad company. In fact, the testimony indicates a similar state of facts to those involved in *Commonwealth v. Railway Co.*, 141 Ky. 502, 133 S. W. 1158, 32 L. R. A. (N. S.) 801, which will hereafter be referred to.

Opinion.

[1] The state brought this suit to recover penalties prescribed by the act of 1907, now incorporated in the Revised Statutes of 1911 from articles 6746 to 6753, inclusive; and from a judgment in favor of the defendant railway company, the state has appealed. The law referred to was enacted for the purpose of requiring common carriers of passengers in this state to provide separate coaches or compartments for the accommodation of white and negro passengers, equal in all points of comfort and convenience. It prescribes a penalty against the carrier, recoverable by the state; for a failure of the carrier to provide such separate coaches or compartments makes it the duty of the conductor to enforce the provisions of the statute, and fixes a penalty against him for knowingly

falling to do so, as well as a penalty against any passenger riding in any coach or compartment not designated for his race, after having been forbidden to do so by the conductor. The latter provisions prescribing penalties against conductors and passengers for breaching the statute are incorporated in the Penal Code, and not in the Revised Statutes. The statute does not assess a pecuniary penalty against the carrier for failing to compel members of each race to ride in coaches or compartments provided for such race, but the only penalty prescribed against the carrier is for a failure to furnish separate coaches and compartments. If the carrier furnishes the accommodations referred to, so that the races may be separated, no penalty can be recovered from it, although a passenger may subject himself to a penalty by riding where he is not entitled to, and the conductor may also be subject to a penalty for permitting him to do so.

[2, 3] It requires no citation of authorities to support the proposition that, whenever the government seeks to recover a penalty for the violation of a statute, the proof must show with a reasonable degree of certainty that the statute has been violated by the defendant from whom the penalty is sought to be recovered. So in this case the burden rested upon the state to show that on the occasion referred to the defendant, while operating the train in question within the borders of this state, failed to provide separate coaches or compartments for the accommodation of the white and negro passengers, equal in all points of comfort and convenience. The record fails to show a discharge of that burden. The proof that white and negro passengers occupied together a particular Pullman coach was not sufficient to show that the other sleeping coaches in the train were not so arranged and marked and designated as to provide separate accommodations of equal comfort and convenience for each of the two races.

[4] It is contended by counsel for the railway company, not denied by counsel for the state, and seems to be held by the weight of authority that statutes providing for the separation of the two races have no application to the rights of interstate passengers; and therefore it would seem that on the occasion in question neither the defendant nor the conductor in charge of its train had any right to compel the colored passengers to leave the coach in which they were riding and go into another, even though equal in point of comfort and convenience. *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547; *McCabe v. Railway*, 186 Fed. 968, 109 C. C. A. 110; *Thompkins v. M., K. & T. Ry.*, 211 Fed. 391, 128 C. O. A. 1, 52 L. R. A. (N. S.) 791; *State ex rel. Abbott v. Hicks*, 44 La. Ann. 770, 11 South. 74; *Hart v. State*, 100 Md. 595, 60 Atl. 457; *Anderson v. L. & N. Ry. (C. C.)* 62 Fed. 46.

[5, 6] But, if it be conceded that the defendant's conductor had such authority, his fail-

ure to exercise it might subject him to a penalty, but would not render the defendant liable. So, if it be conceded that the statute under consideration was intended to apply to Pullman coaches, then in order for the state to recover a penalty it should have been shown that the other Pullman coaches in the train referred to were not equipped in the manner prescribed by the statute. If the Pullman and day coaches were so equipped, then no penalty could be recovered from the defendant company. The defendant, without making any proof concerning the other coaches, showed that the day coaches were equipped in the manner prescribed by the statute; but in this proceeding to recover a penalty we do not feel authorized, from the fact that it made that proof and made no proof as to the condition of the other sleeping cars, to infer that the latter were not so equipped. The burden rested upon the state to make that proof, and we do not feel justified in holding that that burden was shifted to the defendants to show compliance with the statute in reference to such other coaches.

[7] If on the occasion here involved the train contained other Pullman cars equipped, designated, and marked as required by the statute sufficient to accommodate the public, then the fact that Pullman car No. 3197 was not so equipped, designated, and marked would not render the defendant liable for the statutory penalty, even if it did not have the right to ignore the statute as to interstate traffic, as held by some of the cases cited above. But there is another feature of this case.

In *Commonwealth v. Illinois Cent. Ry. Co.*, 141 Ky. 502, 133 S. W. 1158, 32 L. R. A. (N. S.) 801, the Supreme Court of Kentucky in construing a statute quite similar to ours, made the following rulings:

"A Pullman sleeping car controlled wholly by servants of the Pullman Company, and the fares in which were exclusively received by that company, where it does not appear that the carrier was paid anything by the Pullman Company for handling the sleeper, the only benefit it presumably derived therefor being the inducement for an increased travel, was not operated by the carrier to whom it was delivered for transportation within Kentucky Statutes, § 795 (Russell's St. § 5343), and the carrier, not being required to furnish sleeping cars under the act, was not liable thereunder for hauling the sleeper which contained no separate compartments for white and colored passengers or for failure to require a colored passenger therein to enter the compartment of the separate day coach set aside for his race, where he had provided himself before reaching the state with a ticket entitling him to ride in the sleeper, and was a passenger thereof when the sleeper was attached to the carrier's train, and also held a ticket entitling him to be carried through the state upon the carrier's train to which the sleeper was attached. The carrier, having furnished day coaches with the prescribed separate compartments for the white and colored races, and having properly labeled them, even if it were the duty of the conductor of the train to require the colored person to leave the sleeper and take the colored compartment in the day coach, would not be liable under Kentucky Statutes, § 795 (Rus-

sell's St. § 5343), for his failure to do so; such failure being an offense of the conductor."

The instant case is quite similar to the one dealt with by the Kentucky court; and, if it were necessary to so decide in order to support the judgment, we are strongly inclined to the view that our statute should be given the same construction, and that it should be held upon a similar state of facts, as was held in that case, that the railroad company was not operating the Pullman sleeping car within the purview of the statute. In this case whether or not the penalty could be recovered from the Pullman Company is not involved, and we express no opinion upon it.

After due consideration of the case, in the light of able briefs filed by counsel representing the respective parties, our conclusion is that the trial court rendered the proper judgment, which should be affirmed; and it is so ordered.

Affirmed.

INTERNATIONAL & G. N. RY. CO. v. VOGEL. (No. 5564.)

(Court of Civil Appeals of Texas. Austin.
Jan. 19, 1916. Rehearing Denied
March 1, 1916.)

1. RAILROADS \Leftrightarrow 407—INJURIES TO ANIMALS NEAR TRACKS—REPAIRS.

While a railroad company is not liable for damages occasioned by animals becoming frightened from the repairs being made at a cattle guard alongside a public road, it is liable when its servants, notwithstanding the animals showed fright, continued to push a hand car towards them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1402, 1403; Dec. Dig. \Leftrightarrow 407.]

2. RAILROADS \Leftrightarrow 446(12)—INJURIES TO ANIMALS NEAR TRACKS—ACTIONS—JURY QUESTION.

In an action for injuries to horses being driven along a road, which were hurt in crossing a cattle guard, the question whether the owner was guilty of contributory negligence in driving them loose held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1639; Dec. Dig. \Leftrightarrow 446(12).]

3. APPEAL AND ERROR \Leftrightarrow 1003 — REVIEW — VERDICT.

On appeal a verdict cannot be disturbed because against the greater preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. \Leftrightarrow 1003.]

4. TRIAL \Leftrightarrow 251(3) — INSTRUCTIONS — PLEADING.

Where contributory negligence of plaintiff was not pleaded, the matter should not be submitted in the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 590; Dec. Dig. \Leftrightarrow 251(3).]

5. APPEAL AND ERROR \Leftrightarrow 1068(5)—HARMLESS ERROR—INSTRUCTIONS—REFUSAL.

Where it was claimed that plaintiff's horses, which were being driven along a road near a railroad crossing, were frightened by employees of the company, and, running across a cattle guard, received injuries, and under the instructions the jury could not have found against defendant unless its employees were near the road

pushing a hand car, the refusal of a charge that if defendant's employes were not near the road there could be no recovery was not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. 401668(5).]

6. RAILROADS 439(4) — INJURIES TO ANIMALS ON TRACKS—PLEADING—SUFFICIENCY.

Where the petition alleged that a railroad company's employes were operating a hand car near a crossing, that from the point where they were working they might, by the exercise of reasonable care, have seen plaintiff's horses approaching the crossing, and that, though the horses took fright, they continued to push the car towards them, it raised the issue of discovered peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1562; Dec. Dig. 40439(4).]

7. RAILROADS 446(8) — INJURIES TO ANIMALS ON TRACKS — DEFECTIVE CATTLE GUARD.

As a railroad company is bound, under Rev. St. 1911, arts. 6596-6600, to erect proper cattle guards, the question whether cattle guards over which plaintiff's horses passed were sufficient to turn animals, it being contended that the horses were frightened and ran upon the cattle guard, the first one getting past and the others not doing so, was properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1635; Dec. Dig. 40446(8).]

8. RAILROADS 440—INJURY TO ANIMALS—PROOF—VARIANCE.

Where the petition averred that plaintiff's horses being driven down the road were frightened by the operation of a hand car, proof that the car was technically a push car which was being shoved by the railroad company's servants does not constitute a variance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1570-1574; Dec. Dig. 40440.]

9. APPEAL AND ERROR 742(4) — ASSIGNMENTS OF ERROR—STATEMENT.

Under an assignment complaining that in an action for injuries to horses which took fright and ran over a cattle guard the court erred in admitting evidence as to the operation of a railroad push car in the vicinity, a statement concerning evidence showing that the railroad company's employes were making some noise working on the cattle guard is not germane to the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. 40742(4).]

Appeal from District Court, Comal County; Frank F. Roberts, Judge.

Action by Albert Vogel against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fisher & Fisher and Robt. L. Thompson, all of Austin, for appellant. Henne & Fuchs, of New Braunfels, for appellee.

JENKINS, J. Appellee was the owner of some horses that were not broken to harness or the saddle, but otherwise were not wild. He sent them in the care of two negroes to water, one of the negroes was riding and was leading a mare which the other horses followed, and the other negro was in the rear driving them. The road in which the horses were crossed the track of appellant's railway. Appellant's employes were repairing a cattle

guard on the south side of the road. In passing this place the horses became frightened and ran across the cattle guard on the north side of the road and were injured by spikes in the rails of the cattle guard. The grounds of negligence alleged were the improper condition of the cattle guard and that appellant's employes by pushing a hand car towards the horses, frightened them, and that they continued to push said car after they discovered the presence of the horses, and that they had become frightened.

[1] Appellant's first proposition under its first assignment of error is that the court erred in refusing to peremptorily instruct a verdict for appellant, because there was no evidence that its employes engaged in repairing the cattle guard alongside a public road were doing so in an unusual and extraordinary manner, or that they were making any unusual or extraordinary noise while doing so. It is not alleged that the injury occurred by reason of any unusual noise being made in repairing the road, but by reason of the horses becoming frightened at the operation of a hand car. It is true that a railroad company has a legal right to repair its roadbed, and that it is not liable for damages occasioned by animals becoming frightened thereby, when the same is done in the usual and ordinary manner, unless the employes knew, or had reasonable grounds for believing that their acts would have such effect. *Pasture Co. v. Railway Co.*, 41 S. W. 190; *Railway Co. v. Graham*, 46 Tex. Civ. App. 98, 101 S. W. 847. Appellee alleged that the fact that the horses had become frightened was discovered by appellant's employes, notwithstanding which they continued to push the hand car towards the horses. The evidence was sufficient to require this issue to be submitted to the jury; hence the court did not err in refusing to peremptorily instruct a verdict for appellant.

[2] Appellant submits the further proposition under its first assignment of error that the court should have instructed a verdict for it, because the evidence shows that the animals were injured by reason of their "becoming wild and unmanageable through fright or excitement"; and also that it was contributory negligence on the part of appellee to have such animals driven along the road. The allegation of appellee is that such animals became "wild and unmanageable through fright on account of the negligent acts of appellant." The evidence is not such as that we can say, as a matter of law, that it was negligence in appellee to have said horses driven along said road in the manner in which he did. On the contrary, the evidence shows, as is necessarily implied from the finding of the jury, that appellee was not negligent in this regard. The second assignment of error also relates to the refusal of the court to peremptorily instruct a verdict

for appellant, and is overruled for the reasons above stated.

[3] The third assignment is that the court erred in refusing to grant a new trial, because the verdict is against the "greater preponderance of the evidence." If this is true it affords no ground for reversal by this court.

The fourth assignment is that the court should have granted a new trial because:

"There was no evidence from which the jury could infer that plaintiff's horses were caused to be frightened and thereby sustain injury as the proximate result of the presence and negligent operation of a hand car; but, on the contrary, the evidence indisputably shows that if plaintiff's horses sustained any damage, the same was directly and proximately due to their fixed propensities and not to any acts attributable to the defendant."

What we have said in a previous portion of this opinion disposes of this assignment.

[4] The fifth assignment of error is as to the refusal of the court to submit a requested charge on contributory negligence. Contributory negligence was not pleaded by appellant. The only negligence on the part of appellee suggested by the evidence is in appellee's servants driving the horses back over the cattle guard.

[5] The court, at the instance of appellant, gave the following special charge:

"In this case you are charged that if from the evidence you find that plaintiff's employes drove or caused to be driven plaintiff's horses across the cattle guard, and such acts, if any, produced injuries from which said horses or some of them died as the direct and proximate result, you will return a verdict for defendant, regardless of every other issue which may be submitted to you."

The sixth assignment of error is as to the refusal of the court to give special charge No. 10, as follows:

"In this case you are charged that if from the evidence you find that defendant's servants and employes were not present at or near the crossing at the time plaintiff's horses came thereon, you will return a verdict for defendant, regardless of every other issue that may be submitted to you."

Appellant's testimony was to the effect that its employes had left the cattle guard and were some 500 yards distant therefrom when the horses ran across the same. Under the charge of the court the jury could not have found for appellee without finding that this was not true, but that appellant's employes did as alleged, and they could not have done so without being at or near the cattle guard. Hence we overrule said assignment.

[6] The seventh, eighth, and ninth assignments of error relate to the issue of discovered peril. Appellee alleged that appellant's employes—

"were operating a hand car on the south side of the crossing, and that defendant's servants from the point where they were working and pushing said car, as alleged above, could see, and by the use of reasonable care could have seen and actually did see, the horses of plaintiff as they were approaching said crossing."

The testimony upon the part of appellee sustains this allegation; and the charge of the court having fairly submitted this issue to the jury, the assignments above referred to are overruled. *Railway Co. v. Belew*, 22 Tex. Civ. App. 264, 54 S. W. 1079; *Railway Co. v. Beard*, 42 Tex. Civ. App. 427, 93 S. W. 532; *Johnson v. Railway Co.*, 45 Tex. Civ. App. 146, 100 S. W. 206.

The tenth assignment is based upon the proposition that there was no evidence raising the issue of discovered peril which, as above stated, is not sustained by the record.

[7] The eleventh assignment of error complains of the action of the court in giving special instruction No. 1, to the effect that if "the cattle guard over which said horses did run was defective, or was so constructed that it would not turn horses and cattle of ordinary disposition and docility," etc. The evidence shows that the cattle guard had spikes down the center, but that upon each side there was a space without spikes, wide enough for a horse to cross without injury. The evidence indicates that the first horse to cross did so without injury, but that others attempting to follow crowded each other and were forced upon the spikes. The statute requires railroad companies to erect proper cattle guards, and failure to do so renders a railroad company liable for all injuries approximately caused by such failure. Arts. 6596-6600, Rev. Stat.; *Saine v. Railway Co.*, 85 S. W. 487. It was proper under the allegations and evidence in this case to submit to the jury the issue as to whether or not the cattle guard was properly constructed, and, if not, whether the failure to so construct the same was the proximate cause of the injury.

[8] Appellant insists that the evidence is insufficient in this case to require the submission of the issue as to the horses being frightened by the operation of a "hand car," for the reason that the evidence shows that the car being operated by appellant's employes was a push car. Technically speaking, a push car and a hand car are different cars. If this had been a suit upon a contract to furnish a hand car, and the evidence had shown that a push car had been furnished, the variance would have been fatal; but we do not think in a case of this kind the technical definitions "hand car" or "push car" are material. The object of pleading is to notify the opposite party of the facts expected to be proven. In this connection it is evident that testimony would be offered to show that a car was being operated by hand near the cattle guard in such a manner as to frighten appellee's horses. The evidence shows that this was in fact a "push car," and was being pushed along the track by appellant's employes. It was in one sense a hand car, in that it was operated by hand, and we do not think that appellant could have been misled by the allegation that it was a hand car.

[9] The statement under appellant's thirteenth assignment of error is a copy of the bill of exception as to the testimony showing that the appellant's employes were making some noise in working on the cattle guard. The assignment is:

"The court erred in admitting over the objections and exceptions of defendant evidence as to the operation and movement of a push car at or in the vicinity where plaintiff's horses are alleged to have taken fright."

The statement has no application to the assignment.

Finding no error in the record, the judgment of the trial court is affirmed.

Affirmed.

QUANAH, A. & P. RY. CO. v. WARREN. (No. 911.)

(Court of Civil Appeals of Texas. Amarillo.
Jan. 28, 1916. Rehearing Denied
March 1, 1916.)

1. CARRIERS \S 20(6) — DISCRIMINATION OR DELAY IN TRANSPORTATION — STATUTORY PROVISIONS—"UNJUST DISCRIMINATION."

Rev. St. 1911, art. 6670, subd. 1, provides that it shall be an unjust discrimination for any railroad to give any undue or unreasonable preference or advantage to any person, company, etc. Subdivision 2 provides that every railroad company which shall, under such regulations as may be prescribed by the railroad commissioners, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage, or cars destined to any point on or over the line of any connecting railroad shall be guilty of unjust discrimination. Article 6671 provides that any railroad doing or permitting anything thereby prohibited or declared unlawful, or omitting any act therein required to be done, shall be liable for the damages sustained, and, in case of extortion or discrimination, for a penalty of not less than \$125. *Held*, that if no regulations are adopted by the Railroad Commission, the penalty for failure to deliver freight to a connecting carrier without delay nevertheless accrues, but is governed by subdivision 1 and not by subdivision 2.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 41; Dec. Dig. \S 20(6).]

For other definitions, see Words and Phrases, First and Second Series, Unjust Discrimination.]

2. CARRIERS \S 20(6) — DISCRIMINATION OR DELAY IN TRANSPORTATION — STATUTORY PROVISIONS—"DELAY."

As used in Rev. St. 1911, arts. 6670 and 6671, relative to the failure or refusal of any railroad company to deliver without delay, freight destined to a point on the line of any connecting railroad, "delay" means discrimination; and, where delay is shown, a party is entitled to recover the statutory penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 41; Dec. Dig. \S 20(6).]

For other definitions, see Words and Phrases, First and Second Series, Delay.]

3. CARRIERS \S 20(6) — PENALTIES FOR VIOLATION OF STATUTE—RIGHT TO RECOVER.

Where plaintiff, suing a carrier for damages and a penalty, alleged that the carrier's refusal to deliver a shipment to a connecting carrier without delay was in violation of Rev. St. 1911, art. 6670, and in further violation of an order of the Railroad Commission, regulating the transportation, delivery, and interchanging of freight, the regulation of the Railroad Commis-

sion constituted an essential element of the recovery; and, where the Commission's order or regulation was not shown, a judgment for plaintiff was unwarranted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 41; Dec. Dig. \S 20(6).]

4. CARRIERS \S 185(3)—THROUGH SHIPMENTS—EVIDENCE.

Rev. St. 1911, art. 731, provides that common carriers over whose lines any freight received by either of such carriers for through shipment on a contract for through carriage, recognized, acquiesced in, or acted upon by them, shall be considered connecting lines, and deemed and held the agents of each other, and deemed to be under a contract with each other and with the shipper for the through transportation of the property. *Held*, that a receipt issued by a carrier, acknowledging the receipt of goods subject to the conditions of a bill of lading and disclosing that the bill of lading was issued at the initial station of shipment, and that the destination of the goods was a point on the lines of a connecting railroad, did not tend to show that the shipment was a through shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 848-850; Dec. Dig. \S 185(3).]

5. CARRIERS \S 174—PERFORMANCE OF CONTRACT OF TRANSPORTATION — CONNECTING CARRIERS.

In the absence of a special contract or course of business to the contrary, an initial carrier, or an intermediate connecting carrier, is bound only to safely carry and deliver the shipment to the next carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 747-765; Dec. Dig. \S 174.]

6. CARRIERS \S 185(3)—THROUGH SHIPMENTS—EVIDENCE.

Under Rev. St. 1911, art. 731, relative to the liability of connecting carriers in case of a through shipment, there must be something more than the mere receipt and transportation of goods or property to show a contract for through shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 848-850; Dec. Dig. \S 185(3).]

7. CARRIERS \S 20(6) — DISCRIMINATION OR DELAY IN TRANSPORTATION — STATUTORY PROVISIONS.

Under Rev. St. 1911, arts. 6670, 6671, a carrier, delaying or refusing to deliver a shipment, destined to a point on the line of a connecting carrier, to such connecting carrier, is liable for the damages sustained and the statutory penalty, though the shipment is not under a contract for through shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 41; Dec. Dig. \S 20(6).]

8. CARRIERS \S 20(6) — DISCRIMINATION AND DELAY IN TRANSPORTATION—DAMAGES.

Under Rev. St. 1911, arts. 6670 and 6671, requiring a carrier to transport and deliver without delay or discrimination freight destined to any point on or over the line of any connecting railroad under regulations prescribed by the Railroad Commission, and article 6671, making carriers failing to comply therewith liable for damages sustained and a penalty, the Commission has no power to prescribe the damages recoverable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 41; Dec. Dig. \S 20(6).]

9. CARRIERS \S 2—DISCRIMINATION OR DELAY IN TRANSPORTATION—STATUTORY PROVISIONS.

Rev. St. 1911, art. 6670, making it an unlawful discrimination for railroads, under such regulations as may be prescribed by the Railroad Commission, to refuse and fail to transport and deliver without delay or discrimination passengers, tonnage, or cars destined to any

point on or over the lines of any connecting railroad, is constitutional.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. ¶2.]

Appeal from Motley County Court; O. B. Whitten, Judge.

Action by O. W. Warren against the Quanah, Acme & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

D. E. Decker, of Quanah, and G. E. Hamilton, of Matador, for appellant. T. T. Bouldin, of Matador, for appellee.

HENDRICKS, J. The appellee, Warren, sued the appellant railway company, to recover damages for delay in failing to deliver merchandise on its line of railroad to the Motley County Railway Company, at Matador Junction, the point of intersection. Appellee alleged that he was a merchant and bought a bill of goods from Butler Bros. at Dallas, Tex., and that he contracted with the Santa Fé Railway Company, as the initial carrier, at that place, to transport said merchandise from Dallas to Matador, Tex., on a through rate of freight and through transportation; that the Santa Fé transported from Dallas to Ft. Worth, delivering the same to the Ft. Worth & Denver City, which road transported the goods to Quanah, and from which place the Quanah, Acme & Pacific, the defendant herein, as connecting carrier, transported the same to Roaring Springs, the terminus of such carrier, and there held the goods from the 27th to 31st day of August, 1914, refusing to make delivery to its connecting carrier, the Motley County Railway Company at Matador Junction. Appellee alleged:

"That defendant, in refusing to deliver said merchandise to the Motley County Railway, and in carrying the same to Roaring Springs, and there holding the same, did so in violation of articles 6670 and 6671 of the Revised Civil Statutes, * * * defining unjust discrimination and providing a penalty therefor; and in further violation of an order of the Railroad Commission of the state of Texas, regulating the transportation, delivery, and interchanging of freight between carriers, being circular No. 199, which went into effect January 27, 1896, and which has continued in full force and effect since that date."

The case was tried by the court without a jury, who rendered judgment for \$1 damages and \$125 as a penalty on account of alleged unjust discrimination.

[1] Appellant's first assignment of error, in connection with its first proposition, urges that subdivision 2 of article 6670, Revised Statutes 1911, and not subdivision 1, governs this action for unjust discrimination for delay referable to a connecting carrier, and it is necessary to show a violation of a rule and regulation of the Railroad Commission of Texas before a penalty may be recovered under article 6671. This assignment will have to be sustained, possibly for a different reason than adduced by appellant, though covered by the assignment. As clearly pointed out in Quanah, Acme & Pacific Ry.

Co. v. Jones Lumber Co., 178 S. W. 858, in following the case of Inman v. Ry. Co., 14 Tex. Civ. App. 39, 37 S. W. 37 (writ of error denied), if regulations were not adopted by the Commission under subdivision 2, art. 6670, the penalty would accrue where the statute is violated just the same; but if there were regulations—

"the question as to whether or not there was such a refusal as to incur the penalty would be determined from the consideration of them, as well as of the statute."

Subdivision 2, under article 6670, prescribes that:

"Every railroad company which shall fail or refuse, under such regulations as may be prescribed by the Commission, to receive and transport without delay * * * the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as may be prescribed by the Commission, fail or refuse * * * to deliver without delay * * * destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination."

[2] The word "delay" in the above articles means discrimination, and where delay is shown, a party is entitled to recover the penalty. Gulf, Col. & Santa Fé Ry. Co. v. Lone Star Salt Co., 26 Tex. Civ. App. 581, 63 S. W. 1026 (writ of error denied).

[3] However, under the statute, and in view of the allegations of plaintiff's petition, it is very evident that the regulations of circular No. 199, promulgated by the Commission, alleged by the plaintiff and forming a part of the basis of its recovery, in this instance enters into the suit as an essential element of recovery. In the case of Quanah, Acme & Pacific v. Jones Lumber Co., supra, it was shown that a circular was applicable only to carload lots, and the shipment was one less than carload lots. This record is devoid of circular 199, which plaintiff pleads that defendant violated, regulating the transportation, delivery, and interchanging of freight between connecting carriers. A part of the basis of plaintiff's cause of action not having been shown, the judgment was unwarranted. This court adheres to its ruling that if there is no regulation embracing matters of this kind, subdivision 1, under article 6670, in connection with article 6671, would control.

[4-6] There is tendered, between appellant and appellee, the question of through shipment and through transportation, applicable to this record as a predicate for recovery. The plaintiff did not show a contract of through shipment. The receipt forwarded by the consignor to the consignee does not exhibit, nor tend to prove, a contract of through shipment. Again, this receipt states that the goods were "received in good order, from Butler Bros., subject to the conditions of this company's bill of lading." What constitutes the company's bill of lading, which we assume is the real contract between the parties, is not attempted to be shown. The fact that this receipt discloses that it may have

been issued in Dallas, the initial station of shipment, and the consignee is C. W. Warren, with the destination of the goods as Matador, would not tend to show the through shipment. Goods have to be marked for destination for the benefit of connecting carriers. In the absence of a special contract, or course of business shown to the contrary, an initial carrier, or an intermediate connecting carrier, is bound only to safely carry and deliver to the next carrier. *Hunter v. Railway Co.*, 76 Tex. 195, 13 S. W. 190; *Railway Co. v. Jackson*, 99 Tex. 347, 89 S. W. 968; *Railway Co. v. Brown & Williamson*, 99 Tex. 349, 89 S. W. 971; *McCarn v. Railway Co.*, 84 Tex. 358, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51. Justice Stayton, in the latter case, quotes the language of the Supreme Court of the United States, *Myrick v. Railway Co.*, 107 U. S. 106, 1 Sup. Ct. 425, 27 L. Ed. 325:

"That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier. * * *

Neither do we think that the receipt of H. D. Bishop, the agent at Roaring Springs, which was delivered to Warren by the Motley County Railway Company, tended to prove the through shipment. Article 331a, now 731, does not assist the appellee in any manner. *Galveston, H. & S. A. Ry. Co. v. Jones*, 104 Tex. 96, 134 S. W. 328. There must be shown something more than receiving and transporting the goods or property under that article to show a contract for through shipment. Same case, *supra*. The receipts are mere isolated facts.

[7] However, we do not understand that a contract for through shipment, as against the act complained of, would have to be shown to fasten liability. The cause of action here is predicated upon the refusal and failure, willfully manifested, by the Quanah, Acme & Pacific Railway Company to deliver to its connecting carrier, the Motley County Railway Company, the freight in question. The delay and discrimination that carrier is guilty of, and not the delay and discrimination of some other connecting carrier, is the question here. Under the law, it was required to transport and deliver to a connecting carrier, and though a through contract is not shown, but if performed in a manner constituting the delay and discrimination in violation of the statute, the damages and penalty would attach. Its own act is what is complained of.

[8] Plaintiff pleads the violation of circular No. 199. The defendant pleads another circular issued by the Railroad Commission, November 19, 1907. This latter circular seems to be applicable to shipments in less than carload lots, with a graduated penalty embraced therein by the Commission, based upon weight, and extending to the connecting carrier 48 hours additional time at junction

points, if necessary to rehandle the shipment. Article 6671, in the event of delay and discrimination, entitled the shipper aggrieved, to "damages sustained in consequence of such violation," besides the penalty in addition thereto. We do not think that the Commission has the right, in this character of action, to prescribe the "damages sustained," and think that the Legislature evidently did not intend to give such power. These goods arrived at Roaring Springs August 27, 1915, and were not delivered to the connecting carrier until August 31st. Appellant says that the record shows that the Commission's order pleaded by it was complied with in reference to the time at junction points. We do not think so. A part of Thursday, all of Friday and Saturday, is longer than the time prescribed. The fact that it did not run a daily freight would be no excuse in failing to take the freight back to the junction.

[9] We dislike to reverse this case on the technicality involved, but judicially we are unable to tell which regulation would be applicable to this shipment; plaintiff pleads one and does not prove it; defendant interposes another and fails to exhibit it as applicable as a proper defense. The act is constitutional. Reversed and remanded.

HEARD et al. v. BOWEN et al. (No. 5577.)*

(Court of Civil Appeals of Texas. San Antonio. Jan. 19, 1916. On Motion for Rehearing, March 15, 1916.)

1. EASEMENTS ⇨36(3)—ADVERSE POSSESSION—EVIDENCE.

Evidence held sufficient to show that plaintiffs acquired an easement or prescriptive right of way over defendant's property by adverse possession.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 93; Dec. Dig. ⇨36(3).]

2. EASEMENTS ⇨36(2)—PRESCRIPTION—EVIDENCE.

While parol evidence showing a verbal gift of a right of way is not admissible to establish an easement, it is admissible to show that one using such easement did so adversely.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 90-92; Dec. Dig. ⇨36(2).]

3. ADVERSE POSSESSION ⇨106(1) — ADVERSE TITLE—VALIDITY.

A limitation title when it matures is as good as any other title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604, 619-623; Dec. Dig. ⇨106(1).]

4. VENDOR AND PURCHASER ⇨239(1)—BONA FIDE PURCHASER—RECORDATION OF INSTRUMENTS—PRESCRIPTIVE EASEMENTS.

As the recording laws make no provision for the recordation of adverse titles or easements acquired by adverse possession, a purchaser of land across which such an easement had been acquired cannot defeat the easement on the

ground that he was an innocent purchaser and the records did not show the easement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 589; Dec. Dig. ¶ 239(1).]

5. APPEAL AND ERROR ¶490(4) — ASSIGNMENTS OF ERROR — SUFFICIENCY — EXCEPTIONS.

Where the bills of exception complaining of the overruling of objections to charges and the denial of special requests did not show when the objections were made or the requests offered, or that the court's attention was called to the matter before the main charge was given, assignments based thereon will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2298; Dec. Dig. ¶499(4).]

On Motion for Rehearing.

6. APPEAL AND ERROR ¶742(5) — ASSIGNMENTS OF ERROR—STATEMENTS.

An assignment based on the charge on the ground that there was no evidence to support it need not be considered, where the statement did not set out the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶742(5).]

7. EASEMENTS ¶8(2, 3) — PRESCRIPTIVE RIGHTS—ADVERSE USE.

Where a verbal way over land is granted, possession under such grant is adverse; the verbal grant being void under the statute of frauds.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 24, 27-33; Dec. Dig. ¶8(2, 3).]

8. APPEAL AND ERROR ¶1033(5)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where the court might properly have instructed the jury that plaintiffs' holding was adverse, defendants cannot complain of an instruction on that issue; the jury having found that plaintiffs' holding was adverse and that they had acquired a prescriptive way.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ¶1033(5).]

9. APPEAL AND ERROR ¶216(2)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where the court properly submitted a question of fact to the jury, a party who requested no instructions supplying omissions in the charge given and made no objections cannot complain of such omissions on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶216(2); Trial, Cent. Dig. §§ 628, 630-641.]

10. EASEMENTS ¶3(2)—PRESCRIPTIVE EASEMENTS—ACQUISITION.

Though plaintiffs' property was separated from a right of way by an alley, they may, having held the way adversely, claim it as a prescriptive easement appurtenant to their lands.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 10; Dec. Dig. ¶3(2).]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by Francis J. Bowen and others against A. B. Heard and another, who impleaded John D. Sipple, on whose death pending suit the cross-action was revived against Tracy D. Sipple, independent executrix. From a judgment for plaintiffs and a judgment over for the first-named defendants against the cross-defendant, all defendants appeal. Affirmed.

Haltom & Haltom, of San Antonio, for appellants. Joe H. H. Graham, of San Antonio, for appellees.

CARL, J. Appellees, Francis J. Bowen and his wife, Eleanor M. Bowen, Mrs. Mary Gaenslen, a widow, Fred B. Gaenslen and Neva Gaenslen, his wife, sued appellants, A. B. Heard and his wife, Julia D. Heard, to establish a certain easement or prescriptive right in, and to open, a certain street or roadway in South Heights in the city of San Antonio. Appellants answered, and, after denying the allegations, alleged by way of plea over that they bought said property from John D. Sipple, who warranted the title, and since he had died after suit was filed and after he was made a party, his wife, Tracy D. Sipple, independent executrix of John D. Sipple's estate, was made a party defendant on said cross-action. In a trial before a jury, a verdict was returned in favor of the plaintiffs, and in favor of the original defendants against Tracy D. Sipple as independent executrix of the estate of John D. Sipple, deceased, for \$220, and judgment was entered accordingly. The original defendants and Mrs. Sipple have appealed.

[1, 2] The first and second assignments of error assert that adverse possession and user are not shown because the proof shows that appellees were using the property with the consent of the then owners and not adversely to the owners. This is based upon the fact that the evidence shows that about 1,892 appellees obtained from the Denver & San Antonio Investment Company, which owned the property at that time, permission to have water pipes laid over the property. The water company, it seems, had a rule forbidding the laying of pipes to supply water unless the appellants owned the land over which the pipes would pass. Appellees testified that they conferred with the investment company and obtained a grant or declaration of entrance over the property. They "granted and conceded the right to use that road or street." The evidence proceeds:

"I think that they (the investment company) put it in writing, but the waterworks company were not able to find the written document. I did not get any writing; in those early days they did not attend so closely to getting things in black and white as they do to-day. We got a right to use the road, and used it continuously after that. I located my house according to the street and the extension agreed upon, because I thought that would be a satisfactory and good location."

The evidence shows that only the Bowen family lived on block 98, and the road or street was used by them and their friends calling, trades people, etc., having business with them, for the road or street passed into their property. This road or street was used continuously by them from about the fall of 1892 until Heard ran a fence across it in 1910. The evidence taken as a whole is suf-

sufficient to support the finding that appellees were using the road under a claim of right, and that the owners at the time recognized that right and conceded it when they gave the instrument with reference to the laying of the water pipes. The proposition made is that, in order to establish an easement by prescription, there must be a claim to the right of way adverse to that of the owner of the soil, expressly or impliedly known to the owner of the soil. The testimony is sufficient to show that they were using under claim of right the street at that time, and, while parol evidence showing a verbal gift or concession is not admissible to establish an easement in the property, it is admissible for the purpose of showing that the possession was adverse. *Shepard v. G., H. & S. A. Ry. Co.*, 2 Tex. Civ. App. 535, 22 S. W. 267. This question was again passed upon in *Smith v. Guinn et al.*, 131 S. W. 635, and the Supreme Court refused a writ of error. It was there held that evidence of entering on and continuing active possession and use of a lot under claim of parol gift thereof was admissible as showing that the possession was adverse, putting in operation the 10-year statute of limitation. If we take the evidence of appellees in this case as true, and we must, in deference to the jury's finding, that right to lay water pipes was a recognition and acquiescence in the claims then asserted by appellees to the right to use that street for their enjoyment of their property at the time. It was not the mere granting of a license, but was a concession in accord with a claim then being asserted. And if that was, as the cases noted held, sufficient to start the statute of limitation, there has been nothing since occurred which would stop it, up until Heard ran his fence there in 1910. See, also, *Board of Trustees v. Railway Co.*, 67 S. W. 150; *Railway Co. v. Gaines*, 27 S. W. 266; *Hall v. City of Austin*, 20 Tex. Civ. App. 59, 48 S. W. 53; *Irr. Co. v. Irr. Co.*, 92 S. W. 1015; *McManus v. Matthews*, 55 S. W. 589. The matter of whether possession is adverse is for the jury, when the evidence is conflicting, as it is in this case, and that was determined against appellants.

In *Fin & Feather Club v. Thomas*, 138 S. W. 155, cited by appellant:

"The evidence was sufficient to raise the issue that the act of the club in overflowing the slough was adverse to the owner of the land. There was evidence that plaintiff and his predecessors in title allowed the channel of the water on the land to become filled up by sediment, and there was no error in submitting this issue to the jury."

We see nothing in this inconsistent with the views above expressed. The assignments are overruled.

The location of the land was established with sufficient certainty, and the third and fourth assignments are overruled.

[3, 4] The fifth assignment is without merit, and is overruled. This asserts the proposition that, where one buys land without

notice of an easement thereon in favor of a third party, the purchaser takes the same free from the easement. Limitation titles to land easements and similarly acquired rights are not subject to the registration laws of the state. Judge Williams has well expressed the reasons for this in *MacGregor v. Thompson et al.*, 7 Tex. Civ. App. 34, 26 S. W. 650, where he says:

"The law creates and confers the title arising from adverse possession. It does not flow from a contract between the parties, which could be reduced to writing, and put of record. There is no privity between the possessor and him who is dispossessed, and the right of the former does not result from any act of the latter, but is the effect given by law to the possession. The adverse possessor does not hold under the former owner, but independently of him. As the law makes the title complete when the time has run, we cannot hold it necessary for the possessor to do something else, which the law has not exacted."

A limitation title is specially provided for by law, and when it matures it is just as good as any title. See *Burton's Heirs v. Carroll*, 96 Tex. 320, 72 S. W. 582, wherein Judge Brown discusses the matter. And yet we know of no provision of law for the registration of the same, so that the rule of innocent purchaser without notice would apply. A party buying the paper title receives only such title as his grantor has, and, if that has been lost and adverse possession is ripened into a limitation title, he receives nothing. *Williams v. McComb*, 163 S. W. 656; *East Texas Land Co. v. Shelby*, 17 Tex. Civ. App. 685, 41 S. W. 542.

This is not the same kind of a case as that where one buys without knowledge of an outstanding unrecorded deed, as in *Rushing v. Lanier*, 51 Tex. Civ. App. 278, 111 S. W. 1091, cited by appellant, because the law makes provision for the recording of such instruments, and provides especially what effect they shall have as against a purchaser without knowledge thereof.

For that matter, the evidence is sufficient to show that the owners of the fee did have notice of the use to which the road was being put and of the adverse claim of appellees, for Francis J. Bowen testified that he told both Sipple and Heard before either bought. In addition to this, Sipple had been the agent for the Denver & San Antonio Investment Company and had given him the name of the man who was agent for the company before he (Sipple) became agent. Heard saw the lots before he bought, and the appellees' witnesses all say there was a big plain road which any one who saw the lots could see.

[5] The objection to the court's charge set forth in the sixth assignment will not be considered, because the assignment fails to show that the objection was filed and called to the court's attention before the main charge was given to the jury, and that exception was then and there taken to the action of the court. The bill of exception says: "And to this both defendants Heard and Sipple ex-

cepted." When this was done is not stated. It is necessary to show by the bill that the objection to the charge was made at the proper time and by the court overruled, and exception reserved at the time of the ruling. *Connor v. Uvalde National Bank*, 172 S. W. 177; *Price v. Lauve*, 49 Tex. 80; *I. & G. N. Ry. Co. v. Mercer*, 78 S. W. 562; *Anderson v. Anderson*, 23 Tex. 640; *Collins v. Bank*, 75 Tex. 255, 11 S. W. 1053.

And for the same reason the seventh assignment will not be considered. The bill of exception simply shows:

"And be it further remembered that the defendants Heard and Sipple requested special charges 1, 2, 3, 4, 5, 6, 8, 9, 11, and 12, all of which were refused by the court, and the defendants then and there excepted to the action of the court, etc."

When did they request these charges and when were they refused and exception reserved? It certainly does not show that they were presented before the main charge was given to the jury and action then taken by the court and bill reserved.

The judgment is affirmed.

On Motion for Rehearing.

[8] Appellant contends that the bill of exceptions on which the sixth assignment is predicated should be held sufficient. We have given the question careful consideration, and although we believe our holding is in line with the statements made in the cited cases, and the general rules with regard to the requisites of bills of exception, we have no disposition to be unduly technical in the construction thereof, and hence have decided to consider such assignment of error. The assignment is based upon an objection to a paragraph of the charge reading as follows:

"If you believe from the evidence that the Denver & San Antonio Investment Company consented to the use of the lots as a roadway by plaintiffs, and that the plaintiffs commenced and afterwards used the road, if there was one by reason of such consent of the former owner of the lots, if there was, and that such consent, if any, was revocable at the will of the said Denver & San Antonio Investment Company, then you will find for the defendants; but if you believe from the evidence that plaintiffs began to use said road under claim of right prior to said consent, if any, then this issue would become immaterial, and you cannot find for the defendants on this issue."

The only point made is that there is no evidence that the consent given by the Denver & San Antonio Investment Company was not revocable. In this connection, it is stated that a mere permissive use of a road is always presumed to be revocable at the will of the owner. This statement adds nothing to the contention. It amounts to an assumption that the evidence shows merely a permission, and not a grant intended to be permanent. The testimony relating to the consent referred to by the court is not set out by appellants in their statement, and we are justified in overruling the assignment on that ground alone.

[7-9] However, as we understand the testi-

mony considered by us in disposing of the preceding assignments, it shows a verbal grant of the right to use the land as a road or street, upon the strength of which the grantees arranged, in building their houses, to leave open a road or street which would connect with the land over which they claim the easement, and which extension would be beneficial to the grantors. This issue was material on the question whether the possession was adverse, for a permissive use cannot be adverse; but where a grant is made, which is unenforceable because in violation of the statute of frauds, the holding under such a grant is adverse. It is evident from the nature of the transaction as shown by the testimony that the grant was intended to be permanent and not a mere permissive use. If we are correct in this, the testimony being undisputed, it was the duty of the court to so instruct; but the defendants could not have been injured by reason of the fact that the jury decided the question against them, if the court should have so decided it. But to say the least, the testimony we have in mind shows a verbal grant, and, if we have overlooked testimony disputing the same, there was at least an issue for the jury, and the only defect in the charge consisted in failing to give the jury a guide by which to determine whether it was revocable or not. No such objection was made to the charge, however, nor any effort made to supply the omission. The assignment is overruled.

[10] The seventh assignment must be overruled, unless it raises a question of fundamental error, for, in addition to the defect in the bill of exceptions pointed out in our former opinion, we call attention to the further fact that the assignment is not a copy of any paragraph of the motion for new trial, and in fact relates to a point not even mentioned in such motion. We are inclined to the view that, if the assignment points out an error, it would not be a fundamental one; but, as we conclude there is no error, we will briefly state our reasons for such conclusion, leaving the question of what is fundamental error alone, in the hope that, by the time it becomes necessary to pass upon it under similar circumstances, the Supreme Court will have given us some more definite guide than that furnished by the opinions now before us.

Appellant contends that the evidence is insufficient to support the judgment because it shows without contradiction that the land over which the easement is claimed is separated by an alley from the land to which such easement is claimed to be appurtenant. Only one Texas case is cited in support of such contention, viz., *Alley v. Carleton*, 29 Tex. 78, 94 Am. Dec. 260. In said case the point was not decided, but the court in describing the kinds of easements stated that an easement "appendant" is incident to an estate, one terminus of which is the land or

tenement of the party claiming it. The rule contended for by appellant is sustained by some of the earlier cases as well as textbook writers; but the more liberal view now obtains very generally that, notwithstanding neither terminus of the way is upon the close to which it is claimed appurtenant, it will nevertheless be so regarded, if it clearly appears to have been the intention of the parties that it should be. Ruling Case Law, vol. 9, p. 738; *Graham v. Walker*, 78 Conn. 130, 61 Atl. 98, 2 L. R. A. (N. S.) 983 and note, 112 Am. St. Rep. 93, 3 Ann. Cas. 641; *Jones on Easements*, § 5. As the question is an open one in this state, we feel at liberty to adhere to the more liberal rule, which is founded upon justice and common sense in preference to one based upon the shadow instead of the substance.

The motion for rehearing is overruled.

**TEXAS FIDELITY & BONDING CO. v.
GENERAL BONDING & CASUALTY
INS. CO. et al. (No. 7456).***

(Court of Civil Appeals of Texas. Dallas. Feb. 5, 1916. Rehearing Denied March 11, 1916.)

1. CORPORATIONS — 484(2) — POWERS OF CORPORATION — "INDEMNITY."

A corporation organized under Rev. St. 1911, art. 4928, empowering such corporations to guarantee contracts between individuals, corporations, as well as the state and municipal corporations or counties, has no authority to make a contract of indemnity which is an engagement to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is an independent agreement instead of collateral to some principal undertaking as is a contract of guaranty or suretyship.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. 484(2).]

For other definitions, see Words and Phrases, First and Second Series, Indemnity.]

2. CORPORATIONS — 484(2) — POWERS OF CORPORATIONS — ULTRA VIRES.

A corporation authorized by law to enter into contracts of guaranty cannot justify the making of indemnity contracts on the theory that they fall within its implied powers, and such a contract is ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. 484(2).]

3. CORPORATIONS — 388(2) — ULTRA VIRES ACT — ESTOPPEL.

Defendant, a Texas corporation, authorized only to do a guaranty business, entered into an indemnity contract with plaintiff, another Texas corporation authorized to do a similar business. Held that, notwithstanding defendant received compensation under such contract, it was not estopped to urge the ultra vires character of the contract, for plaintiff must have had knowledge of the limitations of defendant's powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1557; Dec. Dig. 388(2).]

Appeal from District Court, Dallas County; Kenneth Feree, Judge.

Action by the Texas Fidelity & Bonding Company against the General Bonding & Casualty Insurance Company and others.

From a judgment in favor of the corporate defendant but against the individual defendants, plaintiff appeals. Affirmed.

Etheridge, McCormick & Bromberg, of Dallas, for appellant. W. D. Cardwell, T. L. Camp, and W. J. J. Smith, all of Dallas, for appellees.

RAINEY, C. J. This was an action on three indemnity bonds, executed for value to insure appellant against the consequences of its becoming surety on three criminal bail bonds required by a court in Louisiana, to recover the losses sustained by appellant as such surety. The case was tried before the court without a jury, and resulted in a judgment in favor of the plaintiff against the individual appellees, but in favor of the corporate appellee.

Appellant pleaded, in substance: That on and prior to May 7, 1913, A. C. Karslake was in jail in the parish of Morehouse, state of Louisiana, where he was being held under three informations charging him in one with the crime of burglary and in two with the offense of grand larceny, and that his bail had been fixed in the burglary case at \$3,000, and in the grand larceny cases at \$1,000 each. That the appellant, at the instance of the appellees, and induced so to do by the execution and delivery to it by appellees of three instruments of indemnity by which the appellees agreed to hold appellant harmless against the consequences of the execution of said bonds as to all demands, liabilities, expenses, and attorney's fees that it might suffer thereby, executed the bail bonds as surety for Karslake. That Karslake who was released by reason of the bonds on which appellant became surety, afterwards defaulted, and that the bonds were forfeited, and judgment rendered against appellant on said bonds, which judgment had been paid off by the appellant in the sum of \$5,046.52, and that it had been required to pay attorney's fees, in Louisiana of \$50, and for bringing this suit of \$750. The appellees filed their original answer, consisting of a general demurrer, a general denial, and W. W. Nelms, appellee, filed no other pleadings. On October 22, 1914, the corporate appellee filed an amended answer, on which the case was tried, consisting of a general demurrer and general denial; certain specific denials and denials of information; and a plea that the contracts sued on were void for want of corporate power to execute them; and a plea that said defendant was a corporation organized under the laws of Texas for the purpose of doing a surety, casualty, and liability insurance business, and none other, and was at the time of the execution of said alleged contract engaged in the business of a surety company, and that it was not authorized or empowered to do business in the state of Louisiana at the time of the execution and

delivery of the alleged contracts, which fact was well known to the plaintiff, and that the contracts were void in law as between the parties thereto, for the want of authority and corporate power on the part of the corporation defendant to make and enter into the alleged contracts which were, and each of them was, in excess of and in violation of the charter conferring corporate powers on said appellee and of the purposes of its incorporation; that these facts were known to the appellant at the time of the execution of the alleged contracts.

The foregoing statement of the pleading is taken from appellant's brief, which the appellees adopt, as well as the conclusions of fact of the trial court, which conclusions are as follows:

"I. I find that on the 7th day of May, 1913, A. C. Karslake was in custody of the sheriff of the parish of Morehouse, state of Louisiana, at Monroe, La., under warrants issuing on informations in three cases charging him in two of the cases with grand larceny and in the other with burglary, and that bail had been fixed in the sum of \$3,000 in the burglary case, and in the sum of \$1,000 for each of the grand larceny cases, copies of which said bail bonds are hereto annexed and made a part hereof, and marked 'Exhibits A,' 'B,' and 'C.'

"II. I find that on the 15th day of May, 1913, the defendants W. W. Nelms and A. U. Puckett executed the instruments on which they are sued herein, and that on the 7th day of May, 1913, the defendant General Bonding & Casualty Insurance Company executed the instruments on which it is sued herein, all of which instruments are of identical verbiage, except the signature and date, one being signed by both W. W. Nelms and A. U. Puckett in each of the three cases, and one being signed by General Bonding & Casualty Insurance Company in each of the three cases. The instruments, omitting dates and signatures, are as follows:

"Texas Fidelity & Bonding Company.

"This agreement witnesseth: That whereas, we, the undersigned, have requested the Texas Fidelity & Bonding Company, a corporation, under the laws of the state of Texas (hereinafter called the company) to sign and execute a certain bond or undertaking on behalf of A. C. Karslake, reference to which is hereby made for the purpose of certainty, and a copy of which instrument is or may be hereto attached; and whereas, the company has signed and executed, or is about to sign and execute the said instrument upon condition of the security and indemnity hereby and herein provided:

"Now, therefore, in consideration of the premises and of the sum of one dollar in hand paid to us by the company, the receipt whereof is hereby acknowledged, we the undersigned, hereby covenant and agree with the company, its successors and assigns, in manner following:

"First. That we will pay in cash to the company at its principal office in the city of Waco, Texas, for the execution of the said instrument, the annual premium or charge of one hundred and no-100 dollars, to be paid annually in advance on the — day of — in each and every year during the time the company shall be and continue liable upon the said instrument, and all matters arising therefrom and until there shall have been furnished to the company, at its principal office in the city of Waco, Texas, due and satisfactory proof, by evidence legally competent, of such discharge and release.

"Second. That we will at all times indemnify and keep indemnified the company and hold and

save it harmless from and against any and all demands, liabilities and expenses of whatsoever kind or nature, including counsel and attorney's fees, which it shall at any time sustain or incur by reason or in consequence of having executed the said instrument; and that we will pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representatives shall pay or cause to be paid or become liable to pay, under its obligation upon said instrument, or as charges and expenses of whatsoever kind or nature, including counsel and attorney's fees by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether it shall have paid out said sum or any part thereof, or not. That in any settlement between us and the company the vouchers or other proper evidence showing payment by the company of any such loss, damage or expense, shall be prima facie evidence against us of the fact and amount of our liability to the company, provided that such payment shall have been made by the company in good faith believing that it was liable therefor.

"Third. That in case any action at law, suit in equity or other proceeding be commenced or notice of such action, suit or proceeding be served upon the undersigned affecting the liability of the company upon said instrument, or growing out of any matter connected therewith, or on account of which the said instrument was given, we will immediately so notify the company at its principal offices in the city of Waco, Texas.

"Fourth. The company may at any time hereafter take such steps as it may deem necessary or proper to obtain its release from any and all liability under the said instrument, or under any other instrument within the meaning of section fifth hereof, and to secure and further indemnify itself against loss and all damages and expense which the company may sustain or incur or be put to in obtaining such release, or in further securing itself against loss shall be borne and paid by us.

"Fifth. That no act or omission of the company in modifying, amending or extending the instrument so executed by the company shall in any way affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof, and we agree that the Company may alter, change or modify, amend, limit or extend said instrument and may execute renewal thereof, or other and new obligations in its place or in lieu thereof, and without notice to us, notice being expressly waived, and in any such case we and each of us shall be liable to the company as fully and to the same extent on account of any such altered, changed, modified, amended, limited or extended instrument, or such renewals thereof, or other new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein.

"Sixth. That it shall not be necessary for the company to give us, or either of us, notice of any act, fact or information coming to the notice or knowledge of the company concerning or affecting its rights or liability under any such instruments by it so executed, or our rights or liabilities hereunder, notice of all such being hereby expressly waived.

"Seventh. That this agreement shall bind not only the undersigned jointly and severally, but also our respective heirs, executors, administrators, successors and assigns (as the case may be), until the company shall have executed a release under its corporate seal, attested by the signature of its officers proper for the purpose.

"Eighth. That these covenants, as also all collateral securities or indemnity, if any, at any

time deposited with or available to the company concerning any bond or undertaking executed for or at the instance of us, or any of us, shall, at the option of the company, be available in its behalf and for its benefit and relief as well concerning any or all former or subsequent bonds or undertakings executed for us, or at the instance of us, or any of us, as concerning the bond, or undertaking such covenants, collateral securities or indemnity shall have been made, deposited or given.

"In testimony whereof we have hereunto set our hands and affixed our seal this — day of —, 19—.

"Signed, sealed and delivered in the presence of

"III. I find that during the month of May, 1913, the plaintiff had so complied with the laws of Louisiana that it was accepted as surety on bonds in the courts of Louisiana, and that the defendant General Bonding & Casualty Insurance Company had not so complied with the laws of Louisiana and was not acceptable as surety on bail bonds in the courts of that state.

"IV. I find that the contracts sued on were delivered to the plaintiff, and that after such delivery and the payment to the plaintiff of \$100 by Karslake the plaintiff became surety on the bail bonds of Karslake in the three cases in which bail had been fixed as aforesaid, and in the amounts of the bail so fixed, and that Karslake was enlarged upon the giving of said bail bonds.

"V. I further find that the said Karslake failed to appear in either case as required by his bond, and that the bonds were forfeited and judgment final rendered against the plaintiff in each of the cases, which judgments aggregated the sum of \$5,000; that interest ran on them at the rate of 5 per cent. per annum from January 6, 1914, to March 13, 1914, which interest amounted to \$46.52 and that on March 13, 1914, the plaintiff duly paid off and discharged said judgments by paying thereon the sum of \$5,046.52; copies of said judgment respectively upon said respective bail bonds, together with all notices issued thereon, are hereto attached, and marked 'Exhibits D,' 'E,' 'F,' 'G,' 'H,' 'I,' and 'J.'

"VI. I further find that, when plaintiff was advised that the judgments had been rendered against it the plaintiff employed an attorney named J. Zack Spearing, of New Orleans, La., to investigate the validity of said judgments and advise it as to its liability thereon, and that the plaintiff paid the said J. Zack Spearing on the 20th of March, 1914, the sum of \$50 as compensation for his services rendered in that matter, which is a reasonable charge for said services.

"VII. I further find that, before the institution of this suit, the plaintiff employed the law firm of Etheridge, McCormick & Bromberg to institute and prosecute this suit to final determination, for which services the plaintiff agreed to pay said attorneys the sum of \$750, which is a reasonable charge for said services.

"VIII. I find that General Bonding & Casualty Insurance Company was duly incorporated under the laws of the state of Texas on the 30th day of November, 1910, 'for the purpose of transacting (1) all kinds of surety business, and (2) all kinds of casualty insurance business, and (3) all kinds of liability insurance business.'

"IX. I find that A. C. Karslake paid the defendant General Bonding & Casualty Insurance Company the sum of \$100 for the execution and delivery to the plaintiff of the contracts sued on, which sum the defendant General Bonding & Casualty Insurance Company still retains; and I find that this payment was made under substantially the following circumstances and conditions: The said A. C. Karslake had been arrested and imprisoned under warrants issuing in the three cases mentioned in plaintiff's petition, and

hereinbefore mentioned, and had employed the defendants Nelms and Puckett to represent him as attorneys at law in defense of the charge against him, and to procure him bail bonds for his enlargement until the trial. That the said Nelms and Puckett applied to the agents of the plaintiff at Dallas to become surety on said bail bonds. That the plaintiff agreed to do so upon being indemnified for so doing by the said defendants Nelms and Puckett and the defendant General Bonding & Casualty Insurance Company, and not otherwise; and then the said defendants Nelms and Puckett, or one of them acting for the said A. C. Karslake, procured the defendant General Bonding & Casualty Insurance Company the sum of \$100 for so doing, and that said General Bonding & Casualty Insurance Company then delivered the contracts signed by it, herein sued on, to the plaintiff, whereupon the plaintiff executed the bail bonds mentioned in the plaintiff's petition, and thereby procured the enlargement of the said A. C. Karslake; and that because the plaintiff had, and the defendant General Bonding & Casualty Insurance Company had not, complied with the laws of Louisiana, the contracts of said General Bonding & Casualty Insurance Company to the plaintiff were executed and delivered to induce the plaintiff to execute as surety said bail bonds.

"X. At the time of the execution of the indemnity contract executed by the General Bonding & Casualty Insurance Company, F. B. Wortman was vice president and treasurer and also underwriting manager of the Texas Fidelity & Bonding Company, plaintiff in this cause, and it was his duty to supervise and pass on bonds that were executed by plaintiff, including bail bonds, and he did pass upon and approve the bail bonds given for Karslake. I find that the plaintiff, through its said vice president and treasurer and supervisor of bonds, F. B. Wortman, was acquainted with the General Bonding & Casualty Insurance Company, one of the defendants, at that time. Both plaintiff and defendant bonding companies were organized under the laws of the state of Texas, and, at the time that the plaintiff accepted said indemnity contracts from the defendant bonding company, the plaintiff's home office was at Waco, Texas, and plaintiff and defendant bonding companies were competitors in business, and plaintiff, through said Wortman, knew that defendant bonding company was a Texas corporation organized under the laws of Texas and knew that the defendant company was a bonding company, and that it acted as a surety company, and understood that it was organized under the laws of Texas."

There being no controversy as to what the facts are the controversy arises upon what are the legal conclusions to be drawn from the facts adduced.

[1] Practically but two points are raised, and they are: (1) Was the contract entered into by appellee ultra vires? (2) If so, was appellee estopped by reason of having accepted a valuable consideration therefor? Appellee was incorporated under the laws of Texas, R. S. art. 4928, and was empowered to "guarantee any contract or undertaking between individuals, or between private corporations, or between individuals or private corporations and the state and municipal corporations or counties, or between private corporations and individuals"; but no authority is granted it by law to make contracts of "indemnity." Contracts of indemnity are different from those of guaranty and suretyship, and are distinguishable, "in that in ordinary contracts the

engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not, as in guaranty and suretyship, a promise to one to whom another is answerable." 22 Cyc. 80.

Again, it is said in 20 Cyc. p. 1402:

"There are important differences between a contract of guaranty and one of indemnity. The former being a collateral undertaking presupposes some contract or transaction as principal thereto; while a contract of indemnity is original and independent, to which there is no collateral contract and with respect to which there is no remedy against the third party. As contracts of indemnity are not required by the statute of fraud to be in writing, while contracts of guaranty must be evidenced by a sufficient writing in order to be enforceable, the courts have been frequently called upon to determine whether parole contracts belong to the one class or to the other."

There being a difference between the two contracts, and appellee's charter not authorizing the making of indemnity contracts, it follows that said contracts are ultra vires.

[2] But appellant contends that:

"As appellee was chartered for the purpose of transacting all kinds of surety business, and all kinds of liability insurance business, it had full power, when compensated therefor, to execute and bind itself by the contract sued on, and to enter into any obligation or contract essential to the transaction of its authorized business."

It is true that it has been held that corporations have "implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred." It is hard sometimes to determine whether or not the act done by the corporation falls within its implied powers, and it is not easy to lay down a rule to govern in every case; but we think the remarks of Mr. Chief Justice Gaines in *Railway Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778, are applicable here, as follows:

"But the following, as announced by a well-known text-writer, commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority: 'Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements, as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately, but immediately by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation.' *Green's Brices' Ultra Vires*, 88. In short, if the means be such as are usually resorted to and a direct method of accomplishing the purpose of the incorporation, they are within its powers. If they be unusual, and tend in an indirect manner only to promote its interests, they are held to be ultra vires."

The charter of appellee did not grant it power to enter into an "indemnity" contract as was here entered into, but was an indi-

rect method of enlarging its business and unauthorized.

[3] It is also contended by appellant that as appellee entered into the indemnity contract, and though ultra vires, it is estopped from setting up its want of power by reason of having received benefit thereof.

Appellant and appellee were chartered under the laws of Texas, granting them power to transact the same kind of business, and each knew, or ought to have known, the authority of the other to enter into such contracts; therefore we think no such equities exist as to invoke the doctrine of estoppel. The contract was clearly outside the charter powers and was void. The principle governing this case is in accord with that announced in *Fidelity & Deposit Co. v. Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782, in which this court adopted the following from *Transportation Co. v. Pullman Co.*, 139 U. S. 59, 11 Sup. Ct. 488, 35 L. Ed. 55, to wit:

"A contract of a corporation, which is ultra vires in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.' It must be borne in mind that we are speaking of acts that are ultra vires absolute—that is, such as are 'beyond the powers of the bank for any purpose and under all circumstances—and not acts that are ultra vires by circumstances, or such as are beyond its authority for some purposes or under some circumstances, but are within its power under other circumstances or for other purposes.' We regard the acts involved in this controversy to be of the character first named."

The courts do not look with favor upon the plea of ultra vires, but, when invoked in a proper case, it must be considered and the principle applied as in other cases, as said in *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817:

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: (1) The obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; (2) the interest of the stockholders, not to be subject to risks which they have never undertaken; (3) and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

The appellant cites many cases where the defense of estoppel has been invoked, but we think in those cases the facts were different from those in this case, and the equities therein were so strong as not to be disregarded; while in this case the two corporations having similar charters under the laws of Texas they should have known, if they did not, that the powers granted to them by

their charters and their contracts were not within the scope of their authority and void, hence the plea of estoppel cannot prevail in order to enforce said contract and give appellant relief.

The judgment is affirmed.

INDIANA CO-OP. CANAL CO. et al. v. GRAY. (No. 5802.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 2, 1916. On Motion for Rehearing, March 15, 1916.)

1. TRIAL \S 357 — VERDICT — SPECIAL FINDINGS — RESPONSIVENESS TO ISSUES.

In an action for injuries to land by water seeping through an embankment of defendants on plaintiff's land, where the court submitted the issue what was the reasonable value of plaintiff's land immediately after the act complained of, the answer, "No immediate market value for agricultural purposes," was not responsive, and was insufficient to sustain judgment on the theory that the value of the land was entirely destroyed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 855; Dec. Dig. \S 357.]

2. WATERS AND WATER COURSES \S 178(2) — INJURIES TO LAND — DAMAGES.

The measure of damages for injuries to land by seepage through an embankment of defendants on plaintiff's land is the difference in the market value of the land immediately before and immediately after the injury, but in arriving at the market value the permanency or temporary nature of the damage should be considered.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 255; Dec. Dig. \S 178(2); Damages, Cent. Dig. \S 276½.]

3. WATERS AND WATER COURSES \S 178(1) — INJURIES TO LAND — ACTIONS — EVIDENCE.

In an action for injuries to land by seepage of water through defendants' embankment, the defendant, in order to show the market value of the land after the water had soaked into it, should be allowed to prove that it had regained its normal state.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 251-254; Dec. Dig. \S 178(1); Damages, Cent. Dig. \S 276½.]

4. WATERS AND WATER COURSES \S 178(1) — INJURIES TO LAND — DAMAGES — "PERMANENCY."

In determining damages to plaintiff's land from water seeping through defendants' embankment, an injury that lasts for a time only, even though it be several years, cannot be deemed permanent, since "permanency" carries with it the idea of something durable, lasting, that never changes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 251-254; Dec. Dig. \S 178(1); Damages, Cent. Dig. \S 276½.]

For other definitions, see Words and Phrases, First and Second Series, Permanency.]

5. WATERS AND WATER COURSES \S 179(6) — DAMAGE FROM SEEPAGE — VERDICT — SPECIAL ISSUES — QUESTIONS TO BE SUBMITTED.

In an action for injuries to land by water seeping through defendants' embankment, the jury should, in order to arrive at the permanency of the injuries, have been required to answer as to the condition of the land at the time of the trial or before that time.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. \S 256, 258, 259, 264; Dec. Dig. \S 179(6); Trial, Cent. Dig. \S 858.]

On Motion for Rehearing.

6. JUDGMENT \S 256(2) — VERDICT — SPECIAL ISSUES — RESPONSIVENESS OF ANSWERS.

It is fundamental error for a judgment to be rendered on an answer of a jury which is not responsive to the issue without which there is no basis for the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 447; Dec. Dig. \S 256(2).]

7. APPEAL AND ERROR \S 934(2) — REVIEW — SCOPE AND EXTENT.

In an action for injuries to land by water seeping from defendants' embankment, while the statement of facts might be consulted to sustain the judgment if an issue had not been submitted to the jury whether the value of the land was totally destroyed, this cannot be done where the issue was submitted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 934(2).]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Action by Asher W. Gray against the Indiana Co-operative Canal Company and others. From a judgment for plaintiff, certain defendants appeal. Reversed and remanded.

R. B. Creager, Amos Rich, and H. W. Williams, all of Brownsville, for appellants. J. C. George, Ira Webster, and Canales & Dancy, all of Brownsville, for appellee.

FLY, C. J. Appellee sued the Indiana Co-operative Canal Company, E. F. Rowson, E. C. Shireman, and A. C. Swanson for damages in the sum of \$4,000, alleged to have arisen by virtue of appellants and A. C. Swanson, who is not a party to this appeal, having negligently constructed this canal so that water escaped through the embankment into and upon the land of appellee and rendered it worthless. The cause was submitted on special issues, and upon the answers thereto, given by the jury, judgment was rendered in favor of appellee against appellants for \$2,516.68, and in favor of A. C. Swanson as against appellee.

The evidence indicates that water seeped through appellants' embankment on the land of appellee, and either by some mineral in the water, or the solution and development of mineral contained in the land, the vegetation on the land was destroyed, and it was rendered unfit for immediate agricultural purposes.

[1] In this case appellee recovered the full value of the land on the proposition that the value was totally destroyed. The court submitted the following issue:

"What was the reasonable market value of plaintiff's land immediately after the accomplishment of the act complained of in plaintiff's petition, namely, seeping of plaintiff's land as therein alleged?"

The answer of the jury was not responsive to the question; for, instead of stating that the land had no market value, the evasive answer was given:

"No immediate market value for agricultural purposes."

The land had never been used for agricultural purposes, but was uncultivated land

covered with grass, cactus, and mesquite trees. The question was broad enough to cover the market value for all purposes, as it should have done, but the jury did not answer it, and the answer was not full enough to form the basis for a judgment. The answer did not meet the issue, and it can be clearly inferred from it that the jury believed that the land did have a market value for purposes other than that of agricultural, and even in a short while value for that purpose. There should be a definite, clear answer to such an issue before appellee can be permitted to recover the full value of the land and have the land also. It may be, as said in *Railway v. Wallace*, 74 Tex. 581, 12 S. W. 227, that the owner of land has the right to have his damages measured by the extent of the injury to the land used for any lawful purpose to which he might desire to appropriate it; still, when the jury was asked to find the market value after the injury was inflicted, the answer should not have fixed the market value by the use that could have been made of the land, but should have found whether the land had any market value, regardless of the purpose to which it might be appropriated. There was evidence to the effect that the land had resumed its pristine vigor, and, if that be true, it would not be a just measure of damages to give appellee the full value of the land. A proper measure of damages should be, and is, one which gives compensation, and it should not be made the means of speculation. It cannot be contended with any degree of propriety that temporary destruction of the fertility of the land should entitle appellee to a recovery for the full value of the land, and in inquiring into the damages weight should be given to facts which tend to show a renewal of the fertility of the land and a return to its normal state. The land might have been rendered for a while utterly unproductive, and have no market value for a time for agricultural purposes, but have a market value for purposes of speculation or other purposes.

[2, 3] It is true, as stated by appellee, that the measure of damages in cases of this character is the difference in the market value of the land immediately before and immediately after the injury, but in arriving at that market value the permanency or temporary nature of the damage should be considered. Suppose for instance land is flooded, but in a few weeks the water disappears, leaving the land as good as it was before the flood; if the fact of the abatement of the water is not considered, but the damage measured by the market value of the land as soon as flooded, a person might be made to pay the full value of the land, and the owner in a few weeks have his land in fine condition. In order to arrive at the market value of the land after the water had soaked into it appellant should have been allowed to prove that the land has regained its normal state. That proof might throw some light

on the market value at the time of the injury.

The court recognized the fact that the jury should take into consideration the renewal of the fertility of the land in arriving at the permanency of the damages, for he so instructed them, but, when some of the proof was offered of the fact of the land regaining its fertility, it was excluded by the court. Under the facts proven, the court should not have rendered judgment for the full value of the land.

[4] Undoubtedly it was a serious injury to impair the usefulness of the land for any length of time, but an injury that lasts for a time only, even though it be several years, cannot be deemed permanent, and the court erred in so instructing the jury. Permanency carries with it the idea of something that is durable, lasting, that never changes. An injury to land may be in its nature permanent as distinguished from the injury to the crops on it, but it might as well be said that eternity is a greater lapse of time as to say that a thing is permanent that is cured in a few years.

The fourth and fifth assignments of error are overruled, and the sixth assignment is too general to be considered.

[5] We sustain the seventh and eighth assignments of error for reasons hereinabove given. The jury should, in order to arrive at the permanency of the injuries, have been required to answer as to the condition of the land at the time of the trial, or before that time. The verdict should have been reached by taking into consideration the time for which the injury lasted.

We have considered all errors that are likely to be committed on another trial, and, for the reasons given, the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

This court has not held, as so emphatically asserted by appellee, that he cannot recover every dollar of damages inflicted upon him by the negligence of appellant, but this court did hold, and reiterates, that he cannot recover for total destruction of the value of his land under a finding that it was only temporarily rendered unfit for agricultural purposes. The answer of the jury was not responsive to the question propounded to them by the court, and no measure of damages can be applied to their answers. If the land had a value for any purpose immediately after the damages were inflicted, that value should be kept in view in arriving at the amount of compensation to be awarded the injured party. This is nothing but common sense and justice. No man should be allowed to recover for the full value of his land, and yet retain the land, which, as in this case, had some value. As is usual in overzealous motions for rehearing, it is asserted that this court has overruled numbers of decisions of other courts, and totally dis-

regarded the former decisions of this court. There is no conflict between the decision of this court and that of any other court in this, or any other state. The evidence tended strongly to show that the value of the land was not totally destroyed, and the jury failed and refused to so find.

[6] It is contended that this court has violated the rules in considering the assignments of appellant, but there is no merit in the contention. It is fundamental error for a judgment to be rendered on the answer of a jury which is not responsive to an issue without which there is no basis for the judgment. The jury evaded an answer to the issue as to what was the value of the land immediately after the alleged injury was inflicted, and there was absolutely no basis upon which to found a judgment for appellee. It is all very well to theorize about the land value being totally destroyed, but the fact remains that the jury failed and refused to so find. The judgment must stand upon the findings of the jury, and not upon theories and hypotheses (however ingeniously and plausibly advanced. If any hardship comes to appellee through the application of the rule that in every case in which damages are sought, compensation, and compensation alone, for injuries can be recovered, it is the rule to which appellee, as others have done before him, must submit. This court is not responsible for the rule, nor is it the author of it, but in justice and good conscience it will enforce it. The rule of compensation is the rule of justice in every damage suit, and all rules must bend to the demands of that rule. Whenever any arbitrary rule stands in the way of the enforcement of the rule of compensation, it must and will be set aside, without fear and without favor.

[7] If the question of whether the value of the land was totally destroyed or not had not been submitted to the jury, the statement of facts might be consulted to sustain the judgment, but it cannot be done in this case, where the issue was submitted. *Terrell v. Proctor*, 172 S. W. 996.

The motion for rehearing is overruled.

CARTER v. SMITH et al. (No. 7354).*
(Court of Civil Appeals of Texas. Dallas.
Jan. 22, 1916. Rehearing Denied
March 11, 1916.)

1. SPECIFIC PERFORMANCE ¶58—CONTRACT FOR SALE OF LAND.

Where a contract for the sale of land provided in its concluding clause that if the purchaser failed or refused to perform by the payment of the purchase money as provided, without default of the vendor, then the purchaser should "as a full penalty and liquidated damages for his breach of this contract forfeit to [the vendor] the first payment of \$500 this day made upon the land herein contracted for," such contract was alternative, and gave the purchaser the choice of paying for the land or of failing or refusing to do so and forfeiting the

first payment, in view of the declaration that the penalty should be in payment of liquidated damages in case of breach, so that specific performance of the contract at the purchaser's suit could not be decreed after default in the payment of the balance of the price.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 179, 180; Dec. Dig. ¶58.]

2. SPECIFIC PERFORMANCE ¶126(2)—ALTERATIVE CONTRACT TO SELL LAND.

A decree for specific performance of a contract to sell land must follow the substantial, if not the precise, terms of the contract, so that it cannot be entered where the contract is alternative in favor of the purchaser, permitting him to perform or to forfeit a payment for breach.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. ¶126(2).]

3. SPECIFIC PERFORMANCE ¶121(10)—ABANDONMENT OF CONTRACT — SUFFICIENCY OF EVIDENCE.

In the purchaser's suit for specific performance of a contract to convey land, evidence held sufficient to sustain the finding that the purchaser abandoned the contract.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. ¶121(10).]

4. APPEAL AND ERROR ¶1010(1)—REVIEW—FINDING.

The fact that the evidence will sustain a finding contrary to that of the trial court affords the appellate court no sufficient reason for interfering with the finding below, provided the evidence was also sufficient to sustain it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981; Dec. Dig. ¶1010(1).]

5. SPECIFIC PERFORMANCE ¶121(10)—ABANDONMENT OF CONTRACT—INTENT.

In the purchaser's suit for specific performance of a contract to sell land, the fact that the vendors' title was not good was not conclusive on the point whether the purchaser abandoned the contract by declining to proceed further with the trade.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. ¶121(10).]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by R. O. Carter against James A. Smith and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Morrow & Morrow, of Hillsboro, and C. M. Smithdeal, of Dallas, for appellant. Barry Miller, Meador, Davis, Johnson & Golden, and Smith, Robertson & Robertson, all of Dallas, for appellees.

RASBURY, J. R. O. Carter, appellant, sued James A. Smith and his wife, M. M. Smith, Mollie D. Kirby, personally and as executrix of the will of her husband, M. W. Kirby, deceased, Union Terminal Company and D. E. Johnson to enforce specific performance of a written contract to convey lands. A jury was waived and the cause submitted to Hon. Kenneth Foree, Judge, resulting in judgment against appellant, from which this appeal is prosecuted.

The pleading in the court below supports the issues presented in the briefs of both

parties, and for that reason it is unnecessary to recite same.

Upon request of appellant the trial judge prepared and filed conclusions of fact. Many of the findings are challenged on the ground that they are without support in the evidence. For that reason we do not attempt to state such findings. Nor will we prepare conclusions of fact upon the whole case, since we do not regard it necessary to do so in order to dispose of the case. We will, however, upon the issues we do discuss, state our conclusions of fact as deduced from the evidence bearing upon such issues.

[1] The contract, which is the basis of the suit, omitting formalities and the acknowledgment of the parties, is as follows:

"This agreement this day entered into by and between Jas. A. Smith and his wife, M. M. Smith, party of the first part, and R. O. Carter, party of the second part, all of Dallas county, state of Texas, witnesseth:

"First. For and in consideration of the sum of five hundred dollars (\$500.00), to us in hand paid the receipt of which is hereby acknowledged, and the further sum of thirty-five hundred dollars (\$3,500.00) to be paid in cash at the date of the execution of the conveyances hereinafter called for, and the further consideration of eight thousand dollars (\$8,000.00) to be paid, to be evidenced by three notes payable to the order of the said James A. Smith, each in the sum of two thousand six hundred and sixty-six dollars and sixty-six and two-thirds cents (\$2,666.66 $\frac{2}{3}$) payable one, two and three years after date, secured by vendor's lien, interest 7 per cent., payable semiannually, party of the first part does hereby covenant, contract and obligate itself to convey to said R. O. Carter, party of the second part, by regular deed of conveyance, with the usual warranties the following described property, situated in the city and county of Dallas, state of Texas, the same being all of block 340, according to Murphy & Bolans official map of the city of Dallas, the same fronting 100 feet on the S. side of Young street and 100 feet on the N. side of Columbia street and 200 feet on the E. side of Broadway street, and being a tract of land 100 by 200 feet.

"Second. The party of the first part agrees to furnish the party of the second part an abstract of title to said land showing good and merchantable title in the first parties, and after delivery of same to second party he shall have reasonable time within which to have said title passed upon by his attorney, and it is hereby agreed and said second party has sixty days from date within which he can pass upon said title and accept the same, and the said second party shall have the full term of sixty days from date within which to accept the title under the terms of this agreement without forfeiture upon the obligation of the parties of the first part to convey title to him as herein provided.

"Third. If, however, said first parties cannot show good and merchantable title in themselves to said land, they shall have reasonable time after the knowledge of such fact within which to make their title merchantable, and if their said title cannot be made merchantable within said reasonable time, the parties of the first part shall refund to said second party the \$500 paid them under the terms of this contract, and this obligation shall become null and void.

"Fourth. If said first parties are able to show good and merchantable title, as aforesaid, in them to the lands herein described, the said second party agrees to pay the said first party upon the execution and delivery of the said deed

to him, as aforesaid, the further sum of \$3,500 cash, and to execute his notes for the balance of the purchase money as above provided; and in the event said second party fails or refuses to perform the terms of this contract by the payment of the purchase money, as above provided for, in money and notes, without default of the party of the first part, as above defined, then said second party shall as a full penalty and liquidated damages for his breach of this contract forfeit to first party the first payment of \$500, this day made upon the land herein contracted for."

The construction placed upon the contract by respective counsel, aside from all other issues in reference thereto depending upon facts aliunde the contract, differs widely. The position of counsel for appellant is that the essential thing intended by the parties was the conveyance of the land, and that the agreement to forfeit the \$500 was intended as a means of coercing performance rather than a satisfaction of the contract, if appellant failed or refused in that respect. The position of counsel for appellee is that the contract is alternative and gave appellant the election of performing the contract or of refusing to do so. Thus a construction of the intention of the parties, gathered from the contract, is obviously of prime and initial importance; and such intention on the issue so raised is to be gathered wholly from the concluding clause thereof, since the remaining provisions of the contract refer wholly to other matters.

In reference to such contracts the Supreme Court of this state say:

"Much has been well said in the opinions of this court * * * affirming the right to specific performance of contracts for the conveyance of land which contain stipulations for the payment of sums of money, called penalties, or liquidated damages, inserted to secure the performance of the act agreed to be performed. A different class of contract is that where one of the parties is given the election to do something else in lieu of conveying the land." *Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 428.

In the case cited the court adopts as a correct rule for determining the class to which a given contract belongs the following:

"The question always is, what is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court enforcing the performance of the very act, and thus carrying into execution the intention of the parties. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election, to compel the performance of the other alternative." *Fry*, Spec. Per. § 115.

We conclude, in the light of the rule stated, the contract was alternative, and gave appellant the choice of two courses, a compliance with either of which would relieve him of all liability. Giving to the language of the contract its ordinary meaning, appellant's obliga-

tion was, if appellees' title was good, to accept the land upon the agreed terms. Or he could, title being good and appellees without default, breach or fail or refuse to perform the contract. The contract expressly provides that if appellant fails or refuses to perform, he shall forfeit to appellees the \$500 deposited by him. For what purpose? The contract itself furnishes the answer when it declares it shall be the agreed or liquidated damages for the breach of the contract. In short, its breach is permitted by forfeiting the \$500. The contract provides as much. This conclusion is sustained by the further provision that the \$500 shall, if forfeited, be "full penalty and liquidated damages" for such "breach" thereof. While the word penalty is descriptive merely of the sum agreed upon, the term "liquidated damages" means, in connection with penalty, that said sum was ascertained and fixed as fair compensation for appellees in the event appellant elected or chose to breach or recede from the contract. The foregoing conclusions are fairly deducible from the language of the contract. A contrary conclusion can find little, if any, support in the language of the contract. No expression is found in the contract indicating that the penalty was intended as a means of coercing performance. The amount of the penalty in its relation to the sum agreed to be paid for the land is insignificant and more nearly represents perhaps the loss which would befall appellees, than a sum which would induce appellant to perform the contract, rather than submit to the forfeit. However, if there was nothing at all in the contract indicating the intention of the parties, we would be inclined to hold that the penalty was inserted to coerce performance. But when, as here, the parties declare the penalty is to be in payment of the agreed or liquidated damages in case of breach, we are constrained to conclude that such was the intention. A contract quite similar in its provisions with the one under discussion was construed in *Moss v. Wren*, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847. The only material difference in the contracts is that by the one in the case cited the seller agreed to "accept" the penalty in satisfaction of the breach of the contract. It is true that the Supreme Court, in receding from its original conclusion that the sum was inserted as a means of coercing performance, said, "If nothing had been said as to the acceptance of the \$1,000 by the seller, our original opinion would have been correct," seemingly making the case turn upon the agreement by the seller to accept the sum. We think the Supreme Court did mean to say that the contract must bind the seller to accept the agreed sum, but did not mean that he could only be held to be bound when the precise word "accept" was used for that purpose. It occurs to us that when appellees assented to the provision in the contract that appellant could breach the contract by forfeiting the \$500, they were as

much bound to accept same as they would have been had they agreed in express words to do so, and that the Supreme Court meant no more than that. It was precisely so ruled in the case of *Simpson v. Eardley*, 137 S. W. 378, and wherein the Supreme Court denied the writ of error. There is no provision in the contract in the instant case that appellant should accept deed from appellees or that appellees should accept the balance of the cash and deferred note payments, but it will not be contended that each was any the less bound to do so had there been no failure of title or breach of contract.

[2] It being clear, then, that appellant had the election of two courses to pursue, the remedy of the parties was not mutual, and specific performance should not have been decreed. This is true for the reason that a decree of specific performance must follow the substantial, if not the precise, terms of the contract. Such a decree in this case would be one that would permit appellant, even thereafter, to perform the contract or forfeit his \$500; in short, a decree requiring appellees to perform specifically but allowing appellant the choice of performing or forfeiting the agreed penalty. In such cases it has been repeatedly held the parties must resort to their remedy at law.

[3] The court below found as a fact that appellant declined to proceed under the contract within the time provided and abandoned same. While we think all other issues immaterial in view of our construction of the contract, we nevertheless further conclude that the evidence does sustain the finding of the court that appellant both declined to perform the contract and abandoned it. It is held that one may "except in the case of a perfect legal title to a corporeal hereditament," abandon "every right or interest in, title to, or ownership of property." 1 C. J. 9. Or, stated otherwise, "there is nothing in principle, to prevent the owner from abandoning his right of property in land, provided the intention to do so be evidenced by an act or deed legally sufficient to operate a divestiture of his title." *Dikes v. Miller*, 24 Tex. 417.

The testimony, which tended to show the refusal to proceed under the contract and an abandonment, is as follows: Appellant is the son of J. Mercer Carter, who was the agent of appellant prior and subsequent to the execution of the contract in all matters pertaining to the land in controversy in this suit. W. G. Currie, real estate broker, commenced with the elder Carter the negotiations which resulted in the execution of the contract. After the contract was executed, Smith, one of the appellees, in compliance with the contract, delivered an abstract of title to the land to an abstractor with instructions to supplement it so as to show the condition of the title to date, and deliver same to J. Mercer Carter when he called for it, but not to attach his certificate until he called for it.

The purpose of holding the certificate open was that Carter when he did call for it might have a certificate covering all matters up to the very time he received same and to avoid furnishing another supplement. Carter was advised by Smith as many as three times that the abstract was at the abstractor's office for him whenever he called for same. Carter did call at the office of the abstractor several times with different people and was told that whenever he was ready for it the certificate would be attached and the abstract delivered. He declined to take it, explaining to the abstractor that when he was ready he would advise him. Carter never did call for the abstract; nor did appellees actually deliver the same to him; nor did R. O. Carter ever call at the abstractor's office; nor was he advised that the abstract was ready for him. Having heard nothing from Carter on May 30, 1907, and construing the contract as having expired on that date, Smith, one of the appellees, secured his abstract from the abstractor and declared the \$500 forfeited to him by Carter and appropriated same. Subsequent to the forfeiture and after the expiration of the time fixed by the contract Carter in casual conversation with Currie inquired whether Currie had received his commission for negotiating the sale for appellees. On being informed that he had not, Carter said he ought to have it. Currie repeated to appellees his conversation with Carter, whereupon appellees directed him to secure a written order or release of the money, and they would pay Currie his commission. Returning to Carter he secured the following:

"Mr. W. G. Currie, Dallas, Texas.—Dear Sir: I am not inclined to abandon my belief that I am entitled to a return of the \$500.00 I paid through you to Messrs. Kirby & Smith, as earnest money on the Berger lot No. 340, but I will concede you the right and privilege to get any adjustment for your commission for making the sale, and if one is made satisfactory to you to-day I will withdraw any and all claims on account of the \$500 that I may have and end the matter.

"[Signed]

J. Mercer Carter."

Upon receipt of the letter appellees paid Currie one half of the \$500, retaining the other half under their agreement with Currie that the commission should be divided in case Currie secured a purchaser. Subsequent to the foregoing and in October, 1907, J. Mercer Carter called upon appellees and sought another option upon the land or the privilege of selling it. Upon being informed that the land was not for sale Carter requested an opportunity of selling it whenever it was placed on the market, assigning as a reason the fact that he had lost his former deposit which he would like to make back. The contract to convey was executed March 30, 1907. The facts just detailed transpired before the expiration of the year 1907. The instant suit was filed April 2, 1914.

[4.] Under the foregoing we feel constrained to hold that the evidence was suffi-

cient to sustain the conclusion of the trial judge that the contract was abandoned, and when there is such evidence we may not disturb the finding. While the evidence may have also sustained a contrary finding, that fact affords no sufficient reason for interference on our part. And in connection with our conclusion it may be admitted, as contended by appellant, that there was evidence adduced by appellants tending to show that appellees' title was not good, and that that was the reason that appellant declined to proceed further with the trade, and yet this court would be bound thereby, since it would not follow as a certainty that it was not the intention of appellant to abandon the contract.

There are a number of other propositions and counter propositions urged by both sides, but we do not consider them, nor deduce the facts in reference thereto because of the conclusions reached on the two issues we have discussed.

The judgment is affirmed.

COMMONWEALTH BONDING & CASUALTY INS. CO. v. HILL et al. (No. 882.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 18, 1915. On Motion for Rehearing, Feb. 16, 1916.)

1. CORPORATIONS \Leftrightarrow 89(2)—SUBSCRIPTION TO STOCK—CALL.

A call for a subscription to stock in a corporation is not necessary when the contract of subscription contains the promise to pay the amount subscribed at a specified date, as the obligation matures at such time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 375, 376; Dec. Dig. \Leftrightarrow 89(2).]

2. CORPORATIONS \Leftrightarrow 78 — ISSUE OF STOCK — PAYMENT OF SUBSCRIPTION.

A corporation is not bound under a subscription to its stock to issue a certificate of stock until the subscription is fully paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 219-231, 420-424, 429-434; Dec. Dig. \Leftrightarrow 78.]

3. CORPORATIONS \Leftrightarrow 78 — SUBSCRIPTION TO STOCK—LIABILITY.

On the corporation's acceptance of a subscription to its stock with the indorsement of secured notes to it the subscriber became liable thereon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 219-231, 420-424, 429-434; Dec. Dig. \Leftrightarrow 78.]

4. CORPORATIONS \Leftrightarrow 99(1)—SUBSCRIPTION TO STOCK—VALIDITY—CONSTITUTIONAL PROVISIONS—"ISSUE."

Under Const. art. 12, § 6, declaring that stocks and bonds issued without money paid therefor shall be void, and in view of Rev. St. 1911, art. 1170, providing for the forfeiture of stock on nonpayment of the subscription notes, a subscription contract with the promoter of a bonding and casualty insurance company upon which the subscriber executed his notes payable to the promoter and to secure which he executed a deed of trust on certain land, which stock was not delivered to the subscriber, but held as additional security for the payment of the notes, was not void or illegal, as the stock subscribed for did not represent any outstanding

liability for stock or any representation to the public that the corporation had in its hands actual cash as represented by fully paid up certificates, and as there was no "issue" of such stock; the term "issue," as a noun, meaning the act of sending or causing to go forth, the act of passing out, and, as a verb, meaning to send out officially, to send or put forth, to put in circulation, to emit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 444; Dec. Dig. ¶99(1).]

For other definitions, see Words and Phrases, First and Second Series, Issue.]

3. EVIDENCE ¶83(1) — PRESUMPTION — PERFORMANCE OF OFFICIAL DUTY.

The presumption is that the officer charged with the issue of a permit to a foreign corporation on its filing of an affidavit showing that it had on deposit with the state treasurer \$100,000 did his duty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ¶83(1).]

6. CORPORATIONS ¶92 — SUBSCRIPTION TO STOCK—NOTES—VALIDITY.

Notes given as part of the subscription to stock of a corporation are not void, and may be enforced and collected as valid obligations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. ¶92.]

On Motion for Rehearing.

7. EVIDENCE ¶158(26) — BEST AND SECONDARY EVIDENCE — ISSUE OF CORPORATE STOCK.

The issuance of the stock of the corporation to its subscriber should be established by the stock itself, which should be produced as the best evidence of its issuance and acceptance; and parol evidence as to the issuance of such stock is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 507-513; Dec. Dig. ¶158(26); Corporations, Cent. Dig. § 1736.]

Appeal from District Court, Swisher County; R. O. Joiner, Judge.

Action by W. F. Hill and others against the Commonwealth Bonding & Casualty Insurance Company, with plea of intervention by C. C. Cantrell, and cross-action by the defendant company. Judgment for plaintiffs and the intervener denying the defendant's cross-action, and defendant appeals. Reversed and remanded.

Speer & Brown, of Ft. Worth, and Martin, Kinder, Russell & Zimmermann, of Plainview, for appellant. Alexander, Baldwin & Ridgway, of Ft. Worth, and Moss & Leak, of Memphis, for appellees.

HUFF, C. J. We adopt the statement made by appellant, which is as follows:

"On October 30, 1914, appellee W. F. Hill (plaintiff below) filed this suit in the district court of Swisher county, Tex., against appellant, Commonwealth Bonding & Casualty Insurance Company (defendant below), to cancel three promissory notes for \$500 each, and one for \$250, payable to Commonwealth Organization Company, and executed by one C. C. Cantrell (intervener and plaintiff below) on December 1, 1910, nearly four years before suit filed, and seeking to cancel deed of trust given at the same time by said C. C. Cantrell to John Scharbauer, trustee for Commonwealth Organization Company, on N. E. ¼ of survey No. 130, block M10, Swisher county, Tex., plaintiff alleging that after the giving of said notes and deed of

trust by Cantrell, he, the said Cantrell, sold said land to one G. W. Harp, who in turn sold to appellee Hill, and Hill sold one-half interest therein to appellee Dora Davis April 20, 1914, or about six months prior to suit. Trustee Scharbauer, the Commonwealth Organization Company, and G. W. Harp were not parties to the suit, and C. C. Cantrell and Dora Davis and husband, M. L. Davis, were not original parties to suit, but on trial of cause appellee Hill's attorneys joined the names of Dora Davis and M. L. Davis as plaintiffs with Hill in an amended petition, and filed a plea of intervention for C. C. Cantrell seeking for Cantrell the same relief sought for the plaintiffs. Appellees sought a cancellation of said notes and deed of trust upon the bare technical legal allegations that said notes were given in payment for stock in a corporation issued to intervener, Cantrell, and were therefore void, making no allegations that same were fraudulently obtained or that said stock was not in a going concern and worth par value.

Appellant, the Commonwealth Bonding & Casualty Insurance Company, answered, denying that said notes were given in payment for such stock, but claiming that same were executed to secure a subscription contract for stock, and were held as collateral security to said subscription contract, and, further, that it is a corporation incorporated under the laws of Arizona, and under the laws of that territory said notes were valid and not prohibited even though given for stock direct. Appellant also by way of cross-action sought judgment on said notes and foreclosure of deed of trust.

"Upon trial before the court without a jury judgment was entered on April 29, 1915, in favor of plaintiffs Hill, Dora Davis, and husband, M. L. Davis, and intervener Cantrell, canceling said notes and deed of trust lien, denying defendant the relief sought in its cross-action, and decreeing that title and possession of the certificates of stock should be divested out of intervener and vested in defendant."

C. C. Cantrell entered into the following subscription contract with the Commonwealth Organization Company:

"Commonwealth Bonding & Accident Insurance Company.

"Capital \$10.00. Surplus \$30.00.

"No. 1124. Subscription to Capital Stock.

"Whereas, Commonwealth Organization Company, of Ft. Worth, Texas, are promoting the organization of a Casualty Bonding & Accident Insurance Company, to be incorporated in pursuance of the laws of the State of Texas, under the name of Commonwealth Bonding & Accident Insurance Company, or such other name as may be selected, with an authorized capital stock of three hundred thousand dollars, and a paid-up capital of at least two hundred thousand dollars, paid up and free from organization expenses, all in accordance with a printed prospectus issued by them and delivered to me;

"And whereas, by their acceptance of this subscription, said Commonwealth Organization Company agree to endeavor with all reasonable diligence to accomplish on or before December 31, 1910, the organization of said corporation, with capital stock fully paid as aforesaid, they to defray all expenses of the organization and incorporation:

"Now, therefore, I do hereby subscribe for 50 one-tenth shares, of the par value of ten dollars each, of the capital stock of said Commonwealth Bonding & Accident Insurance Company, and agree with said company and the said Commonwealth Organization Company, to pay therefor the sum of \$2,000.00 dollars, as follows: The sum of \$1,750.00 dollars I agree to pay in money or securities satisfactory to the insurance department, with six per cent. interest, to said

Commonwealth Bonding & Accident Insurance Company or its trustees at Ft. Worth, Texas (which goes to capital and surplus), at any time after November 1, 1910, immediately upon receipt of notes from said Commonwealth Organization Company that its capital stock has been subscribed in good faith in amounts and at rates netting the company at least two hundred thousand dollars of capital in the aggregate when paid. The remaining sum of \$250.00 dollars I agree to pay and do pay concurrently with this subscription to the said Commonwealth Organization Company, in consideration of their agreement hereinbefore recited, and in lieu of any further or other contribution to expenses of organization and incorporating said company.

"No conditions, representations, or agreements other than those printed herein shall be binding on Commonwealth Organization Company or the Commonwealth Bonding & Accident Insurance Company.

"Witness my hand this the 29th day of September, 1910. C. C. Cantrell (Name of Subscriber), Memphis, Texas. Occupation: Farmer. Witness: R. E. Bristol."

On December 1, 1910, Cantrell executed his four notes, three for \$500 each, due in 12, 24, and 30 months after date respectively, and one note for \$250, due 48 months after date, payable to the order of Commonwealth Organization Company, and to secure which he executed a deed of trust upon the land described in the petition to John Scharbauer, trustee. The deed of trust was filed for record January 20, 1911. Thereafter, on the 31st day of May, 1911, Cantrell conveyed the land to G. W. Harp by a quitclaim deed for a recited consideration of \$4,800, as paid, and the assumption by Harp assuming the obligation of the original purchaser of the land to the state of Texas. This deed recites that a vendor's lien is retained to secure the note. Harp by school land deed conveyed the N. E. $\frac{1}{4}$ of the section to W. F. Hill, which was filed for record October 27, 1911. W. H. Hill conveyed to Dora Davis an undivided half interest to the land in question, dated April 20, 1914, and recorded November 3, 1914. The four notes were introduced in evidence, which showed to bear interest at the rate of 6 per cent. per annum until maturity, and thereafter until paid at the rate of 10 per cent. per annum, payable annually, and providing for the usual 10 per cent. attorney's fees, and said notes being secured by \$2,000 stock in the Commonwealth Bonding & Casualty Insurance Company, and by deed of trust given to John Scharbauer, trustee. The notes were signed by Cantrell and indorsed to appellants by the Commonwealth Organization Company.

The charter for the Commonwealth Bonding & Casualty Insurance Company was obtained under the laws of Arizona on the 23d day of March, A. D., 1911. The purposes for which said corporation was organized were to act as surety, guarantor of the fidelity of employes, trustees, executors, administrators, guardians, and to act as administrator, etc. That the authorized capital stock was to be \$300,000, divided into 30,000 shares of the par value of \$10 each.

The deed of trust was made to Scharbauer, as trustee, to secure the Commonwealth Organization Company in the payment of the notes above specified, and was dated December 1, 1910. Cantrell by his testimony showed that the certificate of stock was issued, and that it was left in the hands of R. J. Thorne, an attorney, who was then representing the Commonwealth Bonding & Casualty Insurance Company. He states that the note and deed of trust were executed in consideration for which he was to receive a certificate of shares of stock in the appellant company. There was no stock certificate offered or produced at the trial and Cantrell's testimony as to the stock is all the testimony that there is in the record as to the issuance of the stock, and this testimony was admitted over the objection of appellant.

[1] It is a generally recognized rule that a call for subscription to stock in a corporation is not necessary when the contract of subscription contains the promise to pay the amount subscribed at a certain specified date or dates; the obligation matures at the time agreed upon.

[2, 3] A corporation is not bound under the subscription to issue a certificate of stock until the subscription is fully paid. *California Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99. When the appellant accepted Cantrell's subscription contract with the indorsement of the secured notes to it, he became liable thereon. *Panhandle Packing Company v. Bivins*, 140 S. W. 523.

[4] The appellee Cantrell has not paid his subscription contract for stock, and for that reason appellees assert his contract is void, and that the note and deed of trust given to secure his subscription are void. Const. art. 12, § 6, does not declare that a subscription contract with a note secured for subscription is void; but it is the stock and bonds issued without money paid therefor, which are declared to be fictitious stock or indebtedness, that are void. If the notes were given for a lawful purpose, we do not think they should be declared void. The fact that the contract was to pay for stock in the corporation does not render it illegal. To construe the Constitution to have the effect that such contract was illegal would render it impracticable to form a corporation. The Constitution prohibits "the issue" of stock by a corporation unless the money is paid. In *San Antonio, etc., v. Deutschmann*, 102 Tex. 207, 105 S. W. 486, 114 S. W. 1174, our Supreme Court said stock "can be paid for in installments." If it can be so paid for, then a contract of subscription with secured notes to be paid in installments would not be an illegal contract. The subscription and the notes given as part thereof are not for an illegal issue of stock. The purpose of the Constitution and laws was doubtless to prevent the issuance of watered stock. If a corporation has not issued such stock, there is no representation to the public that it has

in its hands actual cash as represented by fully paid up certificates. If it does not execute such certificate or deliver the same, there is no obligation on the corporate body for such stock. The stock subscribed for does not represent an outstanding liability for stock. If the contention of the appellees shall prevail, the very object of the law would be thwarted. A corporation could not force collection of stock subscriptions because certain subscribers will not pay and cannot be made to pay. Innocent third parties would be made to suffer and an injustice worked against other subscribers who in good faith have complied with their contract. "Issue," in its ordinary sense, is thus defined in 23 Cyc. 358a:

"As a noun: The act of sending or causing to go forth; a moving out of an inclosed place; egress; the act of passing out; exit; egress or passage out; the ultimate result or end. As a verb: To send out; to send out officially; to send forth; to put forth; to deliver for use or authoritatively; to put in circulation; to emit; to go out; to go forth, as authoritative or binding; to proceed or arise from; to proceed as from a source."

Cantrell says the stock was issued to him for these notes, but it is to be noted that the stock was never delivered to him. He says he saw it in the possession of Robt. J. Thorne, an attorney for appellant company. Moss also testified he saw the stock in the hands of Thorne. It should also be noted that the notes in question were executed to the Organization Company, and before the appellant was incorporated. The evidence is also to the effect that the stock was not delivered to Cantrell, but held as additional security for the payment of the notes. This stock was not therefore sent out or put forth and delivered to Cantrell. It was never in circulation or binding upon the corporation, or by its authority emitted as an obligation binding upon the corporation. The framers of the Constitution evidently used the word "issue" in its ordinary sense. If so, there was never an issue of this stock, and no illegal act with reference thereto. *Hidalgo County Drainage Dist. v. Davidson*, 102 Tex. 539, 120 S. W. 849. The conclusion of Cantrell that the stock was issued to him for the notes is contrary to the facts upon which he bases that conclusion. He had executed his notes before any stock could possibly be issued to him. He had agreed with the Organization Company that he would give his notes and secure the same as part of his subscription, or that he would pay the money. He elected to give the notes with security. The Organization Company transferred the contract and the notes to appellant. This transaction should not be denounced as illegal. He made the contract for the purpose of bringing into existence the corporation, and employed the Organization Company as his agent to perform that labor, and, when this was done, he agreed to pay his subscription contract. The law did not require before incorporating that the stock should be

fully paid before incorporation (article 1121, subd. 37, and articles 1129, 1130, 4928, R. C. S.), such as is required in life insurance companies (article 4725e). The law only required \$100,000 to be paid in by domestic corporations upon obtaining charters issued prior to the act of the Legislature of 1913 (page 123, § 1).

[5] This company was organized and permitted to do business in this state in 1911. Article 4928 was amended in 1913 by adding thereto that all foreign corporations should file an affidavit showing that such corporations had on deposit with the state treasurer \$100,000; but, should the law, as now amended, apply to foreign corporations as it did to domestic corporations at the time the permit was granted by this state to appellant, the charter shows that there was a \$300,000 capital stock authorized, and therefore all the capital stock had not been paid when the charter was granted or the permit issued, and no presumption that the capital stock, including Cantrell's, was fully paid and issued, or so represented to have been. The presumption is that the officer whose duty it was to issue the permit did his duty. The mere fact that the notes were secured by the stock of Cantrell in the corporation does not evidence an issue of stock or make an illegal contract. This agreement, if such it was, is no more than the law fixed on such stock without such an agreement. Article 1170, R. C. S. It has been held by the Courts of Civil Appeals that notes given as part of the subscription to stock are not void, and that they may be enforced and collected as valid obligations. *Cope v. Pitzer*, 166 S. W. 447; *Bank v. Falvey*, 176 S. W. 833; *Horn Bros. v. Baker*, 173 S. W. 470; *Davis v. Burns*, 173 S. W. 476-480. This court has hitherto held in two cases not reported that a subscription contract upon which appellant corporation was organized was valid.

[6] Our attention has been called to the case by the Court of Civil Appeals of the Second District, not yet published, a copy of which has been furnished us. *Cattleman's Trust Company v. Turner*, 182 S. W. 438. This case goes into a thorough discussion of the question here involved, and we are persuaded that the conclusion there reached is a correct one, and we are in accord with the views there expressed, and believe that case to be decisive of the question here at issue. We think the cases cited by appellees are distinguishable from this, in most of which stock was issued for notes which it appears the court held violated the provisions of the Constitution referred to. But where, as in this case, the note is a part of the subscription, and the stock was not issued or delivered to the subscriber for the notes, but held to secure the payment of the subscription and notes, we think the various courts, so far as has been called to our attention, hold that the notes will be valid and collectible.

We believe the trial court was in error in canceling the four notes and the deed of trust on the land; that he should have rendered judgment upon appellant's cross-petition on the notes for the amount sued for, together with the interest and attorney's fees stipulated for in the notes, together with the foreclosure of the lien prayed for on the land.

The judgment of the trial court will be reversed, and judgment here rendered for appellant, in accordance with its prayer.

Reversed and rendered.

On Motion for Rehearing.

[7] We believe the fourth assignment by the appellant should be sustained, and that the court was in error in admitting, over the objection of the appellant, parol testimony as to the issues of a certificate of stock to Cantrell. The issuance of the stock to him should be established by the stock itself, and we think that it should be produced as the best evidences of its issuance and existence. This is the fact upon which appellee's right of recovery, in a measure, depended, and parol evidence ought not be permitted to establish such fact, in the absence of the proper predicate for its nonproduction. *Harvey v. Cummings*, 63 Tex. 599, 5 S. W. 513. A delivery of the certificate, of course, could be shown by parol. The testimony of Cantrell that he left the certificate in the hands of the attorney for the company does not necessarily prove that it was ever delivered to him by the company. It is just as consistent that he saw it there first and left it as that it was delivered to him, and that he took it to the attorney and left it with him. The facts show in this case, according to our view, that it was under the control of the company, and that it was retained to secure the payment of the note. The issuance and existence of the certificate was capable of better proof than by parol. The delivery to Cantrell we do not think sufficiently proven, and on that ground we reversed and rendered this case. Perhaps, under the rule, we should have reversed and remanded, as our conclusion of the facts must necessarily be contrary to the findings of the trial court.

The judgment, therefore, reversing and rendering, will be set aside, and the case reversed and remanded, and to that extent the motion for rehearing will be granted.

DENTON v. HOLBERT. (No. 5582).*

(Court of Civil Appeals of Texas. San Antonio. Feb. 16, 1916. On Motion for Rehearing, March 15, 1916.)

1. BROKERS — 86(3) — CONTRACTS — COMPENSATION — ACTION.

In an action for compensation claimed by a real estate broker, evidence *held* to warrant

a finding that the broker substantially performed his agreement.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 117; Dec. Dig. — 86(3).]

2. BROKERS — 48 — COMPENSATION — RIGHT TO.

Where a landowner, who was disposing of a large tract in small parcels, availed himself of contracts procured by plaintiff broker and did not cancel the broker's contract for nonperformance, he cannot defeat recovery of commissions on the ground that the broker did not comply with all terms of the contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 65; Dec. Dig. — 48.]

3. EVIDENCE — 460(2) — PAROL EVIDENCE — VARYING WRITTEN CONTRACT.

In an action for compensation due under a broker's contract which prohibited plaintiff from selling lands in the territory of any other agent but did not specify plaintiff's territory, parol evidence as to plaintiff's territory is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2116, 2124; Dec. Dig. — 460(2).]

4. BROKERS — 65(1) — COMPENSATION — DEFENSES.

Where defendant, who was disposing of a large tract of land located in Texas, admitted that he made no objections to plaintiff broker's handling other Texas lands, the broker's right to compensation for sales made cannot be defeated on that ground.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 48; Dec. Dig. — 65(1).]

5. BROKERS — 86(4) — COMPENSATION — ACTIONS — EVIDENCE.

In an action by a broker for commissions for sales effected through subagents, evidence *held* to show that the sales were not made by defendant directly through the subagents, but that he recognized such agents as being agents for the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 117; Dec. Dig. — 86(4).]

6. BROKERS — 55(1) — COMPENSATION — RIGHT TO — ESTOPPEL.

Where a broker employed to sell lands in Arizona carried on a selling campaign in person for over a year and then turned the matter over to subagents, the broker is not estopped to claim compensation; the owner after objections acquiescing.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. — 55(1).]

7. BROKERS — 86(2) — COMPENSATION — RIGHT TO.

In a suit for compensation for sales of land for defendant, evidence *held* not to show that defendant discharged the broker or his subagents, but that defendant recognized the continuing agency of such persons.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 117, 119; Dec. Dig. — 86(2).]

8. BROKERS — 86(2) — COMPENSATION — ACTIONS — EVIDENCE.

In an action by a broker for compensation for sales of land effected through subagents, evidence *held* insufficient to show that the original contract was terminated before the sales were made.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 117, 119; Dec. Dig. — 86(2).]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by J. V. Holbert against G. Denton. From a judgment for plaintiff, defendant appeals. Affirmed.

R. E. Hannay, Jr., and R. P. Ingram, both of San Antonio, for appellant. Ryan, Matlock & Reed and Butler L. Knight, all of San Antonio, for appellee.

MOURSUND, J. This is a suit by J. V. Holbert against G. Denton, upon a written contract, to recover commissions for the sale of lands belonging to Denton situated in Dimmit county, Tex., the amount sued for being \$1,360 and upon a trial before the court judgment was rendered for the full amount sued for. The contract appears in the findings of fact filed by the trial court, as follows:

"(1) That heretofore, to wit, on or about the 15th day of October, 1908, the defendant was the owner of and offering for sale about 32,000 acres of land situated in Dimmit county, Tex., and was himself and through agents appointed by him and through subagents selling same in the name of Denton Colony Company.

"(2) Said land had been subdivided into about 2,543 tracts, most of which were in size 10 acres each, but certain tracts contained more than 10 acres.

"(3) A proposed town site was laid off on said land by which arrangement there were two town lots for each tract of land.

"(4) Much of said land was sold through agents of defendant and through subagents of said agents on written applications procured from intending purchasers, whereby each purchaser, upon the payment of a uniform price of \$200 or \$210 on terms, \$10 cash and 20 notes payable monthly, per share, acquired a right to purchase one farm tract with its two accompanying proposed town lots on said land. No particular tract of land or lots were sold to any particular purchaser, but it was understood between the parties that, after sufficient shares had been sold to cover all of said land, then said land would be distributed to the several purchasers.

"(5) All of said shares were sold under the above plan.

"(6) The customary plan of selling was for the purchaser to pay \$10 down and \$10 per month until the sum of \$210 had been paid for each share so purchased. It also provided in case purchaser made default in his payments the contract of sale might be canceled, and quite a number of persons did make default in their purchase contracts, and on account of which the defendant canceled said contracts and resold, or caused to be resold, said shares to other parties, many of which were sold after the distribution of part of said land which was about September 20, 1910.

"(7) Plaintiff, on or about October 15, 1908, resided in the state of California, and engaged in the real estate business at Bakersfield; and while residing at said Bakersfield, as a result of correspondence, plaintiff made a written contract with defendant concerning the sale of said Dimmit county land, which was in words and figures, as follows:

"Selling Agent's Contract.

"In accepting employment as sales agent for the Denton Colony Company, in Dimmit county, Texas, according to plan of partition I specially agree:

"First. That I will vigorously push the sales as per said plan, both personally and through such subagents, if any, to be paid by me upon such basis as may be agreed upon between us, but all of the sales shall be made in my name as agent, and not in the name of the subagent.

"Second. That all moneys and applications, to purchase lots and farms collected or received by me, or any of my subagents, other than the five dollars cash payment which I am entitled to retain as a part of my compensation, shall be

trust funds, and myself or any of my subagents, receiving such moneys, or applications to purchase, shall and will merely act as trustee or bailee for the purchaser, as well as the said Denton Colony Company.

"Third. That all applications to purchase, and payments on applications, shall be forwarded to the Denton Colony Company, San Antonio, Texas, in due course of mail on the day received by me or any of my subagents, and failure so to do shall be a breach of said trust next above specified.

"Fourth. I agree to receive my commission and compensation as follows, viz., \$5.00 cash to be collected from applicant and retained when application is taken; \$5.00 to be paid me by the said Denton Colony Company when they have received payment of the first note; and \$5.00 to be paid me by the said Denton Colony Company when they receive payment of the second note; \$5.00 when they receive payment of third note, and \$5.00 when they receive payment of the fourth note.

"Fifth. In the event of an oversale of the lots and farms, upon notice of such fact, I agree to immediately return to the respective applicants the \$5.00 collected by me, and return any applications that I or my subagents may have in hand or in transit as to all sales made or money collected by me or by my subagents after all lots and farms have been sold.

"Sixth. No commissions are to be paid to me on any sale except such commissions as are collected from the purchasers in the manner stated in the fourth clause hereof.

"Seventh. Should I be negligent, dilatory or unsatisfactory in my services, the said Denton Colony Company, or any one of them is authorized, or the general state agent who appoints me shall have the right to immediately terminate this contract.

"Eighth. I also agree that I will not sell any lots and farms in another agent's territory, it being understood and agreed in advance that no agent will be allowed any commission for applications taken from residents of another agent's territory, except in cases of sales to nonresidents of the state and sales to traveling men.

"Ninth. I agree that I will not publish an advertisement (except extracts from owner's printed literature) and that if I desire to have any other advertisement printed, that I will first submit the copy through owner's San Antonio office, to owner's attorney, and receive owner's approval through his attorney, before the advertisement is printed; and further agree that any violation of this rule discharges me and forfeits to owner all commissions on business done which will thereafter accrue to me.

"(8) It was further understood and agreed between plaintiff and defendant by correspondence that the territory assigned plaintiff under said contract was the state or territory of Arizona; and the plaintiff soon thereafter went to said territory and remained there for about one year, going from place to place in selling and attempting to sell shares in defendant's land plan, and in soliciting and appointing subagents to sell the same, and among other subagents so appointed by plaintiff were J. H. Hudson and V. H. Melick, of Williams, Ariz., under an arrangement with the plaintiff whereby said subagents were to receive \$5 for each share sold by or through them, and there was an understanding or agreement between plaintiff and defendant and said subagents that said subagents should report any and all applications for the purchase of said shares of land directly to the defendant, and that the defendant should remit to them \$5, or said subagents might collect and retain \$5 on each application when taken, per share, so sold as said subagent's commission or compensation for making such sale, and the remaining \$20 was to be paid by defendant to plaintiff.

"(9) This appointment by plaintiff of said sub-

agents was never revoked, and all the land sold by them, to wit, about 181 shares or applications, were sold by said Hudson & Melick under the arrangement first entered into and said Hudson & Melick received from defendant the compensation of \$5 per share for each of said shares so sold; and the defendant reported and paid unto plaintiff the sum of \$20 per share on 93 shares of said shares so sold, being the first 93 shares so sold by said Hudson & Melick as subagents of plaintiff. Defendant did not report to plaintiff the sales of the remaining 68 shares so sold by plaintiff by and through his subagents said Hudson & Melick, and has not paid plaintiff any compensation or commission therefor, on each of which plaintiff was entitled to \$20 from defendant, according to said contracts between said parties thereto and said subagents' contract with plaintiff which was accepted and ratified by defendant, and the commission due plaintiff from defendant on sales made by said subagents is \$1,360, and plaintiff is entitled to same with interest thereon at the rate of 8 per cent. per annum from January 31, 1912.

"(10) I further find that plaintiff substantially complied with the obligations of his contract with defendant and that his contract with defendant was never canceled or revoked.

"(11) I further find that defendant availed himself of the labor and benefits of plaintiff's said subagents in accepting the contracts, and the benefits thereunder, for sale of said 68 shares of defendant's land, and did not pay plaintiff the agreed compensation of \$20 per share thereon."

[1, 2] The court concluded that as the defendant availed himself of plaintiff's subagents in accepting the contracts for the sale of said 68 shares, and did not pay plaintiff the agreed compensation of \$20 per share thereon, plaintiff was entitled to recover \$1,360 with interest thereon from January 31, 1912, at the rate of 8 per cent. per annum.

Appellant contends that the evidence shows a flagrant failure on the part of plaintiff to perform his contract, in that he failed to return to Arizona and push the sales of defendant's land in person, and in fact was absent from Arizona during all the time when the contracts were made upon which he bases his claim for commissions. This attack upon the court's finding that Holbert substantially complied with his contract cannot be sustained. The facts set out in the eighth finding of fact are undisputed and are referred to in this connection. It appears that, when Holbert came to San Antonio with Melick, he wanted to remain in San Antonio and intrust the further work in Arizona to subagents, and especially to Hudson & Melick. Denton wanted him to go back to Arizona, but did not insist upon it, nor cancel the contract, and, in fact, if he had the right to demand that Holbert should in person solicit contracts in Arizona, he waived such right, and permitted Holbert to fulfill his obligations through subagents. In this connection, the evidence warrants a finding that the contract made by Holbert with Hudson & Melick was signed in Denton's office and a copy filed with Denton. Denton recognized that Holbert was performing his contract, and availed himself of the fruits of the labor of the subagents, treating them throughout as subagents. This is shown by the fact

that he paid them only \$5 on each contract mentioned in plaintiff's petition which was the amount due them under their contract with Holbert, and by the further fact that he does not even contend that he ever notified such subagents that any change had taken place such as would entitle them to represent him directly. Denton paid Holbert his commission on 93 contracts sent in by Hudson & Melick, thus showing conclusively that he regarded the contract as being in full force and effect, and the testimony of Holbert and Sawyer supports the court's finding that the contract between Holbert and Denton was never canceled. Holbert testified that Denton told him that he (Holbert) and his subagents had sold over 400 contracts. This was a remarkable performance, and it appears that Holbert won a prize awarded by Denton for efficiency in selling contracts. It appears that Denton considered that his contract with Holbert did not confer the exclusive agency for Arizona, and he sent one A. G. Gnatz to Arizona; but, although he was in Arizona about two months, he failed to sell a single contract. The court was justified in finding that Holbert substantially complied with his contract; but even if he had not done so, as Denton elected not to avail himself of the provision authorizing him to cancel for certain reasons, and received the benefits accruing from the efforts of Holbert's subagents, he should not now be permitted to say that grounds existed upon which he would have been authorized to cancel the contract. The first assignment is overruled.

[3] The second and third assignments relate to the admission of testimony of Holbert with regard to the correspondence leading up to the making of the written contract. This testimony was to the effect that in such correspondence it was stated and agreed that Holbert should have the general and exclusive agency for the sale of lands for Denton in the state of Arizona. The contract afterwards drawn fails to show in what territory Holbert was to exercise his functions as selling agent, but it does prohibit him from selling in another agent's territory except to nonresidents of the state or to traveling men. The territory in which Holbert was to operate is not described in the contract, and there can be no valid objection to permitting Holbert to show what territory his contract applied to, and that is the only fact found by the court upon said testimony. *Abbott's Trial Evidence*, p. 361; *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375, 78 S. W. 974; *Kirk v. Brazos County*, 73 Tex. 56, 11 S. W. 143. We do not understand that the court's judgment was predicated upon the theory that Holbert had the exclusive agency for Arizona. Nothing is said in his findings of fact with regard thereto, and Denton could not have been injured by admitting testimony to the effect that Holbert was to have the exclusive agency. We therefore deem it unnecessary to

determine whether such evidence was admissible upon the theory that it showed a contract or agreement which induced the execution of the written contract. The assignments are overruled.

[4] Appellant also contends that Holbert abandoned the contract and engaged in work under an employment wholly antagonistic to the business of defendant, and therefore his contract was annulled prior to the sales by Hudson & Melick upon which the suit is based. It appears that in January, 1910, Holbert entered into a contract to sell for E. P. Simmons a section of land in Dimmit county under a plan similar to the one used by Denton. The evidence fails to show that he tried to sell any of this land in Arizona, and it appears from Denton's testimony that he had no objections to Holbert's handling other deals in Texas. The fourth assignment is overruled.

[5] Appellant contends that all sales for which commissions are claimed were made direct and through the office of the defendant and were not brought about by any efforts on the part of plaintiff. As is fully shown in discussing the first assignment of error, there is no merit in the foregoing contention, for all sales were made by Holbert's subagents, recognized and treated as such by Denton, and without ever attempting to employ them to sell in any other capacity than as Holbert's subagents. Assignments 5 and 6 are overruled.

[6] It is further contended that Holbert's conduct was such as to estop him from claiming commissions, in that he declined to return to Arizona, engaged in the sale of other lands, and failed to notify Denton he expected commissions. What we have heretofore said disposes of this contention adversely to appellant. There is no element of estoppel in this transaction. Assignment No. 7 is overruled.

There is no merit in the eighth and ninth assignments. Holbert did spend his money and in person prosecute sales vigorously for a year, and afterwards his subagents paid such expenses as they incurred. Defendant incurred no expense in connection with the sale of the 161 contracts reported by Hudson & Melick, except the payment of commissions as contracted. It is plainly apparent from his own testimony that he regarded it as his duty to send out literature at his expense to such persons as his agents named.

[7] It is further contended that the court erred in rendering judgment for the sales made after the latter part of January, 1910, appellant's theory being that at said time the deal was closed and all agents notified and discharged, and the greater portion of the 68 sales were made afterwards, and appellee should not be awarded commission on such sales. Appellant contended that he discharged Holbert as an agent, in so far as the Arizona contract was concerned, in Novem-

ber, 1909; but the court's finding against such contention is amply supported by the testimony. Appellant also testified that he closed up his deal and discharged his agents generally in the latter part of January. Sawyer, Denton's bookkeeper, testified that Denton sent out a telegram to his agents stating that all lots had been sold, or that nearly all had been sold; that in fact they were not all sold, and the telegram was for the purpose of bringing in a rush lot of sales. Holbert testified that Denton never discharged him, and that he never heard of being discharged until the trial of the case. Denton's books show that several sales were made by Hudson & Melick on February 1, 1910, one in May, 1910, and quite a number in June and July, 1910. No change was made in the method of keeping the books at the end of January. Denton made reports to Holbert up to May 7, 1910, of sales by Hudson & Melick and of payments made by purchasers. The parties, in speaking of the close of the sales of Denton Colony lands, appear sometimes to have in view the telegram sent in January to the agents, and sometimes the distribution of the lands which occurred about September 29, 1910. It is very plain that, regardless of what may have been the case as to other agents, Denton went right on with the contract with Holbert, availing himself of the ability of Holbert's subagents to sell contracts, and reaping the benefits thereof, treating them as subagents and paying them as subagents. It is apparent that, when he "discharged his agents generally," he omitted to discharge Holbert and Holbert's subagents, and the court did not err in holding him liable for commissions on all sales made by them. Assignment No. 10 is overruled.

[8] The eleventh assignment presents the contention that Holbert should not recover for any sales made after November 20, 1909, the theory being that a new contract was then made between Holbert and Denton whereby Holbert was authorized to sell in Texas, and therefore he should not recover under the first contract. It appears that Denton recognized the first contract as remaining in full force and effect, reporting to Holbert many sales made after November 20, 1909, and playing his commissions thereon. The assignment is overruled.

Assignments 12 to 16, inclusive, constitute attacks upon the findings of fact of the trial court, while assignments 17 and 18 constitute attacks upon the conclusion of law filed by the trial court. All of these assignments are overruled, and the findings of fact filed by the trial court are adopted by us. The twentieth, in which the contention is made that Holbert was not the procuring cause of the sales for which he seeks to collect commissions, is also overruled.

The twenty-first and twenty-second assignments are also overruled. Our views with

regard to the contentions made are sufficiently disclosed in the discussions relating to other assignments.

Assignments 23 to 35, inclusive, complain of the failure of the court to make additional findings of fact pursuant to request of appellant. There being an agreed statement of facts in the record, and it being our opinion, that appellant has been enabled to present fully all of his contentions, and that no injury has been sustained by reason of the failure of the court to find in answer to the questions asked, we overrule all of such assignments.

The judgment is affirmed.

On Motion for Rehearing.

The statement in our opinion that "It appears that when Holbert came to San Antonio with Melick he wanted to remain in San Antonio and intrust the further work in Arizona to subagents, and especially to Hudson & Melick," is vigorously attacked as unsupported by the evidence. We will briefly state some of the evidence on which we based our statement. Denton testified:

"It is a fact that, just as soon as Mr. Holbert told me he wanted to stay here and he could handle his business as well by subagents, I told him that if he did not go back we were going to discharge him."

Holbert testified to discussing the matter with Denton, and admitted that Denton thought he could do better by going back, but testified positively that Denton did not discharge him verbally or by letter then or later; that he never heard of being discharged until the trial of the case. Holbert testified his health was bad, and that he told Denton he "could manage Arizona here in San Antonio." He testified further:

"He thought I could do better going back, but, after finding Mr. Melick as agent, it proved I was doing better or as good as if I had went back myself, from Mr. Melick's number of contracts he sent down here."

He also testified that he stayed in San Antonio where Denton put him to work and sold shares "after Melick went back and took charge at Williams, Ariz." While it appears that he had other subagents in Arizona, it seems, from the letters he wrote Denton before going to San Antonio with Melick, that most of his hopes were centered in the prospect of selling shares in the vicinity of Williams, and that having formed a club there, if Melick's report on the land proved favorable, he expected sales could be made of from 100 to 200 shares. We think the testimony fully sustains the statement made by us. The evidence supports a finding that while Denton was of the opinion, especially at first, that Holbert should return to Arizona, he did not insist upon it or discharge him, but was satisfied with the way in which sales were being made by Holbert's subagents.

Appellant also attacks the statement that Denton recognized that Holbert was per-

forming his contract and availed himself of the fruits of the labors of the subagents, treating them throughout as subagents. It is true that Denton's books had two columns on each page, showing the name of the general agent and the name of the selling agent. Holbert's name appeared under the heading "General Agent" "up to a short time before the 20th of November, 1909," and thereafter did not appear, while the name Hudson & Melick appears throughout under the heading of "Selling Agent." There was no explanation offered as to why the name of Holbert was left off, and no explanation offered of the circumstance that this occurred a short time before November 20th, the date Denton claims to have discharged Holbert as agent for Arizona. Denton did not keep the books, and Sawyer, who did keep them, merely testified that Holbert's name appeared first as selling agent and that he scratched it out and wrote in the name of Hudson & Melick, and then wrote Holbert's name in the other column; that he did this when Holbert reported that he had certain people assisting him in Arizona who were entitled to commissions. Appellant attaches undue weight to the failure to keep on writing Holbert's name under the heading of general agent. This was primarily Holbert's account, and, while it was necessary to state the name of each selling agent who sold a share, they were all agents of Holbert, and it was unnecessary to keep on writing his name in the other column. It is not a conclusive circumstance showing that Hudson & Melick were no longer treated as subagents. The books, according to the statement of facts, show that on each of the sales mentioned therein made by Hudson & Melick they received \$5, the amount they were to receive as subagents. There is no pretense that they were ever informed that the contract under which they were operating had been canceled. Denton testified: "I did not have a contract with them at any time, I wrote them." In his motion for rehearing he argues we should infer from the statement that he wrote Hudson & Melick that he meant he had no formal written contract, and that, to show he did have some different arrangement with them upon some kind of a basis, he stated that for the last share they sold he paid them \$25. Melick testified they received \$5 for each sale made, but his attention was not directed to the particular sale mentioned by Denton.

Appellant asks too much when he expects courts to infer from the fact that he wrote letters that such letters contained statements informing Hudson & Melick that the contract under which they were operating was at an end, and also when he contends that a contract should be inferred from the fact that on the last sale made by them he paid them \$25. This sale was made on December 28, 1911, to a person whose name does not appear in the list of contracts for which plaintiff seeks to receive commission, and

whose name we can reasonably find does not appear upon the books, for the statement of facts contains the statement that Hudson & Melick were paid \$5 per share for each one appearing in the books. In addition, it may be said that appellant's explanation concerning the payment of this \$25 does not justify any inference of a different contract, for he testified he simply offered it and they "accepted it with no particular reason except to make the sale." Surely, if appellant had informed Hudson & Melick that he had discharged Holbert, and had entered into a contract with them, he would have been only too glad to have so testified, and Melick would also have so stated, for his testimony does not evidence any disposition to assist Holbert. The fact that Denton, for some unexplained reason, considered \$25 adequate compensation for making the last sale, tends to support the finding that he treated Hudson & Melick as subagents with regard to all sales for which he allowed them only \$5 and for which Holbert sought to recover commissions. Appellant admits that up to November 20, 1909, he recognized Holbert's agency, and 93 sales were made by Hudson & Melick upon which he admitted liability to Holbert. The other 68 were made in exactly the same way, through the same parties, without any notice to them that any change had taken place, and he paid only a sub-agent's commission. We think evidence supports the statement made in our former opinion.

We find that we were in error in stating that Denton reported to Holbert many sales made after November 20, 1909, and paid his commissions therein. This statement was made by reason of the fact that so many names included in the reports to Holbert appear in the list of sales for which commission is sought to be recovered. We conclude that said parties must have purchased contracts before November 20, 1909, in addition to those for which commission is sought to be recovered. Still we do not feel authorized to hold that the evidence conclusively shows a new contract between Holbert and Denton on or about November 20, 1909, whereby Holbert was authorized to sell in Texas but discharged from Arizona. There is a direct conflict between the testimony of Holbert and Denton on this issue, and the court may well have concluded that it was highly improbable that Holbert would prefer to stay in San Antonio when required to go back to Arizona or lose the business which the evidence shows paid him for the preceding three weeks from \$1,420 to \$1,820. His testimony was that 93 contracts were made after October 25th, while Denton testified 22 thereof were made prior to October 25th. It appears from Selby's testimony, introduced by defendant, that Selby, during the fall of 1909 and first part of 1910, talked to Holbert three or four times a week, a part of the time; that Holbert told him he was selling land for Sim-

mons, and he understood from Holbert that he was the Arizona agent for Denton Colony. As Holbert's contract with Simmons is dated January 31, 1910, the natural inference is that Holbert considered himself the Arizona agent for Denton Colony after January 31, 1910. Denton testified that when he closed his sales in the latter part of January, 1910, he discharged most of his agents, but kept a few. The evidence supports a finding that he failed to discharge Holbert, for Holbert testified positively that he was not discharged. It appears, however, that on January 31, 1910, Holbert signed a contract with Simmons to sell section 14 upon a plan very similar to that used by the Denton Colony Company, and we were mistaken in saying that he did not try to sell any Simmons contracts in Arizona, for he admitted that he did, but the evidence fails to show when he tried to do so. It does not appear that he succeeded, and he did not try to get Hudson & Melick to sell same, but suggested to Melick that after he got through with the Denton Colony there was another opening in the Simmons land. It appears from Denton's testimony that, after the close of his sales in January, he forfeited several hundred purchases, and that many of those sold by Hudson & Melick were forfeited shares. Denton availed himself of Holbert's subagents to continue selling forfeited shares, without discharging Holbert. The contract with Simmons is dated January 31, 1910. Holbert went to Asherton and opened an office. On February 10, 1910, he wrote Denton concerning the sale of other lands for Denton, but did not mention in said letter that he was trying to sell a certain section of land. On February 14, 1910, Denton Colony Company answered the letter, approving what Holbert had done in his efforts to sell the Denton lands, and approving his arrangement with one Gregory, who apparently represented Denton, for commissions; also, promising to send him a blueprint showing the Denton Colony Annex, and some printed matter in connection therewith. This letter contains the following significant statement:

"I hope you are getting along nicely and will soon close up that section of land you are handling. Mr. Farrington sends his kind regards."

No section of land had been mentioned in Holbert's letter, introduced in evidence by defendant. Had he written other letters not produced by defendant, or had Farrington who was jointly interested with Holbert in the Simmons contract informed Denton that Holbert had undertaken to sell section 14 for Simmons? In the next letter by Holbert to Denton, introduced by defendant, which is dated March 1, 1910, he mentions section 14, and speaks of selling some of it, and says he cannot tell how long it will take for him to close out. On March 16th, he again wrote Denton mentioning section 14 and telling what he had been doing, and stating that he is glad Denton is making arrangements with

his eight sections. The letter by Denton which called for the last statement was not introduced by Denton. On March 18th, Holbert again wrote Denton in reply to a letter not in evidence concerning sales by Holbert to certain San Antonio parties of Denton Colony shares concerning which there was a controversy as to commissions. On April 14, 1910, Holbert again mentions section 14. Denton testified he was familiar with the plan of sale used by Simmons; that, if Holbert was engaged in any other enterprise than his, he would not have permitted Holbert to work for him; that, while he was engaged in selling contracts in Bexar and Dimmit counties, he had no objections to his handling any other deal he wanted to. The evidence warrants a finding that Denton knew of and acquiesced in the employment of Holbert by Simmons and waived any right to claim a cancellation on the ground of antagonistic employment.

We therefore conclude that, even if the employment was shown to be inconsistent, Denton cannot evade liability on the theory of inconsistent employment, as is urged in the fourth assignment. Such employment, if not waived, could at the most be relied on only to deprive Holbert of compensation for sales made after January 31, 1910. *Cotton v. Rand*, 93 Tex. 23, 51 S. W. 838, 68 S. W. 343; *Peacock v. Coltrane*, 44 Tex. Civ. App. 533, 99 S. W. 107.

The motion for rehearing is overruled.

BAKER v. GULF, C. & S. F. RY. CO.
(No. 5569.)

(Court of Civil Appeals of Texas. Austin.
Jan. 26, 1916. Rehearing Denied
March 1, 1916.)

1. LIMITATION OF ACTIONS §121(2)—AMENDING PETITION—VARIANCE—TOLLING STATUTE.

Where, in an action by joint owners for injuries to property, the petition is amended so as to take away a party plaintiff, so that proof of the ownership alleged in the amended petition would not support the ownership alleged in the original petition, such amendment cannot be held to be a new suit barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. §121(2).]

2. LIMITATION OF ACTIONS §121(2)—PARTIES PLAINTIFF—AMENDMENT—TOLLING STATUTE.

In a proper case, a party plaintiff may be dropped by amendment without thereby rendering the statute of limitations available against the remaining plaintiffs.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. §121(2).]

3. LIMITATION OF ACTIONS §127(1)—AMENDING PETITION—TOLLING STATUTE—RULE.

In determining whether an amended petition states a new cause of action barred by limitation, or is the same cause originally declared on, the question is not whether different facts have been alleged, but whether the facts alleged in the amended petition constitute a dif-

ferent cause of action from that originally pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 543; Dec. Dig. § 127(1); Pleading, Cent. Dig. § 688.]

4. LIMITATION OF ACTIONS §127(1)—AMENDING TO SAVE CAUSE OF ACTION.

Amendments are expressly allowed to save causes of action from the operation of the statute of limitations, and the courts are liberal in allowing such amendments, subject, however, to defendant's statutory right to the bar of the statute of limitations, which is not to be denied simply because plaintiff is thereby denied a trial on the merits.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 543; Dec. Dig. § 127(1); Pleading, Cent. Dig. § 688.]

5. LIMITATION OF ACTIONS §126—PARTIES PLAINTIFF—WANT OF PRIVACY.

A suit brought by A. will not suspend the statute of limitations as to a suit subsequently brought by B. for the same cause of action after the expiration of the time limit, where there is no privacy in such case between A. and B.; the requirement of the statute that suits shall be instituted or commenced within a certain time meaning that the suit shall be brought by the party having the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 548-550; Dec. Dig. §126.]

6. LIMITATION OF ACTIONS §126—IDENTITY OF CAUSES—DETERMINATION.

In determining the identity of causes of action on the question whether the first suit tolls the statute of limitations as to the second, the following tests are to be applied: (1) Would a recovery upon the original action bar a recovery upon the amended petition; (2) would the same evidence support both pleadings; (3) is the measure of damages the same in each case; and (4) are the allegations of each subject to the same defenses?

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 548-550; Dec. Dig. §126.]

7. LIMITATION OF ACTIONS §121(2)—COMMENCEMENT OF ACTION—AMENDMENT—CHANGE OF PARTIES.

The addition or subtraction of a party plaintiff is not the bringing of a new suit, since the same cause of action is being prosecuted against the same defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. §121(2).]

8. LIMITATION OF ACTIONS §121(2)—COMMENCEMENT OF ACTION—ADDING PARTY—BAR.

Where a new party is added in a suit, however, after the statute has run, the action is barred as to such new party plaintiff, since as to him the suit was not instituted within the prescribed time.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. §121(2).]

9. ACTION §1—"CAUSE OF ACTION"—DEFINITION.

A "cause of action" is, abstractly, a right claimed or wrong suffered by the plaintiff on the one hand and the duty or delict of the defendant on the other. The right claimed by plaintiff, or the duty owing by defendant, do not strictly constitute a cause of action; it being the violation of the plaintiff's right by the nonobservance of defendant's duty which makes the cause of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 1-7, 85; Dec. Dig. §1.]

For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

10. LIMITATION OF ACTIONS — 127(2)—COMMENCEMENT OF ACTION—PETITION—DAMAGES.

A cause of action is not changed by an amendment which claims merely a different measure of damages.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 544; Dec. Dig. 127(2); Pleading, Cent. Dig. § 688.]

11. LIMITATION OF ACTIONS — 121(2)—COMMENCEMENT OF ACTION—PARTIES PLAINTIFF—AMENDMENT—EFFECT.

Two parties brought an action for injuries to property. After the case had gone to trial, and after the cause of action would have been barred by the statute of limitations, it developed that one plaintiff had bought the interest of his coplaintiff, and was the only party in interest, whereupon the petition was amended so as to make the owner sole plaintiff, the allegations of the petition being otherwise unchanged. Held, that such amendment did not constitute a new cause of action barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. 121(2).]

12. LIMITATION OF ACTIONS — 121(2)—COMMENCEMENT OF ACTION—PARTIES PLAINTIFF—AMENDMENT—IMMATERIALITY.

Since Rev. St. 1911, art. 1995, provides that judgment may be given for or against several plaintiffs or defendants, so that joint plaintiffs are not confined to a joint recovery, or none at all as at common law, such amendment of the petition was immaterial, since the failure of the withdrawing plaintiff to establish a right to recover, had he remained a party, would not have affected the remaining plaintiff's right to recover.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. 121(2).]

Appeal from District Court, McCulloch County; Jno. W. Goodwin, Judge.

Action by L. M. Baker against the Gulf, Colorado & Santa Fé Railway Company. From a judgment dismissing his action, plaintiff appeals. Reversed and remanded.

J. A. Adkins and F. M. Newman, both of Brady, and Wilkinson & Baugh, of Brownwood, for appellant. Sam McCollum, of Brady, Terry, Cavin & Mills, of Galveston, and Lee, Lomax & Smith, of Ft. Worth, for appellee.

JENKINS, J. J. T. and L. M. Baker brought suit against the appellee to recover damages on account of alleged injuries to their property. The case went to trial after the alleged cause of action would have been barred by the statute of limitation, had the suit not been instituted prior to that time. Upon the trial, L. M. Baker testified that the property alleged to have been injured was formerly the property of himself and J. T. Baker, but that prior to the injury he had purchased the interest of J. T. Baker therein. Thereupon the appellant, upon leave of the court, filed an amended petition, in all respects similar to the original petition, except it was alleged that the property belonged to L. M. Baker, instead of to J. T. and L. M. Baker, as alleged in the original petition. The appellee then excepted to the amended

petition as showing upon its face that the cause of action therein alleged was barred by the statute of limitation. This exception was sustained by the court, and, the appellant having declined to further amend, judgment was entered dismissing the case. The appellant, having excepted to such action of the court and perfected his appeal, here presents such action for review.

[1] The specific question here presented is: Where a suit is brought to recover damages for specified injuries to specific property, alleged in the original petition to belong to two parties, and, by amendment, the property is alleged to belong to one of such parties, did the filing of the original petition toll the statute of limitations as to the cause of action set out in the amended petition, the allegations, except as to such ownership, being the same? It is true that the ownership alleged in the original petition would not have been supported by proof of ownership as alleged in the amended petition, but this is not necessarily conclusive as to the point here in issue.

"A variance of this character * * * has frequently been held fatal. * * * But evidently the correction, by amendment, of any misdescription that would be fatal on an objection for variance between the allegata and probata, cannot be held to be a new suit." *Thompson v. Swearingin*, 48 Tex. 560.

It has been held that a petition bad on general demurrer is sufficient to interrupt the statute of limitations. *Kinney v. Lee*, 10 Tex. 155; *Killebrew v. Stockdale*, 51 Tex. 532; *Kauffman v. Wooters*, 79 Tex. 214, 13 S. W. 549.

[2] That a party plaintiff may, in a proper case, be dropped by amendment, and that limitation would not thereby be rendered available against the remaining plaintiff or plaintiffs, cannot be doubted. *Railway Co. v. Watson*, 72 Tex. 631, 10 S. W. 731; *Rapid Transit Co. v. Campbell*, 26 S. W. 884; *Snow v. Rudolph*, 131 S. W. 249.

[3, 4] The principal purpose of amending a petition is to allege facts other or different from those theretofore alleged, and which, without such amendment, would not have been admissible in evidence. The question is not, have different facts from those in the original petition been alleged in the amendment? but do the facts alleged in the amendment constitute a different cause of action from that originally alleged?

"Amendments are allowed expressly to save the cause from the statute of limitations, and courts have been liberal in allowing them, when the cause of action is not totally different." *Walker v. Railway Co.*, 193 Mo. 475, 92 S. W. 90; *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. 674, 675. See, also, *Sanger v. Newton*, 134 Mass. 308; *Cogswell v. Hall*, 185 Mass. 455, 70 N. E. 461; *Tobias v. Harland*, 1 Wend. (N. Y.) 83; *Miller v. Watson*, 6 Wend. (N. Y.) 506.

On the other hand, the right to plead the statute of limitations in bar of an action is secured by statute, and is not to be denied

simply because the plaintiff is thereby denied a trial on the merits of his case.

[5] The language of our statutes of limitation is that "every suit shall be instituted," or "shall be commenced," or "shall be brought," within the time therein mentioned. R. S. arts. 5672-5690. Of course, this means that the suit shall be brought by the party having the cause of action. So that a suit by A. will not suspend the statute as to a suit subsequently brought by B. for the same cause of action, there being no privity in such cause of action between A. and B. It is upon this principle that a suit brought by or against an executor, administrator, or guardian will not arrest the statute of limitations as against a suit for or against such party in his individual capacity, for, though the same individual, in their legal aspect they are different persons. A suit against an executor or administrator is a suit against the estate of the deceased, or rather, against his heirs or legatees, and not against such legal representative as a person. This is clearly stated in *Henderson v. Kissam*, 8 Tex. 54, wherein it is said:

"The object of making [A. C.] Allen, as the representative of the deceased, a party was that the property of the estate, and not his own, might be subjected to the debt. * * * Had the defendant been removed from the office of administrator, and another appointed, the suit would have proceeded against the administrator *de bonis non*, and not against the defendant. * * * The fact that the person now charged [by amendment] individually is the identical person who had been charged [in the original petition] as the representative of another cannot affect the rights of the defendants, or operate in favor of the plaintiff."

See, also, *Morales v. Fisk*, 66 Tex. 194, 18 S. W. 495.

There is no difficulty in determining, as an abstract proposition of law, when a cause of action set forth in an amended petition is or is not subject to the plea of limitation. The authorities all agree that if the amendment sets up a new or different cause of action, the statute is not tolled by the filing of the original petition. The difficulty lies in determining what is a new or different cause of action, and in this regard it has been said by high authority that there is hopeless conflict. This question is fully discussed in an able opinion by the Supreme Court of Arizona in the case of *Boudreaux v. Gas Co.*, 13 Ariz. 261, 114 Pac. 547, 33 L. R. A. (N. S.) 196. The proper way to decide any case is to ascertain, if we can, the legal principles involved, and then apply, as best we may, such principles to the case in hand.

[6] In *Phoenix Lumber Co. v. Waterworks Co.*, 94 Tex. 462, 61 S. W. 709, Mr. Justice Brown lays down the following test for determining the identity of causes of action:

"(1) Would a recovery had upon the original bar a recovery under the amended petition; (2) would the same evidence support both of the pleadings; (3) is the measure of damages the same in each case; (4) are the allegations of each subject to the same defenses?"

These tests, or some of them, have been announced in numerous cases. Applying the second of these tests to that case, the learned judge proceeds to show clearly that the same evidence would not support the two petitions, in that under the original petition, which declared upon an express contract, the issues would have been only was the contract made, was it breached, and what, if any, damage resulted to the plaintiff by reason of such breach; whereas—

"in answer to the amended petition, the defendant would be required to meet a great number of circumstances and facts originating at different times and dates, arising out of transactions by different persons in its employ, all of which would be inadmissible in answer to and would constitute no defense to the original petition."

This reasoning applies, to a greater or less extent, to all cases where the original petition declared upon a contract and the amendment declared upon a tort (*Booth v. Packing Co.*, 47 Tex. Civ. App. 336, 105 S. W. 48), or where the original petition declared upon one kind of a contract and the amendment upon another, as where the suit was upon a note, and by amendment was on a verbal promise to pay (*Williams v. Randon*, 10 Tex. 79-80); or vice versa (*Wooldridge v. Hathaway*, 45 Tex. 380; *McLane v. Belvin*, 47 Tex. 493); or where the original petition declared upon one note and the amendment upon another (*Haddock v. Crocheron*, 82 Tex. 276, 5 Am. Rep. 244); or where the original suit was upon one tort, and the amendment was upon another (*Lumber Co. v. Railway Co.*, 164 S. W. 404).

On the other hand, it has been held that an amendment did not set up a new cause of action against which limitation was not suspended, where the petition alleged that the plaintiffs were partners in a firm composed of three parties, and the amendment alleged that the copartnership was composed of two of said parties (*Pridgen v. McLean*, 12 Tex. 420; *Mayer v. Magill*, 48 Tex. Civ. App. 548, 107 S. W. 363); or where it was originally alleged that a copartnership was composed of two persons, and by amendment it was alleged that the copartnership was composed of an additional party (*Thompson v. Swearingin*, 48 Tex. 555); or adding a new party plaintiff where the property is claimed jointly by plaintiffs (*Laughlin v. Tips*, 8 Tex. Civ. App. 649, 28 S. W. 551. And so, where three parties brought suit to recover land, alleging that they owned the same in fee simple, and the amendment alleged that they, together with four other parties, were owners of the land, it was held it was not a new cause of action as to the original plaintiffs, and that limitation did not continue to run as against them to the time the amendment was filed. *Telfener v. Dillard*, 70 Tex. 142, 7 S. W. 847.

We think that cases, above cited, in which the suit was by partners, are in point for the reason that a partnership is not a legal entity, capable, as such, of maintaining a suit, but the suit must be brought by

the persons composing such copartnership. *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409; *Glasscock v. Price*, 92 Tex. 271, 47 S. W. 965; *Benge v. Sledge*, 132 S. W. 873; *Style v. Lantrip*, 171 S. W. 786. Hence, when an amendment adds or withdraws the name of a party composing a copartnership, it is not simply correcting a misdescription of the plaintiff, but is adding a new party plaintiff or withdrawing one of the plaintiffs from the suit.

[7, 8] Why is the addition or subtraction of a new party plaintiff not bringing a new suit? Because the same cause of action is being prosecuted against the same defendant. Why may the statute of limitations be pleaded in bar of the cause of action as to the additional parties plaintiff, as was held in *Telfener v. Dillard*, *supra*, where the same wrong was complained of against the same defendants? Because the additional plaintiffs did not "institute" their suit, as required by the statute of limitations, within the prescribed period. The cause of action as to the original parties was not changed by the amendment, but the new parties did not sue upon the cause of action alleged until after the alleged cause of action was barred by limitation.

[9] What is a cause of action? Mr. Justice Brown in *Phoenix Lumber Co. v. Waterworks Co.*, *supra*, said:

"The courts have found it very difficult to give any general definition of the phrase 'cause of action' which would apply to all cases alike and few courts have attempted to do so. *Pom. on Remedies*, § 452. However, the following definition will be sufficient for the disposition of the case now before us: In the abstract, a cause of action consists of 'the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant on the other.' *Rodgers v. Mutual Endowment Ass'n*, 17 S. C. 410." Applying this definition to that case, the court held that plaintiff's cause of action, as alleged in its amended petition, was barred by the statute of limitations, not because it appeared therefrom that different plaintiffs, in whole or in part, had suffered wrong at the hands of a different defendant, but because the amended petition alleged entirely different wrongs inflicted upon the plaintiff by the defendant from those alleged in the original petition."

Thus it will be seen that it was "the wrong suffered by the plaintiff on the one hand and * * * the delict of the defendant on the other" (correlative terms) which were held to constitute plaintiff's cause of action. The "right claimed by the plaintiff" and the "duty of the defendant" are, in a strict sense, no part of a cause of action, but it is the violation of such right by the nonobservance of such duty which constitutes a cause of action. The "right claimed by the plaintiff" is not to be molested in his person, property, or reputation; the "duty of the defendant" is to refrain from injuring the plaintiff. Proof of ownership is not necessary to show a "cause of action," but only to show the plaintiff's right to maintain a suit on the same. A cause of action is a wrong committed or threatened, and the damage re-

sulting therefrom (*Miller v. Hallock*, 9 Colo. 551, 13 Pac. 542; *Post v. Campau*, 42 Mich. 90, 3 N. W. 275), and which creates the necessity of bringing the action (*Bank v. Lacombe*, 84 N. Y. 384, 38 Am. Rep. 518).

"The cause of action is not changed by an amendment which claims merely a different measure of damages." *Scanlon v. Railway Co.*, 86 S. W. 932.

In *Walker v. Ry. Co.*, 123 Mo. 453, 92 S. W. 90, it was held that an amendment, changing the name of the party alleged to have been killed by the negligence of the defendant from Elbert to Charles, did not constitute a new cause of action, the wrong complained of being otherwise identified by the allegations in each petition.

[10] Applying the definitions of cause of action to the facts of the instant case, we find that the same wrongful acts and the same damages resulting therefrom are set forth in both the original and the amended petitions with such particularity that the appellee knew that it was called upon, by the allegations in the original petition, to meet the same charges of deliction as those made in the amended petition, and in both petitions appellant showed his right to recover by alleging his ownership of the property injured, the only difference being that, as between him and J. T. Baker, he would have owned one-half of the judgment under the allegations of the original petition whereas he would have been the owner of all of the judgment under the allegations of the amended petition, which fact, in the absence of any defense against J. T. and L. M. Baker jointly, which would not have been equally available to the defendant against L. M. Baker individually, did not concern appellee. Appellant brought his suit upon a good cause of action, before the same was barred by the statute of limitations, and was prosecuting his same suit for the same cause of action under his amended petition.

Applying the tests as to the identity of the causes of action in the two petitions as laid down in *Phoenix Lumber Co. v. Waterworks Co.*, *supra*, the questions there propounded and the answers are as follows:

(1) Would a recovery had upon the original bar a recovery under the amended petition? Yes; because appellant having alleged in his original petition that the property injured belonged to himself and J. T. Baker, he would be estopped in a subsequent suit to deny such fact.

(2) Would the same evidence support both pleadings? As to the cause of action, yes. The same wrongs being alleged in each petition.

(3) Is the measure of damages the same in each case? Undoubtedly so.

(4) Are the allegations of each subject to the same defenses? Yes. The defenses to the allegations in each petition might have been: (a) No injury was committed; (b) want of authority in the agent of appellee, who is alleged to have committed the wrongs complained of; (c) the damages were not as great as claimed by plaintiff; and (d) the damages, in whole or in part, were occasioned by the contributory negligence of the owner or owners of the property injured.

[11] We think that the case of *Foster v. Ry. Co.*, 91 Tex. 631, 45 S. W. 376, is decisive of this case. Foster brought suit in Austin county for damages to a tract of land in Brazoria county. The defendant answered to the merits, thereby waiving its privilege to be sued in Brazoria county. In his original petition Foster alleged that he was the owner of the land. Afterwards Foster filed an amended petition, in which he alleged that he and one Harris were the owners of the land, and Harris intervened as party plaintiff. Thereupon the defendant filed its plea of privilege to be sued in Brazoria county, upon the ground that Foster's amended petition set up a new cause of action, and was therefore a new suit, and that as to Harris it was also the beginning of the suit. Our Supreme Court held that the plea of privilege was properly overruled. It is true that limitation was not involved in that suit, but the right to be sued in the county where the land was situated was involved, which is a valuable right, and in support of which courts are certainly as liberal as they are in support of the plea of limitation. The legal proposition involved was: Did an amendment changing the allegation of individual ownership to one of joint ownership constitute a new cause of action? This question the court answered in the negative. That is the identical question involved here, except that in the instant case the change was made from joint to individual ownership; and we likewise answer the same in the negative.

It might be thought at first blush that the case of *Hopkins v. Wright*, 17 Tex. 30, is in point as supporting appellee's contention, but a careful examination of that case will show that the court held that the original petition was for the recovery of property, and that in the amended petition the suit was to set aside a will, which the court held were not the same causes of action. However, the issue of limitation by reason of a change of the cause of action was not in the case, for the reason that limitation was not complete at the time the amendment was filed under the only statute of limitation applicable to that case.

[12] This case must be reversed for another reason. Article 1995, Rev. St., reads as follows:

"Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and against or for one or more of several defendants or interveners."

In *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093-1095, the original petition alleged that James and Nina King were the owners of the property injured. By amendment it was alleged that the property belonged to James King. The statute of limitations was pleaded as to the amendment. The court said:

"The fact that the Kings sued jointly does not require that there shall be a joint recovery or none at all. The common-law rule was that the several plaintiffs in an action must all re-

cover jointly, or all utterly fail; but our Code (section 396) provides 'that judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants.' If no amendment had been made, and the proof had shown that James King owned the entire interest in the property, and had sustained the entire loss, he would have recovered for that loss. *Murd v. Simpson*, 47 Kan. 872, 27 Pac. 961. The fact that Nina King, impleaded with him, had failed to establish the right of recovery would not affect his right to recover for the actual damages sustained by him; and hence the amendment was unnecessary and immaterial."

It will be seen that the Kansas statute is essentially the same as ours. The additional words "in a proper case," appearing in our statute, mean only where the evidence requires it, and add nothing to the meaning of the statute. We think that the Supreme Court of Kansas properly construed the statute of that state, and we so construe our statute above set out. Our Supreme Court, in *Adderson v. Anderson*, 95 Tex. 367, 87 S. W. 404, gave a like construction to a similar statute in reference to the action of trespass to try title.

For the reasons stated, the judgment of the court below is reversed, and this cause is remanded for a new trial in accordance with this opinion.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. NORRIS et al. (No. 7444).*

(Court of Civil Appeals of Texas. Dallas. Jan. 29, 1916. Rehearing Denied Feb. 26, 1916.)

1. CARRIERS \S 318(4)—CARRIAGE OF PASSENGERS—PROXIMATE CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

In a suit for a death against a railroad, evidence held sufficient to authorize finding that the negligence of the road's servants in making a flying switch with the car on which decedent rode, and the injuries received by him as a result thereof directly and proximately contributed to produce his death.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1307, 1308; Dec. Dig. \S 318(4).]

2. DEATH \S 17—PROXIMATE CAUSE.

Where the injuries sustained by a shipper of household goods and live stock while riding therewith in a box car as a result of the road's negligence in making a flying switch were the efficient cause of his death, together with injuries subsequently received by him from a fall off his wagon, even though such fall was not caused by sickness resulting from his previous injury, the damages caused by each accident not being separable, the road was liable for the death, since if an accident occurs from two causes, both together the efficient cause, all persons whose negligent acts contributed to the accident are liable for the injury.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 19, 21; Dec. Dig. \S 17.]

3. DEATH \S 103(2) — PROXIMATE CAUSE — QUESTION FOR JURY.

In a suit against a railroad for a death, where the jury could have found that the negligence of the road's servants in making a flying switch was the sole cause of the death, that it proximately contributed to cause the death, or

that the injuries received by decedent from the flying switch and the injuries subsequently sustained by him in a fall from his wagon together were the efficient cause of the death, the court properly refused a peremptory instruction for the road, since the question of proximate cause is ordinarily for the jury, and only where the facts are undisputed and the inferences to be drawn from them perfectly plain is it the court's duty to determine the question of negligence as a matter of law, a question ordinarily for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103(2).]

4. APPEAL AND ERROR § 934(2)—FAILURE TO SUBMIT ISSUE—EFFECT—STATUTE.

By direct provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1985, where the case is submitted on special issues, an issue not submitted and not requested by a party must be deemed to have been found so as to support the judgment, if there was evidence to sustain such a finding.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 934(2).]

5. APPEAL AND ERROR § 1062(5)—HARMLESS ERROR—SUBMISSION OF ISSUES.

In a suit against a railroad for a death, error in submitting the issue whether the injuries received by decedent when riding in the road's box car contributed to cause his death after he fell from a wagon, the answer to which could fix no liability on defendant, furnished no ground for reversal of judgment for plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4218; Dec. Dig. § 1062(5).]

6. TRIAL § 213—REFUSAL OF CHARGE.

In a suit against a railroad for a death, where the case was submitted on special issues, the refusal of a charge, embodying a declaration of law which could only be applied by the court to the facts found, and could have been of no material aid to the jury in determining the questions of fact submitted to them, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. § 213.]

7. TRIAL § 260(1)—INSTRUCTIONS.

Charges need not be repeated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260(1).]

8. APPEAL AND ERROR § 1062(1)—HARMLESS ERROR—REFUSAL OF SPECIAL ISSUE.

In a suit against a railroad for a death, the refusal of the issue, "Did the injuries received by deceased * * * as a result of a collision with a box car, directly or proximately in a natural and continuous sequence, and unbroken by a new cause, produce his death?" was harmless to the road, where, had it been submitted and answered in the negative, the judgment against the road would have been authorized and supported by the evidence and other findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. § 1062(1).]

9. TRIAL § 350(1)—SUBMISSION OF USELESS ISSUE.

In a suit against a railroad for a death, the refusal of an issue as to which neither an affirmative nor a negative answer would have relieved the road from liability was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 828; Dec. Dig. § 350(1).]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by J. A. Norris and others against the Missouri, Kansas & Texas Railway Company

of Texas. From the judgment defendant appeals. Affirmed.

Lawther, Pope & Mays, of Dallas, for appellant. Carden, Starling, Carden, Hemphill & Wallace, of Dallas, for appellees.

TALBOT, J. This suit was instituted by the surviving widow and children of J. S. Norris, deceased, to recover damages alleged to have been sustained by them on account of the death of the said Norris, which they claim was caused by the negligence of appellant. The deceased, J. S. Norris, had purchased a farm near Pottsboro, Grayson county, Tex., and in January, 1914, was moving to his new home. From Greenville, Tex., to Pottsboro, Tex., he, together with his household goods, some live stock, farm implements, and produce, was transported by the appellant railway company in a box car. This car arrived at Pottsboro Saturday, January 10, 1914, and was placed upon a side track by means of what is known as a "flying switch." Standing upon the side track was another car, and the car in which the said Norris and his property were being transported collided with said car. The car was sent in on the side track with such force that the impact of the cars coming in collision was so great that the partitions, which had been constructed in said car for the separation of the live stock and other property and orderly arrangement thereof for transportation, were torn down, the said Norris, who was 59 years of age, thrown to the floor, and a horse or cow thrown upon his leg, whereby and by reason of being so thrown to the floor, he received injuries to his head, chest, side, and leg. On the day following the accident, just stated, the said J. S. Norris, in company with a man named Hill, started out in a wagon, drawn by two mules and loaded with some of his goods, to the farm which he had bought. Norris, seated upon some hay stacked two bales high in the front end of the wagon, drove the team. When a short distance out of Pottsboro Mr. Norris pitched forward and fell upon the hounds, or rear part of the wagon tongue. The bale of hay upon which he had been seated also fell out of the wagon and upon him as he was lying upon the wagon tongue. The fall of Mr. Norris and the hay frightened the mules drawing the wagon, and they started forward in a very fast walk or trot, and Mr. Norris fell from the wagon tongue to the ground immediately behind the mules. A very short time before he fell from the wagon he remarked to his companion, Hill, who was seated by his side, that he (Norris) was feeling "awful bad," to which Hill replied "Yes; you look bad." In this connection Mr. Hill testified:

"I looked at him, and he looked pale in the face, kind of pale around the lips, and looked sort of fainty to me; he was just pale all over his face. * * * I mean when I say he looked

pale that he looked white, pale in the face; he seemed a whole lot whiter in the face at that particular time than he had during the morning. At that time he was sitting on the front end of the wagon; that was the same position he had occupied from the time he started out. * * * He was sitting on a bale of hay. * * * At the time he fell off the wagon the mules were traveling slowly, in a moderate walk. There was no rough place in the road that caused him to fall from the wagon. The mules made no stop or start just before he fell off the wagon or at the time he fell."

After Mr. Norris fell from the wagon, and the team caught and stopped, he was assisted into it again by Hill and carried back to Pottsboro, where he was examined by Dr. Hogan and something given him to ease the pain with which he was suffering. Dr. Hogan testified that during the examination he there made Mr. Norris did not complain of any parts of his body hurting except his lower limb and ankle and his left side; that Mr. Norris had a little skinned place on his face, but he was not complaining of that. He further said that Mr. Norris told him that he thought the injury to his left side and ribs was caused by a mule kicking him in the runaway. There was, however, testimony to the effect that Norris received, as a result of the collision of the cars, a cut or skinned place about or above his eye, and that he complained of headache. In a statement secured and reduced to writing by an agent of appellant on Monday following the accidents related, Mr. Norris is made to say, among other things, that he was not injured while in the box car in any part of his body except his left leg and ankle; that when he fell from the wagon he hurt his other leg, side, and face; that his hips were also hurt some, and that he thought one of the mules kicked him in the side. A statement in some respects similar seems to have been procured by the same agent of appellant from Hill, who was with Norris when he fell off the wagon. There is, however, testimony to the effect that the statements made by Mr. Norris and Hill to appellant's agent were not correctly reduced to writing by said agent, and do not reflect the true statements of said parties in most material particulars. After Norris was examined by Dr. Hogan at Pottsboro on Sunday, he was carried to his home and put to bed, where he remained, complaining of his injuries, and a part of the time in a "comatose or dazed condition" until his death, which occurred on Saturday, one week from the date of the accident in the box car. The attending physicians, Drs. Hogan and Parrish, testified that in their opinion Mr. Norris' death was caused by hemorrhage of the brain, one of them, Dr. Parrish, saying that the hemorrhage may have resulted from the injuries received by Mr. Norris in the box car, while Dr. Hogan testified that in his opinion the injury received in the box car, as told to him, could not have caused the hemorrhage; that it would appear reasonable, from the history he

learned of Mr. Norris' injuries received in the runaway, that the hemorrhage of the brain from which he died could have been caused from such injuries. The case was tried on the 7th day of November, 1914, and submitted to the jury upon special issues. Upon the findings of the jury on the issues submitted judgment was rendered in favor of the appellees, Americus Norris, widow of J. S. Norris, and Grady and Amelia Norris, children of said J. S. Norris, against appellant, and that the remaining appellees take nothing by their suit. From this judgment appellant perfected an appeal to this court.

[1] The first assignment of error complains of the trial court's action in refusing to give a special charge requested by appellant, directing the jury to return a verdict in its favor. Appellant admitted in the trial of the cause, or it was proved, that the injuries the decedent, Norris, sustained in the box car were the proximate result of its negligence in making the flying switch. It defended on the ground that the deceased, Norris, did not die from those injuries, but from the injuries received when he fell from his wagon while afterwards driving along the road; and the request for the peremptory instruction under consideration and the assertion that it was error to refuse it are predicated upon the theory and claim that there was no evidence introduced that would authorize the conclusion that the death of the said Norris directly and proximately resulted from the negligence of the appellant in making the flying switch, or that such negligence was one of the "prominent and efficient causes" of his death; that the evidence affirmatively disclosed that the death of the said Norris directly and proximately resulted from other and intervening causes, namely, injuries received by him falling from his wagon the day following the receipt of the injuries alleged to be due to the negligence of appellant. The proposition is made that "the proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produced that event, and without which that event would not have occurred," and that in the instant case the negligent act of the appellant was the remote and not the proximate cause of the death of Norris. We would not be warranted in holding that the evidence in this case conclusively showed that the sole proximate cause of the deceased's death was an injury, or injuries, received when he fell from his wagon, or that the negligence of appellant in making the flying switch which resulted in injury to him while in the box car the day before was not an efficient cause of his death, but only a remote cause thereof, if cause at all. On the contrary, we think the evidence is sufficient to warrant the conclusion that the negligence of appellant's servants in making the flying switch and the injuries re-

ceived by the said Norris as a result thereof directly and proximately contributed to produce his death. Immediately after getting out of the car in which he was hurt, Norris not only complained of his leg and ankle hurting, but he told the witness Morrison, who heard him groaning and saw a cow lying upon him in the car just after the collision, that he was badly hurt in the breast. According to the testimony of L. D. Hill, as Mr. Norris left the car in which he was injured in search of a doctor—

"he walked with his hands on his hip and limped, and his face was pale, and he appeared to be sick. He was bent over and did not walk straight. He had a little skinned place over his eye, complained of being sick, and said he 'had the headache awful bad.' He further said, 'They made a flying switch in there on me, and threw my stock on me, and liked to have killed me;' that one of the mules or horses was lying on him; that the horse fell on his leg, and hurt his leg most."

Mrs. Norris, wife of the deceased, testified, in substance, that on Tuesday following the injuries received by Norris, the appellant's agent called at their home and secured a statement from Mr. Norris in regard to the nature of the injuries inflicted upon him in the box car, which was by the agent reduced to writing; that Mr. Norris told the agent that he felt too sick and bad to read; that he did not have his glasses, and could not see very well, and that the agent kept on reading the statement. Mrs. Norris further testified:

"I heard him (Mr. Norris) tell the claim agent about his injuries he got in that car. He said he was thrown down on the floor, and the horses thrown on him, and all the partitions were broken down and the stock all thrown in where he was, and they were all in there together. He said he hurt his head and his chest and his side and his hips and left leg. That is what Mr. Norris told the claim agent while the agent was there taking that statement. I was there on Monday when Dr. Hogan called. I did not hear Mr. Norris make any statement to Dr. Hogan that he didn't get any injury in the box car except to his leg and ankle. I was there, and could have heard it had he told him anything like that. Mr. Norris told the claim agent that he got his leg hurt in the wagon accident. He did not tell him that anything else got hurt in the wagon accident. In making up that statement, the claim agent would just ask Mr. Norris questions, and Mr. Norris would answer them, and the claim agent would write it up in his own way. Mr. Norris would answer the questions by 'Yes' or 'No.' The claim agent did most of the talking."

The foregoing testimony of Mrs. Norris is contradicted by appellant's agent Hodge, who secured the written statement of the deceased, Norris, above referred to in material particulars. Hodge testified, among other things, that Mr. Norris told him that he got his face skinned in the runaway, and that, as he recalled it, he told him that he got his side hurt in the runaway accident. And Dr. Hogan testified that Norris told him that all the injuries from which he was suffering, except the injury to his left limb and ankle, were received by him in the

runaway. This witness, being asked whether, in his opinion, the death of Mr. Norris was caused by the injuries he received in the box car or the injuries received in the runaway accident, said:

"Well, just from reasoning, I thought he got the worst shake-up in the runaway, from the nature of it and the injuries he told me about in the car, and the fact that I could not see how such an injury from the box car would cause any brain trouble by itself. The injury received by the box car, as he told it to me, could not have caused it, in my opinion. It would appear reasonable, from the history I learned of his injuries received in the runaway, that the hemorrhage of the brain from which he died could have been caused from that."

Dr. Parrish, who was called in consultation, after having testified that he and Dr. Hogan concluded that Mr. Norris was dying from hemorrhage of the brain, said, in effect, that the collision of the cars and the effect thereof in throwing the deceased, Norris, to the floor of the car in which he was being transported, and the throwing of the cow or horse upon him, could have caused such hemorrhage. Being asked how that occurrence could have brought about such a condition, he answered:

"Well, if a man had received a blow on the head, if he had fallen and struck his head against some solid body, the floor of the car or against the wall of the car, he might have ruptured some vessel in the brain that would have brought about the condition that existed when I saw him."

He further said:

"If his (Norris') head had come in contact with some hard body, the concussion of the cars throwing him down against the floor of the car, and bringing his head in contact with the floor of the car, might have caused such a condition."

Dr. Parrish further testified that he could not tell the condition that Dr. Hogan said he found Mr. Norris in when he first saw him, except that he said Mr. Norris had received the two injuries, and that he was at a loss to determine which one of the injuries was the cause of the condition he was in the night that he (Parrish) saw him; that the conclusion was that the condition existing that night was caused by some injury, but which injury they did not know; that he did not think Dr. Hogan decided which.

We have not attempted to quote or state all the testimony bearing upon the question under consideration, but only so much of it as, notwithstanding the contradictions pointed out, and even though it be conceded that the definition of "proximate cause" as contended for by appellant be substantially correct and as approved by the appellate courts in this and many other jurisdictions, justifies our conclusion that we would not be warranted in holding that the evidence in the case shows beyond controversy that the sole proximate cause of Mr. Norris' death was injuries received when he fell from his wagon, or that the negligence of appellant in making the flying switch was not an efficient cause of his death. The appellees,

after alleging the negligent acts of the appellant upon which they based their right to recover, charged that "said negligent acts, omissions or commissions, either separately or concurrently, was and were the direct and proximate cause of the injuries and death of the said J. S. Norris," and upon the whole testimony submitted to them, the jury, in answer to questions propounded by the court, found that the said Norris did not "die from the injury or injuries he got in the box car and none other"; that he did not "die from the injuries he got at the time he fell off the wagon and none other"; that the injuries he got in the box car did contribute to his death; and that the deceased, Norris, after the injuries were received in the box car, was not guilty of negligence which contributed to his death. The jury further found that the deceased, Norris, was sick and faint while riding on the wagon from which he fell, and that such sickness and faintness resulted directly from the injuries he got in the box car, but that the same did not, directly and proximately, cause him to fall off the wagon. They further found that appellees, in the death of the said J. S. Norris, suffered damages in the sum of \$3,750.

[2] The question then is: Was the trial court, under the evidence and the foregoing findings of the jury, authorized to render in favor of appellees the judgment from which this appeal is taken? Appellant contends it was not, and the chief propositions urged in support of its contention, as before indicated, are that the injury received by the deceased, Norris, in the box car can be regarded only as a remote cause of his death, and that to attribute death to two or more concurrent causes, each must be a—

"prominent and efficient cause; for if one of the alleged causes operates slightly with another one, which is the prominent, efficient cause, then the proximate cause of the death should be attached to the latter."

If it necessarily followed as a matter of law upon the undisputed evidence in the case that the injury sustained by the deceased in the box car was a remote cause of his death, or that his fall from the wagon was the sole, proximate cause thereof, then the action of the court in refusing the peremptory instruction requested by appellant was error for which the case should be reversed. We think, however, that the trial court, under the evidence adduced and the findings of the jury, was warranted in entering the judgment it did. If the injuries received by Norris in the box car, as a result of appellant's negligence, and the injuries received by him from the fall off his wagon together were the efficient cause of his death, appellant is liable in damages therefor. In *Railway Company v. McWhirter*, 77 Tex. 356, 14 S. W. 2d, 19 Am. St. Rep. 755, the general rule is announced as follows:

"If an accident occurs from two causes, both due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other."

This language of our Supreme Court is quoted in *Railway Company v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279, in which a writ of error was denied, and it is there said:

"It is not essential that a cause should act alone in order to constitute it the proximate cause; but if it concurs with another cause in producing the result, it will be a proximate cause, and one or both of the instruments setting the cause in motion will be liable for the damages therefrom."

Likewise in the case of *Railway Company v. Lynch*, 22 Tex. Civ. App. 336, 55 S. W. 389, in which a writ of error was also denied by the Supreme Court, where the plaintiff was injured in a collision between a passenger train and a freight car which had been blown out of a side track by a windstorm, the Court of Civil Appeals for the Fourth District held that a charge, to the effect that if the jury should find that the negligence of the railway company in leaving the car on the side track without its wheels being blocked or brakes set and the high and unprecedented windstorm were concurring causes of the collision and the plaintiff's injuries, was proper. The court in referring to the charge, which was complained of by the appellant, said:

"Its clear import is that, if the windstorm and appellant's negligence in leaving the cars unsecured were concurrent causes, and together were the direct and proximate cause of plaintiff's injury, the railroad would be liable therefor. This we understand to be the law."

In *San Marcos Electric Light & Power Co. v. Compton*, 48 Tex. Civ. App. 586, 107 S. W. 1151, a telephone company had placed a guy wire on the top of a pole maintained by the electric company, which extended across live wires strung thereon and hung to within a few feet of the ground. The guy wire became charged with the current, and caused the death of a person placing his hand on it, and the court held that the telephone company, in attaching the guy wire and in allowing it to remain in a dangerous position, and the electric company, in not removing the wire, were each guilty of negligence, which was an efficient cause of the entire injury, and were each liable to the full extent of the injury. This is in harmony with the law as announced in *Mr. Street's 6th Edition of Shearman & Redfield on the Law of Negligence*, § 31. It is there said:

"The mere fact that another person concurs or co-operates in producing the injury or contributes thereto, in any degree, whether large or small, is of no importance. If the injuries caused by the concurrent acts of two persons are plainly separable, so that the damages caused by each can be distinguished, each would be liable only for the damage which he caused; but if

this is not the case, all the persons who contribute to the injury by their negligence are liable, jointly or severally, for the whole damage. It is immaterial how many others have been in fault if the defendant's act was an efficient cause of the injury."

Referring to an action for wrongful death, it is further said in the same section:

"Nor, in such an action, is the defense that the decedent died from an independent disease made out, unless it is clearly shown that he must have died from it, when he did, even if he had not suffered from the defendant's negligent act."

Again, in section 32 of said work, the rule is announced that:

"The connection between the defendant's negligence and the plaintiff's injury may be broken by an intervening cause. In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one if it is the culpable act of a human being, who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury when the connection is thus actually broken by a responsible intervening cause. But the connection is not actually broken if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation. Of course, the very definition of a superseding cause implies that the defendant's negligence cannot be the cause of the injury."

In section 33, in announcing the distinction between superseding cause and inevitable accident, the same authors say:

"The first alternative needs little comment. It is simply the case of inevitable accident, which has already been considered, with only this difference: That such accident occurs after the defendant has been negligent, and when, perhaps, but for the intervention of that accident, he might have been liable. But it must be carefully noted that inevitable accident, in order to furnish a complete defense in such a case, must be the sole cause of the injury, and therefore that it is no defense if, but for the defendant's negligence, the plaintiff would not have been exposed to injury from such accident; while, if it contributed to any part of the resulting damage, it is only a defense in case that part of the damage can be accurately distinguished from the rest."

That part of the damage caused by the fall of the deceased from his wagon cannot, by any means, be distinguished from the damage that resulted from appellant's negligence.

[3] The question of proximate cause is ordinarily for the jury upon all the facts. But, where the facts are undisputed and the inferences to be drawn from them are perfectly plain and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law. Under the evidence in the case at bar the proximate cause or causes of the death of J. S. Norris was or were issuable fact. The jury could have found that the negligent act of the appellant's servants in making the flying switch was the sole cause of his death, or that such

negligence proximately contributed to cause his death, or that the injuries received by the deceased in the box car and the injuries sustained by him in the fall from the wagon together were the efficient cause; therefore the court properly refused a peremptory instruction for the appellant.

[4] The second assignment of error is, in substance, that the court erred in overruling appellant's motion to set aside the verdict and judgment rendered, because the jury found that the sickness and faintness of the deceased, Norris, while riding upon the wagon from which he fell did not proximately cause him to fall off said wagon. The same propositions are advanced in support of this assignment that are urged to sustain the first assignment just discussed, and the argument made that, unless it was established that the injuries received by J. S. Norris in the railroad accident alone caused his death, appellees were not entitled to recover. We do not, as heretofore indicated, agree with this view. On the contrary, we think the authorities, as contended by appellees' counsel, are to the effect that in an action for wrongful death the connection between the defendant's negligence and the death is broken by an intervening cause only when such intervening cause so entirely supersedes the operation of defendant's negligence that it alone, without the defendant's negligence contributing thereto, produced the result. Or if this is stating the rule too broadly, then if the injuries received in consequence of a defendant's negligence and the injuries received as a result of an intervening cause, together are the efficient cause of the death, the defendant will be liable. It was admitted or conclusively shown that the injuries received by the deceased in the box car resulted proximately from the negligence of the appellant's servants in making the flying switch, and the jury found, upon evidence authorizing such findings, that such injuries contributed to cause the death of the said Norris; that the deceased, Norris, did not die exclusively from the injuries sustained at the time he fell from the wagon; and that he was not guilty of contributory negligence. The jury further found that neither the injuries received by the deceased in the box car nor the injuries received by him in falling from the wagon alone caused his death. The effect then of their findings is that the injuries received in the two accidents were together the efficient cause of Norris' death. So if these causes were together the efficient cause of J. S. Norris' death, then the appellant is liable, and may be required to respond in damages therefor, even though the sickness or faintness with which the said Norris was suffering just before he fell off the wagon did not proximately cause such fall. The issue as to whether or not the injuries received by the deceased in the box car and in his fall from the wagon were together the efficient cause of

his death was not submitted by the court to the jury, nor did the appellant request the submission of such issue. Our statute provides, in the event the case is submitted on special issues, that the failure to submit any issue shall not be deemed a ground for reversal of the judgment, upon appeal or writ of error, unless its submission has been requested in writing by the party complaining of the judgment. In such case an issue, not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided there be evidence to sustain such a finding. Vernon's Sayles' Texas Statute, art. 1985. The evidence disclosed by the record is sufficient to sustain a finding that the injuries received in the box car and those suffered as a result of his fall off the wagon by the deceased together were the efficient cause of his death. Therefore, applying the statutory rule referred to, even if the effect of the jury's findings were not sufficient, it must be presumed that the trial court found said issue in accordance with the contention of appellees, which supports the judgment rendered, and not in accordance with the contention of appellant. It follows that appellant's motion to set aside said judgment was properly overruled.

[5, 6] The third and fourth assignments of error are grouped in the brief. The third is that the court erred in overruling appellant's objection to and in submitting the following issue:

"Did the injuries got in the box car contribute to cause the death of the deceased?"

It is claimed that it was error to submit this issue because the answer to the question would fix no liability upon the appellant. Even if this contention is correct, the submission of the issue furnishes no ground for a reversal of the case. But there was no error in submitting the issue in the language used. A charge which authorized a recovery if the negligence alleged merely contributed to the result was held to state correctly the general rule that a recovery could be had for negligence which caused, or contributed to cause, the result. *Railway Company v. Josey*, 95 S. W. 688; *Railway Company v. Groner*, 43 Tex. Civ. App. 264, 95 S. W. 1118. In the first case cited the court said:

"[I]f [the negligence] would not have to be the sole cause, but would be sufficient if it be one that contributes to the result."

The fourth assignment is that the court erred in refusing to give the following special charge, requested by appellant:

"To attribute death to two or more concurrent causes each must be a prominent and efficient cause; for if one of the alleged causes operates slightly with another one, which is the prominent, efficient cause, then the proximate cause of the death should be attached to the latter."

This charge could have been of no material aid to the jury in determining the question of fact submitted to them. It is but a declara-

tion of law which, since the case was submitted on special issue, could only be applied by the court to the facts found. The appellant did not request, and the issue as to whether the injuries sustained by the deceased in the box car were a "prominent and efficient" cause of his death was not submitted to the jury.

[7] The fifth and sixth assignments of error were properly refused, because both of them simply embodied abstract propositions of law, neither of which could have been of any assistance to the jury in determining the questions submitted to them, as they were required to return a special verdict. So far as the definition of "proximate cause," as contained in the special charge No. 9 refused, is concerned, it is sufficient to say that the same definition was given in connection with one of the special issues submitted by the court.

[8] The seventh assignment of error complains of the court's refusal to submit this issue:

"Did the injuries received by the deceased, J. S. Norris, as a result of the collision with the box car directly and proximately, in a natural and continuous sequence and unbroken by a new cause, produce his death?"

The only proposition submitted under this assignment is:

"The question as to whether the negligence of the railroad was the direct and proximate cause of the death of J. S. Norris was one for the jury, and the trial court erred in not submitting the same to the jury."

We think there was no reversible error in refusing to submit this issue. If the injuries received by the deceased as a result of the collision with the box car in which he was transported to Pottsboro and the injuries he sustained in falling from his wagon together were the efficient cause of his death, then appellant cannot escape responsibility for said Norris' death. In such a case—

"all the persons whose acts contribute to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other." *Railway Company v. McWhirter*, supra.

The following questions, among others, were asked the jury:

"Did the deceased, Norris, die from the injury or injuries he got in the box car, and none other?"

"Did the deceased, Norris, die from the injuries, if any, he got at the time he fell off the wagon and none other?"

Both of these questions received a negative answer. It is therefore manifest that the jury was of the opinion from the evidence that neither the injuries received by the deceased in the box car nor the injuries received by him as a result of his fall from the wagon were the sole cause of his death, but together, that is, the concurring effect of the injuries received in the two accidents, were the efficient cause of his death. And this is the effect of their findings that the deceased

did not die from the injuries received in either accident alone. For it follows that if the death of the deceased was not caused solely by the injuries received by him from his fall off the wagon, then as his death could not be attributed under the evidence to any other cause, it was caused by the concurring effect of the injuries sustained in the two accidents, and each of said injuries was necessarily an efficient cause thereof. Therefore the injuries inflicted upon the deceased in the box car through the negligence of the appellant was not, according to the findings of the jury, a remote cause, but an efficient concurring cause of his death, and the appellant is liable for the damages sustained as a result thereof, although the injuries subsequently received as a result of his fall off the wagon likewise proximately concurred in producing the said Norris' death. The issue sought to be submitted was, in effect, perhaps calling on the jury to determine whether or not the injuries received by the deceased in the box car were the sole proximate cause of his death, but if such was not its effect, it ought not to have been submitted, under the evidence in this case, in the form offered. The controlling question in the case, as we view it, was whether the injuries received by the deceased in the box car, together with the injuries received by his fall from the wagon, were the efficient cause of Norris' death; and, had the question refused been submitted and answered in the negative, the same judgment that was rendered by the court would have been authorized and supported by the evidence and other findings made in the case. The refusal to submit the question, therefore, was harmless.

[§] The last assignment of error is that the court erred in refusing to submit this issue:

"Would the death of J. S. Norris, deceased, have occurred but for the injuries received by him in the runaway?"

There was no error in refusing to submit this issue. If it had been submitted, neither an affirmative nor a negative answer would have relieved the appellant from liability occasioned by its negligence, since it cannot excuse itself from the results of its negligence by simply showing that such results alone were not sufficient to cause the death of the deceased. If the results of its negligence and the injuries received by the deceased in the fall off his wagon together were the efficient cause of his death, and the jury have said, in effect, they were, then the appellant is liable, although neither of such injuries alone would have caused the said Norris' death.

On the whole case our conclusion is that the assignments disclose no reversible error; that the judgment is supported by the evidence, and should be affirmed. It is therefore accordingly so ordered.

! Affirmed.

LESTER v. HUTSON. (No. 902)*

(Court of Civil Appeals of Texas, Amarillo.
Feb. 9, 1916. Rehearing Denied
March 1, 1916.)

1. EVIDENCE \Leftrightarrow 265(1)—ADMISSIONS—DENIAL.
There is no rule which prevents a party from denying testimony of admissions alleged to have been made by him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029, 1043, 1044, 1046; Dec. Dig. \Leftrightarrow 265(1).]

2. EVIDENCE \Leftrightarrow 265 (18) — ADMISSIONS — WEIGHT.

Admissions of a party as to a transaction are especially valuable in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1050; Dec. Dig. \Leftrightarrow 265(18).]

3. WITNESSES \Leftrightarrow 159(8) — COMPETENCY — "TRANSACTION WITH DECEASED."

A denial by an interested party that he had a certain "transaction with deceased" is evidence of a transaction, and inadmissible under Rev. St. 1911, art. 3690, prohibiting testimony of transactions with persons deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 669; Dec. Dig. \Leftrightarrow 159(3).]

For other definitions, see Words and Phrases, First and Second Series, Transaction.]

4. VENDOR AND PURCHASER \Leftrightarrow 206—MUTUAL RIGHTS — NECESSITY OF WRITTEN AGREEMENT.

Where the vendor, under an option contract for the sale of land, disposed of certain parcels within the term of the option, it was immaterial that there was no specific agreement to turn over to the option holder the amounts so derived, since the proceeds in equity belonged to him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 424; Dec. Dig. \Leftrightarrow 206.]

5. APPEAL AND ERROR \Leftrightarrow 1056(2)—HARMLESS ERROR.

Exclusion of testimony as to transactions of party interegated with deceased and as to the existence of agreement between such parties held harmless, where its admission would not have benefited the defendant, who sought to introduce it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. \Leftrightarrow 1056(2).]

6. WITNESSES \Leftrightarrow 159(1)—TRANSACTIONS WITH DECEASED—REPRESENTATIVE CAPACITY.

That a transaction with deceased was had in his representative capacity for a corporation does not affect the rule as to admission of testimony regarding it, since it is nevertheless a transaction with one deceased, which is always inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666; Dec. Dig. \Leftrightarrow 159(1).]

7. APPEAL AND ERROR \Leftrightarrow 1067 — HARMLESS ERROR—INSTRUCTIONS.

Error cannot be predicated on the refusal to instruct against liability of the defendant if the contract terminated on a certain date and was not renewed, where the evidence conclusively established that the contract was renewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. \Leftrightarrow 1067; Trial, Cent. Dig. § 475.]

8. TRIAL \Leftrightarrow 194(18)—VENDOR AND PURCHASER \Leftrightarrow 352—OPTIONS—RIGHT TO BENEFITS—INSTRUCTIONS.

Instruction on right of the holder of an option to purchase land to have sums received

from sale to other persons applied on his debt held not on the weight of evidence, nor calculated to confuse.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 462; Dec. Dig. § 194(13); Vendor and Purchaser, Cent. Dig. § 1059; Dec. Dig. § 352.]

9. ALTERATION OF INSTRUMENTS § 29—INTERLINEATIONS—VALIDITY—EVIDENCE.

Evidence held to show that interlineations in a contract were made by the defendant, who denied it, and were of date concurrent with the contract.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 259-263; Dec. Dig. § 29.]

10. TRIAL § 194(13), 240—VENDOR AND PURCHASER § 352—OPTION CONTRACTS—POSSESSION BY OPTIONEE—CHARACTER OF POSSESSION.

Instruction in action on an option contract of sale held not argumentative, ambiguous, or upon the weight of evidence on the issue whether the holder of the option held as a special tenant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 462, 561; Dec. Dig. § 194(13), 240; Vendor and Purchaser, Cent. Dig. § 1059; Dec. Dig. § 352.]

11. VENDOR AND PURCHASER § 352—OPTIONS—POSSESSION BY OPTIONEE—EVIDENCE.

Evidence held to justify the submission of an instruction on the character of the tenancy of the plaintiff's predecessor in interest as a special tenancy.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1059; Dec. Dig. § 352.]

12. APPEAL AND ERROR § 742(1)—REVIEW—PROVINCE OF COURT.

Where a proposition under an assignment of error is insufficient, the court, on appeal, cannot reframe it to make it fit the record in order to properly present the issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742(1).]

13. APPEAL AND ERROR § 690(1)—REVIEW—EXCLUSION OF EVIDENCE—SUFFICIENCY OF EXCEPTIONS.

A bill of exceptions to the exclusion of evidence, reciting merely what the evidence would have been, is insufficient, where it fails to show the materiality of the testimony, which is apparently unconnected with the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897, 2904; Dec. Dig. § 690(1).]

14. APPEAL AND ERROR § 273(5)—PRESERVATION OF EXCEPTIONS—GENERAL EXCEPTIONS.

Where an instruction embodies several propositions of law, some of which are accurate and not subject to objection, a general exception is insufficient to raise the propriety of a particular portion of the instruction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273(5); Trial, Cent. Dig. § 689.]

Appeal from District Court, Deaf Smith County; D. B. Hill, Judge.

Action by Mrs. Kathryn Hutson, administratrix with the will annexed of John Hutson, deceased, against L. T. Lester. Judgment for plaintiff on remand after appeal, and defendant appeals. Affirmed.

See, also, 167 S. W. 321.

Turner & Rollins and Reeder & Dooley, all of Amarillo, and G. W. Barcus, of Waco, for appellant. Carl Gilliland, of Hereford, and Madden, Trulove, Ryburn & Pipkin and W. H. Kimbrough, all of Amarillo, for appellee.

HENDRICKS, J. The plaintiff, Hutson, as administratrix, alleged the execution and delivery by Lester to her deceased husband, John Hutson, of the following instrument:

"Canyon, Texas, January 8, 1907.

"State of Texas, County of Randall.

"I, L. T. Lester, agree to sell to John Hutson, or order, sections 11, Blk. K 14, B. S. & F. Cert. No. 127; 15, block K 14, J. Gibson Cert. No. 129; 17, Blk. K 14, B. S. & F. Cert. No. 1/51—all these sections are located in Deaf Smith Co., Texas.

"Also section 11, Blk. 1, T. T. R. R. Co. Cert. No. 54; also section 12, Blk. 1, T. T. R. R. Co. Cert. 54—both situated in Randall county, Texas.

"Upon the said John Hutson paying me the sum of \$8,106.67, and balance due on said sections with accrued interest and other expenses, with 8% interest from date.

"This agreement to hold good until September the 12th, 1907.

"Witness my hand this 8th day of January, 1907.

[Signed] L. T. Lester."

Plaintiff also averred a supplementary agreement of extension and modification of the above contract; also charging Lester with the sale by him as the possessor of the legal title of a considerable portion of the land embraced in said contract; that he was trustee for Hutson; alleging, further, the assertion of claim of title by the defendant, Lester, constituting a cloud upon the title; praying for an accounting, and that the cloud be removed.

Plaintiff's petition, in its essentials, is thoroughly reproduced in the former opinion of Chief Justice Huff, on a former appeal to this court, and reported as *Lester v. Hutson*, 167 S. W. 324.

The questions involving Lester's plea of privilege to be sued in the county of his residence, his general demurrer, asserting the proposition that the plaintiff's pleading fails to show such an equitable title as that an action to remove cloud could be maintained, also advancing the subsidiary proposition that the above contract was merely an option, and supplementing this with the contention that the petition is, or should be, one of specific performance, further claiming that the alleged supplementary contract is within the statute of frauds, all of which were thoroughly discussed in the former opinion.

Before discussing any of the remaining assignments we set out the following evidence, and submit the following conclusions: It is undisputed that the contract of January 8, 1907, was executed and delivered by Lester to John Hutson; that as late as July, 1910, and at different times prior thereto, and to different persons, Hutson made claim to a portion of the property embraced in said contract; that subsequent to said contract

and the date, on its face, of its expiration, Hutson assumed actual possession of a portion of said land, cultivated the same, and placed thereupon certain improvements; that there is no formal contract of relinquishment to Lester by Hutson of the land.

Referable to the question of an actual extension of this contract, the following testimony, by one J. M. Edelen, engaged in the commission and loan business at Kansas City, Mo., is reproduced:

"I knew John Hutson intimately for 10 years prior to his death. He sought to secure a loan from me on two occasions, in the year 1910 on a tract of 1½ sections of land known as Mr. Hutson's Palo Duro ranch, situated partly in Deaf Smith and partly in Randall county, Tex. This occurred some time in April or May, 1910, and again in July of the same year. He stated to me that he owned both the Palo Duro and the Tierra Blanca ranches, and wished to borrow money for himself. I had a conversation with Mr. Lester, the defendant in this case, relative to his interest in these lands. This occurred after the death of Mr. Hutson and some time in the fall of 1911, in the Amarillo Hotel, at Amarillo, Tex. He asked me whether or not I had been shown the lands by Mr. Hutson, for the purpose of making a loan on the land. * * * He asked me the amount of the loan and the purpose for which Mr. Hutson stated he wanted the loan. I stated to him that Mr. Hutson wanted \$9,500, of which he wished \$8,500 to pay him, Mr. Lester, for the balance of the purchase price of the land, and the balance for some personal use, which he did not tell about. [This last statement was admitted by the court for the limited purpose of showing what the witness stated to Lester, and not for the purpose of proving the statement of Hutson to be true.] * * * Mr. Lester stated to me that he had previously sold the land, offered me as security for a loan by Mr. Hutson, to Mr. Hutson, under a written contract of sale; that the time for the final payment for the lands under the terms of the contract had expired at the time Mr. Hutson had shown the lands to me. * * * That he had agreed that Mr. Hutson might keep the land after the time had expired, on condition that he pay the balance of the purchase money due, as provided in the contract, * * * and that he had urged Mr. Hutson to make the payment."

From the testimony of D. A. Parks, cashier of the bank of which Lester is president, it is undisputed that subsequent to the date of the alleged maturity of the contract on its face, Lester and Hutson had under consideration a matter of settlement with reference to said lands, and in the fall of 1909 a statement, purporting to show how the matter stood, was made up by Mr. Parks and handed to Hutson, with details of the purchase price, interest, taxes, the amounts which certain portions of the land had brought, on account of certain sales made by Lester, and mentioning real estate commissions. It is really undisputed, perforce of succeeding circumstances, after the date of the contract as exhibited in this record, that Hutson accepted the contract of January, 1907.

[1] The testimony of Edelen, in regard to the statements of Lester, are undenied by the latter. It is clearly inferable from the admissions of Lester that at least to July, 1910, he had extended the time, and had permitted

Hutson to remain in possession of a part of the land under the contract. There was no legal obstacle to a denial by Lester, if the above statements could have been truthfully denied. *Wells v. Hobbs*, 57 Tex. Civ. App. 380, 122 S. W. 451.

[2] Jones in his late work on Evidence, in commenting upon the weight of admissions as testimony, says:

"It presents itself to us as evidence of high value, when thoroughly established, for it is of that nature which may successfully challenge contradiction when effectively proved. What the party himself has said or done, at a time when the litigation perhaps was not thought of, if the certainty of it is established, having regard to the circumstances of time, place, and person, should, and often does, furnish a substantial reason for his defeat, when a trial discloses his case founded on facts inconsistent with those which he has himself adopted, and to which he has given publication." Volume 2, § 236, bottom page 358 and top page 359.

In view of the record in this case, many of appellant's assignments of error, if we were to even consider a review of some of the questions as legal propositions which we are not disposed to do, are devitalized to such an extent that no error could be shown.

[3] It is urged that Lester should have been permitted to testify that the written contract of January 8, 1907, was not extended, and that a denial of the alleged transaction with a deceased person is not within the purview of Rev. St. art. 3690. Appellant cites *Adam v. Sanger*, 77 S. W. 954, and other decisions by the courts of other jurisdictions. This court, on the former appeal, citing *Jones on Evidence*, § 785, said the courts have interpreted the term "transaction" as the justice of each case demanded, rather than one of abstract definition. It was further said that the agreement of sale was in writing, and under appellee's contention, as evidenced by the improvements, with Hutson's possession, and Lester's admissions, and the latter's conduct, an agreement of extension was shown; that a denial of a contract of extension would be a negation of some arrangement, or implied agreement, manifested by the above facts, and that such testimony would, in reality, be relative to a transaction with the deceased. The case of *Raison's Adm'r v. Steele* (Ky.) 29 S. W. 454, is rather in accord with this line of reasoning, and the case of *Blount v. Blount*, 158 Ala. 242, 48 South. 581, 21 L. R. A. (N. S.) 755, 17 Ann. Cas. 392, cited by appellant, though upholding the negative testimony in that case, assumes the peculiar position that such testimony was not admissible, as a denial, where it is shown that the party did have a transaction with the decedent; also saying that such testimony may or may not involve a transaction with the deceased, and whether it does or not depends upon the particular circumstances of each case. We are not pretending to assert where the line should be drawn; there is force in the argument of the Alabama case upon other fea-

tures, as to plea of non est factum, but there is some consideration as to the other view. Suppose the handwriting of a grantor cannot be proven by accessible undisputed handwriting documents—the notary and grantees are dead, and the latter has gone into possession, ostensibly, under such a deed, placed valuable improvements upon the land, and the heirs are confronted with the testimony of the grantor, denying that he ever signed such a deed, and makes no attempt whatever by witnesses to show the handwriting was different from his signature. Would the invocation of the rule be then permissible on account of the "peculiar circumstances" of the case? The case of *Adam v. Sanger*, 77 S. W. 954, on account of the turn of the decision, was not approved by the Supreme Court, at least it was not necessary to approve it, and it is in reality in conflict with *Edelstein v. Brown*, 95 S. W. 1128. The notes and citations to the opinion of *Blount v. Blount*, in the L. R. A. volume, present numerous cases on this question.

[4] The forty-third assignment raises the further question that Lester should have been permitted to testify that he had no agreement with Hutson for the sale of the land in parcels and as to the application of the proceeds of said sale. If the extension, however, actually occurred, and the contract was in force, an actual agreement was unnecessary. The proceeds in equity belong to Hutson.

[5] In regard to the offered testimony of Lester, denying any contract of extension, this court also said, in the former opinion, that such a denial, under the conditions, would have been a conclusion, on the theory that an implied agreement of extension could be inferred from the act, admissions, and manifestations stated, and to rebut this, by statement that no agreement was ever made, the testimony as offered would reach such conditions, in its effect, as a denial, and in that sense the testimony was a conclusion. There is force in all these suggestions, though unnecessary to decide on this appeal, for, if such testimony had been permitted, in the face of the record and conclusions derivable therefrom, we are unable to see how it would have benefited Lester in the slightest. The conclusion that some character of arrangement for an extension of the particular contract is so cogent that the loss of that character of testimony to the jury did not injure him.

[6] The forty-second assignment raises the further question that the court erred in sustaining the objection of the plaintiff to the question propounded to the defendant, Lester, to which the answer would have been that said defendant had an arrangement with John Hutson, as agent for the Cedar Valley Land & Cattle Company, that in consideration of the use of a part of the land said company would carry the notes executed

by the defendant at 7 per cent. interest, as long as Hutson or the company were permitted to use the land. The point is not made, as in the forty-first assignment (noticed later), that the plaintiff had called Lester to testify, but it is urged by proposition that testimony concerning a transaction with Hutson, as agent of the Cedar Valley Land & Cattle Company, would not be such a transaction with Hutson as would come within the exclusionary rule of 3690 R. S. Oklahoma has a similar statute.

The case of *Cunningham, Adm'r, v. Phillips*, 4 Okl. 169, 44 Pac. 221, by the Supreme Court of Oklahoma, in its essential elements, affords a strong analogy. Phillips in his suit against the administrator claimed that, when Berger, the deceased, purchased the land in controversy, the deceased was his tenant, and such status constituted Berger his trustee, praying that the administrator execute a deed. The plaintiff, Phillips, was allowed to testify to the making of a lease with Berger, the loss of the same by himself, the contents of said lease, and the payment of rent by Berger. The court said:

"This testimony constituted a very important and material part of the evidence produced in behalf of the plaintiff. * * * It is impossible to conclude, after a careful examination of the evidence in the case, that, if the testimony had been excluded as provided by the statute, the finding and judgment could have been rendered in his behalf."

To testify to a transaction which, by its force, would destroy plaintiff's case is certainly within the spirit of the statute, and the same was enacted to prevent such a result when the other party cannot be heard.

[7] The trial court charged the jury, in substance, that if they should believe from the evidence that Hutson failed to comply with the requirements of the contract of January, 1907, on or before September 12, 1907, the defendant was entitled to cancel and rescind same, unless they further believed that defendant failed to rescind, and instead of rescinding continued to recognize the contract as in force, and permitted Hutson, without objection, to take possession of the lands, etc. The complaint is made that this charge is erroneous for the reason that under the terms of the contract, requiring Hutson to comply, on or before September 12, 1907, "the contract would (of itself) on said date terminate and become null and void unless it had been extended by a positive agreement on the part of the defendant." If error, it is not available. It is conclusive that Lester did extend, and Hutson acted upon the extension of, this contract. Hence, it did not terminate, of itself, on the date mentioned.

Complaint is also made, under another assignment, that this charge constitutes error, because the defendant, Lester, was not required, under the terms of the contract, to take any affirmative action with reference to the rescission. For the same reason this as-

signment is also overruled. The ninth, twelfth, and thirteenth assignments are in the same category, and are not sustained.

[8] The court instructed the jury that if they believed the agreement of January 8, 1907, was continued in force after September, 12, 1907, and that $2\frac{1}{2}$ sections of the land covered by the contract were sold to third parties and the proceeds received by Lester, it was his duty, as the trustee of the legal title, to apply the proceeds to the payment of the sums which Hutson was obliged to pay, including interest and reasonable expenses, and if Lester failed to apply them, the law would treat such proceeds received by Lester as applied at the respective dates when received; and this would be true whether there was any express contract to that effect, since it would be the duty of Lester to apply, and the right of Hutson to receive, such proceeds upon said contract, if it had been continued in force to the time of the sales and the receipt of the proceeds.

The fourth proposition under appellant's twenty-first assignment of error is not embraced within his objection to this charge. We think the charge is clear, is not upon the weight of the evidence, and is not calculated to confuse, raised by another proposition, but in reality enlightens the jury on the questions presented. If the contract was continued in force, and parts of the land were sold during the pendency of the extension, necessarily Lester was a trustee, not only of the legal title, but of the proceeds as applicable to the payment of the debt, and irrespective whether there was any express contract, or not, for the extension, so it was in force.

[9] The twenty-sixth assignment attacks the ruling of the trial court in admitting in evidence, over the objection of appellant, the contract of January 8, 1907, on the ground of an interlineation. The proposition is that before an instrument, which shows interlineations on its face, is admissible, the party offering must explain the same. The body of the bill of exceptions, the manner in which it is framed, does not, in reality, exhibit anything objectionable, but the statement of facts shows that the following language: "And balance due on said sections with accrued interest"—was interlined with ink in the original contract, and the remainder, except the signature and heading, having been typewritten. The modifications of the bill by the court state that, when the instrument was offered in evidence, it was obvious on inspection that the interlineation was in the same handwriting as the signature to the instrument; that it was in ink of the same color, and apparently the same age, as the signature; that the suit had been pending since the summer of 1911; that in none of the pleadings of the defendant had there ever been a verified plea of non est factum, nor any allegation that the instrument had been

altered by any one after the defendant had attached his signature; that counsel for defendant stated, at various times during the progress of the trial, that they made no question at all of the "execution" of the instrument, or the genuineness of the defendant's signature thereto; that the case had been tried twice before in the district court at Hereford; that on both trials the same original instrument had been offered and admitted in evidence, and no objection had ever been offered to it before upon the ground of the alleged interlineation. Hutson was dead, and could not explain. The contract with the Parks memoranda attached was found in Hutson's effects at the ranch. The interlineation was evidently in Lester's handwriting and not Hutson's. The conditions recited by the court were sufficient to free the instrument of any suspicion, and appellant's authorities are inapplicable to this status.

[10, 11] The trial court charged the jury, in substance, that if they believed from the evidence that the possession of the lands mentioned in the contract of January 8, 1907, by Hutson was not under a claim of ownership, or was under a tenancy to Lester, to find for defendant, or, if they believed that after the execution of said contract Hutson abandoned the contract and became the occupant of the land as a tenant, the plaintiff would be estopped from claiming title; but if they believed from the evidence that for a special purpose, understood between Hutson and Lester, Hutson held himself out as a tenant of said Lester, and that such holding out was not intended to alter the rights of Hutson and Lester, as between themselves, and that Lester was not misled or deceived thereby to his injury, plaintiff would not then be estopped by such holding out, if any, by Hutson. In November, 1910, Lester obtained a mortgage upon a part of this property, and at that time Hutson, who was in possession of the property, disclaimed any interest in the land mortgaged except as a tenant of Lester. The fifteenth, sixteenth, seventeenth, and eighteenth assignments attack this charge from several viewpoints: That there is no evidence raising the issue that Hutson held himself out as a tenant for a special purpose; that the burden of proof was placed on the defendant to show that possession of Hutson was not under a claim of ownership, with a general complaint that it is not a correct statement of the law, and, further, that it is argumentative, ambiguous, and upon the weight of the evidence. The charge speaks for itself as to the criticisms, except the one of insufficiency of testimony permitting its submission to the jury.

When Hutson made the written acknowledgment to Herd, the agent of Post, disclaiming any interest in the land, and declaring that he was a tenant of Lester, the jury was entitled to consider the following conditions: As explanatory of his possession, Hutson had claimed the land as late as July, 1910. Prior

to the purchase of this land by Lester from the Cedar Valley Land & Cattle Company, Hutson had been the agent of that company, and continued to be until the time of his death, in January, 1911. Lester had sold several parcels of land embraced in the January contract to different parties prior to the time of the disclaimer. Negotiations for a settlement, with these sales considered, had occurred some time in 1909. Lester said that the figures on Parks' memoranda were made to see what the profits were on the land embraced in the contract. When these sales were made, Hutson, who was also an attorney in fact for the land company, had released the lien for Lester on the tracts, relative to which some of the amounts had not been paid by Lester, nor upon the original notes to the corporation. The notes, or a part at least, which Lester originally gave for all the land, were existent. The day of reckoning was to come, both for Lester and Hutson. To obtain the Post money was expedient for both parties. With a considerable amount of Hutson's debt to Lester having been paid in equity, on account of Lester's sales, the jury had the further right to consider whether Hutson, as between him and Lester, was, or not, actually eliminating his interest in the remaining land by the statement to Herd. An analysis of the testimony of the two witnesses, engaged in the real estate business, as to the declarations of Hutson, in regard to the latter's interest in the remaining land—one stating the declarations were made to him in May, 1910, and the other witness testifying that Hutson made statements to him in November or December, 1910—in connection with conditions and other testimony, could have been rejected by the jury. We think the testimony raised the question whether the disclaimer was made for a special purpose as between Hutson and Lester.

Paragraph 6 of the court's main charge presents a similar question, upon the matter of disclaimer, as well as to the execution of some releases of the vendor's lien to Lester, executed by Hutson (for Herd's benefit) as agent of the Cedar Valley Land & Cattle Company, at the time Herd loaned the money to Lester, submitted as estoppel. The nineteenth assignment complains of this paragraph that there is no evidence to sustain such a charge, and that it detracts from the weight to the jury of the disclaimer. For the reasons above, we overrule said assignment.

[12] The twenty-eighth assignment of error complains of the admission in evidence of the deeds from L. T. Lester, to the several persons (the grantees in said deeds). The only proposition under said assignment which we think necessary to notice asserts that:

"The deeds should have been excluded because there is no evidence that the consideration recited in said respective deeds was the true consideration."

This proposition, in its broad presentation, with no statement under it, in view of the record, should not be sustained by this court. We are not required to reframe a proposition in accordance with, and make it fit, the actual record, nor to make a statement of the testimony which the brief should append, for the purpose of elucidating the actual point, if one exists. Lester did testify, however, as to some of the deeds, when interrogated about them, and said that they did recite the true consideration, without any question asked, nor statement by him, as to the other deeds.

[13] The forty-first assignment raises the question that because appellant was called by appellee, as a witness, by taking his oral deposition, such offered testimony, when Lester was upon the stand, should have been admitted on the direct examination by his counsel, as follows:

"Q. Mr. Lester, state to the jury whether or not you were paid any lease or rents for section 11 and the north half of section 12, in Randall county, during the time Mr. Hutson was in possession of it."

The bill merely recites:

"If the witness had been permitted to answer such question, he would have answered in the affirmative."

"Under well-settled rules it must be made to appear in a bill of exceptions taken to the exclusion of evidence what the evidence was, and that its exclusion may have influenced the judgment." *Holstein v. Adams*, 72 Tex. 490, 10 S. W. 562.

This bill, though it shows the answer, does not undertake to show the connection, or, in reality, the materiality, of the testimony. The mere statement by Lester, that he was paid rents for the land during the time Hutson was in possession would leave its materiality suspended. The bill should have gone further and shown, notwithstanding the nature of the objections in the same, that this testimony could, and would, have been followed by other testimony, and showing in what manner Hutson would have been affected. The mere general statement by Lester that he was paid rents during the time of Hutson's possession would suspend its materiality—paid by whom, and what contractual connection would Hutson have had with the payment? It is unnecessary in this view to discuss the legal questions raised under this assignment.

[14] The twenty-third assignment of error attacks the eighth paragraph of the court's main charge, which is a full submission to the jury of the principles of accounting between Lester and Hutson, in many details according to the trial court's view, in the event the jury found for Hutson. The exception to the charge is a general exception, "because the testimony raised no such issue"; and the proposition to the assignment is:

"It was error * * * to submit the matter of an accounting, inasmuch as there is no evidence in the record showing, or tending to show, the propriety of such accounting."

If the jury found for plaintiff, the testimony certainly raised an accounting of some character between Lester and Hutson, and defendant does not object to the method submitted by the court of stating the account, nor any suggestion that the trial court was in error in stating the principles of accounting. This particular charge has many subparagraphs, and the trial court seems to have covered every conceivable detail arising upon the record, as to the manner of the charges and the application of credits, applying subsidiary principles applicable to different matters of such debits and credits.

As to many of the principles applicable to particular accounts in certain portions of the record, there can be no question but what the testimony raises those particular issues. The Supreme Court of the United States, in *Railway Co. v. Earnest*, 229 U. S. 122, 33 Sup. Ct. 657, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, said:

"We must * * * apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

The thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh assignments of error assail the action of the court in admitting the testimony of the different witnesses as to declarations of Hutson of ownership of the land. This court in the former opinion (167 S. W. pages 328, 329, 330) discussed thoroughly this character of testimony, announcing the limitations of purpose for which said testimony could be used, and further discussion is unnecessary. The trial court conformed the use of the testimony to that holding.

Other assignments in this brief are disposed of by the reasons adduced above, except certain matters which we think unnecessary to discuss.

The judgment is affirmed.

TEXAS & P. RY. CO. v. ERAMBERT et al.
(No. 1585.)

(Court of Civil Appeals of Texas. Texarkana.
March 8, 1916. Rehearing Denied
March 16, 1916.)

CARRIERS \Leftrightarrow 187—LIABILITY FOR DAMAGE TO SHIPMENT—CONNECTING CARRIERS.

Act Cong. Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1913, § 8031), provides that if the owner of any vessel shall exercise due diligence to make it seaworthy and properly manned and equipped, neither the vessel nor the owners shall be responsible for damage or loss resulting from faults or errors in navigation or arising from dangers of the sea or other navigable waters, acts of God, etc. *Held*, that where a violent hurricane loosened a porthole and forced sea water upon the cargo, a finding in favor of the steamship company in an action for damages involved the finding that the damage was unavoidable through an act of

God, and precluded a recovery against a connecting railway carrier, which was guilty of no negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 851, 852; Dec. Dig. \Leftrightarrow 187.]

Appeal from District Court, Cass County; H. F. O'Neal, Judge.

Action by W. H. Erambert, Jr., against the Texas & Pacific Railway Company and others. From a judgment for plaintiff against the defendant named, it appeals. Reversed and remanded.

Appellee Erambert, living at Atlanta, Tex., was consignee of a shipment of trunks and hand bags from the Union Trunk & Bag Company at Richmond, Va. The initial railroad company delivered the goods to the Malory Steamship Company, and the steamship company to the International & Great Northern Railway Company, and the latter company delivered to the appellant company, the delivering carrier. It was proven that the goods en route were damaged by water. The appellee Erambert brought the suit for damages against the steamship company, the International & Great Northern Railway Company and the Texas & Pacific Railway Company. The initial carrier was not a party to the suit. Judgment was entered for appellee against the Texas & Pacific Railway Company, and in favor of the two other defendants.

The evidence shows, without dispute, that on April 1 and 2, 1914, the steamship having the shipment on board encountered a violent hurricane at sea, which by its force caused the porthole to loosen, and sea water was forced into where the cargo was, damaging the present shipment. It was shown that the vessel was in all respects seaworthy, properly manned and equipped. There is no other injury shown to the shipment besides that done by the storm waters. There is no negligence shown on the part of appellant company.

W. B. Figures, of Atlanta, for appellant. Hill Stewart and O'Neal & Allday, all of Atlanta, and E. N. Spivey, of Texarkana, for appellees.

LEVY, J. (after stating the facts as above). Error is predicated upon the ruling of the court in not granting a new trial. It is insisted that the evidence does not show that the damage to the goods occurred on the line of appellant company and through any negligence on its part, it being the delivering carrier. The evidence, as appears in the record, only shows that while the goods were in the possession of the steamship company, an intermediate carrier, they became damaged by sea water while a violent hurricane at sea was raging, and that the damage was through no fault on the part of the steamship company or its employés. Finding, as the court did, in favor of the steamship company

involves the finding of fact that the damage to the goods, occurring while in the possession of the steamship company, was unavoidable through an act of God. The law relieves the steamship company, under the facts, of liability for the damage. Section 8031, 3 U. S. Compiled Statutes of 1913. And as the damage was the result of the storm, the delivering carrier, being innocent and without fault respecting the damage, could not be held liable.

Consequently, according to the record, the proof falls to support the judgment in favor of appellee against the appellant company, and said judgment is therefore reversed, and the cause remanded.

NALLS v. McGRILL et al. (No. 1574.)

(Court of Civil Appeals of Texas. Texarkana. Feb. 24, 1916.)

1. NOVATION \S 5—SUBSTITUTION OF PARTY.

The grantee of a widow, who agreed to support her for life, she thereafter agreeing to his sale to a third person and the latter's substitution as the party who was to support her, was relieved from his obligation and was not liable to the widow for his grantee's breach.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 5; Dec. Dig. \S 5.]

2. JUDGMENT \S 251(1)—SUPPORT BY PLEADINGS—NECESSITY.

In a suit for breach of contract, where plaintiff pleaded no facts entitling her to a personal judgment against a defendant, though the evidence showed that he was personally liable to her, such a personal judgment could not stand, since evidence cannot form the basis of a judgment, though admitted without objection, in the absence of appropriate pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 437; Dec. Dig. \S 251(1).]

Appeal from District Court, Hopkins County; Wm. Pierson, Judge.

Suit by D. E. McGrill against W. A. Smith and B. S. Waldrop, in which S. A. Nalls intervened. From a judgment for plaintiff against Smith and Waldrop, and for the intervener against Waldrop, the intervener appeals. Affirmed.

R. D. Allen, of Sulphur Springs, for appellant. J. A. Dial, of Sulphur Springs, for appellees.

HODGES, J. In January, 1912, the appellant, S. A. Nalls, was the owner of a tract of 38½ acres of land situated in Hopkins county. She was an aged widow, and was desirous of making some arrangements for securing her support and maintenance during the remainder of her life. On the 29th of January of that year, she conveyed her land to W. A. Smith, one of the appellees on this appeal. The following is the consideration recited in the deed:

"I, S. A. Nalls, of the county of Hopkins and state of Texas, for and in consideration of one W. A. Smith taking me to his home and providing for me and taking good care of me the

remainder of my life, have granted, sold and conveyed, and by these presents," etc.

On December 28, 1912, Smith conveyed the same land to B. S. Waldrop in consideration of two notes for \$105 each executed by Waldrop and payable to Smith. In each of the notes a vendor's lien was reserved to secure their payment. These notes were afterwards transferred to the appellee McGrill, who, on the 9th of January, 1915, filed this suit against Smith and Waldrop asking for judgment and the foreclosure of his vendor's lien. The answers of Smith and Waldrop presented no contest to the suit of McGrill. Before the trial the appellant intervened, and alleged, in substance, as follows: That she had theretofore conveyed the land upon which McGrill claimed a lien to W. A. Smith in consideration of his undertaking her support and maintenance for the remainder of her life, and upon his representations that he would faithfully carry out that undertaking; that Smith had failed and refused to perform his agreement, and had, without her knowledge or consent, sold the land to B. S. Waldrop; that both Waldrop and McGrill had both actual and constructive notice of the consideration to be paid by Smith, and the condition upon which he acquired the title. It was further alleged that Smith entered into the agreement with the intervener to support her with no intention of performing it, but with the fraudulent design of depriving her of her land. She prays for a recovery of the land and a cancellation of the deeds from her to Smith and from Smith to Waldrop, and that portion of the note held by McGrill which expressed a lien upon her land, as clouds upon her title. By way of alternative pleading, she alleged her age and life expectancy, and that \$10 per month was reasonably necessary for her support the remainder of her life, and asked judgment against Smith alone for \$1,020 as damages and a foreclosure of an equitable lien on the premises conveyed. She also asks that her lien be declared superior to the vendor's lien asserted by McGrill. In a trial before the court without a jury, personal judgment was rendered in favor of McGrill against Waldrop and Smith for the amount of the notes, together with the foreclosure of the vendor's lien upon the land. Judgment was also rendered in favor of the appellant against Waldrop for \$230 as damages, and a foreclosure of a lien upon the same tract of land; but this lien was subordinated to that held by McGrill. The intervener alone has prosecuted an appeal.

It is urged that the court erred in refusing to render a personal judgment in appellant's favor against Smith for the damages resulting from his failure to furnish her the support contracted for. According to the testimony of Smith and Waldrop, the appellant agreed at the time the transaction occurred that Smith might convey the land to Waldrop

for the consideration stated—that is, the two notes executed by Waldrop—and that Waldrop might be substituted for Smith to support the appellant the remainder of her life. While the appellant denied that she consented to this arrangement and transfer of the property, she admits that she knew that it had been done, and that she had lived with Waldrop several months without having made any objection to the change. The testimony presented an issue of fact which the court determined against the appellant.

[1] While the contract entered into by Smith to support the appellant was not assignable in law, it was one from which he might have been released by her consent. If it be true, as stated by Smith and Waldrop, that the appellant agreed to the sale to Waldrop, and to the substitution of Waldrop as the party who was to support her in the future, it follows that Smith was relieved of any further obligation in that respect, and appellant had no claim against him for Waldrop's failure. *Ascarete v. Pfaff*, 34 Tex. Civ. App. 875, 78 S. W. 974, and cases there cited.

[2] It is also insisted that the court should have rendered a judgment against Waldrop for the sum of \$880, which it is claimed is \$10 per month for the life expectancy of the appellant as shown by the tables of mortality introduced in evidence. A sufficient answer to this contention is that the appellant pleaded no facts which entitled her to a personal judgment against Waldrop for any sum. While the evidence shows that Waldrop by agreement undertook her support and maintenance, and failed to carry out that undertaking, there is no pleading to support any relief based upon such a breach of contract. Evidence cannot form the basis of a judgment, although admitted without objection, in the absence of appropriate pleadings. *W. U. Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; *San Antonio, etc., Ry. Co. v. Flato*, 13 Tex. Civ. App. 214, 35 S. W. 859. This also would seem to be an answer to appellant's further contention that her lien should have been given precedence over that awarded to McGrill. If under her pleadings she was entitled to no judgment against Waldrop, and under the facts to none against Smith for damages, there was no basis for a judgment foreclosing any lien in her favor. Hence there was no error of which she has any right to complain.

The judgment is therefore affirmed.

YATES et al. v. CRADDOCK et al.
(No. 1561.)

(Court of Civil Appeals of Texas. Texarkana.
Feb. 3, 1916.)

1. WITNESSES \Leftrightarrow 189(9) — COMPETENCY — TRANSACTION WITH DECEDENT.
Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3690, providing that in an action by heirs

arising out of a transaction with decedent neither party can testify against the others to a transaction with decedent, plaintiff suing for land as heirs, defendant cannot testify to a purchase from deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 590; Dec. Dig. \Leftrightarrow 189(9).]

2. DESCENT AND DISTRIBUTION \Leftrightarrow 30 — PARENTS AND BROTHERS.

By express provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 2461, one dying intestate without surviving spouse or children, her lands descend half to parents and half to sisters and brothers.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 84-90; Dec. Dig. \Leftrightarrow 30.]

3. BASTARDS \Leftrightarrow 104 — CAPACITY TO INHERIT.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2473, providing that bastards can inherit from and through their mother, bastards of the same mother may inherit from each other.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 251, 257-262; Dec. Dig. \Leftrightarrow 104.]

Appeal from District Court, Titus County;
J. A. Ward, Judge.

Action by Emma Yates and others against Lucy Craddock and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded for new trial.

Appellants sought to have partition made of a certain described tract of land, claiming that they owned a three-fourths and Lucy Craddock a one-fourth interest in the same. Lucy Craddock and her husband answered, denying that appellants had any interest in the land, pleaded in bar the ten-year statute of limitation, and by cross-action sought to recover the title to the land, averring that they had purchased the land of Emeline Stewart in virtue of a parol contract duly performed to take care of, feed, and clothe the aged parents of Emeline Stewart, and had gone into possession of the same, made valuable improvements, and had paid all taxes thereon. There was a trial before the court, and judgment was entered in favor of defendants for title and possession of the land.

It was shown that Emeline Stewart, the owner of the land, died intestate in 1904. She was a widow without children. Adeline Turner was the mother of Emeline Stewart, and she died in 1913. Plaintiffs Turner and Bailey are the sister and brother, and plaintiff Yates is the niece, of Emeline Stewart. Defendant Lucy Craddock is the sister of Emeline Craddock. There is some evidence admitting of the inference that all of the above children of Adeline Turner were bastards. The evidence in respect to the entire case will not be set out.

Seb F. Caldwell, of Austin, for appellants.
J. M. Burford, of Mt. Pleasant for appellees.

LEVY, J. (after stating the facts as above). The defendant Alex Craddock offered to testify in behalf of himself and wife in support of the allegations of their cross-action that

he and his wife, Lucy Craddock, had a parol agreement with Emeline Stewart of purchase of the land in suit, agreeing with Emeline that they would take care of, feed, support, and care for her mother, Adeline Turner, as long as the mother should live, in consideration of the land. The plaintiffs objected to the evidence as being a transaction with a decedent and incompetent under article 3690, R. S. The court overruled the objection, and the witness testified at length concerning a purported parol agreement with Emeline Turner about the acquisition of the land, which is fully shown in the bill of exception. The court qualifies the bill as follows:

"The evidence showed that Adeline was a slave, and during her bondage Emeline Stewart was born, and some of the others who are parties to this suit. Emeline Stewart died prior to the death of her mother. Adeline Turner inherited the whole estate of her illegitimate daughter Emeline Stewart, and, if the other parties to this suit had any interest in the land by inheritance, it was as heirs of Adeline Turner, and not of Emeline Stewart, and the trade between Alex Craddock and Emeline Stewart was not within the inhibition of the statute."

[1-3] It would appear plainly stated that the court deemed the evidence admissible upon the ground that illegitimate sisters and brothers may not legally inherit from each other. The evidence is clearly inadmissible under the terms of the statute, and it is believed the court erred in admitting it. Article 3690, Vernon's Sayles' Stat.; James v. James, 81 Tex. 376, 18 S. W. 1087. Upon the death of Emeline Stewart the title would descend one portion to the mother, and the other portion to the sisters and brother or their descendants. Article 2461, Vernon's Sayles' Stat. And bastard children of the same mother may inherit from each other. Article 2478, Vernon's Sayles' Stat.; Berry v. Powell, 47 Tex. Civ. App. 599, 105 S. W. 345; Berry v. Tullis, 105 S. W. 348. Therefore Adeline Turner, the mother, could not have inherited the whole of the land at the death of Emeline Stewart. As the cross-action was only sustainable upon this evidence, and as the judgment was entered on the cross-action, the error, it is concluded, was prejudicial and ground for reversal.

Judgment reversed, and cause remanded for another trial.

FIRST TEXAS STATE INS. CO. v. BELL. (No. 1565.)

(Court of Civil Appeals of Texas: Texarkana.
Feb. 23, 1916. Rehearing Denied
March 9, 1916.)

1. INSURANCE \S 515—LIFE INSURANCE—DEFERRED RISK—STATUTE.

Under Rev. Civ. St. art. 4742, subd. 3, declaring that no policy of life insurance shall be issued providing for any mode of settlement at maturity of less value than the amounts insured on the face of the policy, plus dividends, and less any indebtedness on the policy, etc., a stipulation in a policy, that if insured should die

from heart disease within one year from its date the insurer's liability would be limited to one-fourth of the principal sum named, was unenforceable and presented no defense to a claim for the full amount of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1300-1302; Dec. Dig. \S 515.]

2. APPEAL AND ERROR \S 1064(2)—HARMLESS ERROR—STATUTORY DEFENSE.

In an action on a policy of life insurance, a charge, assuming that there was no evidence that the deceased had died from heart disease under conditions making a provision of the policy for the payment of only a quarter of the principal sum applicable, was harmless, where the testimony was not sufficient to support a finding upon the issue in the insurer's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4221, 4222; Dec. Dig. \S 1064(2).]

Appeal from Harrison County Court; Geo. L. Hufman, Judge.

Action by Sam Bell against First Texas State Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bibb & Bibb, of Marshall, for appellant. Cary M. Abney and M. M. O'Banion, both of Marshall, for appellee.

HODGES, J. This appeal is from a judgment in favor of the appellee for the sum of \$187.50, the balance due upon a policy of life insurance. It appears from the evidence that the appellant had issued a policy of insurance upon the life of Ella Bell for \$250, in which the appellee was named as the beneficiary. There was a stipulation, however, containing, in substance, the following provision: That if the insured should die from cancer, pulmonary disease, or any disease of the heart, and certain other diseases, or that any such disease contributed to cause the death of the insured within one year from the date of the policy, the liability of the company was to be limited to one-fourth of the principal sum named. It was alleged by the appellant in its defense that Ella Bell, the insured, died within one year from the date of the policy of a disease of the heart, and therefore the appellee was not entitled to receive more than \$62.50, one-fourth of the face of the policy. The only defense presented on this appeal is a settlement with the appellee under the terms of the provision above referred to. It appears that he had accepted \$62.50 at one time in full settlement of his claim against the company. It was alleged by him in his petition that this settlement was brought about through ignorance on his part, and fraud on the part of the company; that the provision of the policy which authorized it was void because in contravention of a statute of this state. The sufficiency of the evidence to sustain these averments of fraud in procuring the settlement is not questioned on this appeal.

[1, 2] The first error assigned complains of a portion of the court's charge, which in effect assumed that there was no evidence

tending to show that the deceased had died of a disease of the heart under conditions which made the clause of the policy above referred to applicable. The third subdivision of article 4742 of the Revised Civil Statutes condemns stipulations of that character. That article was fully discussed and applied by Associate Justice Lana in *First State Ins. Co. v. Smalley*, 185 S. W. —, not yet officially reported. It is there held that such provisions are not enforceable and present no defense to a claim for the full amount of the policy. We deem further discussion of that subject unnecessary. But the state of the evidence in this case is such that, even in the absence of such a statute, the charge was harmless, because the testimony was not sufficient to support a finding upon that issue in appellant's favor.

The second assignment of error complains of that portion of the court's charge which permitted a recovery of attorney's fees and 12 per cent. damages. It is contended that the evidence was insufficient to authorize the submission of that issue to the jury. We have examined the evidence, and agree with the trial judge that the issue was raised by the evidence.

The judgment is, accordingly, affirmed.

FIRST TEXAS STATE INS. CO. v. PIPE. (No. 1553.)

(Court of Civil Appeals of Texas. Texarkana.
Jan. 13, 1916.)

COSTS \Leftrightarrow 260(3)—**APPEAL—DELAY—DAMAGES.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1629, and Court of Appeals rule 43 (142 S. W. xiv), plaintiff in error not appearing by brief, and defendant in error filing a brief and suggesting an appeal for delay, and an examination of the record sufficiently showing it to be a case of delay, judgment will be affirmed, with 10 per cent. damages on the amount in dispute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 985; Dec. Dig. \Leftrightarrow 260(3).]

Appeal from Fannin County Court; S. F. Leslie, Judge.

Action by John Pipe against the First Texas State Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Reasonover & Reasonover, of Denison, for plaintiff in error. J. W. Gross, of Bonham, and D. H. Cabeen, of Honey Grove, for defendant in error.

LEVY, J. The suit is upon a life insurance policy, and judgment was entered in favor of defendant in error for the amount of the policy, interest, damages, and attorney's fees. Plaintiff in error does not appear by any brief, and defendant in error files a brief and suggests an appeal for delay. An examination of the record sufficiently shows that it is a case of delay. The judgment is af-

firmed, and with 10 per cent. damages on the amount in dispute. Rule 43 (142 S. W. xiv); article 1629, Vernon's Sayles' Stat.

RIBBLE v. ROBERTS. (No. 5516.)

(Court of Civil Appeals of Texas. Austin.
Feb. 23, 1916.)

APPEAL AND ERROR \Leftrightarrow 1221—**DISPOSITION OF CAUSE—RENDITION OF JUDGMENT—CORRECTION.**

Under Rev. St. 1911, art. 1626, providing that, when a judgment shall be reversed, the Court of Civil Appeals shall render such judgment as the lower court should have rendered, where the Court of Civil Appeals, in reversing a judgment of the county court, reversing a judgment of a justice of the peace for plaintiff, renders judgment for plaintiff, but not against the sureties on the bond on appeal from the justice of the peace, such judgment will be reformed on motion, so that plaintiff may have judgment against defendant and his sureties on the appeal bond for his debt and costs of both justice and county courts, as well as against defendant for the debt and all costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4722; Dec. Dig. \Leftrightarrow 1221.]

Appeal from Brown County Court; Frank H. Sweet, Judge.

Action by A. D. Ribble against J. B. Roberts. From a judgment of the county court, reversing a judgment of a justice of the peace for plaintiff, he appeals. Heard on motion to reform and correct judgment. Motion granted.

Miller & Low, of Brownwood, for the motion. Mark McGee and Scott & Foster, all of Brownwood, opposed.

RICE, J. This suit was brought by appellant against appellee in the justice court to recover judgment on two notes executed by appellee to him. A trial in said court resulted in favor of appellant, from which judgment appellee prosecuted his appeal to the county court, executing an appeal bond with P. C. Krischke and B. R. Shanks as sureties, conditioned as required by law. On trial in the county court judgment was rendered in favor of appellee, from which appellant, in due time, prosecuted his appeal to this court, where, on November 24, 1915, said judgment of the county court was reversed and rendered for appellant but judgment was not rendered against said sureties on the appeal bond from the justice to the county court (see *Ribble v. Roberts*, 180 S. W. 620), and appellant has since said time filed a motion in this court, asking that said judgment be so reformed and corrected that he have and recover the amount of his debt and the costs of the lower courts against said sureties, as well as against appellee, alleging that the former are liable upon the appeal bond.

We have concluded that appellant is entitled to the relief prayed for in said motion, because article 1626 of the Revised

Statutes of 1911 provides that, when the judgment or decree of the court below shall be reversed, this court shall proceed to render such judgment or decree as said lower court should have rendered, etc. As determined by us, the lower court should have rendered judgment in favor of appellant, instead of appellee, and if this had been done, under the law appellant would have been entitled to judgment against appellee and the sureties on said appeal bond for not only the amount of said judgment, but for costs of both the county and justice court as well. This being true, it follows that appellant is entitled, upon reversal in this court, to such judgment as the county court should have rendered in his behalf. Said motion is therefore granted, and the judgment heretofore rendered is so reformed that appellant have judgment against appellee and his said sureties on said appeal bond for the amount of his debt and costs of both the justice and the county courts, as well as against appellee for said debt and all costs.

Motion granted.

BAIN v. POLASEK. (No. 5623.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 23, 1916.)

1. SALES \S 170—TIME OF DELIVERY—ESSENCE OF CONTRACT.

Where plaintiff agreed to sell cotton for delivery on or about a certain date, and defendant accepted a portion delivered at a subsequent date, the time of delivery was not of the essence of the contract, and failure to deliver on the exact date stipulated did not defeat plaintiff's right to recover for the defendant's refusal to accept the remainder of the cotton.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 424; Dec. Dig. \S 170.]

2. NEW TRIAL \S 99—NEWLY DISCOVERED TESTIMONY—CHARACTER OF TESTIMONY.

New trial cannot be had on the ground of newly discovered testimony, where the testimony relied upon is immaterial and the same facts had already been testified to, but it must appear that the evidence would, on another trial, produce a different result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 201, 207; Dec. Dig. \S 99.]

3. DAMAGES \S 189—EVIDENCE—SUFFICIENCY.

Where the plaintiff, who sold cotton to defendant, who refused to accept all of it, testified that he lost a certain sum on account of the defendant's refusal to perform, and the defendant failed to bring out on cross-examination the basis on which such sum was figured, the plaintiff's testimony was a sufficient basis for a judgment for the amount testified to, especially where a simple computation would reveal the amount of loss to be as testified.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 285, 512; Dec. Dig. \S 189.]

Appeal from Karnes County Court; T. B. Smiley, Judge.

Action by R. J. Polasek against J. L. Bain. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Thames, of Kenedy, for appellant.
C. L. Bell, of Karnes City, and Lipscomb & Lipscomb, of San Antonio, for appellee.

FLY, C. J. This is a suit by appellee to recover the sum of \$144.10, damages accruing from the breach of a contract entered into with appellant, in which the latter agreed to buy 25 bales of cotton from appellee, but refused to pay for 13 of the bales. There was a trial by jury, resulting in a verdict and judgment for appellee for the amount sued for.

The facts indicate that appellee agreed to sell 25 bales of cotton of certain grades at Kenedy, Tex., on or about August 20, 1914; that appellee delivered the cotton at or about the time agreed upon, but appellant refused to pay for 13 bales, entailing a loss on appellee in the sum found by the jury.

[1] The first assignment of error is overruled. The special charge, whose rejection is complained of in the assignment, made the whole case turn on whether appellee failed to deliver the cotton on August 18th, and whether appellant had notice of when the cotton was delivered at Kenedy. Time was not of the essence of the contract, which is clearly evidenced by the fact that appellant paid for 12 bales of the cotton, and only objected to paying for the remainder because not up to the grade for which he had contracted. The 12 bales were paid for on or about August 22d.

[2] The motion for new trial was properly overruled. The newly discovered testimony was utterly immaterial, and the same facts substantially were sworn to by appellant. It did not matter to whom the cotton was shipped, appellant got 12 bales of it, and could have had the other 13 bales if he had paid for it as he agreed. The only complaint was as to the grade of the cotton, and the newly discovered testimony cast no light on that subject. In order to obtain a new trial on the ground of newly discovered testimony, it must appear that the evidence would, on another trial, produce a different result. It is utterly improbable that the testimony sought in this case would have any effect whatever on the result of another trial. The second assignment of error is overruled.

[3] The third assignment of error is overruled. Appellee swore, and his testimony was not denied or questioned, that he lost \$144.10 by the failure of appellant to take his cotton. If appellant desired to know how he arrived at that result, he could have brought it out on the cross-examination, and he failed to do it. That evidence formed a sufficient basis for the judgment. However, it is entirely practicable to ascertain from appellee's evidence that appellant had agreed to pay him 9½ cents a pound for the cotton, and that all he got for it was 7½ cents a pound, or a loss of 2½ cents a pound, and

if the \$144.10 be divided by the 2½ cents, the result is 5,781 pounds of cotton, the weight alleged in the petition. There is therefore no merit in the contention that, the weight of the cotton not being proved, there was no basis for the judgment.

The judgment is affirmed.

TEXAS & P. RY. CO. v. HOWELL
(No. 1547.)

(Court of Civil Appeals of Texas. Texarkana.
Jan. 15, 1916. Rehearing Denied
Feb. 3, 1916.)

1. MASTER AND SERVANT §330(3)—MASTER'S LIABILITY TO THIRD PERSONS—EVIDENCE— NEGLIGENCE OF SERVANT — PROXIMATE CAUSE.

In an action for damages to a horse which became frightened at the actions of section hands on defendant's railway and ran into a fence, evidence held to sustain findings by the jury that the acts of the hands were negligent, and that such acts were the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272; Dec. Dig. § 330(3).]

2. MASTER AND SERVANT §302(2)—MASTER'S LIABILITY TO THIRD PERSONS — ACTS OF SERVANTS BEYOND EMPLOYMENT.

A railway company is not liable for injuries to a horse which was frightened by section hands shouting, laughing, and waving their hands at it, even though at the time they were engaged in their duties, since such acts had no connection with their employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. § 302(2).]

3. MASTER AND SERVANT §302(2)—MASTER'S LIABILITY TO THIRD PERSONS—PROXIMATE CAUSE.

Where a horse which was being driven along a lane adjoining a railroad right of way with other animals and which stopped when about to pass a section gang at work on the track and became frightened when the section hands began shouting, laughing, and waving their hands, jumped over a fence, and sustained fatal injuries, and there was no evidence that the work of the section hands was being done in a negligent or improper manner, the fright of the horse must be attributed to the other acts of the hands for which the railway company was not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. § 302(2).]

Appeal from Fannin County Court; S. F. Leslie, Judge.

Action by L. H. Howell against the Texas & Pacific Railway Company. Judgment for the plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Thos. P. Steger, of Bonham, and Geo. Thompson, of Dallas, for appellant. Cunningham & McMahon, of Bonham, for appellee.

HODGES, J. This appeal is from a judgment in favor of the appellee for \$199, the value of a horse killed near the appellant's

right of way. It is claimed that the animal, while traveling along a lane parallel with and near the appellant's road, was frightened by a group of section hands at work upon the track and caused to run against a wire fence, sustaining fatal injuries.

[1] The only testimony introduced on the trial as to how the injury occurred was that of the plaintiff. He stated that he was on foot driving his horse and three mules from a pasture to his residence; that the lane he was traveling was about 15 yards from the railway track, and at the time the injury occurred he was about 50 yards in the rear of the animals. He said:

"At the time of the injury to my horse he was a little just south of the railway's fence, which runs along the south line of its right of way. * * * I had been to the pasture after my stock, and was driving this horse and three mules from the pasture to my house, traveling this lane and going west. * * * There was a bunch of Mexicans at work on the track of the railway at the time of the injury, and just as the stock got opposite these Mexicans and south of them they had the track raised about a foot and were working on it, putting sand and gravel under the track, using spades, shovels, and crowbars in doing the work. When the stock got up even with the Mexicans, they kind of stopped, and the Mexicans commenced to pound the rails and to chouse the gravel with the shovels, and some of them pulled off their hats and hollered, and the mules rushed by, and the horse jumped over the fence. The Mexicans choused the gravel with the shovels and made lots of noise. That is the way they did their work. Yes; they saw the stock scared. Yes; they kept chousing that gravel down. The Mexicans hollered and nickered like a horse, and the horse jumped over the fence. The Mexicans were looking at the horse at that time, and after the horse went into the fence the Mexicans nickered like a horse. When the horse and mules stopped the Mexicans kept on making the noise worse. After the horse went into the fence the Mexicans did not say a word, but laughed."

The testimony further shows that the horse, in attempting to jump over the fence, sustained injuries which later proved fatal. At the conclusion of the evidence counsel for appellant requested a peremptory instruction for the defendant, which was refused, and the case was submitted on special issues.

The questions propounded to the jury were as follows:

"(1) Were the defendant's employes guilty of negligence in causing injury to the plaintiff's animal?

"(2) If you answer the foregoing question in the affirmative, then I ask you if such negligence, if any, was the proximate cause of the injury?"

Both of these questions were answered in the affirmative. The third question was for the purpose of ascertaining the value of the animal.

[2] Under the evidence the jury could not have given different answers to the first two questions. That the conduct of the Mexicans on that occasion was the sole proximate cause of this injury is conclusively shown. But that fact alone does not furnish the true test

of liability on the part of the railway company. The master is not to be held responsible for all the wrongful acts of the servant, even though performed at the time the servant is engaged in the master's service. The master is liable only for those acts which are done at his direction or in furtherance of the business for which the servant is employed. If while engaged in the performance of his duties the servant, of his own volition, does some act wholly disconnected with the master's service, from which an injury results, he alone is responsible for the consequences. The Mexicans who caused this injury were presumably section hands engaged upon the railway right of way in repairing the track. Their conduct in yelling, laughing, and waving their hats had no connection whatever with the service which they were engaged to perform. If those acts were the sole proximate cause of the injury to this animal, the Mexicans alone are liable. The railroad company can be held responsible only upon satisfactory proof that the manner in which the Mexicans were performing their work was, under the circumstances, negligent.

[3] The important inquiry then is: What conduct on the part of the Mexicans caused the animal to rush against the wire fence and sustain the injuries? Was it their noisy laughter, loud talking, and waving of hats, or was it their manner of repairing the track? We might further inquire which of these different acts was most likely to cause the animal to take fright? To this we think there can reasonably be but one answer: That it was the boisterous, voluntary misconduct on the part of the Mexicans. But, conceding that it were otherwise, liability on the part of the railroad company arises only upon a showing that the section men were guilty of negligence in continuing to do their work, or in the manner in which they continued their work, after discovering the presence of the animals and that they were frightened. The men were upon the premises of the railroad company and were engaged in a lawful and necessary employment. There is no evidence that this was being carried on in an unusual manner, or that anything was being done that was not necessary under the circumstances, or that this particular class of work was calculated to frighten animals passing along the lane at that distance. There was no duty resting upon these employes to cease their work, unless the animals showed fright to that extent which would indicate to a prudent person that they were liable to injure themselves. The mere fact that the animals stopped or slackened their speed when opposite the section men was not alone sufficient to put the latter upon notice that one or more of them might rush into the wire fence instead of going down an unobstructed lane as two of them did. The conduct of the horse clearly indicated that he was suddenly

made frantic, and this could be attributed to nothing but the boisterous conduct of the Mexicans outside of the scope of their employment.

The judgment of the county court will therefore be reversed, and judgment here rendered in favor of the appellant.

ROCKDALE MERCANTILE CO. v. BROWN SHOE CO. (No. 5598.)

(Court of Civil Appeals of Texas. Austin.

March 1, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 282—PRESENTATION OF QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL—NECESSITY.

Where a case is tried before the court without a jury, a motion for new trial is not a prerequisite to the perfection of an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. \Leftrightarrow 282.]

2. ACCOUNT, ACTION ON \Leftrightarrow 10—"OPEN ACCOUNT"—REQUISITES.

An account sued on, embracing numerous articles of merchandise purchased on a single date, properly itemized, which has not become an account stated, is an "open account," proof of which by *ex parte* affidavit is permitted by Rev. St. 1911, art. 3712.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 31; Dec. Dig. \Leftrightarrow 10.

For other definitions, see Words and Phrases, First and Second Series, Open Account.]

3. CORPORATIONS \Leftrightarrow 505—ACTIONS—PARTIES.

A private corporation has the right to maintain an action in its own name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1953-1957, 1975; Dec. Dig. \Leftrightarrow 505.]

4. CORPORATIONS \Leftrightarrow 514(1)—ACTIONS—PLEADING.

The petition, in an action by a private corporation, need not state the name of any officer of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2070; Dec. Dig. \Leftrightarrow 514(1).]

Appeal from Milam County Court; John Watson, Judge.

Action by the Brown Shoe Company against the Rockdale Mercantile Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. A. Camp, of Rockdale, and Wallace & Moore, of Cameron, for appellant. M. G. Cox, of Cameron, for appellee.

RICE, J. Appellee brought this suit to recover a balance for merchandise sold by it to appellant, as evidenced by verified itemized account attached to its petition, and on trial before the court without a jury recovered judgment for the full amount claimed, to wit, \$345.45, from which judgment this appeal is prosecuted.

[1] There was no motion filed by appellant for a new trial in the court below, for which reason appellee insists that we should not consider any of the assignments of error, since they do not conform to rules 24 and 25 (142 S. W. 2d), also citing in support of this

contention *Irving v. T. & P. Ry. Co.*, 157 S. W. 752; *Sallaway v. Grand Lodge, A. O. U. W.*, 164 S. W. 1041; *City of San Antonio v. Bodeman*, 163 S. W. 1043; *Taylor v. Butler*, 168 S. W. 1004. The contrary, however, has been held in a recent opinion by Mr. Chief Justice Phillips in *Craver v. Greer*, 179 S. W. 862, holding that where a case is tried before the court without a jury, a motion for new trial is not a prerequisite to the perfection of an appeal. See that case for a full and elaborate discussion of the question.

[2] The principal contention involved in this appeal is whether or not the account sued upon and offered in evidence is an open account, and therefore the subject of proof by ex parte affidavit under article 3712, R. S. 1911. See, also, same article 3 *Vernon's Sayles' Rev. Stats.* p. 2745. The account sued on embraced numerous articles of merchandise purchased from appellee by appellant under date of May 20, 1914, and was properly itemized, to which was appended the ex parte affidavit of the secretary of appellee, conforming in every respect to the provisions of said article 3712. We think this is such an open account as is the subject of verification under said statute, and makes a prima facie case, upon which appellee was entitled to recover. See *McCamant v. Batsell*, 59 Tex. 363; *Wroten Grain Co. v. Mineola Box Co.*, 95 S. W. 744. As said by Mr. Justice Stayton in the first case cited:

"As used in the statutes of this state, in act referred to, we believe that the word 'account' is used in its popular sense, rather than in a technical sense, and that it applies to transactions between persons in which, by a sale upon the one side and purchase upon the other, the title of personal property passes from the one to the other, and the relation of debtor and creditor is thereby created by general course of dealing; and that it does not mean one or more isolated transactions resting upon special contract."

The account sued on in this case is not a stated account, as evidently was that in the case of *Wroten Grain Co. v. Mineola Box Co.*, supra. It is true that it was but a single purchase, but this does not prevent it from constituting an open account. The account in question shows a sale of the goods by appellee to appellant, stating the price charged therefor, and in every particular conforms to what is regarded by the authorities as an open account; and was therefore, when properly verified, as in the instant case prima facie evidence upon which appellee is entitled to judgment, in the absence of proof impeaching its validity or showing its incorrectness. In *McCamant v. Batsell*, supra, the claim sued upon was held not to be an open account within the meaning of article 3712, and therefore could not be established by the ex parte affidavit of the plaintiff. The suit in that case was brought to recover amounts paid by plaintiff for defendant on two security debts. It is true that the account sued upon in the case of

Wroten Grain Co. v. Mineola Box Co., supra, would ordinarily have come within the purview of this article but for the fact that the plaintiff's petition contained allegations showing that the account sued upon was no longer an open account, but in fact a stated account between the parties, and therefore could not be established by the ex parte affidavit of the plaintiff, and the court so held in that case.

[3, 4] The original petition omitted to give the name of any officer of the plaintiff corporation, and also failed to state the domicile of such corporation. A special exception, addressed to the petition on account of such defect, was overruled, and this is made the basis of appellant's first assignment of error, insisting by its proposition thereunder that the petition is insufficient in this respect. A private corporation has the right to maintain an action in its own name. See *Southern Pac. Co. v. Burns*, 23 S. W. 288. And it has been directly held that it is not necessary to state the name of any officer of the plaintiff corporation. *Yates v. Royston State Bank*, 131 S. W. 255. But, admitting the exception as to omitting plaintiff's domicile to be well taken, and it was necessary to so state the domicile of the corporation, this was in fact done by the trial amendment duly filed with permission of the court, making the petition in every respect conform to the exception of appellant.

Finding no error in the proceedings of the trial court, its judgment is, in all respects, affirmed.

HILLSIDE LAND & IRRIGATION CO. v. RUIZ. (No. 551.)

(Court of Civil Appeals of Texas. El Paso. March 10, 1916.)

WATERS AND WATER COURSES \Leftrightarrow 254—LEASE OF WATER—CONSTRUCTION.

Provision of a lease contract that the lessor shall pay the irrigation company for four irrigations does not require it to furnish the water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 311; Dec. Dig. \Leftrightarrow 254.]

Appeal from Ward County Court; Burch Carson, Judge.

Action by the Hillside Land & Irrigation Company against J. G. Ruiz. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

B. W. Baker, of Barstow, for appellant. W. A. Hudson, of Pecos, for appellee.

HIGGINS, J. By written contract dated January 3, 1913, appellant leased to Ruiz, for the year 1913, 80 acres of land. Ruiz agreed to pay a rental of \$3 per acre. This suit was filed to recover such rental. In bar of the action and as the basis of his cross-action, defendant set up this provision in the contract, namely:

"The lessor agrees to pay the Barstow Irrigation Company the annual water rental due to said company during the term of this lease (for cotton and cane four irrigations only)."

And in his answer pleaded:

"This defendant says that said provisions mean, and were mutually understood to mean, that plaintiff was to furnish water for the growing of crops by irrigation to the extent of four irrigations during the life of said contract, and that, although defendant often requested plaintiff and said irrigation company to furnish him water for irrigation of his crops, said plaintiff failed and refused to furnish said water or cause same to be furnished, and defendant was thereby prevented from making any crops upon said land, and said land was rendered worthless to this defendant, all of which was well known to plaintiff, and that for the reasons stated the consideration for said contract has wholly failed, and that this defendant is not liable for any sum of money thereunder."

In his cross-action he averred:

"That said provision meant, and was understood by the parties to said contract to mean, that plaintiff would furnish or cause said irrigation company to furnish to this defendant for irrigations for his cotton and cane to be grown upon said land during the term of said lease. This defendant says that, if he is mistaken as to the meaning of said provision, then he says that plaintiff is a subsidiary corporation to said Barstow Irrigation Company, and was organized by the stockholders of said irrigation company for the sole purpose of owning and holding lands belonging to said Barstow Irrigation Company, and that the lands herein described are part of such lands, and that plaintiff and said Barstow Irrigation Company are one and the same corporation and are owned and controlled by the same people and have now and at the time of the making of said lease contract had one and the same agent and manager, to wit, one John Wilson."

From a judgment in favor of Ruiz, this appeal is prosecuted.

It is unnecessary to discuss the assignments in detail. It is sufficient to say that the contract between the parties imposed no obligation upon appellant to furnish water for irrigation. It is plain and unambiguous in this respect. There is no allegation or proof of fraud, accident, or mistake. The Hillside Land & Irrigation Company and the Barstow Irrigation Company were separate and distinct corporate entities. The cause will be reversed, and judgment here rendered that appellant recover of Ruiz \$240 with 6 per cent. interest from January 1, 1914, and that Ruiz take nothing by his cross-action.

Reversed and rendered.

FIRST TEXAS STATE INS. CO. v. HERNDON. (No. 61.)

(Court of Civil Appeals of Texas. Beaumont. Feb. 10, 1916.)

INSURANCE §539(1) — NOTICE OR PROOF OF LOSS—STATUTORY PROVISIONS.

Under Rev. St. 1911, art. 5714, providing that no stipulation in a contract requiring notice of any claim for damages as a condition precedent to the right to sue shall be valid unless reasonable, and that any such stipulation

fixing the time at less than 90 days shall be void, a provision in a policy insuring against sickness, requiring that if the sickness continued for more than 30 days insured or his representative should, as a condition precedent to a recovery furnish the insurer every 30 days a report in writing from his attending physician or surgeon, stating his condition and the probable duration of his disability, was void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1828, 1330, 1332, 1337; Dec. Dig. §539(1).]

Appeal from Jasper County Court; C. C. Brown, Judge.

Action by W. H. Herndon against the First Texas State Insurance Company. Judgment for plaintiff and defendant appeals. Affirmed.

Smith & Lanier, of Jasper, for appellant. C. C. Ingram, of Jasper, and R. S. Sanders, of Center, for appellee.

CONLEY, C. J. The appellee brought this suit in the justice court, precinct No. 3, Jasper county, on an insurance policy issued by the appellant in favor of appellee on the 24th day of December, 1912. By the terms of said policy the appellant insured appellee, among other things, against sickness, at the rate of \$50 per month, for a period not exceeding six consecutive months, during which insured was necessarily and continuously confined in the house and regularly visited by a legally qualified physician, and wholly disabled by bodily disease or illness from performing any and every duty pertaining to his business or occupation. The appellant makes no question about the issuance of the insurance policy and the contract arising thereunder, but defended this suit upon the theory that, although the appellee was sick, as he claimed, and would otherwise be entitled to the benefits of the policy, yet on account of his failure to comply with the terms of the policy under paragraph N, in which it was made a condition precedent to recovery thereunder, if the insured was disabled for more than 30 days—he claiming to have been disabled for 60 days—that he should furnish the company, every 30 days, with a report in writing from his attending physician, fully stating his condition and the probable duration of his disability, and that therefore, by reason of such failure, the company was not liable on said policy. The proof showed that appellee became disabled and was prevented from performing any duty pertaining to his occupation from the 16th day of November, 1914, at noon, until the 16th day of February, 1915, and that during said time he was regularly visited by a physician. Paragraph N of said policy provides as follows:

"If the insured is disabled by reason of illness for more than thirty days, he or his representative shall, as a condition precedent to recovery hereunder, furnish the company every thirty days with a report in writing from his attending physician or surgeon, fully stating

the condition of the insured and the probable duration of his disability."

The insured did not furnish to the company a report in writing 30 days after becoming disabled, as required by the policy, but did furnish a report on the forty-ninth day of his illness. In the trial of the cause judgment was recovered in the justice court for \$102.50, and also \$20 attorney's fee. The appellant duly perfected its appeal to the county court of Jasper county, and a trial therein had before that court also resulted in a judgment in favor of appellee for a like amount, and from the latter judgment, an appeal has been perfected to this court.

Appellant's first assignment of error is as follows:

"The judgment rendered herein is contrary to the law and the evidence of this case in this: That the disputed evidence shows that the plaintiff herein failed to comply with the terms of his policy, in that he failed to furnish said company every 30 days with a report in writing from his attending physician, as required by paragraph N of said policy, fully stating the condition of this plaintiff and the probable duration of his disability, said report being a condition precedent to any recovery under the terms of said policy."

The appellee contends that this provision in the policy is void, and in this contention we agree. Revised Statute, art. 5714, provides:

"No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid, unless such stipulation is reasonable; and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void."

The provision in question in the policy required notice, as a condition precedent to recovery on the policy, where the period of sickness extended more than 30 days, within a less time than that fixed by the statute, to wit, 90 days, and such provision, under many of the decisions of this state, is void. *Maryland Casualty Company v. Hudgins*, 72 S. W. 1047; *Royal Casualty Company v. Nelson*, 153 S. W. 674; *Aetna Life Ins. Co. v. Griffin*, 58 Tex. Civ. App. 198, 123 S. W. 432.

The judgment of the court will therefore be affirmed; and it is so ordered.

GILLES v. MINERS' BANK OF CARTERVILLE, MO. (No. 892.)

(Court of Civil Appeals of Texas. Amarillo. March 8, 1916.)

1. APPEAL AND ERROR \S 493—JUDGMENT BY DEFAULT—RECORD—SERVICE OF CITATION.

On appeal from a judgment by default prosecuted in the suit in which the same was rendered, the judgment will be reversed, unless the record contains a citation showing due service thereof, or an appearance by defendant, even though the judgment contains a recital that defendant was duly served with citation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2282-2284; Dec. Dig. \S 493.]

2. VENDOR AND PURCHASER \S 285(2)—FORECLOSURE OF LIEN—DEFECTIVE JUDGMENT.

A default judgment foreclosing a vendor's lien on several tracts of land, omitting a call for the west side of one of the tracts altogether, thus describing no property, was defective.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 801, 802; Dec. Dig. \S 285(2).]

8. JUDGMENT \S 17(8) — DEFAULT — AMENDMENT OF PETITION—NOTICE.

In a suit to foreclose a vendor's lien on several tracts of land, the amended petition, which, in its description of a tract, varied to such an extent from the description set out in the original petition that it described different land, set up a new cause of action, of which defendant should have had notice to make judgment by default valid and binding.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. \S 17(8).]

Error from District Court, Deaf Smith County; D. B. Hill, Judge.

Suit by the Miners' Bank of Carterville, Mo., against Albert O. Gilles and others. To review a judgment for plaintiff, the named defendant brings error. Judgment reversed, and cause remanded.

Russell & Dameron, of Hereford, for plaintiff in error. Gilliland & Estes, of Hereford, for defendant in error.

HALL, J. Defendant in error bank filed this suit in the district court of Deaf Smith county, April 10, 1914, against P. L. Vasse, W. G. Bryant, and Albert O. Gilles, alleging that defendant Bryant sold to defendant Vasse certain lands in Deaf Smith county; that Vasse executed as part payment therefor a certain promissory note in the sum of \$4,500; that thereafter Vasse conveyed by deed said lands to defendant Gilles, the latter assuming payment of said note; that Gilles was still the owner of the land; that Bryant assigned and transferred said note to plaintiff bank. The prayer was for citation, for judgment against each of the defendants, and foreclosure of the vendor's lien on the several tracts of land. The petition discloses the fact that plaintiff and all of the defendants are nonresidents of this state. Notices to serve nonresident defendants were issued and served upon the defendants P. L. Vasse and W. G. Bryant, October 27, 1914, defendant in error bank filed its first amended original petition, and no process was ever issued or served after the filing of said amendment. Appellant insists that the amendment describes altogether different land from that described in the original petition. Seven days after filing the amended petition, judgment by default was taken against all of the defendants, according to the prayer in the pleading. The judgment recites that "the defendants and each of them, though duly cited, having failed to appear and answer in this behalf," etc. The record contains no notice to serve nonresident defendant, nor shows

that any other process was served upon plaintiff in error Gilles.

[1] As said by Dunklin, Justice, in Bomar et al. v. Morris et al., 128 S. W. 663:

" * * * On appeal from a judgment by default prosecuted in the suit in which the same was rendered, the judgment will be reversed unless the record contains a citation showing due service thereof or an appearance by defendant, even though the judgment contains a recital that defendant was duly served with citation. Mayhew & Co. v. Harrell, 57 Tex. Civ. App. 506, 122 S. W. 967, and authorities there cited; Glasscock v. Barnard [58 Tex. Civ. App. 369], 125 S. W. 615."

See, also, Bonner Oil Co. v. Gaines, 179 S. W. 686, and authorities there cited.

This will require a reversal of the judgment.

[2, 3] Complaint is further made that the judgment is defective, in that the calls in the description of one of the tracts of land runs north from the beginning corner 1,161 varas, the next call being south 1,611 varas, and omits a call for the west altogether, thus describing no property. This contention must also be sustained. One of the tracts generally described as survey No. 2, without giving the number of the block, is described in the original petition as beginning at a mound and semicircular trench the northwest corner of J. H. Willis' pre-emption survey. It is described in the amended petition as beginning at the northwest corner of the Mathew Wilson pre-emption survey, and varies to such an extent, in the particular description as set out in the original petition, that in our opinion it describes different land—thus constituting a new and different cause of action. Defendants therefore should have had notice of the filing of the amendment, in order to make the judgment by default valid and binding.

For the reasons stated, the judgment is reversed, and the cause remanded.

MARSHALL et al. v. SPILLER. (No. 5641.)
(Court of Civil Appeals of Texas. San Antonio.
March 8, 1916.)

1. INJUNCTION ⇐148(1)—BONDS.

The issuance of a temporary injunction in a suit to restrain the sale of horses and cattle levied on under an execution, without requiring a bond, was null and void.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 329-330, 333; Dec. Dig. ⇐148(1).]

2. COURTS ⇐480(3)—JURISDICTION—INJUNCTION—RETURN.

In such suit, where it appeared that the judgment on which execution was levied was obtained in another county, the temporary writ of injunction, if legally granted, should, under Rev. St. art. 4653, have been returnable to the county court of such other county.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1273; Dec. Dig. ⇐480(3).]

Appeal from Menard County Court; J. D. Scruggs, Judge.

Suit by Ida S. Marshall and others against

R. H. Spiller. Suit dismissed, and plaintiffs appeal. Proceedings annulled and set aside, and cause dismissed.

M. W. Shelley, of Menard, and W. E. Taylor, of San Angelo, for appellants. Wright & Harris, of San Angelo, for appellee.

FLY, C. J. Appellants brought this suit, alleging that appellee as sheriff of Menard county had levied on certain horses and cattle under an execution issued under a judgment against G. W. Marshall, husband of Ida S. Marshall; that the live stock was the separate property of said Ida S. Marshall, and an injunction was prayed for to restrain the sale of the horses and cattle. A temporary injunction was issued, no bond being required of appellants.

Appellee excepted to the petition on the ground that the cattle had been seized by virtue of an order of sale issued out of another county, and the court had no authority to enjoin the order of sale, and it was answered that a judgment was obtained in Tom Green county against G. W. Marshall foreclosing a mortgage on the stock of horses and cattle. The writ of injunction was issued by the county judge of Menard county, the same being made returnable to the county court of that county. He afterwards heard the case and dismissed it because no bond had been filed.

[1] The whole proceeding was null and void. The temporary writ of injunction should not have been granted without a bond being required. Downes v. Monroe, 42 Tex. 807; Nicholson v. Campbell, 15 Tex. Civ. App. 317, 40 S. W. 167; Pierson v. Connelley, 145 S. W. 1069.

[2] If the temporary writ had been legally granted, it should have been made returnable to the county court of Tom Green county. Rev. Stats. art. 4653; Seligson v. Collins, 64 Tex. 315; Smith v. Morgan, 28 Tex. Civ. App. 245, 67 S. W. 919; Broocks v. Lee, 50 Tex. Civ. App. 604, 110 S. W. 756; Godfrey v. Lackey, 129 S. W. 1145; Brown v. Fleming, 178 S. W. 964; Thallman v. Buckholts State Bank, 181 S. W. 791, decided recently by this court, and not yet officially published.

All the proceedings are hereby annulled and set aside, and the cause is dismissed.

HARRELL et al. v. HOLMES. (No. 538.)
(Court of Civil Appeals of Texas. El Paso.
Feb. 24, 1916. On Rehearing, March 23,
1916.)

INJUNCTION ⇐146—ISSUANCE—TEMPORARY INJUNCTION—ANSWER.

Rev. Civ. St. art. 7271, declares that every inspector shall have power to and may seize and sequester all unmarked or unbranded calves or yearlings freshly marked and branded which are about to be driven or shipped out of the county unless such animals are accompanied by the mother or are identified by the presentation of a bill of sale from a person proven to be

the owner, while article 7272 declares that every inspector shall have power to and may seize and sequester all unbranded animals or hides and animals and hides upon which the brand cannot be ascertained which are about to be taken or shipped out of the county. Plaintiff's petition averred that he was the owner of cattle which were being shipped from Mexico through Texas to another state; that the animals had been temporarily stopped to comply with the laws of the United States governing their transportation; that defendants, as inspectors of hides and animals for the county, were threatening to cause such animals to be seized by writ of sequestration; and that they intended to make a false report to the district judge of some violation of the stock laws of Texas. The petition further averred that the cattle were duly branded. *Held*, that defendants having admitted they intended to seize the cattle, but having denied that they intended to proceed against them in any other manner than as provided by law, does not preclude issuance of an injunction; it appearing from the petition, which was not denied, that the animals were not subject to the stock law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 319; Dec. Dig. ¶ 146.]

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by George M. Holmes against William Harrell and others. From an order granting a temporary injunction, defendants appeal. Affirmed.

Del W. Harrington and Mulcahy & Loftus, all of El Paso, for appellants. F. G. Morris and T. A. Falvey, both of El Paso, for appellee.

HARPER, C. J. This is an appeal from an order granting a temporary injunction, upon substantially the following allegations of fact: Plaintiff, a resident of Arizona, complaining of William Harrell, as inspector of hides and animals for the county of El Paso, Tex., and his deputy, as defendants; that he is the owner of a certain 2,000 head of cattle now in said county and branded by brands described, and which he had theretofore imported from the republic of Mexico; that defendants, as inspectors of hides and animals, are threatening to cause them to be seized by the sheriff of El Paso county by writ of sequestration under articles 7271 to 7273 and 7297 to 7302 of the Revised Civil Statutes of Texas 1911; that such seizure will probably be made unless injunction is granted as prayed for, to the injury of the cattle, etc. It was further alleged that the defendants intend to make a false report to a district judge in El Paso county of some violation of the stock laws of Texas, which report, if true, might induce said judge to order a sequestration of said cattle, if the said stock laws are valid and applicable to said shipment of cattle from Mexico; that such report, if made, would not be made in good faith in the belief by said defendant that the said report was true, but in bad faith, and for the purpose of serving the interests of said defendants and others; that said cattle are not passing through El Paso county otherwise than as a part of the transporta-

tion of an international shipment from Mexico across Texas to another state, they being only temporarily stopped in El Paso county in order to comply with the laws of the United States governing their importation, all of which defendants well knew; that defendants do not offer to inspect the cattle, but seek to seize the same without inspection or offer of inspection.

This petition was submitted to the judge November 11, 1915, whereupon he granted a temporary restraining order, and set the hearing for temporary injunction for November 15, 1915.

Defendants answered by general and special exceptions, and, pleading specially to the merits, answer as follows: Admit that it was their intention to make application to the court for the writ of sequestration under which the greater part of the cattle held by plaintiff in his said herd, and possibly all of them, might be seized and handled as the law provides, to the end that the true and lawful owners of said cattle might have opportunity to recover them or the proceeds of the sale thereof from the plaintiff, who, as defendants believe, has unlawfully acquired said cattle; that they, as inspector and deputy of hides and animals, are bound under their respective oaths of office to perform the duties prescribed by the statute, are subject to penalties for not doing so, and will do so if not restrained by order of court, etc. Further deny that they now have or ever had any intention of making any false report to any justice or judge of El Paso county, or to in any manner proceed against said cattle in any other manner than as the law requires them to do.

Article 7271, Revised Civil Statutes 1911:

"Every inspector shall have power to and may seize and sequester all unmarked or unbranded calves or yearlings, * * * freshly marked or branded, and on which the fresh marks or brands are unhealed, which are about to be * * * driven or shipped out of the county, unless such animals are accompanied by the mothers thereof, or are identified by the presentation of a bill of sale from the person proved to be the owner thereof, signed by him or his legally authorized agent," etc.

Article 7272:

"Every inspector shall have power to and may seize and sequester all unbranded animals or hides, and animals and hides upon which the * * * brand cannot be ascertained, which are about to be taken or shipped out of the county, or which animals are to be slaughtered, unless such animals or hides are identified as provided in the preceding article."

The trial court granted the injunction upon the sworn pleadings, no evidence having been offered, which was clearly his duty to do.

These statutes provide for seizure only in case grown animals are unbranded, or if calves or yearlings unmarked or unbranded, etc. The allegations are that the cattle were branded with the brands described in the petition. The defendants do not deny that the cattle were branded as alleged by plaintiff, nor do they assert that the brands could not

be ascertained. Having admitted that they intended to seize the cattle as charged by plaintiff, it is not sufficient for them to say that they did not intend to "proceed against the cattle in any other manner than as provided by law" to relieve them from the injunctive relief prayed for; for the allegations in plaintiff's petition were sufficient to authorize the court to grant the writ prayed for unless the defendants deny the material allegations thereof and show by allegations of fact under oath that the cattle were subject to seizure under the statutes. This they have not done.

For this reason, the order granting the injunction must be affirmed.

On Rehearing.

Appellants urge the well-settled principle of law that a public officer will not be enjoined from performing the duties of his office under a valid law, and cites many authorities.

We are of opinion that the record presents no reason for us to pass upon the validity or constitutionality of the statutes involved, nor as to whether shipments of cattle from the republic of Mexico through Texas, if stopped in transit, are subject to inspection or seizure thereunder by the inspector, because, granting that the statutes are valid and applicable to such shipments in proper cases, the plaintiff, by sworn pleading, shows that the cattle in question were not subject to seizure under any of the provisions of the statutes, and the inspector having admitted that he intended to sequester the cattle, if not enjoined by a court of competent jurisdiction, and in his answer failed to allege any facts which would authorize the process, in view of the plaintiff's allegations that none existed. We simply hold that there is no authority for the writ, and therefore no duty to be performed by the hide and animal inspector, and his declaration that he intended to act without showing authority to act clearly means that he was to act outside of the statutory line of his duty, and upon the latter theory alone is the opinion of the court predicated.

The motion is therefore overruled.

NORTH AMERICAN DREDGING CO. et al.
v. JENNINGS et al. (No. 7099).*

(Court of Civil Appeals of Texas, Galveston.
Feb. 24, 1916. Rehearing Denied
March 16, 1916.)

FISH \hookrightarrow 7(2)—OYSTER BEDS—GRANT BY PUBLIC AUTHORITIES—VALIDITY.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3982, providing that, whenever any creek, bayou, lake, or cove is within the bounds of an original grant, the lawful occupant thereof shall have the exclusive right to use it for gathering, planting, or sowing oysters, although the original grant from the Republic of Texas, confirmed by the Legislature of the state of Texas, did not give such exclusive right, the grantee

of bayou land has the exclusive right to take oysters within the limits of his grant, the statute being a valid exercise of legislative power by the Legislature in encouraging production of oysters.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 10; Dec. Dig. \hookrightarrow 7(2).]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Suit for an injunction by Walter Jennings and others against the North American Dredging Company and others. Judgment for defendants, and plaintiffs appeal. Reversed and rendered.

Stewarts, of Galveston, for appellants. Frank S. Anderson, of Galveston, for appellees.

PLEASANTS, C. J. This suit was brought by appellants against appellees to enjoin them from taking oysters from that portion of Offatt's bayou, in Galveston county, which is embraced within the boundaries of a grant from the state, under which appellants hold title to land in said bayou. It is unnecessary, for the purpose of this opinion, to set out the pleadings of appellants. The defenses set up in the court below are thus summarized in appellees' brief:

"(a) That said Offatt's bayou is, and always has been, an inlet or small bay, forming a part of the tidewaters of Galveston Bay and the Gulf of Mexico, and through and into which the tide from said gulf and bay ebbs and flows.

"(b) That said bayou is navigable water, and that the same is navigated, and always has been, by small sailboats and other craft; egress and ingress being had thereto from the said Galveston Bay.

"(c) That said bayou is, and always has been, a natural oyster bed, and that as many as five barrels of oysters may be found within 2,500 square feet of any position of said bayou, and that the same has always been used by the public for the purpose of fishing and digging oysters therein and therefrom.

"(d) That the plaintiffs, nor either of them, have ever been granted exclusive right to fish and remove oysters therefrom."

The trial in the court below without a jury resulted in a judgment in favor of the defendants, denying the injunction asked by plaintiffs. The learned trial judge filed a written opinion, which contains the following fact findings that are sustained by the uncontroverted evidence, and which we adopt as our conclusions of fact:

"That Offatt's bayou is a navigable stream, where the tide ebbs and flows, and has always been such, and a part of the public waters of the state of Texas and the former Republic of Texas; that the oysters in said bayou are, and constitute, and have always been, natural oyster beds and reefs, and there have been no private oyster beds, or oysters planted by plaintiffs or those under whom they claim, in said bayou, or upon the lands thereunder involved in this suit.

"I further find that that from that part of said bayou, and the land thereunder involved in this suit, defendants and others have always openly and constantly, without interruption or interference on the part of any one claiming to own or occupy the lands under the waters thereof, or

otherwise, exercised the right of fishing and digging oysters.

"I find that the plaintiffs are the owners of the land under Offatt's bayou designated in their petition, both under patent from the Republic of Texas on November 28, 1840, to said Hall and Jones, and by special act of the Legislature of Texas, February 9, 1854, confirming said grant, decree of partition, and mesne conveyance thereunder."

In adopting these fact findings we understand the first finding to mean only that Offatt's bayou, being a navigable stream in which the tide ebbs and flows, is a public water of which the state has jurisdiction and control for any and all purposes except such as it may have relinquished to private individuals.

The third finding of fact by the trial court shows that the state has parted with its title to the land under said bayou involved in this suit.

It may be conceded that the trial court is correct in the legal conclusion that the grant by the sovereignty of the title to the land under navigable waters does not carry with it the grant to the exclusive right of fishing in the waters covering said grant, unless the grant expressly includes such right. The original grant under which appellants hold title does not give such right, but an act of the Legislature of this state passed in 1905 contains the following provisions:

"Whenever any creek, bayou, lake or cove shall be included within the metes and bounds of any original grant or location in this state, the lawful occupant of such grant or location shall have the exclusive right to use said creek, lake, bayou or cove for gathering, planting or sowing oysters, within the metes and bounds of the official grant or patent of said land. Provided, that the fish and oyster commissioner may require the owner of oysters produced on such land when offered for sale to make an affidavit that such oysters were produced on his land." Vernon's Statutes, art. 3982.

It seems to us that the language of this statute is so plain and definite that there is no room for construction. The authority of the Legislature to grant the exclusive right to the owners of the land covered by the public navigable waters of this state to take oysters therefrom or to plant oysters in said waters cannot be doubted. *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650. There is nothing in the act of which the article above quoted is a part, inconsistent with said article. On the contrary, it seems to us that granting to the owners of the land covered by navigable waters the exclusive right to gather and plant oysters in such waters subserves the manifest purpose of the act, which was to preserve and protect the natural oyster beds of this state, encourage the planting and growing, and thus increase the supply of oysters.

We think the trial court erred in denying the injunction prayed for by plaintiffs, and, the facts being undisputed, the judgment should be reversed, and judgment here ren-

dered, granting the injunction in accordance with the prayer of plaintiffs' petition, and it has been so ordered.

Reversed and rendered.

GAUSS-LANGENBERG HAT CO. v. ALLUMS et al. (No. 67.)

(Court of Civil Appeals of Texas. Beaumont. Jan. 28, 1916. On Motion for Rehearing, March 2, 1916.)

1. JUDGMENT \Leftrightarrow 787 — PRIORITY BETWEEN JUDGMENTS AND CONVEYANCES—ERRONEOUS DESCRIPTION IN CONVEYANCE.

Though a deed executed and delivered before the recovery of a judgment against the grantors described the property as lots 2 and 3 in block 2, instead of block 1, it conveyed the property and passed the title to the grantees; and the fact that a new deed was subsequently executed to correct the description did not change the legal status of the grantor and grantee, especially where the grantee took immediate possession of the land intended to be conveyed upon execution of the first deed, and hence the judgment lien did not attach to the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1361, 1363-1367; Dec. Dig. \Leftrightarrow 787.]

2. PARTNERSHIP \Leftrightarrow 68(1) — CONVEYANCE TO PARTNERSHIP—LEGAL TITLE IN PARTNER.

A deed to C. R. H. & Co., a firm incapable of holding title, and composed of C. R. H. and another, placed the title in C. R. H. in trust for the firm or partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-107, 109-111; Dec. Dig. \Leftrightarrow 68(1).]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by J. J. Allums and another against the Gauss-Langenberg Hat Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. L. Aycock, of Kountze, for appellant. Coe & Coe and Singleton & Nall, all of Kountze, for appellees.

MIDDLEBROOK, J. Briefly stated, this was an injunction suit brought by J. J. Allums and C. R. Hooks, composing the firm of C. R. Hooks & Co., to enjoin the sale of lots Nos. 2 and 3, in block No. 1, Williams' addition to the town of Kountze. A temporary injunction was granted, and upon final hearing the injunction was perpetuated. Hooks & Co. bought the property described on the 17th day of May, 1907, from L. G. Roberts and wife, Dora Roberts, and the deed was duly recorded. They paid \$1,500 for the lot and store building which stood upon it, and immediately went into possession of the property, having at the same time purchased the stock of goods then in the building, and Hooks & Co. proceeded with the business and was the occupant of said building and property at the time of the bringing of the suit, still doing business there. In December, 1908, appellant, Gauss-Langenberg Hat Company, secured a judg-

ment against L. G. Roberts & Son, a partnership composed of L. G. Roberts and Hooks Roberts. In January, 1900, this judgment was abstracted and recorded in Hardin county, Tex. About November 1, 1900, it was discovered that in the conveyance by Roberts and his wife to Hooks & Co., they had misdescribed the lots to be sold, in this: In that deed the lots were described as lots 2 and 3 in block 2, whereas the property should have been described as lots 2 and 3 in block No. 1. The second deed, which was executed on the 1st day of November, 1900, stipulates upon its face:

"This is intended as a correcting deed and to correct the description in a deed made by the same grantors to the same grantees on the 17th day of May, A. D. 1907, which said deed is recorded in volume 47, page 174 et seq., Deed Records of Hardin County, Texas; the property intended to be conveyed by said former deed was and is the same property described in this deed, but erroneously described in said former deed as being in block No. 2, instead of block No. 1, where the property is in fact situated."

There are several assignments presented in appellant's brief, but for a disposition of this case it is necessary only to pass upon one proposition presented to this court, which is presented by appellant under different assignments.

[1] The principal contention of appellant in the case is that its judgment lien attached to the property described in the correction deed, and that, that deed being executed after the abstract and record of its judgment in January before, the property was therefore subject to said lien. We do not understand such to be the law. Under the facts of this case, the property was conveyed and the title of L. G. Roberts therein passed to Hooks & Co. in May, 1907, before the judgment in behalf of appellant was obtained in December, 1908. The fact that it was afterwards found that the property described in the original deed was erroneously described, and a new deed executed, which stated that it was for the purpose of correcting the description, would in no wise change the legal status of the vendor and the vendee of the lots, and especially is this true since the grantee went into immediate possession of the very property he bought and the identical property described in the correction deed. Under such statement of facts, no one could be misled, lose any rights, or suffer any injury by reason of the existing judgment and abstract and the record of the same prior to the time of the execution of the correction deed.

[2] Appellant claims, also, that because the deed was made to C. R. Hooks & Co., no title passed out of Roberts to Hooks & Co., because Hooks & Co., being a firm, was incapable of holding title to the property. We think the proper construction to be placed upon this is that C. R. Hooks, one of the members of the partnership or firm, did hold

the title of the property in trust for the firm or partnership. Supporting both of these propositions, see *Lindsay v. Jaffray*, 55 Tex. 626. The undisputed evidence in this case showing that the title to the property sought to be levied upon by appellant, under its judgment lien, having, long before the securing of the judgment, passed out of Roberts into Hooks & Co., the lien did not and could not attach to said property. This being true, it is unnecessary to consider or pass upon any other assigned errors in this case.

The case is affirmed.

On Motion for Rehearing.

Appellant, in its motion for rehearing, insists that this court erred in not passing upon and rendering an opinion as to appellant, Larned-Carter & Co. Larned-Carter & Co.'s rights and benefits depended upon the same propositions of law as do the rights of the Gauss-Langenberg Hat Company. No separate briefs are filed, and our disposition of the case in the original opinion is a full disposition of it as to Larned-Carter & Co. The motion for rehearing is overruled.

BALLARD v. FOUNTAIN BROS.* (No. 7131.)

(Court of Civil Appeals of Texas. Galveston.
Feb. 28, 1918. Rehearing Denied
March 23, 1918.)

1. EVIDENCE \S 419(2)—DEEDS—VARYING BY PAROL.

Where a deed recited that the grantee bought "subject" to the grantor's indebtedness to the original vendor of the land, evidenced by six notes, the grantor's parol evidence, in the original vendor's suit against both parties, that the grantee agreed to pay the indebtedness when buying the land, was not inadmissible as tending to vary the terms of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1912; Dec. Dig. \S 419(2).]

2. EVIDENCE \S 419(2)—DEEDS—CONSIDERATION—SHOWING BY PAROL EVIDENCE.

Oral testimony is admissible to explain or add to the consideration recited in a deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1912; Dec. Dig. \S 419(2).]

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Suit by Fountain Brothers against G. S. Ballard and others. From a judgment for plaintiffs, the named defendant appeals. Affirmed.

Bebout & Penland and R. O. Stotter, all of Waco, for appellant. J. G. Minkert, of Bryan, for appellees.

LANE, J. On the 27th day of March, 1914, Fountain Bros. conveyed to J. W. Wiley certain city lots in Bryan, Tex., and in part payment therefor Wiley executed his six promissory notes, the first for \$250 and the other five for \$500 each. All of said notes were secured by retention of the vendor's lien on

said lots. Thereafter J. W. Wiley and wife by deed conveyed said lots to appellant G. S. Ballard. Said deed contains the following:

"For and in consideration of the sum of six thousand dollars, to us paid, and secured to be paid by G. S. Ballard, as follows: \$3,250.00 cash in hand paid, the receipt of which is hereby acknowledged, in exchange of property, said Ballard buying subject to an indebtedness of \$2,750.00 evidenced by six notes made by said Wiley, payable to Fountain Bros., at Bryan, Texas, the first for \$250.00, and the other five for \$500.00 each, * * * bearing 8 per cent. per annum interest, and providing for 10 per cent. attorney's fees, etc."

Fountain Bros. brought this suit in the district court of Brazos county against J. W. Wiley and G. S. Ballard to recover on said notes; against Wiley as maker, and against Ballard on an alleged promise to pay said notes as part consideration for said lots, and for a foreclosure of their vendor's lien. Other parties were made defendants who need not be mentioned for the purpose of this opinion. Plaintiff alleges that as part of the consideration of said lots G. S. Ballard undertook and agreed to pay off said notes. Defendant answered admitting that he purchased said lots from J. W. Wiley, and says that he bought same subject to said notes and lien of Fountain Bros., but specially denies that he agreed to pay off said notes as alleged by plaintiff, or otherwise assumed their payment. J. W. Wiley was the only witness who testified as to the consideration set out in the deed he gave Ballard. He testified that at the time the deed was executed and delivered it was the understanding between himself and Ballard that Ballard would pay off the six notes mentioned in said deed; that these notes, together with the \$3,250, estimated value of the property of Ballard's taken in exchange, made the \$6,000 expressed in the deed as the total consideration for the lots sold by Wiley to Ballard; that it was agreed that Ballard was to convey to him (Wiley) the land of Ballard valued at \$3,250 and to take the indebtedness of \$2,750 due Fountain Bros., making \$6,000; that the lots were bought by Ballard with the understanding that he was to take care of the \$2,750 evidenced by said notes. He further testified that at the time he made the deed to Ballard there was no discussion between him and Ballard about the recital in the deed that Ballard was to buy subject to the said \$2,750, except that Ballard was to take care of such indebtedness. The case was tried before the court without a jury, and upon the pleadings and evidence the trial court rendered judgment for Fountain Bros. against J. W. Wiley and G. S. Ballard, appellant, for the \$3,290.40, principal, interest, and attorney's fees, and for a foreclosure of their vendor's lien on the lots sold by them to Wiley. The

judgment directed that said lots be sold and the proceeds be applied to the payment of said judgment, and that if said proceeds were insufficient to pay said judgment, and J. W. Wiley paid any balance due thereon, then and in that event he (Wiley) should have execution against Ballard for the collection of such amount as may be paid by him. From this judgment, G. S. Ballard has appealed.

[1, 2] The contention of appellant is that the deed, by which J. W. Wiley conveyed to him the lots in question, recites that he bought "subject" to the indebtedness evidenced by the six notes of Fountain Bros., and not that he assumed to pay said indebtedness, and that the court erred in permitting J. W. Wiley, his vendor, to testify to alleged verbal agreements between him and Wiley at the time of the execution of said deed, which in effect varies the terms of the written deed and which constitutes the entire and complete agreement between the parties relative to the consideration to be paid by Ballard for the lots.

We cannot agree with appellant in such contention. The clause of the deed relative to the consideration to be paid by Ballard recites that such consideration is the sum of \$6,000, \$3,250 of which was to be and in fact was paid by a conveyance by Ballard of certain property to Wiley, and \$2,750 was to be paid by Ballard to Fountain Bros. in discharge of six notes executed and delivered by Wiley to Fountain Bros. in part payment for the lots in question. The expression, "buys subject to said six notes," in the latter part of the clause reciting the consideration, does not have the legal effect sought to be given it by appellant, Ballard. We do not think the testimony of the witness Wiley, complained of, tends to vary the terms of the deed, but it is consistent therewith. But if we were to give the clause of the deed mentioned the meaning contended for by appellant, still we could not give it the legal effect contended for by him. It has been uniformly held by the courts of this state that the recited consideration in a deed may be explained or even added to by oral testimony, so as to show the true consideration. *Bristol Bank v. Stiger*, 86 Iowa, 344, 53 N. W. 285; *Jones on Mort.* § 740; *Taylor v. Merrill*, 64 Tex. 494; *Hill v. Hoeldtke*, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672.

We conclude that the court did not err in admitting the testimony of the witness Wiley, and hence overrule appellant's contention.

The evidence was amply sufficient to support the judgment, and, finding no error in the trial of the cause, the judgment of the trial court is in all things affirmed.

Affirmed.

INVESTORS' MORTGAGE SECURITY CO.,
Limited, v. NEWTON et al. (No. 7412).^{*}
(Court of Civil Appeals of Texas. Dallas. Feb.
19, 1916. Rehearing Denied
March 25, 1916.)

1. HOMESTEAD ⇐141(1), 142(1)—LIABILITIES
ENFORCEABLE—EXPRESS LIENS.

Under Rev. St. 1911, § 3422, providing for exempt property of an insolvent decedent's estate to pass absolutely to the widow and children free from debts of the estate, express liens on a homestead give way to the rights of the widow and children, unless within exceptions named in the section.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-268, 269-273, 277-280; Dec. Dig. ⇐141(1), 142(1).]

2. HOMESTEAD ⇐141(1), 142(1)—LIABILITIES
ENFORCEABLE—EXPRESS LIENS.

That an express lien was created on land before marriage of the owner does not affect the rule that express liens on the homestead of an insolvent are subject to the rights of the widow and children of the owner.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-268, 269-273, 277-280; Dec. Dig. ⇐141(1), 142(1).]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Suit by the Investors' Mortgage Security Company, Limited, against Mrs. L. L. Newton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

M. D. Gano and W. N. Coombes, both of Dallas, for plaintiff in error. N. G. Turney, M. G. Owen, E. E. Hurt, and R. L. Hurt, all of Dallas, for defendants in error.

RAINEY, C. J. This suit was brought by plaintiff in error against defendants in error, who are the surviving widow and children, respectively, of E. E. Newton, deceased, to establish an indebtedness and lien on a tract of land owned by said E. E. Newton at his death, and which was at the time of his death the homestead of said Newton and family, consisting of the said widow and children. The answer, in effect, was that said land was the homestead, that the estate of said Newton was insolvent, that said homestead had been set apart to defendants in error as such, and that said lien was thereby discharged as to said land. The case was tried by the court without a jury, and judgment rendered in favor of plaintiff in error establishing said claim against the estate, but denied the lien on said land. From the judgment denying said land subject to said lien, this appeal was taken.

The facts are that plaintiff in error is a corporation by virtue of the laws of Great Britain, doing business in Texas by its permission. The defendants in error are the widow and children of E. E. Newton, deceased, and Mrs. Newton is the administratrix of his estate, which was insolvent at his death. On March 7, 1898, E. E. Newton, then unmarried, executed his note for \$600, payable to himself, and to secure the pay-

ment of same executed a deed of trust to the land in controversy, being 92 acres, with Philip Lindsley as trustee. Said note was duly transferred to James R. Mitchell. Newton remained single until November 17, 1899, when he married defendant in error Lula L. Newton. In June, 1900, E. E. Newton, with his family, moved upon said land and lived thereon as his home until October, 1901, when said Newton and his wife moved to the Territory of Oklahoma, where they acquired a homestead. While living there, in April, 1902, said E. E. Newton made application to plaintiff in error for a loan of \$700 to take up said \$600 note which was held by plaintiff in error, it having been duly transferred by said Mitchell. Said loan was made, a note for \$700 executed by said Newton in renewal and extension of said \$600 note, interest and expenses, and for this purpose a new trust deed to said land was executed, with Robert Ralston named as trustee. Said Newton, without being joined by his wife, made the last transaction. Some time after the last transaction E. E. Newton and family, having sold the home in Oklahoma, moved back to Texas and reoccupied and lived on said land as their home until he died in February, 1910, leaving surviving him the defendants in error herein. Mrs. Newton was duly appointed administratrix of his estate, which was insolvent. By order of the probate court said land was duly set apart as the homestead of defendants in error. Said order of the probate court has never been set aside or appealed from. The claim of plaintiff in error was presented to the administratrix for allowance, but same was refused—hence this suit. The land was the separate property of E. E. Newton, it having been acquired by him before marriage, and the indebtedness was for borrowed money, none of which was expended for the purchase price of said land.

[1] There is no controversy about the facts, upon which but one question of law arises for determination, and that is: Did the said land as a homestead descend and vest in defendants in error freed from the lien given by E. E. Newton, while single, the estate of said Newton being insolvent at his death? We are of the opinion that this should be answered in the affirmative. The lien on the land was executed by Newton, it being his separate property, he being at that time a single man. He subsequently extended and renewed the lien after he had married, and it was a valid and subsisting lien at the time of his death, but his estate was insolvent, which subordinated the lien on the land subjected to the widow's and children's claim to homestead exemption.

Our state under its Constitution and laws has made wise provision for the exemption of the homestead for the protection of the head of a family, his wife and children, and especially so for the wife and children

when the husband dies and leaves an insolvent estate. R. S. 1911, art. 3422. This article provides for all exempt property to pass absolutely to the widow and children free from debts of the estate, except in certain cases, this not being within the exception. Therefore express liens on exempt property have to give way to the widow's and children's right to such property, unless the debt comes within the exception. This rule was first announced in *Robertson v. Paul*, 16 Tex. 472, which has been adhered to ever since. This case has been criticized by other jurisdictions, but our Supreme Court has not thought proper to overturn it, and it remains the law to-day. In support of this rule we cite *Hoefling v. Hoefling*, 167 S. W. 210; *Griffie v. Maxey*, 58 Tex. 214; *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 49 S. W. 571, 50 S. W. 931; *Krueger v. Wolf*, 12 Tex. Civ. App. 167, 33 S. W. 663; *Reeves v. Petty*, 44 Tex. 249; *Bonding Co. v. Logan*, 166 S. W. 1132, and numerous others.

[2] While plaintiff in error virtually admits that the foregoing is the rule in this state, yet it contends that this case is different and is not governed by the ruling announced, because Newton was a single man when he created the lien on the land, and it could not be anticipated that he would marry and the widow's right would intervene to defeat the valid lien. We see no material difference in principle whether a man is single or married when a valid lien is fixed, if in the case of the married man the wife does not join in the lien. In the latter case the lienholder knows of the marriage, and takes cognizance of the then existing law; and in the former his marriage should be anticipated, and the same rule of law obtains. The law fixes the status of the property at the time of the death of the parties, and if the estate is insolvent, the lien on exempt property is subordinated to the rights of the widow and children.

In *Krueger v. Wolf*, supra, the facts are that Mrs. Stuessey, a widow, and her widowed daughter, Mrs. Krueger, were living together as one family upon lots 3 and 4, block 30, in the city of Austin, which was Mrs. Stuessey's separate property to the extent of a life estate, and her homestead. Mrs. Stuessey owned two other lots, Nos. 11 and 12, block 29, in said city, but no part of the homestead. She incumbered these two lots with a valid lien. Subsequently she died insolvent, leaving Mrs. Krueger as her only heir and only constituent of the family. Mrs. Krueger sought through the probate court an allowance in lieu of a homestead. Lots 11 and 12, block 29, were set apart to her as a homestead, subject to the payment of the lien. On appeal the court reversed the judgment and rendered it in favor of Mrs. Krueger, holding that she was entitled to said lots as a homestead freed from the lien, thereby vesting absolute title in her.

This case illustrates the principle that should be applied to the facts of this case. Mrs. Stuessey, at the time she created the lien on the two lots, was authorized to do so, and the said lien was valid. But she died insolvent, and the lien she had theretofore fixed became subordinate to the homestead exemption. So in the instant case Newton had the right to establish a lien on the land, and, subsequently dying insolvent, the lien was subordinated to the homestead rights of his widow and children. Being a rural homestead, it is not subjected to valuation, for the law does not fix any valuation, but only requires that it shall not exceed 200 acres of land.

It did not require any action of the probate court to fix an allowance in lieu of the homestead in this instance, as it became established by reason of the estate being insolvent. *Hoefling v. Hoefling*, supra; *Bonding Co. v. Logan*, supra.

The principle herein seems a little hard on creditors who have trusted on the faith of creating liens to secure the payment of their debts, but believing such to be the law, as decided by the decisions, the judgment is affirmed.

Affirmed.

STEGER LUMBER CO. v. McSWAIN et al
(No. 1573.)

(Court of Civil Appeals of Texas, Texarkana.
March 3, 1916. Rehearing Denied
March 9, 1916.)

JUDGMENT — 403 — SATISFACTION — EFFECT.

Equity will not interfere to set aside a judgment where, after its rendition, there was a compromise and settlement, and, in violation of the compromise, execution issued and a judgment was satisfied by sale of the property to a third person; the remedy then being by an action at law for damages for the wrongful taking, and not to set aside the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 764; Dec. Dig. 403.]

Appeal from Fannin County Court; S. F. Leslie, Judge.

Action by Mrs. E. G. McSwain and others against the Steger Lumber Company, a corporation. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

The Steger Lumber Company, a corporation, filed suit on June 17, 1914, against H. M. Curtis, Shelby Hudson, and Mrs. E. G. McSwain, doing business as partners, for a balance of \$216.77 due on account. After the regular service of citation on the defendants, and at the regular term of court on July 7, 1914, plaintiff took a judgment by default against the defendants for \$91.70, with interest from date and costs of suit. On December 2, 1914, the plaintiff in the suit caused to be issued a writ of execution to enforce the judgment; and the sheriff levied the writ on personal property of the defendant Mrs. E. G. McSwain, and, after selling such per-

sonal property, applied the proceeds of sale to the full satisfaction of the judgment and costs. The plaintiff by attorney on February 20, 1915, entered on the margin of the judgment entry in the minutes of the court that the judgment was satisfied with the proceeds of sale under execution. On June 17, 1915, the defendants filed the instant suit to set aside and cancel the judgment and any execution thereunder, alleging as grounds therefor that after the institution of said suit the defendants and the plaintiff agreed upon a settlement and compromise of the suit, and that thereafter defendants paid to said plaintiff, and plaintiff accepted, the sum of \$207.30 in full settlement of the indebtedness sued on; and that it was further agreed and understood by and between the parties to said settlement that the said suit would be dismissed at the costs of the plaintiff therein, and that defendants therein would not be required to make any defense in the suit nor to pay any other sum or sums of money on account thereof. That, relying upon said agreement and settlement, the defendants therein made no appearance in the suit, and paid no further attention to the suit, and did not know until about January 8, 1915, that the plaintiff therein had taken judgment against them in said suit, in violation of said compromise agreement and settlement; that the plaintiff in the judgment had caused an execution to be levied on the property of the defendants therein, and had caused the property to be sold under the execution. The prayer was:

"Wherefore plaintiffs pray that said defendant be cited to answer this petition, and on hearing hereof the judgment heretofore rendered in said cause of Steger Lumber Company v. H. M. Curtis et al., No. 2882 on the docket of this court, be reopened, vacated, set aside, and annulled, and the execution and sale so had under said fraudulent judgment be declared null and void, for cost of suit, and relief, general and special, to which they may be entitled in law or equity."

The jury made the finding, on special issues, that there had been a compromise agreement and settlement before the taking of the judgment. The court entered, in accordance with the prayer of the petition, a decree setting aside and declaring null and void the judgment execution and the levy and sale made thereunder. Appellant appeals, seeking revision of that decree.

Thos. P. Steger, of Bonham, for appellant. A. P. Bolding and J. W. Gross, both of Bonham, for appellees.

LEVY, J. (after stating the facts as above). The proceeding in the instant case is by interment in the nature of a bill in equity, wherein appellees are, according to the averments, merely seeking to be relieved against a judgment taken at a former term of court, in violation of a previous compromise agreement and settlement by payment, after suit and before judgment, of the debt sued on in such suit. And the evidence conclusively

shows that subsequent to the rendition of the judgment complained of, and nearly four months before the institution of the present proceedings, the judgment had been fully enforced and paid by proceeds of execution sale, and formal entry of satisfaction of the judgment had been duly registered. And there does not appear any evidence that the plaintiff in the judgment was endeavoring or threatening to make further attempt at enforcing such satisfied judgment. And it appears that the plaintiff in execution was neither the purchaser of the property sold under execution, nor in possession of or claiming the same. Since satisfaction under execution, and formal entry thereof, of the judgment had the legal effect to extinguish and wipe out the judgment debt and cancel the judgment, it could not be legally further executed or enforced. As remarked in the similar case of *Fluegelman v. Armstrong*, 59 Misc. Rep. at page 508, 110 N. Y. Supp. at page 969:

"It is perfectly clear that at the time the motion was made to open the defendant's default and to vacate and set aside the judgment there was no judgment in existence, and therefore nothing for the court to exercise its power upon. The judgment had been extinguished."

Consequently there manifestly appears adequate relief against injury by reason of the judgment, which was legally vacated and extinguished by full satisfaction, and a want of any need or ground for equitable assistance. Equity could give no further assistance and grant no more relief against further injury from the judgment than already adequately existed to appellees. Equity action, under common principle, is not granted where there is no real injury to be apprehended. *Watrous v. Rodgers*, 18 Tex. 411; *Whitman v. Willis*, 51 Tex. 421. And equity action is given, in the character of cases such as pleaded, to afford relief either by preventing the deprivation of property or by restoration of the property so wrongfully and unjustly taken. For instance, as a ground of relief courts of equity interpose and prevent the enforcement or further collection of a judgment where the demand upon which it is based has been fully satisfied prior to its entry (*Gates v. Steele*, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; *Greenwaldt v. May*, 127 Ind. 511, 27 N. E. 158, 22 Am. St. Rep. 660; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467), and make restoration of the property wrongfully taken, where circumstances permit (*Cook v. Sparks*, 47 Tex. 28), and interpose, in circumstances where the judgment is not in fact satisfied and should be vacated, to prevent its being further enforced (*Heath v. Garrett*, 50 Tex. 264; *Hirshfeld v. Brown*, 30 S. W. 962; *American Surety Co. v. Bernstein*, 101 Tex. 189, 105 S. W. 990). But where, as here alleged and proven, the judgment has since rendition been satisfied by process of execution, the remedy for such wrongful taking of the property is an action for damages. *Cleveland v. Tufts*, 69 Tex.

580, 7 S. W. 72; *Bank of Mertens v. Steffens*, 51 Tex. Civ. App. 211, 111 S. W. 782. See, also, *Chambliss v. Hass*, 125 Iowa, 484, 101 N. W. 153, 68 L. R. A. 126, 3 Ann. Cas. p. 16, showing that involuntary payment of the wrongful judgment does not operate as a waiver of right to restitution or redress by proper action therefor. Therefore, in view of the facts stated, it is believed that it should be held, as insisted by appellant under proper assignment of error, that there is failure to prove any need or ground for equitable relief against injury by reason of the judgment.

The case of *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232, relied on by appellees, is purely a statutory proceeding to set aside a default judgment, which does not obtain so extendedly in this state. It may be remarked, though, that quite a different case would have been presented here if the petition had, besides attacking the judgment as it did, gone further and sought damages as for conversion or wrongful taking of property under execution. And we do not by the remark intend to agree, as urged by appellees, that such character of suit must necessarily be brought in the court where the judgment was originally rendered.

It is concluded that the court erred in not granting the motion for new trial, as complained of by appellant, and the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. et al. v. ATLANTIC FRUIT DISTRIBUTORS et al.

(Court of Civil Appeals of Texas. Texarkana. Feb. 28, 1916. On Motion to Correct Record and Set Aside Dismissal, March 9, 1916.)

1. APPEAL AND ERROR ⇨79(1) — "FINAL JUDGMENT"—SEVERAL DEFENDANTS.

Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1997, providing that only one final judgment shall be rendered in any cause, there is no "final judgment" from which an appeal may be taken in a cause against several defendants until it is finally disposed of as to all of them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 484, 486-493; Dec. Dig. ⇨79(1).

For other definitions, see *Words and Phrases*, First and Second Series, *Final Judgment*.]

2. APPEAL AND ERROR ⇨79(1)—FINAL JUDGMENT—CROSS-ACTIONS.

Where two defendants in an original action on contract for the purchase of fruit brought a cross-action against a railway company for damages to the fruit during shipment and the action and cross-action were tried together and judgment was rendered only against one of the defendants and the railway company, the judgment in the cross-action could be treated only as part of the one judgment allowed in the cause, and, there having been no disposition of the case as to the other defendant, no appeal would lie from the judgment against the railway company.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 484, 486-493; Dec. Dig. ⇨79(1).]

Appeal from Lamar County Court; S. B. M. Long, Judge.

Action by the Atlantic Fruit Distributors against J. D. Payne and another, in which the defendants filed a cross-bill against the Gulf, Colorado & Santa Fé Railway Company. Judgment for the plaintiff against the named defendant only and for that defendant against the cross-defendant, and defendant and cross-defendant appeal. Appeal dismissed.

Terry, Cavin & Mills and Jno. G. Gregg, all of Galveston, and Wright & Patrick, B. B. Sturgeon, and M. H. Baughn, all of Paris, for appellants. A. P. Park, of Paris, for appellees.

LEVY, J. The Atlantic Fruit Distributors sued J. D. Payne on contract, to recover the purchase price of a car of bananas, and the First State Bank of Paris as guarantor of the payment of the price. J. D. Payne answered the suit and filed a cross-bill against the Gulf, Colorado & Santa Fé Railway Company, seeking to recover of it damages for alleged negligence respecting transportation of the car of bananas. The charge of the court authorized a verdict in favor of the plaintiff against Mr. Payne and the bank, and the jury so found. And the charge of the court authorized a verdict in favor of Mr. Payne against the railway company, and the jury so found. The judgment of the court, though, as it appears in this transcript, does not dispose of the First State Bank of Paris, and the judgment is not in that respect in conformity with the pleadings, charge of the court, and verdict. J. D. Payne and the railway company each appeal.

[1, 2] The question of jurisdiction of this court is directly presented, upon the ground that there is not a sufficient final judgment under the statute to base an appeal upon. The judgment did not dispose of the litigation as to all parties in the suit. And it is thought that this should have been done in order to have a final judgment under the statute. The statute permits only one final judgment to be rendered in any cause. Article 1997, *Vernon's Sayles' Statutes*. And there is no final judgment in a case against several defendants until the case is finally disposed of as to all. The plaintiff's suit here was, it is quite certain, upon a contract, and Payne's cross-action was against the railway company on a tort. It is not open to question that the controversies were quite distinct and severable; yet the causes of action were in fact joined in and tried as one cause. It is analogous to several suits consolidated. *Mills v. Paul*, 1 Tex. Civ. App. 419, 23 S. W. 189. The judgment on the cross-action therefore could be treated only as a part of the one judgment allowed in a cause, and not as a separate and distinct judgment as such.

The appeal of each appellant must be dismissed for want of jurisdiction to entertain it.

On Motion to Correct Record and Set Aside Dismissal.

At a former day of this court the appeal was dismissed for want of jurisdiction, upon the ground that a final judgment in the cause had not been entered. The parties then by proceedings in the trial court caused to have entered a final judgment, by nunc pro tunc order, and now present a certified copy of the judgment so entered and ask that it shall be taken as an amendment of the judgment appearing in the record of the appeal and that we set aside the former order of dismissal. It is believed that the motion must be overruled. In order to confer the right of appeal in the first instance, "notice of appeal" and "the filing with the clerk an appeal bond," as well as computing the time, must be, by terms of the statute, from the term of court "at which the final judgment in the cause is rendered." Article 2064, R. S. And until the judgment in the cause is actually entered in that final form it is not in full life and legally effective for review by appeal. *Trotti v. Kinnear*, 144 S. W. 326. The actual entry of a judgment final in form, though, may under proper proceedings be by a nunc pro tunc order, which renders the judgment legally effective. But in such instance the right of appeal begins then from the date of the entry of the nunc pro tunc order. *Partridge v. Wooten*, 137 S. W. 412; *Slayden v. Palmo*, 90 S. W. 908; *Rope Co. v. Brick Co.*, 150 S. W. 600. And appellants' right of review beginning, as it does, only at the date of the present judgment, as a final one in form, this court would lack authority to relate the amended judgment back and entertain jurisdiction to review it as a part of and from the date of the premature appeal from the former judgment, interlocutory and not final in form. The present judgment may be reviewed on appeal only when presented as a new and original proceeding of appeal in the manner and way prescribed by statute for appeals. The former appeal, not allowable and not conferring any jurisdiction upon this court to entertain it in the first instance, would be treated for all purposes of appeal as a nullity, and as not capable of being made valid. In case of dismissal of appeal, the transcript is not even regarded as a record of the court. See Rule 62 (142 S. W. xvi). Where the judgment or decree in a cause is final in form and appealable in the first instance, an amendment thereof pending appeal is allowable and may be made of misrecitals or mistakes. *McNairy v. Castleberry*, 6 Tex. 286; *De Hymel v. Mortgage Co.*, 80 Tex. 493, 16 S. W. 311. The subsequent correction, though, of a mere misrecital or mistake in a judgment that is directly appealable in the first

instance, and over which this court would acquire jurisdiction by the appeal, presents quite a different question from the one now considered. In such case a jurisdictional question is not involved.

The motion is overruled.

WEBSTER v. INTERNATIONAL & G. N. RY. CO. (No. 7154.)

(Court of Civil Appeals of Texas. Galveston. March 10, 1916.)

1. APPEAL AND ERROR ⇐715(2)—COURT OF CIVIL APPEALS—POWER TO ASCERTAIN JURISDICTION—STATUTE.

By direct provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1593, the Court of Civil Appeals has power to ascertain by affidavit or otherwise such matters of fact as may be necessary to the proper exercise of its jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2965; Dec. Dig. ⇐715(2).]

2. APPEAL AND ERROR ⇐407(1)—APPEAL BY WRIT OF ERROR—CITATION.

A Court of Civil Appeals has no jurisdiction to entertain a writ of error, unless citation in error has been legally served on the defendant in error or service accepted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2120, 2128, 2129, 2131, 2132; Dec. Dig. ⇐407(1).]

3. RAILROADS ⇐24(2)—RECEIVERS—SERVICE OF PROCESS—AGENT.

The agent of the receivers of a railroad corporation under appointment of a court of competent jurisdiction is not the agent of the corporation for service of process, although before the appointment of the receivers he was the agent, and at the time of service of citation upon him he is serving the receivers as agent in the same capacity in which he served the corporation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 54; Dec. Dig. ⇐24(2).]

Error from District Court, Harris County; Chas. E. Ash, Judge.

Suit by Lizzie Webster against the International & Great Northern Railway Company. To review a judgment for defendant, plaintiff brings error. Writ ordered stricken from the docket.

James Slyfield, E. H. Vasmer, C. L. Michael, and Guynes & Colgin, all of Houston, for plaintiff in error. Geo. A. Hill, Jr., of Houston, amicus curiæ.

McMEANS, J. Daniel Webster and his wife, Lizzie Webster, brought this suit against the International & Great Northern Railway Company for the recovery of the title and possession of a tract of land in Harris county. Pending a trial Daniel Webster died, and Lizzie Webster was authorized by the court to prosecute the suit in her own name and right. A trial resulted in an instructed verdict for defendant, upon which a judgment in its favor was duly entered. Plaintiff did not perfect an appeal from the judgment, but seeks to have several alleged

errors of the trial court reviewed by writ of error to this court.

George A. Hill, Esq., a practicing attorney of the Harris county bar, as amicus curiæ, has, by an instrument filed in this court, suggested the want of jurisdiction of this court to determine the questions presented, for the reason that the citation in error has not been served upon the defendant.

It appears from the record that the plaintiff filed her petition for a writ of error in the district court on May 3, 1915, and that citation in error to defendant was issued on May 4, 1915, and that on May 7, 1915, the writ was served on S. B. Mobley by the sheriff of Harris county. The sheriff's return indorsed upon the writ is as follows:

"Came to hand on the 4th day of May, 1915, at 5 o'clock p. m., and executed on the 7th day of May, 1915, at 8:45 o'clock p. m., by summoning the International & Great Northern Railroad Company, a corporation, by delivering a true copy of this writ to S. B. Mobley in person, the local agent of the above named company."

The amicus curiæ suggests that on the 7th day of May, 1915, the day the citation in error was served, the said S. B. Mobley was neither the agent nor employé of the International & Great Northern Railway Company, nor in its service, nor had he been engaged in any capacity of the said railway company since the 10th day of August, 1914, on which date Jas. A. Baker and Cecil A. Lyon were appointed receivers of said railway company by the United States District Court for the Southern District of Texas, and that on the date the citation in error was served on said Mobley he was employed as agent of said Baker and Lyon as such receivers, and has been in their employment since said 10th day of August, 1914.

Attached to the written suggestion, as an exhibit, is the affidavit of said Mobley, which we here copy:

"The State of Texas, County of Harris.

"Before me, the undersigned authority, on this 12th day of February, A. D. 1916, personally appeared S. B. Mobley, known to me to be the person whose name is subscribed to the following affidavit, who being by me duly sworn on oath deposes and states as follows, to wit: On the 7th day of May, 1915, citation in error was served on me in cause No. 60379 on the docket of the Eleventh district court of Harris county, Texas, styled Daniel Webster et al. v. I. & G. N. Railway Company. On said date I was neither agent nor employé, nor in the service of the International & Great Northern Railway Company, nor am I now agent or employé or in the service of the International & Great Northern Railway Company, nor have I been engaged in any capacity in the service of the International & Great Northern Railway Company since the 10th day of August, A. D. 1914, on which date

Jas. A. Baker and Cecil A. Lyon were appointed receivers of the International & Great Northern Railway Company by the United States District Court for the Southern District of Texas. On the date said citation was served on me I was employed as agent of Jas. A. Baker and Cecil A. Lyon, receivers of the International & Great Northern Railway Company, and have been since the 10th day of August, 1914, in their employ.

S. B. Mobley.
"Subscribed and sworn to before me this 12th day of February, A. D. 1916.

"[Seal.]

L. Temme,
"Notary Public in and for
Harris County, Texas."

There was also attached a certified copy of the order of the United States District Court for the Southern District of Texas, showing the appointment of said Baker and Lyon receivers of said railway company on August 10, 1914.

[1] The power of this court to ascertain, by affidavit or otherwise, such matters of fact as may be necessary to the proper exercise of its jurisdiction is unquestioned. Article 1593, Vernon's Sayles' Civil Statutes; *Smith v. Buffalo Oil Co.*, 99 Tex. 77, 87 S. W. 659; *Dixon v. Lynn*, 154 S. W. 656; *Jones & Co. v. Gammell*, 156 S. W. 317.

[2] It is well settled that this court has no jurisdiction to entertain an appeal by writ of error, unless citation in error has been legally served on the defendant in error, or service accepted. *Pierce v. Cross*, 36 Tex. 187; *Thomas v. Childs*, Id. 148; *Garney v. Menefee*, 53 Tex. Civ. App. 490, 118 S. W. 1063; *McCloskey v. McCoy*, 89 S. W. 450; *National Cereal Co. v. Earnest*, 84 S. W. 1101.

[3] Whatever may be the ruling in other jurisdictions, it has been held in this state that the agent of the receivers of a railway corporation under appointment of a court of competent jurisdiction is not the agent of the corporation, although before the appointment of the receivers he had been the agent of the corporation and at the time of the service of citation upon him was serving the receivers as agent in the same capacity in which he had served the corporation. *Railway v. Moore*, 32 S. W. 379.

It affirmatively appearing from the affidavit of S. B. Mobley that at the time of the service of citation in error upon him he was not the agent of the railway company, and as it appears from the record that it was upon this service that the writ of error was attempted to be prosecuted, this court has not acquired jurisdiction. It is therefore ordered that the writ of error be stricken from the docket of this court (*Vineyard v. McCombs*, 100 Tex. 318, 99 S. W. 544), with permission to the plaintiff to withdraw the record in order to perfect service.

EARL v. BAKER et al. (No. 7079.)

(Court of Civil Appeals of Texas. Galveston.
March 2, 1916.)

1. COURTS \Leftrightarrow 30—TEXAS—DISTRICT COURT—JURISDICTION.

Under Const. art. 5, § 8, giving the district court original jurisdiction of all suits for trial of title to land and for enforcement of liens thereon, the district court does not, where suit is in good faith brought to enforce a lien on land, lose jurisdiction because it develops on trial that there is no lien and the amount involved is less than \$500, which is the jurisdictional limit of that court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 119-128; Dec. Dig. \Leftrightarrow 30.]

2. APPEAL AND ERROR \Leftrightarrow 1172(3)—REVERSAL—EFFECT.

In a materialman's suit to enforce his lien and recover for the materials, where the district court improperly dismissed the suit upon it appearing that the materialman was entitled to no lien, the amount involved being less than \$500, that portion of the judgment holding that there was no lien, not having been complained of on appeal, will not be disturbed, though the rest of the judgment will be reversed, rule 62a for Courts of Civil Appeals (149 S. W. x), declaring that if an error affects only a part of the matter in controversy and the issues are severable, the judgment shall be reversed only as to the part affected by the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4557, 4558; Dec. Dig. \Leftrightarrow 1172(3).]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by F. H. Earl against W. E. Baker and others. From a judgment for defendants, plaintiff appeals. Affirmed in part, and in part reversed and remanded.

P. Harvey, of Houston, for appellant.
Townes & Vinson, of Houston, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against appellees, W. E. Baker, J. B. Murdock, and S. T. Deason, to recover the sum of \$327.84, alleged to be due him by appellees, and to foreclose an alleged materialman's lien to secure said sum on lot 2 in block 4, Hyde Park addition to the city of Houston.

Plaintiff's petition alleges in substance that plaintiff at the special instance and request of defendants had furnished lumber and building material of the value of \$802.44, which was used by the defendants Deason and Murdock in the construction of a residence upon the lot before mentioned which was owned by the defendant Baker, and that there remained due and unpaid on the agreed purchase price of said lumber and material the sum of \$327.84.

Plaintiff also alleged that at the time the material was furnished by the plaintiff to Deason and Murdock—

"the said Baker agreed with and informed plaintiff that if he would furnish said lumber and material to said Deason and Murdock to be used in the construction of said house that he (the said Baker) would pay plaintiff therefor, and plaintiff alleges that he furnished said lumber

and material to said Deason and Murdock on the faith of the statement and promise of said Baker that he would pay for said lumber and material."

It is further alleged that plaintiff had, within the time prescribed by the statute, presented an itemized account of his claim and had filed a verified copy of said account prepared in accordance with the provisions of the statute providing for the fixing of materialmen's liens. The prayer of the petition was for the recovery of the amount sued for against all of the defendants and for the foreclosure of plaintiff's lien upon the property before described.

The defendant Baker, joined by his wife, filed an answer in which he alleged that he was a married man and the head of a family at the time the contract was made with Deason and Murdock for the construction of the house; that the property against which the foreclosure of a lien was sought was bought with the proceeds of the sale of his former homestead in the city of Houston; that the contract for the construction of the house was neither signed nor privily acknowledged by his wife; and that the plaintiff therefore had no lien upon said property. He also specifically denied that he had ever promised or agreed to pay the plaintiff the balance or any other sum.

Plaintiff by supplemental petition denied the homestead character of the property.

The judgment recites that the matters in controversy—

"of fact as well as of law were submitted to the court," and that upon due consideration "on this the 4th day of September, A. D. 1914, in open court (the court) announced his opinion to the effect that whereas the plaintiff's cause of action is for the recovery of the sum of \$327.84 against the defendants jointly and severally, and for the foreclosure of an alleged materialman's lien against the defendant W. E. Baker on lot No. 2 in block 4 of the Hyde Park extension to the city of Houston, Harris county, Tex., belonging to the defendant W. E. Baker, which lien the court is of the opinion and here finds does not exist, and is not a valid and subsisting lien, and without which the court has no jurisdiction to further hear and determine this cause: It is therefore, ordered, adjudged, and decreed by the court that this cause of action by the plaintiff F. H. Earl against the defendants, W. E. Baker, S. T. Deason, and J. B. Murdock, be and the same is hereby dismissed for want of jurisdiction of this court to hear and determine the same."

The only assignment of error contained in appellant's brief complains of the judgment of the court dismissing plaintiff's suit for want of jurisdiction.

[1] The proposition submitted under this assignment is as follows:

"Const. art. 5, § 8, gives the district court 'original jurisdiction * * * of all suits for trial of title to land and for enforcement of liens thereon'; and where a suit is brought in a district court, in good faith, to enforce a lien on land, the fact that it develops upon trial that there is no lien, will not deprive the court of jurisdiction to give the parties relief, even though the amount involved be less than \$500."

This is a sound proposition and the assignment must be sustained. *Ablowich v. Bank*, 95 Tex. 429, 67 S. W. 79, 881. The rule is otherwise if the allegations of the petition asserting the lien are insufficient; in such case the jurisdiction of the court would depend upon the amount in controversy and upon sustaining exceptions to such allegations, if plaintiff does not amend, unless the amount in controversy is within the jurisdiction of the court, the cause should be dismissed. *Telegraph Co. v. Arnold*, 97 Tex. 365, 77 S. W. 249, 79 S. W. 8.

[2] No complaint is made of the finding of the trial court against plaintiff's claim of a lien, and that portion of the judgment should not be disturbed. Rule 62a for the Courts of Civil Appeals (149 S. W. x) provides:

"If it appear to the court that the error (complained of) affects a part only of the matter in controversy and the issues are severable the judgment shall only be reversed and a new trial ordered as to that part affected by such error."

The case presented by this record comes clearly within this rule. *Johnson v. Conger*, 166 S. W. 406.

It follows from these conclusions that that portion of the judgment of the court below finding against plaintiff's claim of lien should be affirmed, and that portion of the judgment dismissing plaintiff's suit for recovery of the amount claimed by him against all of the defendants should be reversed, and the cause remanded for a new trial upon such claim; and it has been so ordered.

Affirmed in part. Reversed and remanded in part.

NEWNOM v. HEDEMAN et al. (No. 5588).*
(Court of Civil Appeals of Texas. Austin. Feb. 9, 1916. Rehearing Denied March 15, 1916.)

1. MORTGAGES — 151(7)—PRIORITY — ALLOWANCE TO WIDOW.

Vernon's Sayles' Ann. Civ. St. 1914, art. 3413, provides for the setting apart for the use and benefit of the widow and minor children all property exempt from execution, with the exception of exemption of one year's supply of provisions. Article 3414 authorizes an allowance in lieu of such articles exempted which are not among the effects of the deceased. Article 3420 provides that no property on which liens have been given by the husband and wife, acknowledged in a manner legally binding upon the wife to secure creditors, shall be set aside to the widow or children until the debts secured by such liens are discharged. Article 3422 provides that if the estate on final settlement is insolvent, the title of the widow to all property and allowances set apart is absolute, and cannot be taken for debts of the estate, except as provided by article 3428, which requires payment of funeral expenses and the expenses of the last sickness of the deceased. Before marriage, deceased gave a mortgage on certain property, in which the creditor did not have the wife join after the marriage. *Held*, that her right to the allowance was superior to the lien of the mortgagee, the provision of article 3420 providing an exception in favor of the creditor, within whose terms he must clearly bring himself, so that, where the mortgage was not signed by the

wife, the creditor had no lien as against her claim for an allowance.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 332-336; Dec. Dig. —151(7).]

2. EXECUTORS AND ADMINISTRATORS — 182 — ALLOWANCE TO WIDOW—PRIORITY — INSOLVENT ESTATES.

In such case, if the estate was insolvent *Vernon's Sayles' Ann. Civ. St. 1914, art. 3420*, did not apply.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 651, 686-693; Dec. Dig. —182.]

Appeal from District Court, Llano County; N. J. Stubbs, Judge.

Proceedings between Mrs. May Newnom, surviving widow, and H. E. Hedeman and others to determine priority of claims against the estate of Geo. H. Newnom, deceased. From orders allowing certain sums to the widow but subordinating payment to the claims of mortgage creditors, she appeals. Affirmed in part, and in part reversed and rendered.

J. H. McLean, of Llano, for appellant. Wilburn Oatman, of Llano, for appellees.

RICE, J. This is a controversy between the appellant, the surviving widow of Geo. H. Newnom, deceased, who is executrix of his estate, on the one hand, and appellee and other mortgage creditors of said estate on the other, as to the priority of their claims against said estate over the allowances set apart to her in lieu of exemptions. The facts are substantially these: Prior to the marriage of appellant to said Newnom he had, while a single man, given a mortgage lien to appellee Hedeman to secure a note executed by him to said Hedeman on seven head of cattle, which was a valid, subsisting, and unsatisfied lien, both at the time of his marriage and death, but which had never been signed or acknowledged by his wife after their marriage. Upon his death appellant, his surviving widow, qualified as executrix of his estate, which was insolvent, and, as such, applied to the probate court of Llano county for an order setting apart to her her statutory allowances and exemptions, and in response thereto said court made an order, allowing her \$800 for a year's support and the following sums in lieu of exempt property not on hand in kind, viz.: \$500 in lieu of homestead and \$495 in lieu of other exempt property—but subordinated the payment thereof to that of all claims secured by mortgage or other lien on the property of deceased. The court, however, found the Hedeman claim to be the only one so secured, and awarded it priority over appellant's allowances in lieu of exemptions. She, being dissatisfied with that judgment, appealed to the district court, where a similar judgment was rendered, taxing costs of both courts against her, from which she prosecutes this appeal, urging by her first assignment that the court erred in rendering judgment giv-

ing priority to the claim of appellee, because she had not signed and acknowledged said claim, as required by law; and, second, because, in addition thereto, said estate was insolvent at the time of her husband's death.

By article 3413, Vernon's Sayles' Rev. Civ. Stats., it is provided that:

"At the first term of the court after an inventory, appraisement and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state, with the exception of any exemption of one year's supply of provisions."

By article 3414, Id., it is provided that:

"In case there should not be among the effects of the deceased all or any of the specific articles so exempted it shall be the duty of the court to make a reasonable allowance in lieu thereof, to be paid to such widow and children, or such of them as there may be as hereinafter directed."

By article 3420, Id., it is provided that:

"No property upon which liens have been given by the husband and wife, acknowledged in a manner legally binding upon the wife to secure creditors, or upon which a vendor's lien exists, shall be set aside to the widow or children as exempted property or appropriated to make up the allowances made in lieu of exempted property, until the debts secured by such liens are first discharged."

Article 3422, Id., provides that:

"Should the estate, upon final settlement, prove to be insolvent, the title of the widow and children to all the property and allowances set apart or paid to them, under the provisions of this and the preceding chapter, shall be absolute, and shall not be taken for any debts of the estate, except as hereinafter provided."

Article 3428, Id., provides that:

"The exempted property, other than the homestead, or any allowances made in lieu thereof, shall be liable for the payment of the funeral expenses and the expenses of last sickness of deceased, when presented within the time prescribed therefor; but such property shall not be liable for any other debts of the estate."

[1] Appellant contends that by reason of the provisions of article 3420, her claim for allowances was superior to that of appellee, and that the court erred in failing to give it priority. We agree with this contention. In the absence of this provision it would seem that any of the property of the deceased, no matter whether mortgaged or not, could, under the statutes above quoted, be applied to the payment of such allowances and exemptions. If this be true, then article 3420, reserving the exempt property, upon which creditors have acquired a lien in accordance with its provisions, from being taken or appropriated for the payment of the exemptions, is an exception to the general rule. Therefore, for the creditor to bring himself within its exceptions, he must literally comply with its provisions, which it appears he has failed to do in the instant case, as the mortgage was not signed and acknowledged

by the wife, as required by said article. It is true that at the time of its execution G. H. Newnom was a single man, and hence it could not have been so executed; but no reason is shown why appellant could not have signed and acknowledged it after their marriage. So we think the requirements of the statute have not been met, which, in order to give such claim priority over allowances set apart to the widow and children, makes it necessary for the wife to sign and acknowledge such claim. If deceased had remained single, then appellee had the absolute right to have the proceeds of the mortgaged property applied to the satisfaction of his debt. Having married, his status was changed, and the law applicable to such changed condition must be held to apply. Appellee, failing to bring himself within the terms of the statute, cannot, we think, be held to come within either its spirit or letter, and must be held to have accepted the mortgage with a knowledge of the law, and cannot now claim the benefit of its privileges without complying with its terms.

[2] But, if we are mistaken in this, in the present case article 3420 cannot be held to apply for another reason. The estate is insolvent, and it has been held that this provision will not apply to insolvent estates. See *Krueger v. Wolf et al.*, 12 Tex. Civ. App. 167, 33 S. W. 663, in which writ of error was refused. For other cases bearing upon the subject here discussed, see *Champion et al. v. Shumate*, 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394; *Parlin & Orendorff Co. v. Davis*, 74 S. W. 951; *Hoffman v. Hoffman*, 79 Tex. 189, 193-196, 14 S. W. 915, 15 S. W. 471; *McLane v. Paschal*, 47 Tex. 365; *Abney v. Pope*, 52 Tex. 288; *Mabry v. Ward*, 50 Tex. 404 et seq.; *Robertson v. Paul*, 16 Tex. 472-475; *Giddings v. Crosby*, 24 Tex. 295-299; *Terry v. Terry*, 39 Tex. 310; *Mayman v. Reviere*, 47 Tex. 357; *Griffie v. Maxey*, 58 Tex. 210; *Ford v. Sims et al.*, 93 Tex. 586, 57 S. W. 20.

For the reasons stated, the judgment of the court below is reversed, and here rendered in favor of appellant as against the claim of appellee Hedeman, but in other respects it is, in all things, affirmed.

Affirmed in part, and in part reversed and rendered.

KANSAS CITY, M. & O. RY. CO. v. RUSSELL. (No. 933.)

(Court of Civil Appeals of Texas. Amarillo. March 25, 1916.)

1. RECEIVERS ↔ 183—LIABILITY FOR RECEIVERS' DAMAGE TO STOCK.

A shipper of live stock, suing for damages thereto while the properties of the railroad were in the hands of receivers, must allege and prove that the receivers had been duly appointed and discharged, and that its property delivered back was equal in value to the amount of the shipper's claim, or that such claim was made a

condition of such delivery of the property by the decree of the court terminating the receivership, and also by what court the receivers were appointed and discharged.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 861-866; Dec. Dig. ¶183.]

2. RAILROADS ¶265—RECEIVERSHIP—INJURY TO SHIPMENT OF STOCK—PLEADING.

Where damage to a shipment of live stock occurred while the railroad was in the hands of receivers, appointed by a federal court, such road will be treated as in the hands of the federal courts when the injury occurred, and the shipper cannot recover therefor.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 838-853; Dec. Dig. ¶265.]

3. CARRIERS ¶230(12)—CARRIAGE OF LIVE STOCK—INSTRUCTION—DOUBLE RECOVERY.

In an action against a railroad for damages to a shipment of live stock, an instruction, authorizing a double recovery, was erroneous.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 961; Dec. Dig. ¶230(12).]

4. APPEAL AND ERROR ¶216(1)—RESERVATION OF GROUNDS OF REVIEW—ERROR IN INSTRUCTION.

Under the statutes, where a charge is erroneous, the party aggrieved need only except, pointing out the defects and reserving objection by proper bill of exceptions, though a party aggrieved by an instruction, correct as far as it goes, must request a correct charge, covering the omitted issues or the facts not covered by the main charge.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. ¶216(1); *Trial*, Cent. Dig. §§ 627-641.]

Appeal from Foard County Court; G. W. Walthall, Judge.

Suit by W. S. J. Russell against S. B. Hovey and another as receivers of the Kansas City, Mexico & Orient Railway Company of Texas and another. By an amended petition said railroad was made defendant in place of the receivers. From a judgment for plaintiff, defendant railroad appeals. Reversed and remanded as to appellant.

D. J. Brookreson, of Benjamin, for appellant. Robert Cole, of Crowell, for appellee.

HUFF, C. J. Russell originally brought suit against S. B. Hovey and M. L. Mertz, as receivers of appellant railway company and the Ft. Worth & Denver City Railway, for damages to a shipment of cattle from Crowell, Tex., to Ft. Worth, Tex., occasioned by the usual alleged rough handling. Afterwards, the appellee amended his petition, making the appellant a party defendant in place of the receivers, dismissing the receivers from the suit. In the ninth paragraph of the amended petition it is alleged that at the time of the shipment and when the suit was filed, and service had, appellant was then in the hands of the receivers, S. B. Hovey and M. L. Mertz, but since which time the receivers were discharged and appellant had taken charge of the railroad and became liable to pay plaintiff his damages. The appellant railway, in its answer, admits that part of the ninth paragraph, alleging that at the time of the shipment and when

the suit was instituted, its properties of all kinds were in the hands of S. B. Hovey and M. L. Mertz, receivers, duly appointed by an order of the United States District Court for the Northern District of Texas, at Dallas, which was made and entered on the 9th day of March, 1912, and that they were duly discharged as such receivers by order of the United States District Court, July 9, 1914, and since have surrendered appellant's line of railroad to it—

"but especially denies that it became liable for any damages occasioned to plaintiff during the time such receivers were operating its properties."

There is no denial filed by the appellee that the United States District Court appointed the receivers named by appellee and thereafter discharged them. There was a verdict and a judgment against appellant for \$180 and against the Ft. Worth & Denver City Railway Company for \$20. The Ft. Worth & Denver City Railway Company is not appealing. The testimony all shows that the shipment was made while the receivers were in charge of the road. The pleadings in this case, by both parties, show that the cattle were injured while the road was in the hands of the receivers.

[1] The case of *Hovey v. Weaver*, 175 S. W. 1089, holds, as we read the case, that, in order to show liability on the part of the railway company, it was necessary to allege and prove that the receiver had been duly appointed, discharged, and the property delivered to the road, and either that such property was equal in value to the amount of plaintiff's claim, or that plaintiff's claim had been made a condition of such delivery of the property by the decree of the court terminating the receivership. It is also held in that case that the petition did not show a cause of action, for the reason that it was not alleged in the petition by what court the receivers were appointed and discharged. We believe that that case announces the correct rule. It was incumbent on the plaintiff to allege and prove a cause of action against the railway company.

[2] The appellant alleged the receivers were appointed by the federal court. This was not denied or disproven by the appellee, and, it having been admitted the injury occurred while the road was in the hands of the receivers, we believe the road should be treated as in the hands of the federal courts when the injury occurred. Under the decisions of the courts, as we understand them, appellee did not show a cause of action, either by allegation or proof. *Railway Co. v. Ballou*, 174 S. W. 337; *Hovey v. Weaver*, *supra*, and authorities cited.

The first and second assignments we regard as being well taken, and will be sustained in so far as they require a reversal of the case.

[3] The third assignment we also believe

well taken. The charge of the trial court authorized a double recovery, and falls under the rule announced in the case of *Railway Co. v. Lane*, 49 Tex. Civ. App. 541, 110 S. W. 530. Under that authority, we sustain the third assignment.

[4] The appellees suggest that if the charge was not correct, appellants should have requested a correct charge. This, under the statutes, was not required of appellant. The charge being erroneous, all that was necessary was to except to the charge, pointing out the defects. This it did, reserving its objection thereto by a proper bill of exceptions. The cases cited by appellee refer to that class of instructions which are correct as far as they go, but which the aggrieved party contends do not cover all the issues, or which charges are not as full as they should be. In that class of cases the courts hold the aggrieved party is not entitled to reversal unless he shall request a correct charge covering the omitted issues, or the facts not covered by the main charge. The case of *Wells-Fargo v. Benjamin* (Sup.) 179 S. W. 513, cited by appellee, is to the effect above stated.

The judgment as to the Ft. Worth & Denver City Ry. Co., which is not appealing, will be affirmed; but as to the appellant, the case will be reversed and remanded.

INTERNATIONAL & G. N. RY. CO. v. LOGAN. (No. 7468).*

(Court of Civil Appeals of Texas. Dallas.
Feb. 19, 1916. Rehearing Denied
March 25, 1916.)

1. RAILROADS \S 890—INJURIES TO PERSONS ABOUT TRACKS—DISCOVERED PERIL.

To render a railroad company liable for injuries received by one on or about its tracks under the theory of discovered peril, it must appear the engineer in charge of the train realized such person's danger, and that he could not or would not extricate himself from the dangerous situation, yet failed to take precautions to avoid the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1324, 1325; Dec. Dig. \S 890.]

2. RAILROADS \S 400(14)—INJURIES TO PERSONS ABOUT TRACKS—ACTIONS—EVIDENCE—DIRECT QUESTION.

In an action by a young boy hurt when a passing train struck the gate leading from a stock pen to the tracks, the question whether the engineer in charge realized the boy's position of peril, but failed to take precautions to avoid injuries, held for the jury.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. \S 400(14).]

3. DAMAGES \S 134(3)—PERSONAL INJURIES—MEASURE.

Where a boy through the negligence of a railroad company suffered injuries consisting principally of a broken arm, an award of \$800 cannot be held excessive on the theory that it did not appear such injury would diminish his earning capacity on reaching majority; there being evidence of mental and physical suffering and permanent injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 368, 390-392; Dec. Dig. \S 134(3).]

4. TRIAL \S 352(6)—SPECIAL ISSUES—LEADING QUESTIONS.

Special issues submitted to the jury, though they be leading questions, are not improper, where they do not in any manner suggest the answer expected, but merely call for an unequivocal answer.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 842; Dec. Dig. \S 352(6).]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by Jack Logan against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wilson, Dabney & King, of Houston, and Neff & Taylor, of Waco, for appellant. Shurtleff & Cummings, of Hillsboro, for appellee.

RASBURY, J. The appellee, a minor, by his next friend, C. P. Langford, sued appellant in the court below for damages for personal injuries alleged to have been the result of appellant's negligence. No issues arise upon the pleading, and they will not be stated. Upon the theory that appellant was liable, if at all, on the ground that it discovered appellee in a perilous position in time to have avoided injuring him, the court submitted to the jury certain special issues of fact, and in response to which they found, among other things not essential to recite here, that appellee at the time he was injured was discovered in a perilous position by appellant's engineer upon the platform of its stock pen, that his peril was known by the engineer, and that he could, by the use of the means at his command and with safety to himself and train, have stopped same before appellee was injured, and that his failure to do so was negligence which proximately caused appellee's injury, compensation for which was fixed at \$800. Upon motion, judgment was entered for appellee for the sum awarded, from which this appeal is prosecuted.

The first assignment of error asserts, in effect, that the evidence adduced at the trial is insufficient to sustain either the special findings of fact of the jury or the judgment of the court entered thereon. We have carefully examined the evidence, and in deference to the findings of the jury it will support the following conclusions of fact: In the town of Irene, where appellee was injured, appellant maintains stock pens built alongside a switch track of the company. There are gates in the pens opening onto a small platform at right angles with the tracks, and when so opened the gates connect with the stock cars being joined thereto by means of sliding slats or bars, forming a chute through which stock enter the cars over the platform and gangplank or running board which bridges the space between the platform and the car; the space between the platform and car being approximately 18 or 20 inches.

At the time the appellee was injured, the gate to the stock pen was standing open at right angles with the switch track with appellee behind it. Appellant's engineer had backed his engine and three empty cars into the switch for the purpose of securing two loaded cars which were upon the switch. After coupling on the two loaded cars, the engineer started out of the switch to the main line. As he passed the stock pens, he was going at a speed of 10 miles an hour. Before passing the stock pens and when distant therefrom about 150 or 250 feet, he saw the gate open at right angles with the tracks and saw appellee standing behind it. The tracks over which the train was moving were of light steel, the roadbed was not ballasted, and there were low joints in the track, and vegetation had overgrown the tracks. Passing over such a track at the speed indicated caused the cars to rock and jerk and sway out, particularly loaded cars. The engineer knew the condition of the track, knew he had two loaded cars, and the tendency of the loaded cars to sway out in passing over such track while going at the speed stated. After observing the boy, the engineer did not slacken his speed. One of the loaded cars struck the open gate, which in turn struck appellee, knocking him from the platform and breaking his arm. After observing the appellee behind the gate, the engineer, with safety to himself and the train, could have stopped same before the appellee was injured. Photographs of the track and the gate were before the jury, though not in the record.

[1, 2] We gather from the authorities that for the rule of discovered peril to be applicable in the instant case it must appear that appellee was in a place of danger when seen by appellant's engineer, and that the engineer realized his danger, and also that appellee could not or would not probably extricate himself from the dangerous situation. *H. & T. C. Ry. Co. v. O'Donnell*, 99 Tex. 636, 92 S. W. 409. Concerning the knowledge of the engineer of the facts necessary to make the rule available to the injured party, it may also be said that circumstances or facts may be shown from which the jury may conclude that the servant ought to have acquired knowledge of injured party's peril notwithstanding the servant's statement that he did not know or realize such peril. *Ft. W. & D. Ry. Co. v. Shetter*, 94 Tex. 196, 59 S. W. 533. Under the rule stated, it seems to us that the court properly referred the matter to the jury. Appellant's engineer was aware of the appellee's situation, saw him standing behind the open gate, knew that only 18 or 20 inches separated the platform from the passing cars, knew that the tracks over which he was drawing the cars were unballasted and had a number of low joints, that such conditions caused the cars to rock, jerk, and sway, particularly the loaded cars, and that the speed at which he

was moving increased the tendency to sway.

Thus, it is seen that appellee was in actual danger and appellant's engineer knew of his danger. He was in that position when the engineer saw him, and he was making no effort to remove himself from such danger, but, according to the engineer, was standing his ground, poking a stick at the approaching engine, and awaiting its approach. Appellee was not, as said in *I. & G. N. Ry. Co. v. Vallejo*, 102 Tex. 70, 113 S. W. 4, 115 S. W. 25, in a secure place. On the contrary, he was, according to the evidence, in an insecure and dangerous situation of which appellant's engineer had knowledge, and being in such situation, as further said in the case just cited, if there was a "probability that by the continued movement of the train injury would be inflicted on the boy, the duty to stop the train would have arisen."

[3] By assignments 3 and 3a appellant asserts that, since the evidence fails to show that appellee's injury will in any way diminish his earning capacity after he arrives at 21 years of age, the verdict is excessive and should have been vacated. It does not follow, in our opinion, that the verdict is excessive in the absence of proof that the injury would diminish his earning capacity after reaching 21 years of age. Diminished earning capacity is not the only item recoverable by the minor. He may recover fair compensation for mental and physical suffering, the probable future effect of the injury on his health, and for any permanent injury. There was evidence of mental and physical suffering and of permanent injury. The verdict was for \$800. Those facts considered, we cannot say, in view of the restricted right to disturb the jury's findings, that the verdict is excessive.

[4] The seventh and eighth assignments complain of the form of two of the questions submitted to the jury. Special issue No. 1 is as follows:

"Was Jack Logan, immediately before he received his injury, standing upon the platform of the stock pen with the chute gate open at right angles with the railroad track?"

It is urged that the expression, "with the chute gate open at right angles with the railroad track," is leading and prejudicial.

Special issue No. 2 is as follows:

"Did the engineer in charge of the train that was approaching said stock pens see Jack Logan standing south of the gate with the gate open at right angles with the railroad track?"

It is urged, in reference to this special issue, that it contains the same expression that special issue No. 1 does and is for the same reason advanced above objectionable.

"The rule as to leading questions to witnesses is not applied to issues submitted to a jury by a court; and, unless there is an intimation by the court as to what answer is expected or desired, an appellate court will not interfere with the exercise of his discretion." *Sullivan & Co. v. Ramsey*, 155 S. W. 580, and cases cited.

To inquire of the jury whether appellee was just prior to receiving his injury stand-

ing upon the platform of the stock pen with the gate open at right angles is to ask, of course, a leading question; but it cannot with any force be said that it suggests an expected or desired answer. The only rational or intelligent answer which could be made to the question would be yes or no. That the question does not suggest which of the possible answers is expected or desired is manifest from the fact that the only suggestion of the court is that the answer be yes or no.

The second, fourth, fifth, and sixth assignments raise issues considered by us in discussing the first assignment of error, and, for the reasons there stated, they are overruled.

Finding no reversible error in the record, the judgment is affirmed.

FORD v. JOHNSTON et al. (No. 1551.)

(Court of Civil Appeals of Texas. Texarkana. Jan. 20, 1916.)

1. BILLS AND NOTES \S 200—ORAL ASSIGNMENTS—RIGHT OF ASSIGNEE TO SUE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 582, providing that any person to whom a negotiable instrument may have been assigned may maintain any action in his own name which the original obligee or payee might have brought, a verbal assignment of a note entitled the assignee to sue thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 423, 425-427, 497, 498, 501; Dec. Dig. \S 200.]

2. BILLS AND NOTES \S 540—ACTIONS—JUDGMENT—CONFORMITY TO PLEADINGS AND PROOF.

Where plaintiff, suing on a note payable to the order of J., alleged and proved that the note was made payable to J., his agent, instead of to himself as the result of a mutual mistake on the part of defendant and the agent, defendant's contention that the judgment was erroneous, because it did not appear from the pleadings and proof that the note had been transferred by J. to plaintiff, and that plaintiff had acquired it bona fide and for value, was untenable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1918-1934; Dec. Dig. \S 540.]

3. ATTACHMENT \S 232—ABATEMENT—FALSITY OF GROUNDS STATED.

Where the allegations in the affidavit for an attachment, if true, entitled plaintiff to the writ, the fact that they were not true did not entitle defendant to the abatement of the writ, though it might have entitled him to damages on the injunction bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 796, 797, 808; Dec. Dig. \S 232.]

Appeal from Bowie County Court; Lee Tidwell, Judge.

Action by Edward Johnston against O. E. Ford and another. From a judgment for plaintiff, the defendant named appeals. Affirmed.

See, also, 164 S. W. 424.

By his suit commenced in a justice court, appellee Edward Johnston sought a recovery

against appellant on the latter's promissory note dated January 21, 1911, for \$75, interest and attorney's fees, payable, by its terms, on or before January 15, 1911, to the order of John Johnston, and a foreclosure of the lien of a mortgage on certain live stock, also dated January 21, 1911, given by appellant to secure the payment of a note described therein as dated said January 21, 1911, and as payable November 15, 1911. Said appellee also sought a recovery against the appellee J. C. Parish of the value of the live stock mortgaged to him as stated above, on the ground that Parish purchased same of appellant with notice of the fact that it had been so mortgaged. The appeal is by appellant Ford alone from a judgment rendered by the county court, to which an appeal of the cause was prosecuted, in favor of Edward Johnston against appellant for \$113.32, the amount of the principal, interest, and attorney's fees stipulated for in the note, and foreclosing the lien of said mortgage, and also the lien of a writ of attachment levied upon certain cotton belonging to appellant at the instance of said Edward Johnston, and in favor of said Edward Johnston against appellee Parish for \$60 as the value of the live stock covered by the mortgage and purchased by him of appellant.

J. W. Hillman, of Texarkana, for appellant. Turner, Graham & Smitha, of Texarkana, for appellees.

WILLSON, C. J. (after stating the facts as above). [1, 2] We are of opinion there is no error in the judgment. It is attacked on the ground, mainly, that it did not appear from the pleadings and the testimony that the note had been transferred by John Johnston, the payee named therein, to appellee Edward Johnston, and that the latter had acquired it bona fide and for value. In view of the pleadings on the part of appellant, had the suit been by Edward Johnston as the transferee of the note, it would have been immaterial to his right to recover on it whether he acquired it bona fide and for value or not. Nor would it have been necessary for him to have known that the assignment to him was evidenced by a written instrument of any kind or by an indorsement on the note. A verbal assignment thereof would have entitled him to sue on the note. Article 582, Vernon's Statutes; Bank v. Berrott, 23 Tex. Civ. App. 662, 57 S. W. 340; Word v. Elwood, 90 Tex. 130, 37 S. W. 414; O'Connell v. Rugely, 48 Tex. Civ. App. 466, 107 S. W. 151. But the suit was not by appellee Johnston as an assignee. He claimed a right to recover on the note as the payee, and alleged and proved that it was made payable to the order of John Johnston, his father, instead of to himself, and on January 15, 1911, instead of November 15, 1911, as the result of a mutual mistake on the part of his agent,

said John Johnston, and appellant. The nature of the suit being as stated, the contentions of appellant based on its being of a different nature are untenable and must be overruled.

[3] The contentions based on the action of the court below in overruling appellant's motion to abate the writ of attachment cannot be sustained. The allegations in the affidavit, if true, entitled appellee Johnston to the writ. If they were not true, the fact that they were not might have entitled appellant to damages, but did not entitle him to judgment abating the writ. *Dwyer v. Testard*, 65 Tex. 432. For, as said by the Supreme Court in the case cited:

"The validity of the writ depends, not upon the truth of the facts stated in the affidavit, but upon the fact that they are so stated. The bond protects the defendant. The injury done him is compensated in the damage he recovers. The plaintiff, in the terms prescribed by law, in the bond, has contracted with the defendant for his remedy. * * * Ever since the decision of *Cloud v. Smith*, 1 Tex. 611, it has been the practice to give the plaintiff the benefit of his lien, and leave the defendant to his remedy on the bond."

Whether appellant was entitled to an abatement of the writ on proof that the sureties on the bond did not own property subject to execution sufficient to satisfy it, or not, need not be determined, as such proof was not made. On the contrary, the testimony heard on that issue was sufficient to support a finding that they did own enough of such property to make them "good and sufficient sureties" within the meaning of the statute.

The judgment is affirmed.

FIDELITY & CASUALTY CO. v. TYLER COTTON OIL CO. (No. 1514.)

(Court of Civil Appeals of Texas. Texarkana. Feb. 24, 1916.)

1. INSURANCE \S 188(2)—EMPLOYER'S LIABILITY INSURANCE—PAYMENT OF PREMIUMS—SUFFICIENCY OF EVIDENCE.

In suit by an employer's liability insurer for a premium, evidence held sufficient to support the finding of the trial court that defendant rendered the insurer true statements of its pay roll in compliance with the terms of its policies and that defendant had paid all premiums due from it under the policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 245, 404, 406; Dec. Dig. \S 188(2).]

2. INSURANCE \S 183—EMPLOYER'S LIABILITY INSURANCE—LIABILITY FOR PREMIUMS.

Where an employer's liability policy provided that the premium to be paid should be based on the entire compensation of which an estimate was given in the schedule, also expressly providing that it did not cover indemnity to the assured for injury or death suffered by any reason "unless his compensation is included in the estimate set forth in the schedule," the fact that the assured failed to include the salaries of its manager and bookkeeper in its report of compensation paid did not entitle the insurer to recover premiums based thereon, since there was no failure on the part of the assured to pay premium if the salaries of such employees did not

go in the labor record and were not in the estimated compensation given in the schedule as found.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 894; Dec. Dig. \S 183.]

Appeal from Smith County Court; Jesse F. Odom, Judge.

Suit by the Fidelity & Casualty Company against the Tyler Cotton Oil Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The appellant company issued to appellee an employers' liability policy during the years, respectively, of 1908 and 1909. The amount of compensation paid employees for the period of the policy determined the amount of premium payable for the indemnity provided in the policy. The policy expressly stipulated as follows:

"The premium is based on the entire compensation of which an estimate is given in the schedule. If such compensation exceeds the estimate set forth in the schedule the assured shall immediately pay the company the additional earned premium; if such entire compensation is less than the estimate set forth in the schedule the company will return the unearned premium when determined; but the company shall be entitled to not less than the minimum earned premium specified in condition R."

The "schedule" of the policy of 1908 and 1909 each stated "estimated average number of employees" to be "20," and the "estimated compensation for period of policy" to be "\$5,000." The appellant brought the suit under the terms of the policies to recover the amount of additional earned premium, alleging that the entire compensation of employees, as shown by the actual pay roll of appellee, for the period of each policy respectively, exceeded the estimate set forth in the schedules of the policy. The appellee answered that it had made to appellant correct pay roll of compensation paid, and settled with and paid appellant in full for all amounts of premium due each year on the policies. The case was tried before the court, and judgment was entered for appellee.

The policy indemnified the appellee—

"against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered through the assured's negligence, and as the result of an accident occurring while this policy is in force: (a) By any employee or employees of the assured while within the factory, shop, or yard described in the schedule, or upon the sidewalk or other ways immediately surrounding the same provided for the use of such employees or the public, in and during the operation of the trade or business described in the schedule."

The policy provides that the agreement to indemnify is subject to conditions, of which is the following:

"B. This policy does not cover loss from liability for, or any suit based on, injuries or death suffered or caused by: (1) Any person unless his compensation is included in the estimate set forth in the schedule, but this exclusion shall not apply to injuries or death caused by the insured himself, if an individual or any member of the firm if the insured is a partner—

ship, vice president, secretary or treasurer if the insured is a corporation."

The trial court made the finding of fact that the defendant rendered to the plaintiff reports showing compensation paid for the period of time covered by the policies, and that they were statements of its pay roll, and that defendant had paid all premiums due under each policy in compliance with the terms and conditions of the policy.

J. A. Bulloch and B. C. Johnson, both of Tyler, for appellant. Simpson, Lasseter & Gentry, of Tyler, for appellee.

LEVY, J. (after stating the facts as above). [1] There is evidence to support the finding of the trial court that appellee rendered to appellant true statements of its pay roll in compliance with the terms of the policies, and that appellee had paid all premiums due by it under each of the policies. Therefore the assignments of error challenging the action of the court in rendering judgment against appellant must be, it is believed, overruled. The president and manager of appellee testified:

"That the policies introduced in evidence were the ones, or copies of the ones, that had been issued to the Tyler Cotton Oil Company by plaintiff, and that the reports made under said policies are the reports made by him to plaintiff. That, at the time he made the reports, he took from the books of the Tyler Cotton Oil Company all the labor included in said policies and made a full, true and correct report of it. That no other labor had been paid for by the Tyler Cotton Oil Company except as reported by him under these reports. That he personally made the reports and knew they were correct as shown by and reflected by the books. That the additional premium was paid. That frequently the employees of the Tyler Canning Company would be paid off at the Tyler Cotton Oil Company's office, and that the amounts paid to the employees of the canning company would be entered upon the books of the oil company. That if the witness Allen in his examination of the books found the figures testified to by him, then they included amounts paid to employees of canning company. * * * That the salaries of the bookkeeper and manager amounting to about \$2,500 per year, was not included in the report made by him to the company under either one of the policies, and did not show on the pay-rolls for labor; and that at the time these policies were taken out he did not intend to include the salary of the bookkeeper and manager, and their salaries did not go on the labor record."

[2] The fact that the reports of the compensation paid omitted and did not include the salaries of the manager and the bookkeeper would not, it is thought, entitle appellant to recover premiums based thereon. There is not failure on the part of the appellee to pay premium as contracted if the salaries of such persons "did not go on the labor record" and were not in the estimated compensation given in the schedule, as comprehended in the court's finding. It was contracted, as provided in the policy, that the premium to be paid for the indemnity should be based "on the entire compensation of which an estimate is given in the schedule." And the policy ex-

pressly provides that it does not cover indemnity to the assured for injury or death suffered by any reason "unless his compensation is included in the estimate set forth in the schedule." It was therefore reasonably meant by the parties that the premium payable was to be based on the entire compensation of all such employees engaged in the business whose compensation was actually included in the estimate set forth in the schedule.

The judgment is affirmed.

TEXAS & P. RY. CO. v. GRIFFIN et al.*
(No. 1554.)

(Court of Civil Appeals of Texas, Texarkana
Feb. 3, 1916. Rehearing Denied Feb. 17,
1916.)

1. MASTER AND SERVANT ⇨279(6)—INJURIES
TO SERVANT—NEGLIGENCE—SUFFICIENCY OF
EVIDENCE.

In an action against a railroad for death of a member of a switching crew, evidence of the engineer's negligence in checking his engine too sharply held sufficient to support a verdict for plaintiffs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 979; Dec. Dig. ⇨279(6).]

2. TRIAL ⇨260(9) — INSTRUCTIONS — REPETITION.

In a servant's action for injuries, where the court in its main charge instructed on the burden of proof, the refusal to give a special charge on the subject was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. ⇨260(8).]

3. TRIAL ⇨260(8)—INSTRUCTIONS—REFUSAL
OF SPECIAL ISSUES.

In a servant's action for injuries, where the court failed to submit certain states of fact as a basis of liability in his main charge, the refusal of special charges directing that they could not find for plaintiffs upon such states of fact was proper, since the failure to submit the issues was sufficient to exclude them from the consideration of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. ⇨260(8).]

4. DEATH ⇨99(5) — DAMAGES — EXCESSIVE
VERDICT.

In a mother's action for death of her married son, a railroad switchman, where the mother was 81 years old, in good health for her age, while decedent was 40 years of age, and had received his portion of her property on division among all her children in return for his promise to support her, he having contributed but little in the past through inability, and being her youngest child, so that strong feelings of attachment existed between them, a verdict for \$500 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 130; Dec. Dig. ⇨99(5).]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Suit by Mrs. Ada Griffin and others against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

F. H. Prendergast, of Marshall, for appellant. S. P. Jones, T. P. Harte, and Beard & Davidson, all of Marshall, for appellees.

HODGES, J. The appellees are the widow, daughter, and mother of S. A. Griffin, who was killed while employed by the appellant in its yards at Marshall, Tex. The accident occurred under the following circumstances: The switching crew with which S. A. Griffin was working desired to make a drop or flying switch in order to place a car at a certain point in the railroad yards. Griffin, in obedience to the directions of the foreman, went on top of the car to be placed for the purpose of stopping it when disconnected from the engine. This was his first experience in that line of work, and he was placed there because he was unacquainted with the signals and other things necessary to work in any other capacity with the switching crew. Another switchman took a position on the side of the car for the purpose of uncoupling it at the proper time. After the engineer had given the necessary slack in the speed of the engine, and the car had been uncoupled, it was discovered that it had not passed over the switch as far as desired. Upon investigation it was found that Griffin had fallen from the car and had been run over and killed at the point where the car was uncoupled, and under circumstances indicating that his fall resulted from the jam then produced. In their petition the appellees alleged that the engineer was negligent in his manner of operating the engine on that occasion, in suddenly and violently checking the speed of the car to permit the uncoupling; that he did this by reversing the engine without cutting off the steam, producing a violent jam which caused the fall of Griffin from his position on top of the car. A verdict was returned in favor of Mrs. S. A. Griffin, the widow of the deceased, for \$5,000, the daughter for \$2,500, and the mother, Mrs. Georgia Griffin, for \$500.

The first assigned error complains of the conduct of the court in his treatment of the attorney representing the appellant upon the trial. We have carefully examined the record upon which this complaint is based, and are not inclined to think that this conduct had any effect upon the result of the trial, whatever may be said of it in other respects.

[1] The court gave the following as a part of his main charge:

"If you should find from the evidence that the engineer handling the engine at the time Griffin was killed undertook to slack the speed of the engine by reversing the same without shutting off the steam, and that the same caused the speed of the cars to be so suddenly checked as to cause an unusual jam or jar of the car on which S. A. Griffin was performing his work, and that this caused the said Griffin to fall or to be thrown from said car, thereby causing his death either by the fall or by the car passing over his body, and if you should further find that the engineer was guilty of negligence in so reversing the said engine without shutting off the steam, if you find that he did so, and you should find that the same caused the cars to be suddenly checked, and said Griffin to be

thrown from them and killed either by the fall or the car passing over his body, then you will find for the plaintiffs, unless you find against them under other portions of this charge."

The testimony clearly indicates that Griffin was thrown from his position on top of the car by the jam produced when the engineer was attempting to give what the witnesses call the "slack" necessary to permit the uncoupling of the car. The charge quoted is objected to: First, because the evidence does not show that the engineer was negligent in the manner indicated; second, because there was not sufficient evidence to show that the unusual jar caused Griffin to fall; and, third, because the evidence was not sufficient to show that it was negligence to reverse the engine without shutting off the steam. None of these objections, we think, are tenable. The engine foreman, Moore, who testified for the appellees, stated that the engineer upon that occasion reversed his engine without shutting off the steam. This was denied by the engineer; but he admitted that such a mode of giving slack would be dangerous to the man on top of a car, and would likely throw him off. It appears that Moore had previously made a written statement to the appellant's claim agent as to how the accident occurred and the manner in which the cars were being handled at the time, in which he had said that:

"There was no rough handling of the cars at any time, no sudden jerks or sudden jars, and that they handled the same in the usual manner and as carefully as could be."

On cross-examination he was confronted with this statement and asked if he had not signed it. He admitted that he had, but said he did so without reading it, and had assumed that it was a correct record of what he had previously said in answer to questions propounded to him by the claim agent. He had answered the questions in the morning as he went to his work, and signed the statement in the evening on his return home. When pressed to indicate what portions were incorrect, he pointed out only a part of what was material, leaving enough to show an admission that the cars were handled on that occasion in the usual manner and as carefully as they could be. This written statement was subsequently put in evidence to impeach Moore. In some respects it is inconsistent with his testimony that the engineer upon that occasion reversed his engine without cutting off the steam. If we consider that testimony in connection with the admission of the engineer that to reverse the engine without first shutting off the steam was not their usual method of making such switches, and that it would be dangerous to a man on top of the car, we have evidence of negligence sufficient to support the verdict and the charge of the court.

[2] The court in other portions of his main charge instructed the jury on the burden of

proof, and there is no merit in the assignment based upon the refusal of the court to give a special charge upon that subject.

[3] Special charges were refused which directed the jury that they could not find for the plaintiffs upon certain states of fact which were set out in the appellees' original petition. The failure of the court to submit those issues in his main charge was sufficient to exclude them from the consideration of the jury, and special charges upon that subject would have been mere matter of argument upon which the court was not required to enter.

[4] It is also contended that the verdict of the jury is excessive, especially the allowance of \$500 to the mother. The evidence shows that Griffin at the time of his death was 40 years of age; his mother was 81 years old, and in good health for one of that age; that she had previously divided all of her property among her children, and was dependent upon them for her support; that S. A. Griffin, the deceased, had received his portion and had promised to support her. She admitted that he had contributed but little in the past, but said that he gave as an excuse for his failure that he was unable to do so. She further testified that he was her youngest child, and that strong feelings of attachment existed between them. Under these circumstances we cannot say as a matter of law that the mother had no right to expect contribution from her son. It presents the instance of an aged woman, doubtless unable to do anything toward earning a support, who, having distributed her property among her children, became dependent upon them for her support during the remainder of her life. She had as an assurance that this would be done, not only the natural attachment usually existing, but the promise of her son, which the jury had a right to infer was based upon the fact that he had received his distributive portion of his mother's estate during her lifetime. Under these circumstances we cannot say that the verdict was excessive.

The judgment of the district court is affirmed.

NORTH AMERICAN INS. CO. v. JENKINS. (No. 7099.)

(Court of Civil Appeals of Texas. Galveston.
Feb. 23, 1916.)

1. APPEAL AND ERROR \S 560(2) — MATTERS REVIEWABLE—RECORD ON APPEAL—STATEMENT OF FACTS.

Though an instrument called a "statement of facts" is found in the record, where it is not signed by counsel for plaintiff or approved by the court, it cannot be regarded as a statement of facts proved at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2531, 2532, 2543; Dec. Dig. \S 560(2).]

2. JUSTICES OF THE PEACE \S 141(2)—JURISDICTION—APPEAL.

Where a justice court has no jurisdiction of suits for the recovery of more than \$200 under Const. art. 5, \S 19, the court on appeal from the judgment of the justice court cannot award a sum in excess thereof, so that, where a suit was for \$200 and the court gave judgment for the principal and a penalty and items exceeding the amount, the judgment was invalid.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 472; Dec. Dig. \S 141(2).]

3. APPEAL AND ERROR \S 1132 — REFUSAL — WHEN NECESSARY.

Where a judgment of the county court affirming a justice court's judgment added a penalty and items in excess of the amount legally within the jurisdiction of the justice court, though the judgment was invalid, it could be reformed and affirmed instead of being reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4447; Dec. Dig. \S 1132.]

4. INSURANCE \S 186(2) — ACCIDENT INSURANCE—PREMIUMS—TIME OF PAYMENT.

Whether time for payment of premiums on a policy of accident insurance is of the essence of the contract depends altogether on the wording thereof, and it cannot be said that as a matter of law time is of the essence.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. \S 186(2).]

5. APPEAL AND ERROR \S 544(1) — MATTERS REVIEWABLE—RECORD ON APPEAL.

The court on appeal cannot say that the conclusion reached by the trial judge was erroneous, in the absence of a statement of facts as to the disputed question; the conclusion being all that is required of the judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2412; Dec. Dig. \S 544(1).]

6. APPEAL AND ERROR \S 294(1) — MATTERS REVIEWABLE—RESERVATION OF EXCEPTIONS.

Where a party desires to have the judge's conclusion reviewed, he should call attention to alleged insufficiency of evidence in a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1727, 1732, 1733; Dec. Dig. \S 294(1).]

Error from Galveston County Court; George E. Mann, Judge.

Action by Edna Jenkins against the North American Insurance Company. From a judgment of the county court affirming judgment of the justice court for plaintiff, defendant brings error. Reformed and affirmed.

Wilson & Webb, of Galveston, for plaintiff in error. O. S. York, of Galveston, for defendant in error.

McMEANS, J. Edna Jenkins brought this suit against the North American Accident Insurance Company in the justice court of Galveston county to recover \$200, the amount of an accident insurance policy issued by defendant to her husband, Edward Jenkins, in which she was named as beneficiary; the said Edward Jenkins having been killed. A trial in the justice court resulted in a judgment for plaintiff for the amount sued for. The defendant appealed the case to the county court, where, upon a trial before the court without a jury, a judg-

ment was rendered for plaintiff for \$200, the amount of the policy, and for \$50 as attorney's fees and 12 per cent. penalty, amounting to \$24, aggregating \$274. From this judgment the defendant has prosecuted a writ of error to this court.

[1] No statement of facts accompanies the record. An instrument styled "statement of facts" is found among the papers of the case, but it does not appear to have been signed by the counsel for the plaintiff or approved by the court, and it cannot therefore be regarded as a statement of the facts proved at the trial. The court, however, reduced to writing and filed its findings of fact, and we here copy the same:

"The policy sued on was issued by defendant on life of Jenkins, payable to his wife, the plaintiff; premium \$1.50 payable first day of each month in advance. Insured paid at such times as was convenient, seldom on day premium was due. On January 18th insured paid for December, and told agent he would have to call again for the January payment. This was assented to. A few days afterwards, insured was stabbed, and his wife sent for the agent and told him she wanted to pay for January. He told her that, as her husband was stabbed, he could not receive the premium. The husband died next day from the wound."

Upon the foregoing findings of fact, the court concluded as a matter of law that:

"The custom of the company in receiving premiums after due dates, and the offer of the wife to pay, render the company liable. The clause of the policy and 'General Agreement' is so involved and complicated that no negro could be expected to understand it, and the court does not understand it, as to when less than the whole amount of policy is to be paid, and therefore I conclude plaintiff is entitled to full amount, \$200, of the policy and reasonable attorney fees, fixed by the court at \$50, and statutory damages of 12 per cent."

[2] We are confronted in limine with what appears to be a fundamental error apparent upon the face of the record in the proceedings in the county court. The transcript from the justice court shows that plaintiff's suit was for the recovery of exactly \$200. This was an amount within the jurisdiction of that court. Article 5, § 19, Constitution. It does not appear that either of the parties filed written pleadings in either court, or that the plaintiff after the case reached the county court sought a judgment for a greater sum than that sued for in the justice court; but, notwithstanding this, the county court not only rendered judgment for plaintiff upon the item and for the amount sued for in the justice court, but upon other items and for additional amounts which made the amount of the recovery beyond the jurisdiction of the justice court. It is well settled that an appeal cannot confer upon an appellate court jurisdiction which the court a quo did not possess. *Taylor v. Lee*, 139 S. W. 908, and authorities cited. The justice court not having jurisdiction where the amount in controversy exceeds \$200, the county court's jurisdiction is limited to sums not in excess of that amount, because the

county court acquired by the appeal only such jurisdiction as the justice court had. The rendition of the judgment for \$274 is therefore clearly erroneous.

[3] But we are not under the necessity of reversing the judgment and remanding the case on account of the error, because the judgment, if no other error is pointed out which requires a reversal, may be reformed by omitting therefrom a recovery for the items of attorney's fee and penalty, for which the court erroneously gave judgment, thereby leaving in force and effect a judgment for \$200, being the amount of the policy sued upon and which amount was within the jurisdiction of the court.

[4, 5] Error is assigned to the refusal of the court to set the judgment aside because, as plaintiff in error contends, the same is not based upon the findings of the court as filed. It is contended under this assignment, in effect, that when a policy of insurance provides that the premium shall be paid on a stipulated day, time becomes of the essence of the contract, and the failure to pay the premium at the time stipulated determines it in the absence of waiver or estoppel; and that under the judge's fact findings he should have concluded as a matter of law that the policy was forfeited.

Whether the obligation to pay a premium at a time specified is of the essence of the contract of insurance largely depends upon the provisions of the contract itself. The contract is not before us, not having been brought up in a statement of facts, and its provisions are not recited in the court's findings. We do not know as a fact that there was a provision of the policy providing for a forfeiture in case of a failure to pay the premium at the time stipulated, nor can we say that there was not a provision which justified the conclusion that the custom of receiving premiums after maturity and the offer to pay the premium which was refused did not constitute a waiver of payment at the time specified in the policy. The court concluded that the custom of the company in receiving premiums after due dates, and the offer to pay the last premium after its maturity, rendered the company liable. Whether or not this conclusion was warranted by the evidence is a question which the absence of a statement of facts precludes us from determining, unless the findings of the judge, on their face, show that it was not. *Harrison v. Fryar*, 8 Tex. Civ. App. 524, 28 S. W. 250: The findings of the judge are in no wise inconsistent with his conclusion, and it is only the conclusion which we can look to in reviewing a judgment without a statement of the evidence. The judge is not required to state the evidence, but only his conclusion, and he does not say that the facts mentioned were all that were put in evidence affecting the question. Consistently with those stated, every other fact necessary

to justify his conclusion may have been shown, and may have added their force to those named in producing the conclusion at which the court arrived.

[6] Appellant, if it desired to attack the conclusions as unsupported by the evidence, ought to have brought up the facts, or at least have pointed out to the court below, in a motion for a new trial, the insufficiency of the evidence to support the conclusion. The judgment of the court below will be reformed so as to deny recovery for a sum in excess of \$200, the amount sued for in the justice court, and as reformed is affirmed.

Reformed and affirmed.

ANDERSON et al. v. ENGLER et al.
(No. 5632.)

(Court of Civil Appeals of Texas. San Antonio.
March 8, 1916.)

1. APPEAL AND ERROR \S 787—GROUNDS FOR
DISMISSAL — FAILURE TO PROSECUTE PRO-
CEEDINGS.

Where no transcript was filed until nearly six months after trial and no briefs were filed until four days before the time set for submission, the appeal will be dismissed for want of prosecution unless there was fundamental error in the trial of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3129, 3130; Dec. Dig. \S 787.]

2. EASEMENTS \S 18(1)—WAY OF NECESSITY—
STATUTE — CONSTRUCTION — INTENTION OF
THE LEGISLATURE.

Where the defendants' land was bounded on three sides by the Rio Grande river and on the fourth by the land of one of the plaintiffs, they could not invoke the provisions of a law enacted in 1884 (Gammel's Laws Tex. vol. 9, pp. 600-602), requiring a right of way be left across land surrounding the land of another, as that law did not by its terms apply to the defendants' tract, and the court had no authority to extend the law to include land evidently not contemplated by the Legislature.

[Ed. Note.—For other cases, see Easements, Cent. Dig. \S 50, 52, 55; Dec. Dig. \S 18(1).]

3. STATUTES \S 167(1) — REPEAL — ACTS NOT
CARRIED INTO REVISAL.

Where, in adopting the Revised Statutes of 1895 and of 1911, it was in each case provided that all civil statutes of a general nature in force when the Revised Statutes took effect and not included therein or not expressly continued in force were repealed, a law enacted in 1884 (Gammel's Laws Tex. vol. 9, pp. 600-602), which was not carried into either Code and which was not in either case among the exceptions to the repealing clause, was repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 242; Dec. Dig. \S 167(1).]

Appeal from District Court, Cameron County; W. B. Hopkins, Judge.

Suit for injunction by R. C. Engler and others against W. P. Anderson and others. From the judgment for plaintiffs, defendants appeal. Dismissed.

Rentfro & Cole and H. B. Galbraith, all of Brownsville, for appellants.

FLY, C. J. This is a suit brought by appellees to restrain appellants from driving

loose live stock through the gates and on the lands, crops, canals, or laterals of appellee Engler, who was the landlord of the other appellee, and from using said gates or roadway for other purposes than for pedestrians, persons on horseback or in vehicles, from leaving the gates open, and from leaving the road and going in or upon the canals, crops, or lands of said Engler. Appellees alleged their title to and possession of certain tracts of lands lying "in a bend of the Rio Grande in such a way that the east and west ends of said lands border on said river, for practically the full length of the east and west lines thereof"; that a canal had been constructed on the land, and was used to convey water for the irrigation of the crops; that the buildings and improvements, except fences, are situated on and near the west end of the land and are adjacent to the canal and its laterals; that gates have been provided near the canal, and the roadway runs along the canal, and no one has been prevented from using such gates and road, said gates being in the north and south lines of said land; that appellants claimed to own a tract of land lying south of and adjoining the lands of Engler, the land of appellants being bounded on the north by the south fence of said Engler, "While the east, west, and south sides of said lands claimed by defendants are bounded by the Rio Grande." It was further alleged that appellants had been driving loose stock across the lands of Engler and damaging the crops and canal on said lands. The court granted the injunction and rendered judgment in favor of appellees for \$100 actual and \$200 exemplary damages.

[1] This cause was tried in the district court on April 9, 1915, and the transcript was filed in this court on October 6, 1915. No briefs were filed in this court until February 26, 1916, the cause having been set down for submission for March 1, 1916. Appellees have filed a motion to dismiss the appeal for want of prosecution, and it will be done unless there be fundamental error in the trial of the cause, as contended by appellants.

[2] It will be noted that the petition showed that the land of appellants was lying completely between the land of appellee Engler and the river, and on the only side that egress and ingress from and to their land was open to appellants was the land of appellee Engler, the other sides of their land being encompassed by the Rio Grande, the boundary between Texas and Mexico. Appellants urged a general demurrer to the petition, which was overruled, and it is contended that such action was fundamental error, because the petition showed on its face that the land of Engler surrounded the lands of appellants and that no fence, road, or lane 60 feet wide had been left across said Engler's land as required by a law enacted

in 1884. Gammel's Laws of Texas, vol. 9, pp. 600-602.

There are two reasons why that law has no application in this case: First, because the law provides for fences and roads in connection with "land surrounding the land of another," and it clearly appears that the land of Engler lies only on one side of the land of appellants; the other sides being bounded by the Rio Grande, over which Engler has no power or control. The law in its very terms does not apply to a tract of land so bounded, but the law was evidently intended to protect the small landowner whose land might be inclosed in a pasture or other inclosure. It may be unfortunate that the law did not include land bounded as is appellants,' but this court has no authority to extend it so as to include land evidently not contemplated by the Legislature.

[3] The second reason why the law of 1884 cannot be invoked in this case is that it was not carried into the Revised Statutes of 1895 or those of 1911, and in adopting both Codes it was specially provided:

"That all civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."

That provision is followed by certain exceptions to the repealing clause, the law of 1884 not being among them.

There was no fundamental error in overruling the general demurrer, and the appeal will be dismissed for want of prosecution.

WESTERN UNION TELEGRAPH CO. v. SHERLIN. (No. 1549.)

(Court of Civil Appeals of Texas. Texarkana. Jan. 13, 1916.)

TELEGRAPHS AND TELEPHONES § 68(2)—ACTIONS FOR DAMAGES—MENTAL SUFFERING.

On October 9th the plaintiff left his train at Chattanooga, Tenn., because he could not buy a ticket required for his daughter, a child of 12. Early the next morning he filed a message to his father-in-law in Texas requesting money, which was written and accepted by the defendant's agent. In the afternoon he inquired for an answer, for the first time revealing his circumstances to the defendant's agent. At that time the message had not been sent. On October 12th, to avoid sacrificing the tickets for the rest of his family, plaintiff was obliged to leave for Texas without an answer, and to leave his child with a relative. The child received good treatment, and afterwards came safely to Texas alone. Plaintiff claims specific damages because of mental suffering. *Held*, as a matter of law, that the situation shown in evidence was not productive of such mental suffering proximately caused by negligence of the defendant as would entitle the plaintiff to judgment.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 69; Dec. Dig. § 68(2).]

Levy, J., dissenting.

Appeal from Fannin County Court; S. F. Leslie, Judge.

Action by Hugh Sherlin against the Western Union Telegraph Company. From a verdict for plaintiff, the defendant appeals. Reversed, and judgment rendered.

The action is by appellee for damages, founded upon mental anguish, for the negligent failure, as alleged, to transmit and deliver the following telegram:

"Chattanooga, Tennessee. October 10, 1913. J. T. Haney, H. M. Bonham, Texas. Wire me \$10.15 for half ticket and \$5.00 expense money. [Signed] Hugh Sherlin."

There was a trial before the court, and judgment for appellee.

The evidence shows that on October 9, 1913, the appellee was on his way from the state of Tennessee to Bonham, Tex., and when in the vicinity of Chattanooga he ascertained that the railroad company over whose line he was traveling would require a ticket for one of his children, a daughter about 12 years old. Appellee did not have the money with which to pay for the ticket of his child, and he and his family got off the train at Chattanooga and went to the home of his wife's uncle, who resided there. The uncle, as appears by inference, was not able to advance the money required for the ticket, and on the next morning at 7:45 o'clock appellee filed the above message, which was accepted by appellant. The appellee could not write, and at his request the agent wrote the message for him. The appellee did not, according to the evidence, inform the agent at Chattanooga at the time of filing the message of the circumstances surrounding him, but at 4 o'clock p. m. of the same day did give the agent at Chattanooga notice as follows:

"That I was in trouble and would have to leave one of my children if I didn't get the money; that I had no money and did not want to leave her there, and that it would grieve me if I did; that I didn't know what would happen to her, and that she would have to come to Texas by herself; that J. T. Haney was my father-in-law, and would send the money called for in the message."

At the time of this notice at 4 o'clock it does not affirmatively appear as a fact that the agent at Chattanooga had transmitted the telegram to Bonham. The record requires this court to support the finding of the trial court, as comprehended in the judgment, that the agent at Chattanooga at the time of the notice above had not forwarded the telegram, and that it was yet in his possession for the purpose of forwarding. Two hours, it was shown, was a reasonable time for a message to come from Chattanooga to Bonham. The evidence sufficiently supports a finding of fact here made of a negligent failure to transmit and deliver, as alleged, the telegram to the consignee, who was accessible to the delivering office at Bonham. The railway tickets of appellee and his family were not valid after the 12th day of October, and for this reason they were compelled to

pursue the journey without further delay in Chattanooga. The child, Cora, was left in Chattanooga at her granduncle's home, and was well treated while there. Subsequently, in about a week, J. T. Haney telegraphed the money to Chattanooga, and the child Cora came alone to Bonham, reaching there safely and well. Appellee testified:

"On account of not getting the money asked for in the message, I left my daughter Cora with Mr. Coleman at Chattanooga. Because of leaving her I was very much grieved, and suffered so much that I was unable to sleep or eat on the trip to Texas, and was uneasy about her, because I knew she would have to come to Texas alone. I brought all of my family with me except my daughter Cora. I had bad feeling on account of having to leave her to come alone, and was all tore up over it. * * * I left my daughter and came on because I did not want to lose my tickets. I could have stayed with her by sacrificing the tickets. Coleman and his family treated Cora kindly, and she was well cared for, and I did not fear that my daughter would be mistreated while with him. My daughter reached Bonham safely, and was well when she arrived in Bonham, and nothing happened to her in any way. * * * I suffered more on account of having to be separated from my child than anything else."

Hamp P. Abney, of Sherman, and Rosser Thomas, of Bonham, for appellant. Cunningham & McMahon and L. O. Fuller, all of Bonham, for appellee.

LEVY, J. (after stating the facts as above). By appellant's third assignment of error it is contended that, since the proof shows no notice of the circumstances surrounding appellee was given to the agent at Chattanooga at the time the message was filed with him, it was error for the court to render judgment for appellee for the special damages, which was mental anguish. The evidence, construed in the light of the direct and cross-examination of appellee, conclusively shows, it is concluded, that the only notice given by appellee to the agent at Chattanooga respecting special damages was subsequent to the filing of the message at 7:45 o'clock a. m., and such notice was given on the occasion of his second visit to the telegraph office at 4 o'clock in the afternoon, when he inquired of the agent concerning an answer to the telegram. But, according to the evidence in the record, this court is not warranted in concluding, it is believed, that when the notice was given to the forwarding agent at 4 o'clock such agent had performed his duty of transmitting the message, and did not have it in his possession unforwarded. The inference is permissible from the evidence that the forwarding agent had not at the time of the notice transmitted the message, and, as the trial court could have so inferred, this court must, in support of his judgment, so conclude. The forwarding agent does not testify respecting the transmission of the telegram. The receiving agent says: "I recall distinctly about receipt of the message in question, but do not recall now the time of its receipt," and does not otherwise

fix the time or day when he received it. And the effect of the evidence of Mr. Haney is that at one time the receiving agent told him there was no message in the office, and later admitted to him "that it was there when I called, and he didn't know why he did not give it to me." Mr. Haney, it appeared, called at the office on the 9th, 10th, and 11th of October, and on which day the telegram was at such office is not disclosed. In view of the facts, therefore, of this case, it is believed that notice to the agent before he had actually forwarded the telegram was sufficient to predicate special damages. Until the telegram had been transmitted by the agent at Chattanooga and the contract in that respect performed, he had power to act for the appellant with reference to the very subject-matter to which the notice relates. It is not thought that this is opposed to the principle laid down in *Railway Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518; *Id.*, 89 Tex. 428, 35 S. W. 6. See *Bourland v. Railway Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 647.

By proper assignment of error it is urged that under the facts pleaded and proven the appellee is not legally entitled to recover damages for mental anguish. The child, it appears, did not accompany her parents on the journey from Chattanooga to Texas, for lack of money on the part of her father to pay the railway fare. While at Chattanooga the child was well treated, and stayed at the home of her granduncle. Appellee, as he says, had no fears respecting his daughter while at her granduncle's. The child subsequently made the trip to Texas safely and was well when she arrived. The mental distress appellee suffered was on account of the fact that he was forced to separate himself from the child and leave her to later continue the journey to Texas by herself; she being young and inexperienced. The fact that the child later made the trip alone should not in the evidence, it is concluded, be held to be the direct and probable result of the failure to deliver the telegram, entitling appellee to recover. Knowing, as appellee did, that the child would have to take the trip alone, it was incumbent upon him to take all reasonable steps to prevent that fact and guard against any mental distress in that respect. And it affirmatively appearing, as it did, that appellee himself did not return nor send any one else to accompany the child, and there being an absence of any evidence excusing appellee from the failure to take such steps to prevent the child from traveling alone, his own conduct, and not the failure to deliver the telegram, would be the proximate cause producing the mental anxiety suffered on account of the child's traveling alone. It would so appear from the evidence of appellee, and therefore the burden was on him to show negligence proximately causing injury. And the mere fact, it is concluded, of mental agitation, in the

circumstances of the case, at being separated from the child and continuing the journey without her, does not afford a proper basis for recovery of the damages allowed. *Telegraph Co. v. Chamberlain*, 166 S. W. 370; *Morrison v. Telegraph Co.*, 24 Tex. Civ. App. 347, 59 S. W. 1127. This necessitates the reversal of the judgment and here rendering judgment for appellant, with all costs of appeal and of the trial court.

The writer is not inclined to agree to the conclusion of the majority that the situation shown in the evidence is, as a matter of law, not productive of such mental suffering, proximately caused by negligence of appellant, as would entitle appellee to the judgment.

We have considered the other assignments of error, and believe they should be overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. ELIAS. (No. 5577.)

(Court of Civil Appeals of Texas. Austin.
Feb. 9, 1916. Rehearing Denied
March 1, 1916.)

1. PLEADING \Leftrightarrow 20—**PETITION—ALTERNATIVE ALLEGATIONS.**

A petition alleging an unconditional liability against the defendant railway company, and in the alternative alleging that if plaintiff was mistaken another was liable, states a cause of action against the railway company, and is good as against general demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 43; Dec. Dig. \Leftrightarrow 20.]

2. PARTIES \Leftrightarrow 25—**JOINDER—RULES.**

The strict rules of pleading with respect to the joinder of parties have been relaxed owing to the abolition of the distinction between law and equity and the forms of pleading.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 81, 86-40; Dec. Dig. \Leftrightarrow 25.]

3. APPEAL AND ERROR \Leftrightarrow 1170(1)—**REVIEW—DISREGARD OF ERROR.**

In an action for the loss of cotton seed, plaintiff joined a railroad company and an oil mill, judgment being rendered against the railroad company alone. Plaintiff did not appeal from the judgment, though the undisputed evidence showed that one of the parties converted plaintiff's cotton seed. *Held*, that as on retrial the action would proceed against the railroad company alone, the error must be deemed harmless and the judgment affirmed under rule 62a (149 S. W. x), requiring the disregarding of immaterial errors, though the joinder was improper, for it must be presumed that the evidence justified the verdict, there being no statement of facts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. \Leftrightarrow 1170(1).]

4. APPEAL AND ERROR \Leftrightarrow 907(3)—**PRESUMPTION—STATEMENT OF FACTS.**

Where there is no statement of facts in the record, it must be presumed that the evidence justified the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. \Leftrightarrow 907(3).]

Appeal from Bastrop County Court; J. B. Price, Judge.

Action by A. M. Elias against the Missouri, Kansas & Texas Railway Company of Texas

and another. From a judgment against the named defendant alone, and in favor of its codefendant, defendant appeals. Affirmed. See, also, 166 S. W. 417.

Page & Jones, of Bastrop, for appellant. S. L. Staples, of Smithville, and N. A. Bector, of Austin, for appellee.

JENKINS, J. This is the second appeal in this case. It was tried upon the same petition as in the former case. For a full statement of same, see 166 S. W. 417. Upon trial of this case, judgment was rendered in favor of appellee against the appellant, and in favor of the codefendant Smithville Oil Mill Company.

[1] Appellant's first assignment is that the court erred in overruling its general demurrer, and in support of this assignment appellant cites *Oglesby's Sureties v. State*, 73 Tex. 680, 11 S. W. 873, and *Thorndale Mercantile Co. v. Evens & Lee*, 146 S. W. 1056. In the *Oglesby's Sureties Case*, supra, Judge Gaines, speaking for the Supreme Court of this state, said:

"To allege in a petition against A. and B. that A. is liable if B. is not, and that B. is liable if A. is not, does not allege the unconditional liability of either."

In the instant case the appellee alleged an unconditional liability against the Railway Company, and then, in the alternative, alleged that if he was mistaken in his allegation, that the Oil Mill Company was liable to him; hence, so far as the appellant is concerned, it was not error to overrule its general demurrer.

[2-4] The second assignment of error is that the court erred in overruling appellant's special exception to the effect that appellant and the Oil Mill Company were improperly joined.

"The same strict rules of pleading do not prevail with us in respect to the joinder of parties and causes of action, as in other states where the distinction between law and equity and forms of action is recognized." *Craddock v. Goodwin*, 54 Tex. 582.

Practically the only injury that could have been suffered by appellant's being compelled to try the case against it with the alleged cause of action of the Oil Mill Company would have been the delay that might have been, but in this case was not, occasioned thereby, concerning which the court might have exercised a sound discretion, and the additional cost, which might have been reached by a motion to tax costs. On the other hand, had appellee been forced to try its case against appellant alone, the jury might have found that it delivered the cotton seed to the Oil Mill Company, and the evidence might have been sufficient to sustain such finding, the jury being the judges of the credibility of the witnesses and the weight to be given to their testimony. On a trial against the Oil Mill Company before another jury, it might

have been found that the seed were not delivered, and an appellate court, for the same reason, might have been compelled to uphold that verdict. And thus, though the undisputed evidence showed that one or the other of said parties converted appellee's cotton seed, he would have lost as to both of them. But it is not necessary that we should decide this point in the instant case, for if we should sustain this assignment and reverse this case, it is apparent that it would proceed upon another trial against appellant alone, inasmuch as the judgment in favor of the Oil Mill Company is not appealed from, and therefore must be affirmed by this court. If there can be a case in which rule 62a (149 S. W. x) properly applies, we think this is such a case. There is no statement of facts in the record; hence we must presume that the testimony fully sustains the finding of the jury and the judgment of the court; and if it be true, as must be implied from the verdict of the jury herein, that the appellant received the cotton seed, as alleged in plaintiff's petition, and failed to deliver the same, no other judgment could be rendered upon another trial than that which was rendered upon the trial from which this appeal is taken. Besides this, appellee not having appealed from the judgment in favor of the Oil Mill Company, must be deemed to have abandoned his suit against that company; and as no joint liability is alleged, we see no reason why appellee might not abandon his action against that company, and we think it would be proper to treat the case here upon the theory that this is now a proceeding against appellant alone.

For these reasons we deem it our duty to affirm the judgment of the trial court herein; and it is so ordered.

Judgment affirmed.

MAYFIELD CO. et al. v. HARLAN & HARLAN. (No. 1538).*

(Court of Civil Appeals of Texas, Texarkana. March 11, 1916. On Rehearing, March 24, 1916.)

1. APPEAL AND ERROR §1010(1)—REVIEW—FINDINGS OF FACTS.

There being evidence tending strongly to support the finding that a transaction was a sale, and not a consignment of goods, that issue is not open on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. § 1010(1).]

2. FRAUDULENT CONVEYANCES §229—BULK SALES—REMEDY BY GARNISHMENT.

The purchasers from one who sells without compliance with the Bulk Sales Law (Rev. St. 1911, arts. 3971-3973) are liable in garnishment to his creditors for the goods, or the proceeds, if resold.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 668-670; Dec. Dig. § 229.]

3. FRAUDULENT CONVEYANCES §322—BULK SALES—RIGHTS OF BUYER.

One who in making a purchase, void because in violation of Bulk Sales Law, as consideration releases the seller's debt to him, cannot revive it, so as to share with the seller's other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 981; Dec. Dig. § 322.]

4. FRAUDULENT CONVEYANCES §318—BULK SALES—LIABILITY OF SECOND BUYER.

S. selling in violation of the Bulk Sales Law to M., and M. reselling to N., and taking his note, S.'s creditors cannot subject to their debts both the note and the goods.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 981; Dec. Dig. § 318.]

On Rehearing.

5. CHATTEL MORTGAGES §186 — STOCK OF GOODS—RESERVING TITLE AS SECURITY IN SALE.

Rev. St. 1911, art. 3970, declaring void every mortgage or other form of lien attempted to be given by the owner of a stock of goods daily exposed to sales in parcels in the regular course of business, does not apply to a lien resulting from reservation of title to secure the purchase money, made when the goods were sold to the storekeeper; and this though article 5654 makes such a reservation of title a mere chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 368; Dec. Dig. § 186.]

6. CHATTEL MORTGAGES §186—UNRECORDED RESERVATION OF TITLE—RETAKING GOODS—RIGHTS OF CREDITORS AND SELLER.

Under Rev. St. 1911, art. 5654, declaring a reservation of title to chattels to secure the purchase money a chattel mortgage, void as to creditors and bona fide purchasers unless registered, the seller taking possession of the goods with the consent of the buyer can hold them to the extent of the unpaid purchase price, against creditors of the buyer not then having a lien on them, though the reservation was unrecorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 368; Dec. Dig. § 186.]

Appeal from Smith County Court; Jesse F. Odom, Judge.

Action by Harlan & Harlan, a corporation, against the Mayfield Company and another, with garnishment against the Mayfield Company and W. E. Nunnellee. From an adverse judgment, the garnishees appeal. Reversed and rendered.

Simpson, Lasseter & Gentry, of Tyler, for appellants. Price & Baird, of Tyler, for appellee.

HODGES, J. On December 1, 1913, the Mayfield Company, a private corporation, acquired at a bankrupt sale a stock of goods, wares, and merchandise, together with some furniture and fixtures. On the same date all of those goods, furniture, and fixtures were delivered to the possession of one M. T. Sheets, of Tyler, Tex. The value of the goods amounted to \$3,100; the value of the furniture and fixtures to \$800. M. T. Sheets immediately advertised in the only daily paper published in the city of Tyler, where the transaction occurred, that E. O. Sheets

had purchased through the Mayfield Company the John F. Haden & Son bankrupt stock of groceries, and would conduct a grocery business at the old stand of John F. Haden. On December 6th following, February 12, 1914, and in August of the same year the Mayfield Company and Sheets entered into different written agreements, which were offered in evidence and form a part of the findings of fact filed by the trial judge. These tend to show that the goods were delivered to Sheets upon consignment, to be disposed of by him as the agent of the Mayfield Company. The trial court, however, found that these agreements, when properly construed, were intended to constitute merely a mortgage upon the goods in favor of the Mayfield Company to secure the original price, and that the transaction between the Mayfield Company and Sheets was a sale and purchase of the goods, furniture, and fixtures for the aggregate sum of \$3,900. M. T. Sheets took charge of the goods, and so far as the evidence discloses, conducted it according to the usual methods of carrying on a retail grocery business. During the year 1914 he incurred debts to various parties among whom was Harlan & Harlan, a private corporation, the appellee in this suit. After deducting payments which had been made to Harlan & Harlan at different times, Sheets owed that company when he quit business the sum of \$103.40. On November 25, 1914, the Mayfield Company, by agreement or otherwise, took charge of all the goods which Sheets then had on hand which had been purchased from it, and closed the house. The only goods in the building at that time which were not taken possession of by the Mayfield Company consisted of a small lot amounting in value to the sum of \$90 according to an estimate then made, but which were subsequently appraised at \$35. At the time of this transaction Sheets was indebted to the Mayfield Company in the sum of \$2,250.20, and owed other debts to the amount of \$600. On the 28th of November the Mayfield Company sold and delivered to the appellant W. E. Nunnellee this entire stock of goods, together with the furniture and fixtures. The goods were invoiced in that sale at \$985.17; the fixtures at \$519.20. The consideration paid by Nunnellee was part cash and a promissory note amounting in the aggregate to over \$400. In January following Harlan & Harlan filed suit in the justice court against Sheets for the \$103.40 due on account, and at the same time sued out writs of garnishment which were served upon both the Mayfield Company and Nunnellee. The Mayfield Company answered, denying that it owed Sheets anything, or had any effect belonging to him in its possession. By way of special answer, however, it alleged that previous to that time it had delivered to M. T. Sheets on consignment a stock of goods, wares, and merchandise, and that subse-

quently Sheets, in order to pay to the Mayfield Company a part of his debt, had turned over and delivered to it goods, wares, and merchandise inventoried at about \$900, of the probable value of \$600, which were a part of the goods theretofore consigned to Sheets by the Mayfield Company; that this amount was credited on the account of Mayfield Company against Sheets; that prior to the time the writ of garnishment was served upon it the Mayfield Company had transferred and sold the merchandise received from Sheets to other parties, and had no interest in or claim to the merchandise. Nunnellee answered, denying that he owed Sheets anything or had in his possession any effects belonging to Sheets, except a small amount of merchandise appraised at \$35; that before the service of the writ of garnishment a judgment was rendered against him in favor of I. H. Crutcher & Son in a suit similar to the one then pending for an amount greatly in excess of the \$35, and, if Crutcher's judgment is sustained, the garnishee would have nothing belonging to Sheets. These answers were controverted by Harlan & Harlan.

In a trial before the court a judgment was rendered in favor of Harlan & Harlan against the Mayfield Company, finding as facts that at the time the writ of garnishment was served Nunnellee had in his hands effects belonging to Sheets consisting of a stock of groceries, goods, wares, and merchandise of the value of \$985.17; that Mayfield Company had in its possession a promissory note executed and delivered to it by Nunnellee for the stock of goods in the sum of \$450. It was ordered that Mayfield Company deliver up to the sheriff, or any constable of Smith county, Tex., presenting to it an execution in favor of the plaintiff Harlan & Harlan, the note of Nunnellee, and that Nunnellee deliver the effects, or so much thereof as was necessary to satisfy the execution. Both the Mayfield Company and Nunnellee have appealed.

[1, 2] In one group of assigned errors the appellants contend that the evidence shows that the Mayfield Company had never parted with the title to the goods when delivered to Sheets; that such delivery was a mere consignment to an agent, and that the Mayfield Company had a right to retake these goods at any time with the consent of Sheets. That contention is based upon the various written agreements which were offered in evidence. The court's finding to the contrary disposes of that issue of fact. The dealings between the Mayfield Company and Sheets were much like those which usually occur between a vendor and purchaser, and in many respects unlike those which generally take place between a principal and his agent. The entire absence of any stipulation in those written agreements fixing the compensation which Sheets was to have for handling the goods, when considered in connection with his man-

ner of advertising and conducting the business, all tend strongly to support the findings of the trial court. It is conceded that the Mayfield Company took the goods from Sheets on the 25th day of November, 1914, without complying with the requirements of articles 3971, 3973 of the Revised Civil Statutes, commonly known as the "Bulk Sales Law," and that its purchase from Sheets was void as against the latter's creditors. The liability of the Mayfield Company to those creditors for the goods remaining in its hands, or their proceeds if sold, in a proceeding of this character, is settled by a recent decision of our Supreme Court. *Owosso Carriage & Sleigh Co. v. McIntosh & Warren* (Sup.) 179 S. W. 257. We deem it unnecessary to add anything to what is said in that opinion.

[3] The Mayfield Company insists that the stock of goods received by it from Sheets was insufficient to satisfy all of the creditors of Sheets, and that, if it is liable upon the ground that its purchase was unlawful, nevertheless Harlan & Harlan is not entitled to collect its entire claim; that it should share with other creditors of Sheets a part of the loss resulting from the insufficiency of the assets to satisfy his indebtedness. This proceeding is not one in which we can enforce an equitable distribution of the assets of an insolvent debtor. We are not referred to any evidence showing that Sheets was, in fact, insolvent, or that the Mayfield Company will lose its debt unless such a distribution is made. It may be that in its purchase from Sheets the Mayfield Company released, in whole or in part, whatever debt Sheets owed it. If so, it cannot now revive that claim and insist on sharing with other creditors the right to a distributive portion of the assets of Sheets. The contract by which it secured possession of the goods from Sheets was unlawful; and the law will leave the parties just where they placed themselves.

We therefore conclude that the judgment against the Mayfield Company should be affirmed.

[4] But the appellant Nunnellee occupies a different situation. He purchased from the Mayfield Company, and gave his promissory note in part payment. Assuming that goods in the hands of a vendee of one who has purchased in violation of the "Bulk Sales Law" may be reached through garnishment proceedings by an aggrieved creditor, it would be manifestly unjust to so hold under the circumstances presented by the record before us. The appellee recovered a judgment against the Mayfield Company requiring it to deliver to the proper officer the note by Nunnellee for the goods, and that judgment is here affirmed. Appellee is not entitled to subject both the note and the goods to its debt. *Armstrong v. Elbert*, 14 Tex. Civ. App. 141, 36 S. W. 139, and cases cited. The record further shows that the goods held by

Nunnellee other than those for which the note was given had been previously garnished by another creditor of Sheets.

The judgment as to Nunnellee will therefore be reversed, and judgment here rendered in his favor.

On Rehearing.

[5, 6] After considering the arguments presented and the authorities referred to in the appellants' motion for a rehearing, we have concluded that we erred in affirming the judgment rendered against Mayfield Company. Assuming, as the trial court did, that the contracts entered into between Mayfield Company and Sheets had the effect of creating a mortgage or lien in favor of Mayfield Company for the purchase price of the goods delivered to Sheets, that fact alone was sufficient to place those goods, when returned to Mayfield Company, beyond the reach of the writ of garnishment afterwards served. It is true that article 3970 of the Revised Civil Statutes makes void "every mortgage, deed of trust or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of business." But in the case of *Bowen v. Lansing Wagon Co.*, 91 Tex. 385, 43 S. W. 872, our Supreme Court has determined that this article of the statutes has no effect upon mortgages or liens resulting from a reservation of title to secure the purchase money made at the time the goods are sold. It is further held that article 5654, which makes all reservation of title to or property in chattels as security for the purchase money mere chattel mortgages, does not affect the validity of such liens. Such reservations are void only as to creditors and subsequent purchasers in good faith without actual or constructive notice of the existence of the lien. If Mayfield Company had any lien in this instance, it arose at the time the goods were purchased by Sheets, and by reason of a reservation of the title to the goods to secure the purchase money. Such a lien or mortgage was void only as to the creditors of Sheets and those who subsequently purchased from him without actual or constructive notice. At the time Sheets returned the goods to Mayfield Company in part payment of his debt Harlan & Harlan had acquired no lien and had taken no legal action which would place it in that class of creditors entitled to the protection of article 5654. *Bowen v. Lansing Wagon Co.*, supra; *Hall v. Keating Implement Co.*, 33 Tex. Civ. App. 526, 77 S. W. 1054; *Eason v. DeLong*, 38 Tex. Civ. App. 531, 86 S. W. 348; *Mansur & Tebbetts Implement Co. v. Beeman-St Clair Co.*, 45 S. W. 729.

The writ of garnishment was sued out after Mayfield Company had secured possession of the goods and held whatever title had theretofore been held by Sheets. The service

of this writ could have no retroactive effect. The attitude of Harlan & Harlan must be determined by its status at the time Sheets parted with his title and possession to Mayfield Company. If the mortgage was valid as between Mayfield Company and Sheets, and there is no creditor who can assail its validity, it follows that the goods in the hands of Mayfield Company were not subject to the writ at the time of its service. The evidence shows that the debt due Mayfield Company by Sheets was greatly in excess of the value of the goods he returned. What Mayfield Company might have accomplished by a judicial proceeding in subjecting those goods to the payment of its debt against Sheets is not illegal when done by the parties themselves without the perpetration of any fraud or wrong toward others.

The judgment heretofore rendered affirming that of the trial court as to Mayfield Company will be reversed, and judgment will be here rendered in favor of the appellant Mayfield Company, together with all costs both of this court and of the court below.

MAYFIELD CO. et al. v. I. H. CRUTCHER & SON. (No. 1545.)

(Court of Civil Appeals of Texas. Texarkana. Feb. 11, 1916. On Rehearing, Feb. 24, 1916.)

Appeal from Smith County Court; Jesse F. Odom, Judge.

Action by I. H. Crutcher & Son against M. T. Sheets, with garnishment against the Mayfield Company and another. From an adverse judgment, garnishees appeal. Reversed and rendered.

Simpson, Lasseter & Gentry, of Tyler, for appellants. Price & Beaird, of Tyler, for appellees.

WILLSON, C. J. This case in its material facts is like Mayfield Company et al. v. Harlan & Harlan, 184 S. W. 313, this day decided by this court, except that there: (1) The amount of the debt in favor of appellee against M. T. Sheets was \$133.83; (2) the writs of garnishment were served upon Mayfield Company and Nunnellee before the former sold the Sheets stock of goods to the latter, and at a time when, according to a finding of the court, the goods were in the joint possession of Mayfield Company and Nunnellee; and (3) the judgment directed them to deliver to the sheriff or constable holding an execution issued on the judgment in appellee's favor against Sheets the effects belonging to him and in their possession when the writs were served, or so much of same as were necessary to satisfy such execution. The finding that the goods were in the joint possession of Mayfield Company and Nunnellee at the time the writs of garnishment were served upon them respectively is attacked by appellants as without support in the testimony. But the finding was warranted by evidence which it appears from the record appellants in open court agreed the court should consider in determining the facts of the case. For reasons stated in the opinion of Judge Hodges disposing of the Harlan Case, the judgment is believed to be without error, and therefore it is affirmed.

On Rehearing.

As stated in the opinion of this appeal, the case is like Mayfield Company et al. v. Harlan & Harlan, 184 S. W. 313, decided 27th ult. The motion of the appellant Mayfield in that case has been granted, and for reasons stated in the opinion of Justice Hodges on that motion the judgment therein rendered by this court affirming the judgment of the court below in so far as it was against the Mayfield Company has been set aside, and judgment has been here rendered in favor of that company. Those reasons apply as well to this case, and therefore the motions of the appellants will be granted, the judgment heretofore rendered by this court affirming the judgment of the court below will be set aside, and judgment will be here rendered that appellees take nothing by their suit against appellants, and that the latter recover of the former the costs of both this court and the court below.

HAZELRIGG v. NARANJO. (No. 5621)*

(Court of Civil Appeals of Texas. San Antonio. Feb. 23, 1916. Rehearing Denied March 22, 1916.)

1. CONTINUANCE ⇨23—RIGHT TO—DENIAL.

In an action for the purchase price of horses, where it was not shown that cattle transactions between the parties were material, the denial of a continuance on account of the absence of witnesses who could testify as to such transactions was not error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 68-71; Dec. Dig. ⇨23.]

2. CONTINUANCE ⇨46(4) — APPLICATION — STATEMENT OF CONCLUSION.

A mere statement of a conclusion as to what would be proven by an absent witness is not a compliance with the statute entitling a party to a continuance to procure such witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 182; Dec. Dig. ⇨46(4).]

3. CONTINUANCE ⇨22—ABSENT WITNESSES—RIGHT TO.

In an action for the purchase price of horses, where defendant counterclaimed for duty paid on the horses, and the evidence showed that neither the seller nor one of his agents had anything to do with the payment of duties, the denial of a continuance requested on the ground of the absence of the seller and such agent, whom it was claimed could testify as to such matters, was not error; for in disposing of such a question the appellate court may consider the evidence.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 58-67; Dec. Dig. ⇨22.]

4. PRINCIPAL AND AGENT ⇨119(1)—AGENCY —SCOPE—PRESUMPTIONS.

Agency, when once shown to exist, is presumed to be general, and not special.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391, 393, 398, 399, 401; Dec. Dig. ⇨119(1).]

5. EVIDENCE ⇨75—PRESUMPTION—FAILURE TO PRODUCE EVIDENCE.

A party's failure to produce evidence or introduce a witness who is present raises a presumption that such evidence was not favorable to him, and that such witness would not have testified in his behalf.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. ⇨75.]

6. PRINCIPAL AND AGENT ⇨123(10) — ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit for the purchase price of horses, where defendant claimed plaintiff was bound to recompense him for duties paid on the animals,

evidence held to warrant a finding that defendant's brother, to whom the duties were paid, was defendant's agent authorized to receive payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 429; Dec. Dig. 128(10).]

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Action by Francisco Naranjo against J. B. Hazelrigg. From a judgment for plaintiff, defendant appeals. Affirmed.

Hicks, Hicks, Teagarden & Dickson, of San Antonio, for appellant. H. G. Dickinson, of Laredo, for appellee.

MOURSUND, J. Francisco Naranjo sued J. B. Hazelrigg for \$2,540 alleged to be due for 127 head of horses and mules sold by Naranjo to Hazelrigg. Hazelrigg admitted that he bought 127 head of horses and mules from plaintiff, through his agent, Vicenta Garza, but alleged that as a part of said agreement he (Hazelrigg) paid the duties, both export and import, from Mexico to the United States, of approximately \$19 per head on 200 head of horses, and it was agreed that the same should be repaid to defendant out of the purchase price of said horses, and that thereafter said 200 head of horses were placed in a pasture, and charges of \$250 accrued for their pasturage; that thereafter the number of horses was reduced by "death, purchase and claims of others" to about 127 head, and defendant, through an agreement with said Garza, took the same at the rate of \$20 per head, with the understanding that the duties as well as the pasturage advanced by defendant should be deducted from the price; and that therefore he only owes to plaintiff \$300.

Plaintiff, by supplemental petition, admitted that he was bound to pay the duties, and alleged that through his agent, Segundo Villareal, he paid to defendant \$2,000, the full amount of said duties. He denied that he agreed to pay defendant the pasturage, or to deduct same from the purchase price of the horses. Defendant, in answer to such petition, denied the facts therein alleged, and alleged that none of the sums mentioned in his answer had been paid or allowed him. Upon the trial plaintiff agreed that defendant was entitled to an offset of \$250 for pasturage paid by him. Judgment was rendered in favor of plaintiff for \$2,290.

[1] Appellant complains of the refusal of his first application for a continuance, wherein he alleged that the testimony of plaintiff, Naranjo, and Vicenta Garza was material to his defense. He alleged that he expected to prove by said witnesses that for two years he had been dealing with plaintiff in the buying and selling of cattle, and that during said time they had been running an open account, and that he had paid various sums to the plaintiff, and does not know the exact status of said account, but that said Garza, the manager and agent of Naranjo, has kept

accurate account, and that the matter sued on by plaintiff is dependent upon the status of the account between plaintiff and defendant. No effort is made to show in what way there is any connection between the contract for the sale of the horses and the alleged account concerning purchases and sales of cattle. There is no pleading which would make said testimony material, and the allegations in regard thereto were not sufficient to require the granting of the application.

[2, 3] It was further alleged in the application that he had paid the duties on the horses as pleaded by him, and that he was entitled to an offset on the amount of duties paid to the extent of approximately \$2,000, and that these facts are known to Garza and plaintiff, and that, if said parties were present, he would be able to show such facts by them, or at least by Garza. It will be noted that appellant refrained from alleging that such duties had not been paid to him by plaintiff, or in his behalf, and leaves such fact to be inferred from the conclusion that he is entitled to the offset. It has been held that the statement of conclusions is not a compliance with the statute. *East Texas Land & Improvement Co. v. Texas Lumber Co.*, 21 Tex. Civ. App. 414, 52 S. W. 645; *Earl v. State*, 33 Tex. Civ. App. 161, 76 S. W. 207. An appellate court in passing upon an assignment complaining of the overruling of an application for a continuance may look at the evidence taken upon the trial to determine whether the testimony desired was, in fact, material and whether any injury resulted by reason of the absence of the witnesses. *Orouch v. Johnson*, 7 Tex. Civ. App. 485, 27 S. W. 87; *Railway v. Brooks*, 182 S. W. 95; *Mutual Life Ins. Co. v. Garvin*, 141 S. W. 797. Upon the trial it was shown without contradiction that Garza had nothing to do with the transaction with reference to payment of duties, that he was in Monterey at the time, and that Segundo Villareal by direct authority of plaintiff paid to Bob Hazelrigg, appellant's brother, the sum which said Hazelrigg claimed to have paid for duties exacted. In fact, it was made clear that on the single issue to be determined Garza knew nothing and plaintiff knew nothing. Appellant, although in court, failed to testify, and introduced no evidence from which it could be seen that either Garza or Naranjo knew anything concerning such issue. When the application is viewed in the light of the testimony, it is apparent that appellant suffered no harm by the refusal thereof. It therefore becomes unnecessary to discuss the question whether the application shows due diligence. The first assignment is overruled.

[4-5] Appellant contends that the evidence fails to show that the sum paid for duties had been repaid to him. Thos. O'Connor, who was authorized by Naranjo to collect from appellant for the horses, testified that he talked to appellant about the matter, and

appellant admitted the indebtedness for 127 head of horses, but claimed an offset of \$250 for pasturage. He did not make any claim that Naranjo owed him for the duties paid. O'Connor testified further that Segundo Villareal was acting as Naranjo's agent in this matter. Segundo Villareal testified that he acted for Naranjo in the delivery of the horses, that he delivered same to Bob Hazelrigg, appellant's brother, and that he paid Bob Hazelrigg \$2,000, which was the sum said Hazelrigg claimed he was required to pay as duties. The witness testified that Bob Hazelrigg told him he was acting for appellant. He further testified that Vicenta Garza told him he had sold the horse stock to appellant for \$20 per head; that Bob Hazelrigg told witness the Carranzistas wanted \$2,000, and witness consulted with Naranjo, and he said it was all right; that said Hazelrigg crossed the stock on June 8th, and on the 10th witness paid him the said sum out for duties; that Vicenta Garza was not present during any of these transactions between witness and Bob Hazelrigg, he being at that time at Monterey, Mexico. It appears from this testimony that the trade between Naranjo and appellant was made before it was undertaken to bring the horses across from Mexico; that Bob Hazelrigg purported to act as the agent of appellant in receiving the horses, paying the duties and collecting the money from Villareal. It appears from appellant's pleadings and admissions to O'Connor that he recognized his brother's agency by receiving the horses through him. Agency, when once shown to exist, is presumed to be general, and not special. It therefore may be presumed that Bob Hazelrigg, in connection with his duty to receive the horses for appellant, had the authority to do everything necessary to be done in connection with the matter. If he used appellant's money to pay the duties, he would naturally be expected by appellant to collect the sum from Naranjo. Having collected the same, it was his duty to pay it to appellant, and, if he failed to do so, it is indeed strange that appellant made no claim in talking to O'Connor about the amount due by him for the horses to the effect that he had not received the sum paid out for duties. It is strange that he would admit his indebtedness for 127 head of horses, with the exception alone that he was entitled to an offset of \$250 for pasturage if he was entitled to a further offset of \$2,000; in other words that he would admit an indebtedness of \$2,540, less \$250, if he really only owed \$290. The evidence fails to disclose that he himself had anything to do with paying the duties, and if, in fact, he personally paid the duties, as he intimates in his brief might be inferred from the pleadings, then it would seem that, if he did not want his brother, who crossed the horses and had all the dealings with Villareal, to collect the sum from Villareal,

he should have notified Villareal of the limitations he desired to impose upon his brother's authority. The testimony of Villareal is not as clear as it should be; for instance, he testifies that Bob Hazelrigg turned the horses over to him after bringing them over from Mexico, which is inconsistent with the fact that \$250 was allowed to appellant for pasturage paid on the stock, which pasturage appellant alleges accrued after the horses were brought across from Mexico. We think, however, the evidence is sufficient to sustain the judgment, and the fact that appellant failed to call as a witness his brother Bob, who was seen by Villareal at Laredo two or three days before the trial, and failed to take the stand himself, although present, as is shown by a recital in the judgment, not only strengthens the probative force of the testimony given, but of itself is clothed with a certain probative force. Jones on Evidence (2d Ed.) § 19.

The court was warranted in concluding that Bob Hazelrigg was the agent of appellant, with full power to do all that Villareal testified he did do, and that, as such agent, he collected the \$2,000 which appellant claims should be offset against plaintiff's demand, and that appellant received said sum from his said agent.

The judgment is affirmed.

VADEN v. BUCK et al. (No. 7045.)

(Court of Civil Appeals of Texas. Galveston. March 9, 1916.)

1. PLEADING — 267 — AMENDMENT — STATUTES — RULE OF COURT.

Under Rev. St. 1911, arts. 1824, 1825, and rule 16 for the district and county courts (102 Tex. xxxix, 142 S. W. xviii), touching the amendment of pleadings, in a suit by an agent to recover commissions for effecting a sale and exchange of lands between defendants and a party impleaded, where there was nothing in the amendment to his cross-bill which the party impleaded sought to file which operated to surprise the other parties, it not setting up any new matter, but merely amplifying the allegations of the original pleading, and correcting errors therein, the trial court, although its own rule required amendments to be filed five days before trial, which was not observed, erred in refusing to permit the party impleaded to file the amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 808; Dec. Dig. — 267.]

2. APPEAL AND ERROR — 1041(1) — HARMLESS ERROR — REFUSAL OF AMENDMENT.

Where an original cross-bill, with the trial amendments permitted to be filed, contained all material allegations in an offered amendment to the cross-bill, an erroneous ruling of the trial court refusing to permit the amendment was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4106; Dec. Dig. — 1041(1).]

3. FRAUD — 64(1) — QUESTION FOR JURY.

In a suit for fraud and false representations, where there was ample evidence to sustain plaintiff's allegations thereof, and to show

that he suffered damage, the issues were for the jury under proper instructions.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 65½, 67, 71; Dec. Dig. § 64(1).]

4. EVIDENCE § 358—WITNESSES § 406—CONTRADICTION—MAPS.

In a suit by the buyer of land for false representations of the seller's agent as to its quantity, the map furnished the buyer by the agent, which appeared to have been changed, after it was made by the surveyor, to show a greater amount of cultivated land on the tract than there was in fact, was admissible not only to contradict the agent's testimony, but as affirmative evidence to establish the buyer's allegations of fraud and false representations.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358; *Witnesses*, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.]

5. PLEADING § 228—ISSUES—EXCEPTIONS TO PLEAS.

Where the trial court sustained plaintiff's exceptions to pleas of waiver and estoppel, and no amendment thereof was filed, the issue was not in the case, and could not be considered by the jury.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 584-590; Dec. Dig. § 228.]

Appeal from District Court, Anderson County; John S. Prince, Judge.

Suit by J. B. Berry against Bert G. Buck and another, in which O. L. Vaden was impleaded. From a judgment for plaintiff against defendants, and in favor of the defendants and plaintiff against the party impleaded, the latter appeals. Reversed and remanded.

A. D. Dyess, of Temple, and Funderburk & Strickland, of Palestine, for appellant. Gardner & Gardner and Campbell & Sewell, all of Palestine, and P. W. Brown, of Ft. Worth, for appellees.

PLEASANTS, O. J. By a cross-bill filed and presented in a suit brought by J. B. Berry against Bert G. Buck and Charles M. Buck to recover commissions alleged to be due him as agent in effecting a sale and exchange of lands between appellant and said Bert G. and Charles M. Buck, appellant, who was impleaded in said suit by the defendants Buck, sought to recover from said defendants and the plaintiff Berry the sum of \$4,000 actual damages, and from plaintiff Berry the further sum of \$1,000 exemplary damages, for the alleged false and fraudulent representations of said Berry as agent of defendants Buck in effecting said sale and exchange of land, which false representations are alleged to have been willfully and maliciously made by the said Berry.

The pleading of appellant alleged, in substance, that on or about the 7th day of November, 1913, he entered into a contract with the said Bucks as principals, acting by and through their agent, J. B. Berry, whereby he purchased certain lots or parcels of land in Navarro county, Tex., described in his petition, for the sum of \$34,000; that on or about the 17th day of November, 1913,

the defendants Charles M. Buck and Bert G. Buck conveyed by warranty deed the said property to said Vaden, and he paid the consideration specified in said contract. The intervener further alleged that prior to the purchase of said land by him and prior to the execution of the aforesaid deed and during the negotiations preliminary to said purchase and sale, the said J. B. Berry, acting for himself and his codefendants, represented as a matter of fact that said tract of land contained at least 500 acres of land that had previously been put in a first-class state of cultivation, when as a matter of fact there were only 317 acres of said land in a state of cultivation; that said representations as to the quantity of land in cultivation were material; that intervener relied upon same and did not discover that they were false until after he had placed valuable improvements on the land.

In answer to this cross-action defendants Buck and plaintiff Berry, in addition to general and special denial, pleaded waiver and estoppel. Exceptions interposed by appellant to the pleas of waiver and estoppel were sustained by the trial court. The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff Berry against the defendants Buck for the sum claimed by him, and in favor of said defendants and plaintiff against appellant on his claim for damages. This verdict was returned in obedience to peremptory instructions by the court.

The first assignment of error complains of the refusal of the trial court to grant appellant's request, made before the commencement of the trial, to file an amended pleading. It appears from the bill of exceptions and the qualifications made thereto by the trial judge that the cause was set for trial on December 10, 1914. The court was engaged until late in the evening of that day in the trial of another cause, and when this cause was finally reached it was too late to begin the trial before the morning of the 11th, but plaintiff and defendants announced ready. Thereupon appellant before announcing asked leave to file an amended pleading, which request was refused. On the next morning before the trial of the case began appellant renewed his request, and it was again refused. In explanation of his ruling refusing leave to file the amendment, the trial judge states that a year or more before the trial of this cause he had made an order which was entered upon the minutes of the court that required all amendments to pleadings to be filed at least five days before the day set for the trial of the case in which they were filed, and that this requirement had been frequently announced by the court and usually adhered to by both the court and attorneys; that plaintiff's counsel objected to the filing of the amended plead-

ing offered by appellant on the ground that it came too late, and "much was said on both sides as to whether the pleading contained new matter, which the court does not fully remember. Plaintiff was contending that the new pleading set up a new cause of action. The objection was sustained and the amended pleading not permitted to be filed, but intervenor (appellant) was permitted to file a trial amendment correctly pleading his measure of damage as the original pleading had failed to do." During the trial appellant was also permitted to file a trial amendment to meet a variance between the allegations of his original pleading and the evidence offered by him.

[1] The trial court erred in refusing to permit appellant to file the amendment. There was nothing in the amendment which could have operated to surprise appellees. It does not set up any new matter, but merely amplifies the allegations of the original pleading and corrects errors therein, and under the statute regulating amendment of pleadings the trial court was not authorized to refuse to permit the amendment to be filed. It goes without saying that the rule promulgated by the trial court cannot change or modify the rules fixed by the statute and prescribed by the Supreme Court regulating the amendment of pleadings. Articles 1824 and 1825, Revised Statutes (1911); rule 16 for district and county courts (102 Tex. xxxix, 142 S. W. xviii); Metzger v. Wendler, 35 Tex. 367; Fidelity & Casualty Co. v. Carter, 23 Tex. Civ. App. 359, 57 S. W. 315; Railway Co. v. Butler, 34 S. W. 756; Boren v. Billington, 82 Tex. 187, 18 S. W. 101.

[2] We do not think, however, that this erroneous ruling of the trial court would require a reversal of the judgment, because the original pleading with the trial amendments permitted to be filed by the court contains all of the material allegations in the offered amendment, and there is nothing in the record which suggests that appellant suffered any injury by not having been permitted to file his amendment.

[3] The second assignment complains of the charge of the court peremptorily instructing the jury to return a verdict against appellant. This assignment must be sustained. There is ample evidence to sustain the appellant's allegations of fraud and false representations and to show that he suffered damages thereby, and these issues should have been submitted to the jury under proper instructions.

[4] The map offered by appellant in evidence, which was furnished appellant by plaintiff Berry and which appears to have been changed after it was made by the surveyor so as to show a greater amount of cultivated land on the tract sold appellant than there was in fact, was admissible not only for the purpose of contradicting the testimony of plaintiff, but as affirmative evi-

dence tending to establish the allegations of fraud and false representations alleged in appellant's pleading, and the trial court should not have limited this evidence to the question of the credibility of plaintiff.

[5] The trial court having sustained appellant's exceptions to the pleas of waiver and estoppel and no amendment of said pleas having been filed, that issue was not in the case and could not properly have been considered by the jury.

For the error of the trial court in instructing the jury to return a verdict against appellant, the judgment is reversed, and the cause remanded.

Reversed and remanded.

MANN et al. v. BELL. (No. 5584.)

(Court of Civil Appeals of Texas. Austin. Feb. 23, 1916.)

1. TRIAL \S 139(1)—PROVINCE OF JURY—CONFLICTING INFERENCE.

Where there is any evidence about which reasonable minds may differ, it is the duty of the trial court to submit the issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341; Dec. Dig. \S 139(1).]

2. PRINCIPAL AND AGENT \S 116(1)—ACTS OF AGENT—SCOPE OF AUTHORITY.

Where an agent authorized to buy cotton, bought cotton for future delivery and the seller did not know of the principal's uncommunicated instructions that cotton should be bought only for immediate delivery, the principal is liable, for, as the agent was acting within the scope of his apparent authority, secret instructions are unavailing.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 377; Dec. Dig. \S 116(1).]

3. EVIDENCE \S 471(31)—OPINION EVIDENCE—CONCLUSION.

Testimony that it was a matter of common knowledge that defendant's agent had no authority, save to buy spot cotton, is inadmissible as a conclusion where the suit was to recover on a contract to purchase cotton for future delivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2176; Dec. Dig. \S 471(31); Witnesses, Cent. Dig. \S 833-836.]

4. PRINCIPAL AND AGENT \S 20(1), 120(1) — SCOPE OF AUTHORITY — GENERAL REPUTATION.

Neither agency nor the scope thereof can be proven by general reputation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 37, 402, 404, 408, 410, 411; Dec. Dig. \S 20(1), 120(1).]

Appeal from District Court, McCulloch County; Jno. W. Goodwin, Judge.

Action by Thomas Bell against James T. Mann and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Jos A. Adkins and Shropshire & House, all of Brady, for appellants. F. M. Newman, of Brady, and Wilkinson & McGaugh, of Brownwood, for appellee.

RICE, J. Appellee brought this suit against James T. Mann, O. Duke Mann, R. V. Stearns, Grace Beavans, and James Beavans,

appellants herein, who were formerly stockholders in the corporation of O. D. Mann & Sons, to recover damages suffered by him on account of their alleged breach of contract in refusing to accept and pay for 200 bales of cotton sold to said company through their agent, Steve Duke, 100 bales on September 23, and 100 bales on September 29, 1911, respectively, to be delivered on the 25th day of October of said year, or earlier at his option, the first 100 bales at $10\frac{3}{16}$ cents and the second 100 bales at $9\frac{15}{16}$ cents per pound, basis middling; alleging that he tendered said cotton to appellants on October 19, 1911, in compliance with his contract of sale, and demanded payment therefor; that is to say, he demanded payment for 100 bales at their value based on $10\frac{3}{16}$ cents per pound for middling grade cotton, and for 100 bales at their value, based on $9\frac{15}{16}$ cents per pound for middling grade cotton; that the 100 bales sold September 23d weighed 53,817, and the other 100 bales weighed 53,247; that at the time of said tender the market value of middling grade cotton at Brady was $8\frac{3}{14}$ cents per pound, basis middling; that at the time said first 100 bales were tendered they were worth $1\frac{1}{16}$ cents per pound, or \$773.62 less than at the time of sale; and the other 100 bales were worth $1\frac{1}{16}$ cents per pound, or \$632.23 less than at the time of their sale, aggregating the full sum of \$1,405.95. He further alleged that said corporation was dissolved about December 26, 1911, and at the time appellants (except James Beavans, who was impleaded only pro forma) were owners of its stock; that all of its property was by its directors and managers James T. Mann, O. D. Mann, and R. V. Stearns turned over to its said stockholders, and by them converted to their own use and benefit, the same being of greater value than the damages here sued for.

After a general denial, appellants specially answered, admitting that the said Duke was employed by said company to purchase cotton for it on the streets of Brady, but averred that said authority was limited to purchases for immediate delivery only; that he had no authority to make any contract binding it to accept and pay for cotton to be delivered in the future; that he was furnished with a price limit each forenoon to be used during that day only in purchases of cotton for immediate delivery; that it was the universal custom amongst cotton buyers to limit the authority of their agents who bought cotton, just as Duke was in the present instance, and that appellee, who was an experienced cotton buyer at said place, was well acquainted with said custom; that neither said corporation nor appellants had ever held said Duke out as having authority to purchase cotton for future delivery, and had never ratified any such purchases by him.

[1, 2] Upon conclusion of the testimony the

court, of its own motion, instructed a verdict for appellee for the sum of \$1,405.95 and upon its return rendered judgment in accordance therewith against appellants, from which they have prosecuted this appeal, insisting by their first assignment that the court erred in so charging the jury, contending that there being evidence to support their contention, it was the duty of the court to submit their theory of the case to the jury upon a proper charge, citing in support thereof *Choate v. Railway*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319; *Id.*, 91 Tex. 406, 44 S. W. 69; *Insurance Co. v. Brown*, 82 Tex. 631, 18 S. W. 713; *Huff v. Crawford*, 89 Tex. 220, 221, 34 S. W. 606; *Dallas v. Beeman*, 12 Tex. Civ. App. 344, 34 S. W. 341; 31 Cyc. 1674-77. The rule of law seems to be that where there is any evidence about which reasonable minds may differ, it is the duty of the trial court to submit the issue for the consideration of the jury. Appellee, admitting the law to be as contended by appellants, insists, however, that there was no evidence warranting the submission of such issue, and therefore it became the duty of the court to instruct a verdict in his behalf. Appellants admitted on the trial of this case that the corporation of O. D. Mann & Sons, their predecessor, had, in September, 1911, employed Steve Duke as its agent and authorized him to buy cotton for it during the season in the town of Brady, but the evidence showed that it gave him private instructions to purchase cotton only for immediate delivery. The testimony, however, failed to show that these instructions were known to appellee, and he testified that he never knew, heard, or suspected that there was any limitation upon Duke's authority; that at one time he sold Duke 25 bales and at another 100 bales; the 25 bales were delivered close to the time of purchase, but the 100 bales were delivered some 10 or 12 days thereafter, all of which was accepted and paid for by appellants; that he knew of said Duke having purchased cotton to be delivered in the future from other parties during said season; during the time mentioned in the petition he lived at Brady and made the alleged contract with Duke and tendered the cotton called for therein in compliance therewith, but appellants refused to receive same, and when so tendered the cotton was shown to have been worth \$1,405.95 less than the contract price.

The agent having bought said cotton while acting within the scope of his authority, appellants were bound thereby. See *Merriman v. Fulton*, 29 Tex. 98-108; *New York Life Ins. Co. v. Rohrbough, Moore & Co.*, 2 Willson, Civ. Cas. Ct. App. § 217; *Watkins v. Morley & Co.*, *Id.* § 727; *Strozier v. Lewey & Co.*, 3 Willson, Civ. Cas. Ct. App. § 181.

Secret or private instructions to an agent, though binding as between the principal and agent, can have no effect on a third person who deals with the agent in ignorance of the

instructions and in reliance upon the apparent authority with which the principal had clothed him. As to third persons, such secret instructions are no restrictions upon the apparent authority of a general agent, for persons dealing with an agent are, in the absence of special proof to the contrary, presumed to know only his general authority, and have a right to assume that the principal intended him to employ the usual and appropriate means to do the acts that belong to the particular character of employment, or that have been previously employed by such agent, irrespective of any private directions the principal may have thought it best to give to the agent; and a special agent who acts within his apparent power will bind his principal, even if he has received private instructions which limit his special authority. See 31 Cyc. 1327B et seq.

In the instant case it appears that Duke was the agent of appellants, with general authority to buy cotton upon the streets, and was so generally regarded in the town of Brady, and there was no evidence whatever to show that appellee had any knowledge of the private instructions limiting his authority to purchase for immediate delivery only. This being true, we think that appellants were clearly bound by the acts of their agent in purchasing the cotton in question, and that the court properly instructed the jury to return a verdict in favor of appellee. In *Clark & Skyles on Agency*, § 70, p. 177, it is said:

"Where the facts are undisputed, the question whether the agent had the requisite authority to bind his principal by a particular act or contract is a question of law for the court."

[3] Appellants contend by their eleventh assignment that the court erred in refusing to permit them to prove by James T. Mann that it was matter of common knowledge that everybody in the town of Brady knew that Steve Duke had no authority from the firm of O. D. Mann & Sons, except to buy spot cotton on the streets. This evidence was properly excluded, we think, upon objection of appellee that it was the mere conclusion and opinion of the witness. See *E. A. L. M. Co. v. Briggs*, 41 S. W. 1036; *Int. Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93-100; 31 Cyc. 1652, subd. 3; 10 Ency. Evid. pp. 227, 228; *McCornick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah, 71, 63 Pac. 820-822.

[4] Neither agency nor the scope thereof can be proven by general reputation. See *McGregor v. Hudson*, 30 S. W. 489; *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227-229; *Mechem on Agency* (1st Ed.) § 101; 31 Cyc. p. 1665, subd. 9; 10 Ency. Evid. p. 27, subd. 14; *Union Trust Co. v. McKeon*, 76 Conn. 508, 57 Atl. 111, 112; *Tucker v. Constable*, 16 Or. 407, 19 Pac. 14.

The remaining assignments complain of errors in refusing to give special charges re-

quested at the instance of appellants; but since we have concluded that the court did not err in directing a verdict in behalf of appellee, none of them need be considered.

Finding no error in the proceedings of the trial court, its judgment is in all things affirmed.

Affirmed.

FULLER, HANNA & CO. v. ROGERS.
(No. 73.)

(Court of Civil Appeals of Texas, Beaumont.
Feb. 10, 1916. Rehearing Denied
March 1, 1916.)

1. CERTIORARI \S 17 — RIGHT TO WRIT—CORRECTION OF RETURN.

On appeal from a judgment against the claimant of attached property in an action begun in a justice court, the Court of Appeals cannot issue certiorari to correct the return as made by the constable showing the value of the property attached in order to make it conform to his intentions, though it could issue the writ to have the record corrected if the return were incorrectly copied therein.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 22; Dec. Dig. \S 17.]

2. JUSTICES OF THE PEACE \S 44(7)—JURISDICTION—AMOUNT IN CONTROVERSY—CLAIM OF ATTACHED PROPERTY.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 7773, providing that, when a third person shall claim attached property, the sheriff or officer having it in charge shall indorse on the writ the fact of such claim and state the value of the property, and article 7773, providing that, where the value assessed shall be more than \$200 and less than \$500, the writ shall be returned to the county court for trial, the assessment of the value by the officer, when made, is conclusive as to the court's jurisdiction, and the justice of the peace has no jurisdiction if it shows a value of \$250, though, in fact, it was worth only half that amount.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 165; Dec. Dig. \S 44(7).]

3. APPEAL AND ERROR \S 185(1)—QUESTIONS PRESENTED—JURISDICTION.

The jurisdiction of the justice of the peace over a claim for attached property can be questioned by assignment of error to the judgment of the county court and appeal from a justice of the peace, since jurisdiction is a matter that can be called in question at any time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1166-1168, 1173; Dec. Dig. \S 185(1).]

Appeal from Nacogdoches County Court; J. F. Perritte, Judge.

Attachment by Fuller, Hanna & Co. against George Rogers, in which Silas Rogers appeared and claimed the property. From a judgment of the county court, on appeal from a justice court, plaintiffs appeal. Reversed and dismissed.

S. M. Adams, of Nacogdoches, and Geo. F. Fuller, of Martinsville, for appellants. C. A. Hodges, of Nacogdoches, for appellee.

BROOKE, J. On the 14th day of December, 1914, the appellants, Fuller, Hanna &

Co., filed in the justice court, precinct No. 3, Nacogdoches county, a suit against one George Rogers, on account amounting to \$156.40, and had issued on said day an attachment commanding the constable of precinct No. 3, Nacogdoches county, Tex., to seize sufficient property belonging to said George Rogers to make the sum of \$156.40, and probable costs of suit, and that said constable did, on the 16th day of December, 1914, levy upon one gray mare and 800 pounds of cotton seed as the property of one George Rogers, and on the 16th day of December appellee, Si Rogers, filed with the justice of peace of said precinct and county his affidavit, and on the 17th day of December, said Si Rogers filed a claimant's bond in terms as required by law, which was approved, and the property was surrendered to the said Si Rogers. On the 19th day of March, 1915, the case was tried and judgment rendered against the claimant for the property, and within the time prescribed by law claimant filed his appeal bond, and the case was sent to the county court. On the 29th day of June, 1915, it was tried before a jury upon special issues, and the court on said issues rendered a judgment against the defendant. The case is properly before this court on appeal.

[1] We are confronted at the outset with an application for writ of certiorari filed by appellee which is in the following language:

"Now comes your petitioner, Si Rogers, appellee in the above styled and numbered cause, and makes this, his application for writ of certiorari, so as to make the record speak the truth therein in said cause, and represents to the court:

"(1) That for some reason, by oversight or error, the transcript in said cause shows the writ made by John P. Grimes, constable, upon the bond, that he valued the cotton and mare levied upon by him at \$250, when in truth and fact same is an error, and the value of said property was by said officer fixed at \$125, as is shown by said officer's statement hereto attached, and made a part hereof."

It is to be noted that the application for the writ does not state that the transcript does not contain on its face and is not a copy of the papers in the court below, and it appears that no claim is made that the error or oversight complained of consists in the incorrect copying into the transcript of papers; but, if we understand it, appellee is seeking to correct in this court a return made by a constable on a writ in the court below, and seeking here to show that the return should be corrected. If the return was not correct, this matter cannot be corrected in this court. Without question we would grant the writ if the record in this court was incorrectly copied, but we are without authority to grant the request or motion in this case. Therefore the application for writ of certiorari is overruled.

[2] Appellants by their first assignment complain that the court erred in not dismissing the cause, for the reason that it had no jurisdiction of the controversy, as was shown

by the plaintiff's issues filed in the justice court, as the value as placed upon the property by the constable of precinct No. 3 was for more than the jurisdiction of the justice court.

Article 7773, Vernon's Sayles' Civil Statutes, provides:

"Whenever any person shall claim property and shall make the oath and give the bond, as provided for in this chapter, if the writ under which said levy was made was issued by any justice of peace or court of the county where such levy was made, the sheriff or other officer receiving such oath and bond shall indorse on the writ that such claim has been made and oath and bond given, stating by whom, and shall also indorse on such bond the value of the property as assessed by himself, and shall forthwith return such bond and oath to the proper justice or court having jurisdiction to try such claim, as hereinafter provided."

Article 7777 provides:

"The sheriff or other officer taking such bond shall also indorse on the original writ that such claim has been made and oath and bond given, stating by whom, the names of the sureties and to what justice or court the bond has been returned; and he shall forthwith return such original writ to the justice or court from which it is issued."

Article 7778 provides:

"Cases arising under this chapter shall be tried as follows:

"First. Where the assessed value of the property does not exceed \$200, the writ shall be returned to a justice of peace, as before provided.

"Second. Where the value assessed is more than \$200 and does not exceed \$500, the writ shall be returned to the proper county court.

"Third. When the assessed value is more than \$500, the writ shall be returned to the proper district court."

It has been held that the assessment of value placed on property by the officer who seizes it under attachment should determine the jurisdiction on the trial of the right of property, and not its value as subsequently ascertained. *Cleveland v. Tufts*, 69 Tex. 580, 7 S. W. 72; *Harris v. Hood*, 1 White & W. Civ. Cas. Ct. App. § 573; *Carney v. Marsalls*, 77 Tex. 62, 13 S. W. 636.

In the case of *Oullers v. Gray*, 57 S. W. 305, it was held that, where the officer omits to assess the value of a part of the property, the court is not bound to determine its jurisdiction by this assessment, but can hear evidence of value.

It has been held also that a justice of peace has no jurisdiction of a case on the trial of the right of property when the amount in controversy exceeds in value \$200. *Marx v. Carlisle*, 1 White & W. Civ. Cas. Ct. App. § 93; *Chrisman v. Graham*, 51 Tex. 454.

It has been held that, in the absence of an indorsement on the bond, the statements in the affidavit and the bond that the amount was within the jurisdiction of the court is sufficient. *Leman v. Borden*, 83 Tex. 620, 19 S. W. 160.

All the authorities hold, however, that when the value of the property has been assessed by the sheriff or constable, it controls

the jurisdiction of the court, and that the value of the property subsequently ascertained on the trial does not control.

The record in this case shows that the constable of precinct No. 3, Nacogdoches county, when he levied on the property and claimant's bond was given and approved by the said constable, made the following indorsement:

"The within-named gray mare and 800 pounds of seed cotton has been valued by me in the sum of \$250. John P. Grimes, Constable Precinct No. 3, Nacogdoches, Texas."

The view we take is that under this assessment of the value of the property levied on by the officer the case could not have been tried in any court save the county court. It having been tried, however, in the justice court and appealed to the county court, that court took no jurisdiction, and this court is without jurisdiction.

[3] Jurisdiction being a matter which can be called in question at any time, and being assigned as error by the appellant, and the facts being as above set out, we feel that of necessity the first assignment of error must be sustained, and therefore the cause will be reversed and dismissed from the docket of this court.

MIDDLEBROOK, J., not sitting.

MOSLER SAFE CO. v. ATASCOSA COUNTY et al. (No. 5588.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 9, 1916. On Motion for Rehearing, March 8, 1916.)

1. EVIDENCE \S 399—ACTIONS ON CONTRACTS—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

Plaintiff sued a county on an alleged written contract for safe doors. Defendant denied the contract, and alleged that the doors were furnished a contractor erecting a courthouse. By supplemental petition plaintiff pleaded the contents of the minutes of the county commissioners' court showing a written contract between the commissioners' court and plaintiff, and to this supplemental petition no answer was filed. *Held*, that it was error to admit parol evidence that the commissioners' court was only selecting the doors for the contractor, and not purchasing them, since, if it was permissible at all to alter or abrogate the contract, except by motion in the commissioners' court to amend its minutes, this could not be done without a plea of fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1772-1777; Dec. Dig. \S 399.]

On Motion for Rehearing.

2. APPEAL AND ERROR \S 1173(1)—DISPOSITION OF CAUSE—GRANTING RELIEF TO PARTY NOT APPEALING.

In an action against a county for the price of safe doors, it denied liability, and asked that a contractor and its surety be made parties, and that it have judgment against them if plaintiff recovered any judgment against it. The trial court rendered judgment in favor of all the defendants, and plaintiff appealed. The judgment was reversed, and judgment was rendered for plaintiff against the county. *Held* that, as the judgments in favor of the contractor and

the surety were apparently rendered upon the theory that, as the county had been adjudged not indebted to plaintiff, it could not maintain any cross-action against them, such judgment would be reversed, and the cause remanded for a new trial as between the county and them; as the power to give relief to an appellant by changing the judgment carries with it the power and necessity to make such other changes as justice to the other parties demands.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4562-4567, 4569, 4656; Dec. Dig. \S 1173(1).]

Appeal from District Court, Atascosa County; F. G. Chambliss, Judge.

Action by the Mosler Safe Company against Atascosa County, which brought in other defendants. From a judgment for defendants, plaintiff appeals. Reversed and rendered in part, and remanded in part on rehearing.

C. A. Keller, of San Antonio, for appellant. W. W. Walling, of San Antonio, for appellees.

MOURSUND, J. Mosler Safe Company sued Atascosa county, alleging that on or about January 23, 1913, said county executed and delivered to plaintiff its certain written order or contract, whereby plaintiff sold to defendant certain safe doors for \$584; that defendant had paid only \$77.99, leaving a balance of \$506.01 due thereon, with interest; that a lien was retained in said contract upon said safe doors. Plaintiff prayed for judgment for said sum, with interest, and for foreclosure of its lien. A copy of the order was attached as an exhibit.

The defendant denied that it ever executed and delivered to plaintiff the order and contract as alleged, and that, if the same was ever executed and delivered by any person, such person was wholly unauthorized by defendant to make or deliver the same to plaintiff, and defendant has never ratified or confirmed the same. Defendant further alleged that, if it ever paid the sum of \$77.99 as a payment on the alleged claim of plaintiff, such payment was to the Gordon-Jones Construction Company, the contractor who erected the courthouse at Jourdanton, and was in no wise intended as a payment to plaintiff, as said company had contracted with defendant to furnish all material for the construction of the courthouse, and defendant had no contract with plaintiff at any time for the furnishing of any material for said courthouse; that said safe doors were, in fact, furnished to the Gordon-Jones Construction Company; that in order to secure the faithful compliance by said company with its contract with defendant for the construction and completion of a courthouse, under the terms of which said company bound itself to pay for all material that might be used in the construction thereof, said company furnished a bond in the sum of \$32,500 with the Equitable Surety Company as

surety thereon. Defendant prayed that Gordon-Jones Construction Company and Equitable Surety Company be made parties, and that, if plaintiff recover any sum from defendant, defendant have judgment over against both of said companies for such sum.

Plaintiff, by supplemental petition filed April 21, 1915, alleged that the written order mentioned in its original petition was executed by Walter E. Jones, county judge of Atascosa county, after a bid was duly presented to the commissioners' court of said county and accepted by such court, and that the execution of said contract by such county judge was the duly authorized act of said commissioners' court; that on or about January 23, 1913, plaintiff, acting by its agent, duly authorized thereto, presented to the commissioner's court of Atascosa county a bid for certain vault doors, being those described in the original petition, agreeing to furnish same for \$584, and that by an order duly entered in the minutes of said court such bid was accepted as the lowest and best bid, and afterwards such doors were furnished and delivered to the order of said county, and were used by it, and are still used by it. Plaintiff denied that it furnished said doors to the Gordon-Jones Construction Company, and joined issue on the allegation that the \$77.99 was paid to said company. The defendant failed to answer this supplemental petition.

The Equitable Surety Company answered, alleging that the doors were ordered by the defendant, and not by the Gordon-Jones Construction Company, and denying liability to the county for any debt incurred by it. It prayed that, if any judgment be rendered against it, it have judgment over against the Gordon-Jones Construction Company. The Gordon-Jones Company filed no answer.

Judgment was rendered that plaintiff take nothing by its suit.

[1] Plaintiff alleged and proved a written contract with Atascosa county, evidenced by its bid and the acceptance thereof, which bid and acceptance were duly entered in the minutes of the commissioners' court. It appears that, if the minutes do not speak the truth, the proper method to amend the same is by a motion made in the court, and not by allegation and proof in another tribunal in which the litigation concerning its orders may arise. *Gano v. Palo Pinto County*, 71 Tex. 99, 8 S. W. 634. But, if the order of the court could be set aside in this case on the ground of fraud or mistake, it is a sufficient answer to say that neither of such grounds is pleaded by defendant. In its brief it contends that a fraud has been practiced on the county in obtaining the entry upon the minutes of the bid and the order accepting the same, but we find no pleadings which raise any such issue. De-

fendant did plead that the county judge had no authority to sign the order for the doors, but when plaintiff pleaded the contents of the minutes of the commissioners' court, which showed a written contract between the commissioners' court and plaintiff, such allegations were not denied. Defendant was permitted over plaintiff's objection to introduce parol evidence to the effect that the commissioners' court was only selecting the doors for the Gordon-Jones Construction Company, and not purchasing same. If it be permissible at all to alter or abrogate the contract appearing on the minutes of the commissioners' court, except by motion in such court, it is evident that parol testimony should not be admitted for that purpose in the absence of a plea of fraud or mistake. *Gano v. Palo Pinto County*, supra; *Douglass v. Myrick*, 159 S. W. 422.

The plaintiff was entitled to judgment for its debt. The judgment of the trial court is reversed, and judgment rendered in favor of Mosler Safe Company against Atascosa county for \$506.01, with interest thereon from August 3, 1914, at the rate of 6 per cent. per annum, and all costs of suit. Interest is allowed only from date of filing original petition, for the reason that we are unable to tell from the pleadings or the evidence when the doors were delivered. In all other respects the judgment will remain undisturbed.

On Motion for Rehearing.

[2] The judgments in favor of the Gordon-Jones Construction Company and the Equitable Surety Company could have been rendered, and apparently were rendered, upon the theory that, as the county had been adjudged not to be indebted to the safe company, it could not maintain any cross-action against said two parties. This being the case, we conclude that it would be unjust to let the judgment in favor of said two parties stand. The power to give relief to appellant by changing the judgment carries with it the power and the necessity to make such other changes therein as justice to the other parties demands. *Thompson v. Kelley*, 100 Tex. 539, 101 S. W. 1074; *Reeves v. McCracken*, 103 Tex. 416, 128 S. W. 895; *Tynberg v. Cohen*, 78 Tex. 409, 18 S. W. 315.

The judgment heretofore entered by this court is set aside, and judgment entered reversing the judgment of the district court in its entirety, and awarding the Mosler Safe Company a recovery of its debt as indicated in our former opinion and judgment, but providing that the cause, as between Atascosa county and the Gordon-Jones Construction Company and the Equitable Surety Company, be remanded for another trial. All costs of this appeal will be taxed against Atascosa county.

OOX et al. v. GEORGE et al. (No. 1568.)*
(Court of Civil Appeals of Texas. Texarkana.
Feb. 25, 1918. Rehearing Denied
March 9, 1916.)

1. WILLS \Leftrightarrow 452—CONSTRUCTION—DISINHERITANCE.

Where a testator, who was survived by children by each of his two deceased wives, by holographic will gave one-half of the home place, which had been the community property of himself and his first wife so that their children were the owners of an undivided one-half interest therein, to the children of the first wife, naming them, and one-half thereof to the children of the second wife, naming them, and the rest of his property to be divided equally between certain named heirs omitting three of the children of the first wife, the clause will be construed as giving each of the groups of children an undivided one-fourth interest in the home place, or one-half of their father's interest therein, since the will manifests an intention that the children shall all receive something, and, if it be construed as giving to the children of the first wife only the interest they already had, three of them will be disinherited.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 968-970; Dec. Dig. \Leftrightarrow 452.]

2. WILLS \Leftrightarrow 558(1)—CONSTRUCTION—DESCRIPTION OF PROPERTY.

The courts favor a construction of a general disposition of property, of which the testator owns only a share, which disposes of only that share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1205, 1206, 1211-1214; Dec. Dig. \Leftrightarrow 558(1).]

3. WILLS \Leftrightarrow 707(1)—ACTIONS TO CONSTRUCT—COSTS.

The costs of a suit, which was necessary to determine the interest of the devisees in certain property and was for the benefit of all parties alike, will be adjudged against all parties in the proportion of their interests in that property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1684; Dec. Dig. \Leftrightarrow 707(1).]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Suit by Mary A. Cox and others against Lula George and others for the construction of a will. Decree construing the will in favor of the defendants, and plaintiffs appeal. Reversed, and will construed in favor of plaintiffs.

C. Z. Bridge married four times during his lifetime. There were five children of the first marriage, to wit, S. A., C. B., W. E., Alice L., who married one Scott, and Mary A., who married Jesse Cox; and five children of the second marriage, to wit, H. L., Roy, Luly, who married T. E. George, Jessie, who married one McCoy, and Edna M., who married one Blair. Subsequent to the time when their mother died, S. A. Bridge and Alice L. Scott died, leaving children surviving them. Prior to the time when her father died, Edna M. Blair died, leaving children surviving her. There were no children of the third and fourth marriages. At the date of the death of the first wife, she, with her husband and children, resided upon a tract of 115 acres of land, which belonged to the community estate between her and her

husband. C. Z. Bridge died on December 1, 1913, leaving a holographic will, which was duly probated, as follows:

"The State of Texas, Fannin County.

"To all whom it may concern:

"Know you that I this day have willed and bequeathed the following property to the following named heirs: One half of what is known as the 'home place' heirs of S. A. Bridge, dec., heirs of Alice L. Scott, dec., C. B., W. E. Bridge and Mary A. Cox, the same to be equally divided, the other half of same place to H. L. and Roy Bridge, Lula George and Jessie McCoy. These last-named heirs to pay to the heirs of Edna M. Blair, dec., the sum of three hundred dollars when said property is sold or divided.

"The remainder of my property which may consist of real estate, notes, accounts, money in the bank, etc., after paying debts, funeral expenses, etc. shall be equally divided with the following named heirs to wit: C. B., W. E., H. L., and Roy Bridge, Lula George and Jessie McCoy. It is my desire that this be settled peacefully and without any trouble. W. E. Bridge and T. E. George are named to settle up this estate. Done this November 17, 1910. Witness my hand, C. Z. Bridge."

The property mentioned in the first clause in the will as that "known as the 'home place'" was the 115 acres of land above referred to. Besides the interest he owned in that tract, the testator at the date of his death owned another tract of land, containing 144 acres.

This suit was by Mary A. Cox, joined by her husband, against other children and grandchildren of C. Z. Bridge and the executors of his will. Its purpose was to have the court construe and determine the meaning of the first clause in the will. The plaintiff, who is the appellant here, and certain of the parties named by her as defendants, who adopted her pleadings, and so, in effect, became plaintiffs, contended that the will should be construed as operating to pass to the children of the first marriage a one-fourth undivided interest, and to children of the second marriage a one-fourth undivided interest, in the "home place." The trial court, sustaining the contention of other parties to the suit, held that the will operated to pass to the children of the first marriage a one-half undivided interest in that property, and to children of the second marriage a one-half undivided interest therein. The appeal is by Mary A. Cox, joined by her husband.

J. M. Baldwin, of Honey Grove, and C. A. Wheeler and J. W. Gross, both of Bonham, for appellants. Cunningham & McMahon and L. C. Fuller, all of Bonham, and G. W. Wells, of Honey Grove, for appellees.

WILLSON, C. J. (after stating the facts as above.) [1] It conclusively appeared, and the court so found, that the children of the first marriage as the heirs of their mother owned a one-half undivided interest in the "home place," and that their father at the time he made the will knew they so owned an interest in the land.

It is apparent, if the language of the first

clause in the will should be construed literally and without reference to that in the other clause, that the testator undertook to dispose of the "home place" as an entirety, and not the undivided interest he owned in it. If, however, the clause in the will is construed with reference to the language in the other clause, and the fact that the testator knew that he owned only an undivided half of the home place, such an intent on his part would not be at all clear; for the language, "the remainder of my property," used in the other clause in the will, would then indicate that his intention was to dispose of his own property only.

[2] If therefore the face of the will furnished no other evidence showing the intention of the testator, the presumption the law would indulge, that he intended to dispose of his own property alone, probably would require us to hold that his intention was to dispose of only his half interest in the "home place," for, as said by Mr. Underhill:

"The courts, in construing a general disposition of property in which the testator owns only a partial interest, will favor a construction which will dispose only of the actual interest of the testator." 2 Underhill on Wills, § 730.

But the language of the will as a whole, construed with reference to the circumstances surrounding the testator, furnishes other evidence, to which the law gives weight, showing his intention to have been to dispose only of his part of the "home place." It appears therefrom that he did not intend to disinherit any of his children, but, on the contrary, intended to make provision for each of them. It further appears, if the will should be construed as determined by the trial court, that it would operate to disinherit three (S. A. Bridge, Alice L. Scott, and Mary A. Cox) of the children of that marriage; for, if the will is so construed, nothing was devised to them that they did not already own.

"Where any ambiguity exists in a will," said the author of the article on "Wills" in 40 Cyc. 1412, "unless there is a manifest intention to the contrary, a presumption that the testator intended that his property should go in accordance with the laws of descent and distribution will be applied as an aid in construing the will. Hence such a construction should be given the will as favors heirs at law or next of kin, in preference to disinheritance."

And see, also, *McIlvaine v. Robson* (Ky.) 171 S. W. 418; *Morrison v. Tyler*, 266 Ill. 308, 107 N. E. 602; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 982.

When the presumptions which, as we have seen, the law in a proper case indulges, are kept in mind, we think it is reasonably clear from the language of the will considered as a whole, and with reference to the circumstances surrounding the testator, that he did not intend to dispose of the "home place" as an entirety, but only of his half thereof. It is more reasonable and more in harmony with rules of law, we think, to say that he did

not intend to do what he had no right to do, to wit, to dispose of property he did not own, than to say that he intended to do what he plainly declared he did not intend to do, to wit, disinherit some of his children.

It follows we are of opinion the trial court erred when he construed the will as he did. Therefore the judgment will be reversed, and judgment will be here rendered construing the will as operating to pass to the children and heirs of children of the first marriage a one-fourth undivided interest in the "home place," and to children named of the second marriage a one-fourth undivided interest therein, charged with the payment by them to the heirs of Edna M. Blair, deceased, of the sum of \$300 when said "home place," is sold or divided.

[3] The suit, we think, was necessary to determine the interest in the "home place" which passed to the devisees named in the first clause in the will, and was for the benefit of all the parties alike. The costs therefore will be adjudged against all of them, each to pay a part thereof proportioned to the interest he or she takes in that property. 40 Cyc. p. 1864; 1 Underhill on Wills, § 462.

GALVESTON, H. & S. A. RY. CO. v. MOSES.* (No. 5607.)

(Court of Civil Appeals of Texas. San Antonio.
Feb. 23, 1916. Rehearing Denied
March 22, 1916.)

1. APPEAL AND ERROR \S 994(2)—REVIEW— QUESTIONS OF FACT.

In a railway employe's action for injuries, where there was testimony to support the allegations that bolts in the bolsters of a car were improperly placed, or had become loose so as to slip down and catch on the lower beam or bolster holding the trucks rigid so they would not adjust themselves to curves, but would run off the track, it was for the jury, and not for an appellate court, to pass upon the credibility of the witnesses testifying to this effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. \S 994(2).]

2. MASTER AND SERVANT \S 111(1)—LIABILITY FOR INJURIES — "DEFECT" IN APPLIANCES.

Where bolts in the bolsters of a railway car were improperly placed, or had become loose so as to slip down and catch on a lower beam or bolster, making the trucks rigid so that they would not adjust themselves to curves, and causing them to leave the track, the rigidity so caused was a "defect" in the car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 215; Dec. Dig. \S 111(1).]

For other definitions, see Words and Phrases, First and Second Series, Defect.]

3. MASTER AND SERVANT \S 124(10)—LIABILITY FOR INJURIES—NEGLIGENT INSPECTION.

It was not the law that a railway company was not liable for injuries to an employe caused by a derailment, if its inspectors who inspected the train failed to discover the defect in the car, causing the derailment, though the car was not its own, and the court properly refused to so charge, as a railroad company has no more

right to endanger the lives and limbs of its employes, with defective foreign rolling stock than with its own when using such foreign cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 242; Dec. Dig. § 124(10).]

4. TRIAL § 260(1)—INSTRUCTIONS COVERED BY THOSE GIVEN.

A requested instruction, fully covered in one given, was properly refused, especially where the one given came nearer being the law than the one refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 200(1).]

5. TRIAL § 194(1)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A requested instruction, which was on the weight of the evidence, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 418, 436, 439, 440, 450; Dec. Dig. § 194(1).]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by A. N. Moses against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and Templeton, Brooks, Napier & Ogden and Ed W. Smith, all of San Antonio, for appellant. D. Fred Worth and John Sehorn, both of San Antonio, for appellee.

CARL J. Appellee sued appellant for personal injuries inflicted on him by reason of the derailment of a car, No. 127, belonging to the Lone Star Brewing Association. The derailment occurred on the switch or track which runs from appellant's east yards in the city of San Antonio to the brewery between Burleson and Lamar streets. The alleged defects in the car and grounds of negligence will fairly appear from the following paragraph, No. 4, of the plaintiff's petition:

"That the bolster, trucks, center bearings, side bearings, wheels, axles and all the running gear of said car were out of order and defective, and would not operate and perform the functions of said parts and running gear properly, and by reason of the said defective condition of the said parts and the running gear the trucks of the said car would not operate so as to permit the wheels of said car to follow and remain on the rails, but the said trucks of the said car were caught and held too rigidly, and as a consequence thereof the wheels of said trucks were prevented from adjusting themselves to suit the different conditions and changes in the curvature and elevation of the track, rails, and switches at the point where the said derailment occurred, and were prevented from following and remaining on the rails, and the said wheels were thereby caused to leave the rails and become derailed; that the defendant was negligent in permitting this condition, and in operating said car while in such defective condition, which said negligence caused, and directly contributed to produce and cause said derailment and plaintiff's injuries. Plaintiff alleges that he cannot more specifically describe the defects which caused the said derailment than as above set out."

The petition charges that within a day or so before this accident this car was derailed,

which was notice to appellant of its defective condition, and, notwithstanding such notice, appellant continued to operate said car. An ordinance of the city of San Antonio was pleaded which prohibits the running of cars to exceed 10 miles per hour, and it is alleged that this train was being operated at 15 to 17 miles per hour, at the time of the derailment, in violation of such city ordinance. Plaintiff alleges that he was on top of said car at the time of the derailment, and was thrown and caused to fall with great violence upon and about the top of said car and against the running board, and his back, sides, spine, and spinal cord were severely shocked and injured; that his nervous system suffered shock and injury; that by reason thereof his heart action had been greatly impaired and made weak; that his kidneys and bladder and vocal organs were seriously affected; and his general health and physical condition have been permanently impaired and broken down, etc. The petition avers that the plaintiff cannot more specifically set forth the defects in the car, but that such facts are peculiarly within the knowledge of the defendant company. His injuries are alleged to be permanent. The defendant, among other things, alleges that the injuries were the result simply of an accident; that the defects in the car, if any, were latent, and proper inspection had been made, all of which was denied by appellee. The verdict rendered by the jury was for \$8,000, and judgment was in accord therewith.

[1] The first assignment of error is that the verdict is contrary to the law and the evidence, it being set out in detail wherein appellant contends that this is true. In a large part of the statement and in the argument, appellant seeks to show that the evidence produced by appellee is untrue; but the fact remains that there is testimony to support the allegations of the petition, certainly on the proposition that the bolts in the bolsters were improperly placed or had become loose so as to permit them to slip down and catch on the lower beam or bolster. And the evidence is that when this happened such bolts would hold the trucks rigid so that they would not turn and adjust themselves to the curve in the track. Instead of adjusting themselves to the curve of the track, the trucks remained straight, and therefore would run off the track. There seems to be little or no difference of opinion that this would be the natural result, the only difference being, on that point, as to whether the bolts were properly in place. Not only the plaintiff, but another witness, testified that these bolts were not in place. It is true that there was much testimony to the contrary; but appellant must know that it is not the function of this court to pass upon the credibility of witnesses, when by law

that duty is placed upon juries. The first assignment is overruled.

[2] We do not think that the fourth paragraph of the court's charge is subject to the criticism urged. As we understand the objection, it is based upon the idea that the rigidity caused by the bolts dropping down was not a defect in the car. We have already held, in substance, that such was a defect in the car, in *G., H. & S. A. Ry. Co. v. Webb*, 182 S. W. 424, recently decided by us and not yet officially reported, in which case the injuries grew out of the same derailment. The evidence supports the finding that the defect in the bolsters caused the injury. The second assignment is overruled, as is also the third.

[3] There was no error in the court refusing to give appellant's requested special charge No. 7, because to have given the same would have been equivalent to charging the jury that if there were defects in the car which were not actually discovered by appellant's inspectors, the verdict should be for defendant. The suggested charge starts out on the hypothesis that the inspectors were not required to inspect the car at all; but in fact they say they did inspect the whole train of about nine cars in about 30 minutes. Then the proposed charge concludes:

"And, even if you should find that there was a defect in the construction of this car in respect to the side bearings in question, and that this was the cause of the alleged derailment, but that such defect was not noticed or observed by defendant's said inspectors, then plaintiff is not entitled to recover, and you should return a verdict for the defendant."

We do not understand this to be the law. A railroad company has no more right to endanger the lives and limbs of its employes with defective foreign rolling stock than it has with its own, when it is using such foreign cars. The fourth assignment is overruled.

The duty of inspection was fully covered in the fifth paragraph of the charge given, and in special charge No. 12, so far as it was necessary to charge on that subject, and it was not error to refuse to give appellant's special charge No. 8, requested. It was not the law. The fifth and sixth assignments are overruled.

[4] The matter asked for in the defendant's requested special charge No. 10 was fully covered in appellant's special charge No. 12, which was given, and the one so given came nearer being the law than the one refused did. The seventh assignment is overruled, and the eighth as well.

[5] The ninth assignment complains of the refusal by the court to give appellant's requested special charge No. 13, which is subject to the objection, heretofore mentioned, that it assumes that the trucks becoming rigid would not constitute a defect. The requested charge was on the weight of the evidence. The assignment is overruled.

There is sufficient evidence to sustain the verdict, which, considering plaintiff's testimony and that of the medical fraternity participating in the trial, we cannot say is excessive.

Judgment affirmed.

KANSAS CITY, M. & O. RY. CO. v. HANSARD. (No. 931.)

(Court of Civil Appeals of Texas. Amarillo. Feb. 23, 1916. Rehearing Denied March 15, 1916.)

1. CARRIERS \S 228(1)—LIVE STOCK—BURDEN OF PROOF—REASONABLENESS OF STIPULATION—NOTICE.

In an action for damages to a shipment of live stock the carrier has the burden of proving that a stipulation in a written contract for carriage that notice of injury must be given in one day before the cattle were removed from the place of delivery at destination was reasonable under the facts of the particular shipment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 957, 958; Dec. Dig. \S 228(1).]

2. CARRIERS \S 218(1)—LIVE STOCK—STIPULATION—REASONABLENESS.

A provision in a written contract for the carriage of live stock that a suit for injury must be brought within 91 days after the alleged injury, or else the action should be barred, is not unreasonable or invalid.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 674-696, 983-985, 989; Dec. Dig. \S 218(1).]

3. CARRIERS \S 218(5)—LIVE STOCK—LIMITATION OF LIABILITY—CONSIDERATION.

A stipulation in a written contract for the carriage of live stock that a suit for damages must be brought within 91 days would not be binding if there was no consideration therefor; and where an oral contract, binding the carrier, had been previously made, a subsequent written contract would be without consideration.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 674-696; Dec. Dig. \S 218(5).]

4. CARRIERS \S 207(2)—INTERSTATE SHIPMENT—ORAL CONTRACT.

An interstate shipment of live stock may be made on an oral contract.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. \S 207(2).]

Appeal from Hardeman County Court; D. E. Magee, Judge.

Action by T. M. Hansard against the Kansas City, Mexico & Orient Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. W. Allred, of Chillicothe, and H. S. Garrett, of San Angelo, for appellant. Marshall & Perkins, of Quanah, for appellee.

HUFF, C. J. The appellee, Hansard, sued the railway company, in the county court, for alleged damage to a shipment of cattle from Chillicothe, Tex., to Wichita, Kan., with the usual allegations of delay and rough handling, remaining on side tracks, and consequent skinning, bruising, resulting in damages to the appellee. The railway company answered at length, principally setting up a written contract, which required notice to

be given in 1 day before the cattle were removed from the place of delivery at destination, and also requiring suit to be brought within 91 days after the alleged injury or the cause of action would be barred, and certain other provisions of the contract not necessary to set out. The appellee replied the cattle were not shipped on this written contract; that previous to signing the written contract he had theretofore entered into a lawful verbal contract with the railroad to transport the cattle from Chillicothe to Wichita, and under the oral agreement had contracted for the cars, which were furnished, the cattle loaded into the cars, and the railroad had accepted the cattle for transportation, and they were then on the track ready for shipment when the written instrument was presented for the signature of the shipper; that it was signed without reading, and that he did not have time to read it and could not read it because of so much fine print, and that he understood that it was only intended as a return pass for the caretakers of the cattle, and that there was no consideration for the written contract or the provisions set up. The jury found substantially that these allegations were true, and that there was no consideration for the written contract. In addition to the findings of the jury, the trial court also finds that there was no consideration for the written contract, and that the cattle were shipped on the oral contract set up.

This case turns on a question of law alone; that is, whether an interstate shipment may be made on a verbal contract. All of appellant's assignments go to that point, which assignments are presented by motions to strike out testimony, exceptions to testimony and to render a verdict on the written contract, etc. There is no assignment, however, calling in question the sufficiency of the evidence to establish a verbal contract of shipment. It may be stated that the railway company entered into a verbal contract to furnish cars for the carriage of the cattle from Chillicothe, Tex., to Wichita, Kan., and under such contract the cattle were delivered to the railroad and loaded into the cars, and after they were loaded and just before they started on the trip, the agent of the railway presented a written contract to be signed by the shipper, who did not read it, and he testified he did not have time to do so, but signed it believing that it was only a contract for return trip pass, and not the contract for the shipment of the cattle, with the provisions set up as to the limitation of his right to sue, as pleaded by appellant. This writing contains a stipulation that notice must be given of the injury, in one day after the cattle arrive at their destination, etc., and also if suit was not brought in 91 days after the injury received by the cattle, the cause of action should thereafter be barred.

[1] On the first ground in the contract, this

court, by a majority opinion, held the burden was on the carrier to allege and prove the stipulation for 1 day's notice reasonable under the facts of the particular shipment. *Railway Co. v. Whaley*, 177 S. W. 543; *Railway Co. v. Dalton*, 177 S. W. 556. This court is not convinced beyond a reasonable doubt of the correctness of the position there taken, as will be evidenced by the vigorous dissenting opinion of Judge Hendricks, but nevertheless, it will be regarded as the rule of construction by this court until corrected by the higher courts, if error.

[2] The United States Supreme Court, in the case of *Railway Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, in passing on a provision in almost the exact language of the 91-day clause pleaded in this case, said:

"But there is nothing in the policy or object of the statute which prohibits parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies," etc.

Again:

"The provision requiring a suit to be brought within 90 days is not unreasonable."

[3] In support of the proposition announced in that case that court cited a Texas case (*McCarty v. Railway Co.*, 79 Tex. 33, 15 S. W. 164), which was rendered prior to our present statute with reference to contracts of this kind. It appears from appellee's brief that, owing to the case of *Railway Co. v. Word*, 159 S. W. 375, he was compelled to do unnecessary work in procuring the trial court to find there was no consideration for this provision. This court simply announced in that case what the Supreme Court had held, and our duty in such cases. The case of *Railway Co. v. Scott*, 156 S. W. on pages 296, 297, cited by appellee and relied on by him, also recognized that the Supreme Court of the United States holds such provision valid. The trial court in this case held the 91-day clause without consideration, as the jury also found. If there was no consideration for the written contract as we held in the *Word Case*, and in others, it would not be binding. If a lawful contract binding the railway company to transport the cattle had been previously made, then the contract in question was without consideration. If there was no lawful contract so made, the stipulation pleaded in this case would be binding, and would constitute part of the contract of shipment, and in such case the trial court should instruct a verdict for the railway.

[4] This court, however, is committed to the proposition that an interstate shipment may be made on oral contract, and if such a contract is executed before the delivery of the written, with a provision such as here set up, and which is contrary to the oral contract agreed upon and stipulated for, such provision would be without consideration and could not be enforced. Such is the hold-

ing of this court, and whether we were right or wrong, as we now consider the matter, it will require the holding of the Supreme Court to the contrary, in order to change the ruling. *Railway Co. v. Stinson*, 181 S. W. 526; *Railway Co. v. Jones*, 182 S. W. 1 (not yet officially reported). In the two cases named, various authorities are collated in support of the proposition necessary to the conclusion there reached. This case falls under the rule established by this court as to such contracts, and the verdict and judgment in the trial court, establishing that an oral contract was entered into previous to the written contract pleaded by appellant, and without the stipulations set up by the appellant as contained in the writing, will require an overruling of all the assignments presented by appellant in this case.

The case will therefore be affirmed.

McAMIS v. GULF, C. & S. F. RY. CO.
(No. 7618.)

(Court of Civil Appeals of Texas. Dallas.
Feb. 12, 1916. Rehearing Denied
March 25, 1916.)

1. EMINENT DOMAIN §243(2) — CONDEMNATION—EFFECT OF.

As under Rev. St. 1911, art. 6518, the only issue in a proceeding by a railway company to condemn land is the damages which will be sustained by the owner and the benefits which will result to the remainder of the land, the fact that a railroad company condemned land intending to use the property condemned as a channel for a water course which it was about to divert, will not prevent the owner of the land from enjoining an unlawful diversion.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 627, 700; Dec. Dig. § 243(2).]

2. WATERS AND WATER COURSES §78 — DIVERSION—RIGHT TO DIVERSION.

A railroad company cannot divert a water course which drained plaintiff's land in such a manner as to impound surplus waters on plaintiff's property, Acts 34th Leg. (1st Called Sess.) c. 7, specifically prohibiting such diversion.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 67-69; Dec. Dig. § 78.]

3. INJUNCTION §146 — PROCEEDINGS—TEMPORARY INJUNCTION.

Under Rev. St. 1911, art. 4649, declaring that no injunction shall be granted unless the applicant shall present his petition verified by his affidavit, a temporary injunction may be granted on a verified petition alleging facts sufficient to warrant issuance despite defendant's general denial, which denial was re-established by Acts 34th Leg. (1st Called Sess.) c. 7, for, except upon final hearing for perpetual injunction, the bill when properly verified may be used as an affidavit, and when so verified may be sufficient basis for the issuance of a temporary injunction unless the facts averred are controverted by other facts set up by verified answer.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 819; Dec. Dig. § 146.]

Appeal from District Court, Dallas County;
E. B. Muse, Judge.

Action by J. K. McAmis against the Gulf, Colorado & Santa Fé Railway Company.

From a judgment denying temporary injunction, plaintiff appeals. Reversed and remanded.

A. S. Baskett, of Dallas, for appellant.
Terry, Cavin & Mills, of Galveston, E. M. Browder, of Dallas, and Lee, Lomax & Smith, of Ft. Worth, for appellee.

RASBURY, J. This is an appeal from the judgment of the trial court refusing appellant a preliminary or interlocutory injunction. The application was submitted on sworn pleading, neither party tendering any evidence, and for that reason it is necessary to deduce from the pleading the facts alleged by both parties.

The essential facts alleged by appellant and upon which he based his application, stated in our own language, are in substance, as follows: The appellant owns certain pasture land contiguous to Rowlett creek in Dallas county at a point where appellee's line of railway crosses appellant's land and said Rowlett creek by means of a trestle. At this point the configuration of the ground is such as to afford a natural drainage, in time of heavy rains and consequent overflows of Rowlett creek, away from appellant's land, with which natural drainage appellee's trestle does not interfere. Shortly before the commencement of this suit appellee filled in under one end of its trestle with earth for a distance of about 264 feet. The result was that the water which formerly flowed under the trestle, following the natural drainage, was permanently impounded at said point, due to the fact that the earth's surface was higher at the end of the fill than at the point where the surface water was so impounded. For the purpose of discharging the waters thus impounded, appellee was preparing to dig a ditch of considerable size parallel with said fill, beginning at the point and place where it had impounded the surface water, and thence from said point to the end of the fill and under the trestle, and thence following the fill back to a point opposite the point where the water was impounded on the other side. Appellee intended to dig said ditch upon appellant's lands contiguous and adjacent to its right of way, using for that purpose a strip 25 feet wide and 264 feet long. The impounding and diversion of the water in the manner proposed would in time of heavy rains cause the surface waters to overflow and remain upon appellant's land, instead of flowing away from same as it does under present conditions, for a time sufficient to kill appellant's grass, and cut his land in washouts or excavations, resulting from the increased bulk of water thrown upon appellant's land. Upon the facts stated, appellant prayed that appellee be restrained from constructing the proposed ditch so as to discharge the said overflow waters upon his lands, and from digging same upon his lands,

Appellant's suit was commenced September 24, 1914, and the petition was verified in the manner provided by statute.

The record does not contain appellee's original answer, which was filed October 10, 1914, but does contain its amended original answer which was filed October 30, 1915. The answer, in addition to tendering the general demurrer and general denial, discloses the following facts: Subsequent to the commencement of appellant's suit and the coming in of appellee's original answer and a hearing, appellee, in the exercise of the power of eminent domain conferred upon it, filed with the judge of the county court of Dallas county at law its petition to condemn the strip of land which it proposed to use over appellant's land for the purpose alleged. Commissioners were appointed, notice was issued, and appellant appeared and the commissioners condemned the land to appellee's use and assessed the damages. Appellant, not being satisfied with the damages awarded, filed his opposition thereto in the county court at law, which opposition was undetermined at the time of the hearing on appellant's application for preliminary injunction. Desiring to enter upon and take possession of the land awarded it by the commissioners pending determination of the opposition, appellee deposited in court the amount of the award, paid all costs, and executed the bond and made the additional deposit provided for in such cases. Appellee desired the strip of land so condemned for the reason that its use was essential to the proper drainage of defendant's dump and right of way, and to prevent damage to its dump, track, and adjacent land. The pleading was not sworn to, but counsel for appellant, on submission, stated in open court that verification was waived, and requested this court to consider the pleading from that standpoint, which he will do.

The application, as we have said, was denied, the court basing its judgment, as shown by the recitations thereof, on the ground that the issuance of the injunction would in the opinion of the court, "materially interfere with and defeat the rights of the defendant under the condemnation proceedings in the county court of Dallas county at law as set up in said first amended original answer."

Appellant has not favored us with briefs, but his counsel argued, on submission, on his behalf, in effect, that conceding, as he did, that the condemnation proceedings eliminated the issue of appellee's right to dig the ditch upon appellant's land, he was entitled nevertheless to the relief prayed for on the ground that the other facts alleged by him established prima facie that appellee was about to divert the natural drainage of the waters of Rowlett creek, and that such diversion would cause appellant irreparable injury. Counsel for appellee, who has filed briefs, argues that the ground upon which

the court based its judgment is correct. In short, that to restrain appellee from diverting the waters in the manner proposed would be to destroy or suspend the power of eminent domain, conferred upon it by the Constitution and statutes, and by authority of which it acquired the land of appellant.

[1] We will discuss appellee's contention first. As we understand the several statutory provisions under which appellee condemned appellant's property, their effect is only to confer upon railroads the power of eminent domain, ordinarily the attribute of the sovereignty, on the theory that such power will promote the general welfare. We also understand that when land is appropriated in the exercise of such power it must nevertheless be used in a lawful manner and for a lawful purpose. Such conclusions are obviously correct when certain provisions of the act conferring the power are considered. The only issue according to the statutes to be considered in such proceeding is "the damages which will be sustained by the owner," and "the benefits that will result to the remainder" of the land (article 6518, R. S. 1911), save as that issue may be modified by article 6519, 6520, or 6521, as the case may be. In *Gregory v. Gulf & I. Ry. Co.*, 21 Tex. Civ. App. 598, 54 S. W. 617, it was ruled that the owner could not in condemnation proceedings recover damages resulting from depredations of stock due to the failure of the company to build cattle guards and fence its right of way, since the inquiry in such cases is limited to the provisions of the statute quoted above. In *Kirby v. Panhandle & G. Ry. Co.*, 39 Tex. Civ. App. 252, 88 S. W. 281, in point here, it was also ruled that damages to the owners of grain caused by an overflow due to the defective construction of the railroad company's embankment were not recoverable in condemnation proceedings. Such issue it was said "is independent of and should not be confounded with a condemnation proceeding." Thus it is quite clear that appellant was not precluded by the condemnation suit from proceeding against appellee for injunction, but that he could not have urged such remedy in the condemnation proceeding had he attempted to do so; and from which it follows also that the injunction proceeding, so long as it did not attempt to prevent appellee from acquiring the land, in no way tended to destroy or suspend that right.

[2, 3] We now come to the question of whether appellant was entitled to a preliminary injunction on the facts alleged in his petition therefor. It is probable in such connection that the trial court never considered that precise question after he concluded the condemnation proceedings were a bar, in any event, to the issuance of the writ. In fact the judgment of the court rectifies as much, as we have shown at another place in this opinion. We conclude, with the issue upon which the writ was refused eliminated, that the pleading when presented to the court

disclosed a state of facts which, in the absence of other proof, entitled appellant to the preliminary writ. The facts deducible from the petition, as we have shown, disclosed that appellee was about to divert the natural flow of surface waters, now prohibited by statutory enactment (Gen. Laws 1915, 1st Call. Sess. 34th Leg. 17), so as to discharge same upon appellant's land, and that such diversion would irreparably damage appellant's grass and land. Such verified allegations of fact on preliminary hearing, in the absence of an answer, affidavits, or oral testimony, controverting same, are sufficient basis for the issuance of the writ. The rule is thus stated:

"Except on final hearing for a perpetual injunction the bill or complaint itself, when properly verified, may be used as an affidavit as to the facts properly stated therein, and frequently the bill alone, when so verified, may be a sufficient basis for the issuance of a temporary injunction if it contains allegations of fact sufficient, if taken as true (as they will be before answer), to authorize the issuance of an injunction. * * * 22 Cyc. 942.

The rule is recognized by statute in this state. Article 4649, R. S. 1911. The only attempt to controvert the facts related in the petition, other than the condemnation proceedings tendered in avoidance, was the general denial. This plea was, we believe, insufficient, notwithstanding it was sworn to. While the effect of the general denial, which was re-established in our practice by the Thirty-Fourth Legislature, is to put plaintiff upon proof of every fact essential to his case, the sworn petition has that effect, since it is to be received and considered by the court as an affidavit, and being so considered, it proves the facts alleged. Accordingly, the defendant cannot rely on such denial, but is required to go further and state facts which disprove those stated by the plaintiff, or which will avoid the effect of those so stated. An accepted authority states the rule to be that:

"Upon an application for preliminary injunction, defendant may at once file his answer which must be considered and given its proper effect in deciding as to the propriety of issuing a temporary injunction. If properly verified it must be given effect as an affidavit of and for defendant. On motion for an injunction made on bill and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true, and if in such answer under oath the facts constituting the claim of the complainant for the interposition of the court are controverted by defendant, the court will not generally interfere but will deny the injunction." 22 Cyc. 945, 946.

The submission by the parties of the case upon the sworn pleading is quite similar to the case of the coming in of the defendant's answer on motion to dissolve injunction issued upon ex parte hearing. In that character of case the rule, which we think applicable here, is that:

"When the sworn answer fully and unequivocally denies all the material allegations of the bill upon which complainant's equity rests, the

injunction will be dissolved. This rule, however, requires positive averments in the answer and not merely general allegations of denial based on information and belief. The denial must be of the same positive character as the averments in the bill on which the complainant's equities are based. Nor will an answer suffice where it is not fully responsive to the bill." Dawson v. Baldrige, 55 Tex. Civ. App. 125, 118 S. W. 593.

For the reasons indicated the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

BOGATA MERCANTILE CO. v. OUTCAULT ADVERTISING CO. (No. 1523.)

(Court of Civil Appeals of Texas. Texarkana. Jan. 18, 1916.)

1. COMMERCE §16—"INTERSTATE COMMERCE"—APPLICATION OF STATE LAWS.

Where a mercantile corporation in Texas signed an order directing an advertising corporation in Chicago to ship certain advertising cuts and type, the transaction was interstate commerce, and not subject to the anti-trust laws of Texas.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. §16.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. CONTRACTS §22(1) — COUNTERMANDING ORDER AFTER ACCEPTANCE—EFFECT.

Where defendant signed an order, directing plaintiff to ship it certain advertising cuts and type, defendant's acceptance of the order completed the contract between the parties, and the subsequent countermanding of the order did not relieve defendant of the legal consequences of its breach of contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 90, 107; Dec. Dig. §22(1).]

3. CONTRACTS §312(2)—BREACH—EXCLUSIVE PRIVILEGE.

Where a contract by which plaintiff agreed to furnish defendant certain advertising service, consisting of certain advertising cuts and type, provided that defendant was to have the exclusive right to use such service in its city, plaintiff did not break the contract by furnishing another party in the same city a different advertising service.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279½; Dec. Dig. §312(2).]

4. DAMAGES §163(2)—MITIGATION OF DAMAGES—BURDEN OF PROOF.

An order, signed by defendant, for certain advertising cuts and type, provided that defendant was to hold the type and cuts, subject to plaintiff's order, when the contract expired. Defendant countermanded the order, and plaintiff sued for the amount agreed to be paid. There was evidence warranting the inference that the advertising material prepared for defendant could be used only by it, and would have been of no value to any one else, and that it had been fully prepared before plaintiff's receipt of the letter countermanding the order. Held, that the contract was not one for the sale of the material, but for its hire to defendant, and it appeared prima facie that plaintiff's damage was the sum defendant agreed to pay for the use thereof, and the burden was on defendant to show that plaintiff might have pursued a course which would have mitigated the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 456, 457; Dec. Dig. §163(2).]

Appeal from Red River County Court; George Morrison, Judge.

Action by the Outcault Advertising Company against the Bogata Mercantile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellant, a Texas corporation, carried on its mercantile business at Bogata, in this state. Appellee, an Illinois corporation, carried on its advertising business at Chicago, in that state. September 24, 1913, appellant, through one of appellee's traveling agents in this state, sent it an order as follows:

"Order No. 151.

"To Outcault Advertising Co., 508 S. Dearborn St., Chicago, Ill.:

"Date Sept. 24, 1913.

"Ship us, at our expense, as per samples shown you, Outcault Service De Luxe to cover a period of one year, beginning Oct. 10, 1913. This service to consist of

"40 Outcault Service De Luxe (4 Column) cuts.

"12 Outcault Service De Luxe (6 Column) cuts.

"One font of type. (9 lbs. in font).

"We agree to pay you net cash monthly, at the rate of \$3.50 per week, for one year, we to have exclusive right to use the above Outcault Service De Luxe in our city only, and to hold type and cuts subject to your order when this contract expires.

"Failure to pay any installment when due renders full amount of this contract due.

"This contract cannot be canceled. Ship all at one time if possible.

"Lines of goods we carry,

"Fill in 'Yes' or 'No.'

"Dry Goods, Yes. Millinery, Yea.

"Ladies' Made Wear, Yea.

"White Goods Sale When? ———.

"Fur Sale When? No.

"Anniversary Sale When? Sept.

"Men's Clothing, Yea.

"Men's Shoes, Yea.

"Ladies' Shoes, Yea.

"Furniture, No. Groceries, Yea.

"Rugs, Yea. Carpets, No.

"M. O. Cuts, Yea.

"Bogata Mercantile Co.,

"Per B. C. Peyton.

"[Write plainly.]

"Town, Bogata.

"State, Tex.

"J. M. Wyatt, Salesman."

The order was received and accepted by appellee on September 27, 1913. On that day appellant telegraphed appellee as follows:

"Withhold shipment adv. matter. Will advise by letter"

—and on the same day wrote appellee as follows:

"Bogata, Texas, 9/27, 1913.

"Outcault Adv. Co., Chicago.—Gentlemen: We wired you to-day:

"Withhold shipment of adv. matter. Want to make change. Which we now confirm.

"Owing to the limited circulation of our little paper here we have decided that your proposition is too large for us. We realize the importance of advertising, and are now, and intend to contribute to adv., yet your proposition is too large for us. Consequently we would ask that you cancel our order. It is quite probable that we will take up your line for the fall of 1914.

"Yours,

Bogata Mercantile Co.,

"Per B. C. Peyton."

The telegram was received by appellee the day it was sent, but, as found by the court, after appellee had received and accepted the order. The letter was not received by appellee until September 29, 1913. Appellant's president, Peyton, testified:

"Mr. Wyatt, salesman for the Outcault Advertising Company, came into the store of his own accord and told me about this advertising. I didn't know what the Outcault Service De Luxe was, but Mr. Wyatt explained that they would furnish special cuts and special advertising matter for our store, and that the cuts would have to be fixed with our name and address, and picture cuts specially designed for us would be furnished each week, 52 of them. I understand from Mr. Wyatt that this material would have to be specially prepared for our use after our order was accepted by the company. I don't know how long it would take."

The witness Hadden, who seems to have been the manager of appellee's business at Chicago, testified:

"We kept no record of when the goods in question on this contract were manufactured, and consequently I cannot recall the exact datings and cannot give them and cannot say what of them were manufactured prior to September 27, 1913, and what prior to receipt by our company of letter from the Bogata Mercantile Company dated September 27, 1913."

Part of the material constituting the advertising service appellant contracted for was shipped to it by appellee October 2, 1913, and the remainder thereof October 3, 1913. Appellant declined to receive either shipment, claiming that it had countermanded the order therefor by its telegram and letter of September 27, 1913, and that it therefore was not liable to appellee on the contract, and, further claiming it was not liable because, it alleged: (1) The contract was in violation of the anti-trust law of this state, in that it was for an exclusive right to use appellee's advertising "service de luxe"; and (2) was first breached by appellee, in that it entered into a similar contract with the Bogata Drug Company on or about September 24, 1913. Appellee thereupon commenced this suit in a justice court. On appeal to the county court judgment was rendered in appellee's favor against appellant for \$182, the sum sued for, and appellee appealed.

Long & Wortham, of Paris, for appellant. Austin S. Dodd, of Clarksville, for appellee.

WILLSON, C. J. (after stating the facts as above). [1] The transaction between appellant and appellee evidenced by the contract was interstate commerce, and hence not subject to the anti-trust laws of this state. *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791; *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 Tex. Civ. App. 553, 120 S. W. 532; *Moroney Hardware Co. v. Goodwin Pottery Co.*, 120 S. W. 1088; *McCall Co. v. Stiff Dry Goods Co.*, 142 S. W. 661; *Koch Vegetable Tea Co. v. Malone*, 163 S. W. 663. Therefore the first and second assignments are overruled.

[2] There was evidence to support the find-

ing involved in the judgment that appellee had received and accepted appellant's order at the time it received the latter's telegram of September 27, 1913. If, therefore, that telegram should be construed as one countermanding the order—and we think it should not be so construed—it did not have the effect appellant claims it had. Appellee's acceptance of the order completed the contract between the parties, and countermanding the order thereafter did not relieve appellant of the consequences the law attached to its breach of its contract. Therefore the fourth assignment is overruled.

[3] There was testimony to support a finding that the "little druggist advertising service," which appellee bound itself to furnish to the Bogata Drug Company, was not the same as the "service de luxe," which it bound itself to furnish to appellant. Therefore the fifth assignment, in which appellant complains that it appeared that appellee violated its contract with it by entering into a similar one with the Bogata Drug Company, is overruled.

[4] What has been said disposes of all the assignments except the third, in support of which appellant contends that the measure of appellee's damages was not the sum it agreed to pay for the use of the advertising material, as determined by the court, but was the difference between that sum and the value of the material in the condition it was in at the time the order for same was countermanded. The fair inference from the testimony of the witness Hadden, set out in the statement above, was that appellee had done all it was to do to prepare the material for the use appellant was to make of same before it received appellant's letter of September 27, 1913, countermanding the order. The fair inference from the testimony of the witness Peyton was that the material as so prepared could have been used only by appellant for advertising purposes, and therefore was of no value for such purposes to any one else. Therefore, it seems to us, it *prima facie* appeared that appellee was entitled to recover as damages for the breach by appellant of its contract the sum it had agreed to pay for the use of the material. The contract was not one for the sale of the material, as appellant treats it. It was for the hire thereof to appellant for a period of one year. What appellant was entitled to was the use of the material during that period. What appellee was entitled to was the material at the expiration of that period and the sum appellant agreed to pay for its use to that time. As appellee was entitled to the material after it had been used by appellant during the time agreed upon, it *prima facie* appeared, we think, that what it lost as a result of appellant's refusal to receive and use the material as agreed upon was the sum appellant undertook by its contract to pay for

the use thereof. It so appearing, as we understand the rule, the burden was on appellant to show, and it did not, that, when it breached the contract appellee might have pursued, but did not, a course which would have mitigated the damage it suffered. *Jefferson & N. W. Ry. Co. v. Dresson*, 43 Tex. Civ. App. 282, 96 S. W. 63; *Porter v. Burkett*, 65 Tex. 383.

The judgment is affirmed.

WESTERN UNION TELEGRAPH CO. v. WINTER. (No. 1571)*

(Court of Civil Appeals of Texas. Texarkana.
March 1, 1916. Rehearing Denied
March 16, 1916.)

1. TELEGRAPHS AND TELEPHONES ⇐38(6) — DELAY IN DELIVERY—CONTENTS OF MESSAGE —NOTICE TO COMPANY.

A telegram worded as follows: "Houston, Texas, July 2, 1914. Geo. W. Winter, Bonham, Texas. Gabe died Chicago this morning. Arrangements later. [Signed] Francis"—which was not promptly delivered, charged the telegraph company with notice that Gabe Winter had died in Chicago; that funeral arrangements were yet to be made; that he was the brother of addressee; and that addressee would probably desire to attend the funeral.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. ⇐38(6).]

2. TELEGRAPHS AND TELEPHONES ⇐38(6) — DELAY IN DELIVERY—LIABILITY—KNOWLEDGE OF FACTS.

The delay in delivering such message rendered the telegraph company liable for damages resulting from the addressee's failure to attend the funeral, notwithstanding the company's lack of knowledge of the place where the funeral would be held.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. ⇐38(6).]

3. TELEGRAPHS AND TELEPHONES ⇐49 — DAMAGES—SUBSEQUENT TELEGRAM.

A telegraph company which failed to deliver promptly a message announcing the death of addressee's brother is not relieved from liability for damages resulting from his failure to attend the funeral by its prompt delivery of a subsequent message for addressee giving the place and time of the funeral to the person in whose care it was sent, by whom it was not communicated to addressee until too late, since, if the person to whom it was delivered could be considered addressee's agent, it could only be for the purpose of delivering the message to him, and her knowledge of its contents could not be imputed to him so as to make his failure to attend the funeral negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. ⇐49.]

4. TELEGRAPHS AND TELEPHONES ⇐37(2) — DELIVERY—CARE OF ANOTHER PERSON.

Where a telegram is addressed to a person in care of another, delivery by the company to the other relieves the company from all liability.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 29, 32; Dec. Dig. ⇐37(2).]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by George W. Winter against the Western Union Telegraph Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Appellee's brother, Gabe Winter, resided in Waco, Tex., but on July 2, 1914, died in a sanitarium at Chicago, Ill. On the morning of that day Francis Winter, another brother to appellee, delivered to appellant at Houston, Tex., for transmission to appellee at Bonham, Tex., where he resided, a telegram as follows:

"Houston, Texas, July 2, 1914. Geo. W. Winter, Bonham, Texas. Gabe died Chicago this morning. Arrangements later. [Signed] Francis."

The message was promptly transmitted to Bonham, but it was not delivered to appellee until Sunday morning, July 5th. In the meantime, to wit, at 4 o'clock on the afternoon of Saturday, July 4th, the remains of appellee's brother Gabe, having been removed to Waco, were there interred. This suit was by appellee to recover damages resulting to him, as he alleged, from negligence of appellant in failing to promptly deliver to him the message set out above. The appeal is from a judgment in his favor for the sum of \$500.

Hamp P. Abney, of Sherman, and Francis R. Stark and Albert T. Benedict, both of New York City, for appellant. Cunningham & McMahon, of Bonham, for appellee.

WILLSON, O. J. (after stating the facts as above). [1] The language of the message, which was set out in full in the petition, charged appellant with notice of facts as follows:

(1) That Gabe Winter had just died in Chicago.

(2) That arrangements had not been, but would be, made for interring his remains.

(3) That he was appellee's brother.

(4) That in all probability appellee would desire to attend the funeral when it occurred. Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

[2] Notwithstanding it thus appeared that appellant had notice of such facts, and notwithstanding allegations showing that appellee could and would have ascertained when and where the remains were to be interred, and could and would have attended the funeral at Waco had the telegram been delivered to him promptly, appellant insists that the petition did not state a cause of action against it, because it did not appear therefrom that it had notice of the fact that the burial would be at Waco. Western Union Tel. Co. v. Kuykendall, 99 Tex. 328, 89 S. W. 965, and Western Union Tel. Co. v. Ayers, 41 Tex. Civ. App. 627, 93 S. W. 199, are cited as supporting the contention.

In the Kuykendall Case it appeared from the petition that the plaintiff's wife's brother died at Hollis, O. T., December 18th, and was buried in the family burying ground at Tow

Valley, Tex., December 21st. The plaintiff, with his wife, lived eight or ten miles from Kingsland, near Tow Valley. The message, which was not delivered until 6 o'clock p. m. December 19th, was as follows:

"Hollis, O. T., 11/18/08. Mrs. Myrtle Kuykendall, Kingsland, Texas. Will Arant died this a. m. Will be at Lampasas to-morrow evening the 19th day. [Signed] Walker Arant."

It was not alleged that the defendant had notice of any other facts than those disclosed by the language of the message. The Supreme Court held that the petition did not show liability on the part of the defendant for damages to the plaintiff's wife due to the fact that, because the message was not promptly delivered, she did not have an opportunity to prepare for the interment of her brother's remains or to attend the funeral. The court said:

"One would naturally expect the deceased person would be buried in the vicinity of his residence, where he died. The phrase 'will be at Lampasas to-morrow evening the 19th day' clearly means that the sender, Walker Arant, would be at Lampasas at the time named; but there is nothing in the terms of the message to indicate that he would carry the body of the deceased with him. Neither did the message give notice to the telegraph company that the deceased would be buried in the family burying ground, near the home of the sister, nor of any facts or circumstances which would make it necessary for her to make preparation to receive the body or to enable her to attend the funeral."

The Ayers Case was not different from the Kuykendall Case in any material respect, and was held by the Court of Civil Appeals to be ruled by it.

In both of those cases there was an absence of anything in the message which could be construed as notice to the telegraph company that the funeral might not be at the place where the deceased died. In this case appellant knew from the face of the message delivered to it that arrangements for the funeral had not been, but were to be, made, and we think it might reasonably have contemplated that the arrangements when made would provide for the funeral to be elsewhere than in Chicago. Moreover, we think appellant might and should have contemplated that appellee, on receipt of the message, if promptly delivered to him, could and would, as he testified he could and would, have ascertained what the arrangements, when made, were, in time to have attended the funeral at Waco.

The case is more like Smith v. Tel. Co., 104 Tex. 171, 133 S. W. 1041, 135 S. W. 1147, than it is like those cited by appellant. In that case it appeared that it was understood between plaintiff's wife and one Thatcher that, if her brother, David Terry, who was sick at Belton, should die, he (Thatcher) would advise her of the fact and arrange for the burial in the family burial ground at Houston. The message was as follows:

"Belton, Texas, November 25, 1904. Mrs. J. Mayrant Smith, care Oriental Oil Company, Dallas, Texas. Dave died this morning three

o'clock. Will make all arrangements. [Signed] Wm. Thatcher."

The Court of Civil Appeals held that:

There was "nothing in the telegram that can be held to give notice to the telegraph company that the remains would be carried to Houston for burial, and therefore it cannot be said that the damages resulting to Mrs. Smith in not being notified in time to attend the funeral at Houston were contemplated by the company at the time the contract to transmit and deliver the message was entered into." Postal Tel. Cable Co. of Texas v. Smith, 124 S. W. 733.

And on authority of the Kuykendall Case it reversed the judgment in Smith's favor. The Supreme Court, having granted a writ of error, reached a contrary conclusion, and in distinguishing the case from Tel. Co. v. Kuykendall, supra, said:

"In the present case the place of the burial had been fixed, and all due arrangements in respect thereto provided for, all of which was well understood and known to the addressee of the message. These were not matters as to which she needed information or as to which the message was intended to give information. The important fact intended to be conveyed to her, and which alone, as she avers, was necessary to enable her to attend the funeral of her brother, was the fact of his death. This information was, by the negligence of the company, withheld from her. The nature of the telegram was such as to visit it with notice of the fact that she might, and probably would, wish to attend the burial whenever it might be. Nor can her right to recover be defeated because notice of the place of the funeral was not given in it."

The difference between the Smith Case and this one lies in the fact alone that there, had the message been delivered to the addressee, she would have known, not when, but where, the funeral would occur; while here, had the message been delivered to appellee, he would not have known when nor where the remains of his brother would be interred. But in each of the cases the important fact intended to be conveyed to the addressee by the message was the death of the party named therein. As Mrs. Smith, had the message been promptly delivered to her, could have ascertained when the funeral would occur, so appellee, had the message to him been promptly delivered, could and would, he alleged, have ascertained when and where his brother's remains would be interred, and have been present at the funeral. So far as the language of the message in the Smith Case is concerned, it was not materially different from that in the message to appellee, and it did not advise the defendant in that case of any fact not disclosed to appellant by the message in question here. We think the petition stated a cause of action, and it was not error to overrule the demurrer.

[3] Appellant alleged and proved that on Friday, July 3, 1914, appellee's brother Francis delivered to it at Waco a message to appellee at Honey Grove, as follows:

"Waco, Texas, 7/3/14. Geo. W. Winter, care Miss McNew, Honey Grove, Texas. Join Annie Dallas morning Katy. Gabe interred Saturday 4 o'clock. [Signed] Francis."

And he further alleged and proved that the Miss McNew, to whose care the message was addressed, was appellee's sister-in-law, and that it promptly transmitted and delivered the message to her at Honey Grove. It appeared from the testimony that appellee was not, in fact, advised of the contents of this message until Sunday morning, July 5th; but it further appeared that, had Miss McNew acted diligently, the contents thereof could have been communicated to him in time to have enabled him to be present at his brother's funeral.

Appellant insists that the delivery of this message to Miss McNew was, in legal effect, a delivery thereof to appellee, and that he was chargeable with knowledge of its contents at the time it was delivered to Miss McNew. On this theory appellant urges that it appeared as a matter of law that appellee's failure to act on the information contained in this telegram, and not its negligence in failing to promptly deliver the telegram of July 2d, was the proximate cause of his failure to attend his brother's funeral, and therefore that the court erred when he refused to peremptorily instruct the jury to find in its favor.

[4] It is true that appellant fully discharged the duty it owed to appellee with reference to the telegram of July 3d when it promptly transmitted and delivered same to Miss McNew. Tel. Co. v. Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751. Had appellee's suit been predicated on that telegram, it must have failed; for it would have appeared that appellant had fully discharged the obligation it incurred when it accepted same for transmission and delivery. But appellee's suit was not predicated on any act or omission on the part of appellant with reference to that telegram, but on its negligence in failing to promptly deliver the telegram of July 2d. It is, of course, true that, had it appeared that the contents of the telegram sent to Miss McNew's care were communicated to appellee in time to have enabled him to attend the funeral, he should not have been heard to complain because of appellant's negligent delay in delivering the other telegram; for it would then have appeared that his own negligence, and not appellant's, was the proximate cause of his absence from the funeral. But it conclusively appeared that the contents of the telegram to Miss McNew's care were not communicated to appellee until Sunday, after the funeral on Saturday. Certainly appellee was not negligent in fact in failing to act on information which had not been communicated to him at the time he must have acted to avoid the injury he suffered; and we do not think it should be held that he was negligent in law on the theory that Miss McNew's knowledge is imputed to him. We know of no principle of law which operated to charge appellee with knowledge of the contents of the telegram possessed by

Miss McNew. If she was his agent, she was not so because of any act of his, and was so for the sole purpose of receiving that telegram when it was tendered to her, and delivering same to him. Knowledge on her part of the contents thereof, in any event, could be imputed to him only so far as it might affect rights asserted by him with respect to that telegram.

The judgment is affirmed.

COLLIN COUNTY NAT. BANK et al. v. SATTERWHITE. (No. 7144.)

(Court of Civil Appeals of Texas. Galveston. March 13, 1916.)

1. CARRIERS — 58 — BILL OF LADING — TRANSFER — EVIDENCE.

Where a bank purchased a seller's bill of lading with draft attached, but on refusal of the buyer to accept the goods the seller gave its check to the bank for the amount of the draft, held, on the evidence, that at the time of a levy on the goods as the property of the seller the title was in the seller, and not in the bank.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. — 58.]

2. EXECUTION — 90 — FORM — OMISSION OF WORD.

Execution issued out of the county court of Houston county directing the officer making the levy to make return "Before said court at the courthouse thereof in Houston within 60 days," etc., was not void for the omission of the word "County" after "Houston."

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 185; Dec. Dig. — 90.]

3. EXECUTION — 182 — CLAIMS BY THIRD PERSONS — ATTACK UPON VALIDITY.

A claimant in execution cannot without pleading or proof attack the validity of the execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 547; Dec. Dig. — 182.]

Appeal from District Court, Houston County; John S. Prince, Judge.

Suit by B. L. Satterwhite against the Collin County National Bank and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Nunn & Nunn, of Crockett, for appellants. Aldrich & Crook and Adams & Young, all of Crockett, for appellee.

LANE, J. At and prior to the time of the institution of this suit appellee, B. L. Satterwhite, had and owned a valid and subsisting judgment rendered by the county court of Houston county against Brown Grain Company, a firm composed of E. P. and C. V. Brown, of Collin county, Tex.; that on the 31st day of October, 1913, execution was issued upon said judgment, and on the same day was levied on one car of oats in Houston county as the property of Brown Grain Company. Thereafter the appellant Collin County National Bank of McKinney, Tex., filed its claimant's oath and bond, claiming said oats as its property, and by virtue of

such bond the officer who levied said execution delivered said oats to said bank.

Issues were joined between the appellee, Satterwhite, as plaintiff, claiming under said levy of execution, and said bank, as defendant, claiming by virtue of an alleged purchase from said Brown Grain Company prior to said levy of execution. The issues thus joined were submitted to the trial court without a jury, who, after having heard the evidence, rendered judgment in favor of appellee, B. L. Satterwhite, against the Collin County National Bank, as principal, and H. F. Moore and Arch Baker, as sureties, on said claimant's bond, for the sum of \$359.56, together with 6 per cent. per annum interest thereon from date of judgment. Said judgment provided that the same might be satisfied by a return of the said car of oats to the officer within ten days from date of judgment. From this judgment Collin County National Bank, H. F. Moore, and Arch Baker have appealed.

[1] Appellants' first assignment of error is as follows:

"The court erred in its finding of fact, which is as follows: 'I find that at the time of the levy the car of grain was the property of the Brown Grain Company, defendants in the judgment hereinbefore referred to, and not the property of the Collin County National Bank,' because the undisputed evidence shows that the title to said car of grain [which was oats] had passed out of the Brown Grain Company and was vested in the Collin County National Bank at the time of such levy, and there was no evidence upon which to base such finding."

The undisputed evidence shows that the Brown Grain Company shipped the car of oats in question to Crockett, Tex., consigned to Edmiston Bros.; that they drew a draft on Edmiston Bros. for the purchase price of said car of oats, and attached the same to the bill of lading and sold said draft with bill of lading attached to the appellant bank; that, when said car of oats reached Crockett, Edmiston Bros. refused to receive the oats and pay the draft; that upon notice of such refusal the Brown Grain Company gave said bank its check for the amount of the original draft, and the same, with the bill of lading attached, were retransferred to and delivered to said Brown Grain Company; that thereafter Brown Grain Company directed the railway company to forward the car of oats to Sequoyah, Tex., consigned to Thompson Bros. Lumber Company. The following testimony shows substantially the disputed facts upon which the court rendered judgment:

Appellants' witness J. W. Ashley, cashier for appellant bank, testified on cross-examination as follows:

"It is a fact that, when the car of oats arrived at Crockett, Tex., Edmiston Bros. refused to accept the car. This car was diverted to Sequoyah, Tex., to Thompson Bros. Lumber Company, and a draft with bill of lading attached was made on Thompson Bros. Lumber Company by the Brown Grain Company, and was purchased by the Collin County National Bank

and sent out by said bank as a cash item; the proceeds of the draft having been passed to the credit of the Brown Grain Company. When the draft and bill of lading was returned to the Collin County National Bank that was made against Edmiston Bros. by the Brown Grain Company for the car of oats, the Brown Grain Company gave to the Collin County National Bank their check for the draft and bill of lading. It is a fact that Thompson Bros. Lumber Company sent a draft under date of November 13, 1913, payable to the order of the Brown Grain Company, and that said draft was turned over to Collin County National Bank as part payment on the original draft that said bank purchased from the Brown Grain Company, but not as the property of the Brown Grain Company, as said bank had already paid the Brown Grain Company for the draft, and said Brown Grain Company had no interest in same, but indorsed and turned it over to the Collin County National Bank as its property."

E. P. Brown, witness for appellants, testified on cross-examination as follows:

"Yes; the 200 sacks of oats involved in this shipment were shipped by Brown Grain Company to Edmiston Bros., Crockett; that Brown Grain Company drew draft attaching bill of lading to draft, indorsed it over to the bank, took credit for the amount of the draft, and used the money. Afterwards Edmiston Bros. refused to accept it, and at the bank's offer the Brown Grain Company repurchased the oats by giving their check to the bank for the amount, as the bank claimed the Brown Grain Company could handle the car of oats better than they could."

"Yes; it is a fact that Brown Grain Company made out a bill to Thompson Bros. Lumber Company as inquired about; that he thinks the Exhibit A is a sufficient copy of the bill."

"Yes; the draft was received by Brown Grain Company, was indorsed by witness, but it is not a fact that Brown Grain Company received payment direct from Thompson Bros. Lumber Company, because, when Brown Grain Company received this draft, this being the property of the Collin County National Bank, the witness took the draft down to the bank, indorsed it, and handed it to the bank, and the bank received the payment of the money on the draft as it belonged to the bank."

"No; the Collin County National Bank did not debit the Brown Grain Company with the amount of draft after Edmiston Bros. refused the oats, but they called up the Brown Grain Company and suggested that the Brown Grain Company could handle the oats better than they could, and asked the Brown Grain Company if they could not take up the oats. At their request we gave them a check for the amount, took it up, and handled it ourselves."

G. H. Henderson, the agent for the International & Great Northern Railroad Company at Crockett, Tex., a witness for appellee, testified as follows:

"That the car was shipped from Crockett to Thompson Bros. Lumber Company at Sequoyah, Tex., without bill of lading and without draft attached, there being no agent there; that there was no draft drawn for that car of oats on Thompson Bros. Lumber Company; the way it was shipped to Thompson Bros. Lumber Company was that Thompson Bros. Lumber Company could take the car and unload it without making any payment at all; that it is the rule where a car is refused, and there is no chance of selling it to some one else at that point, then it is diverted by the railroad company per the instructions of the consignor."

"The consignor instructed our auditor's office to forward the car to Thompson Bros. open; that he had no instructions from the consignor, but his instructions were from W. G. Warner, auditor at Houston; that such instructions are contained in telegrams which were presented in evidence."

B. L. Satterwhite, appellee, testified as follows:

"That after this car of oats was delivered he had a conversation with Brown Grain Company over the telephone; that they called him up the next day after the delivery of the car and said that they had had quite a good deal of hard luck, and wanted to get the judgments against them taken up, but could not pay them off 100 cents on the dollar; that they could pay 33 1/3 cents on the dollar; that he replied that he could not do that, his attorneys telling him that he was in pretty good shape to collect 100 cents, and that he wanted 100 cents on the dollar; they just said they would like to get that settled off; they didn't mention the ownership over the telephone or in the letter either; they didn't say anything about this car of oats being the property of the Collin County National Bank, and did not say anything only that they would like to get it settled off; didn't mention it in letter or over telephone either."

We think there was sufficient evidence to support the judgment of the trial court. We therefore overrule appellants' assignment.

[2] By appellants' second assignment they insist that the execution issued out of the county court of Houston county by virtue of which the car of oats was levied on by the officer, was void, because it directed or commanded the officer making the levy to make return "before said court at the courthouse thereof in Houston within 60 days," etc. Appellants' contention is hypercritical and without merit. We think it clear that the omission of the word "county" after the word "Houston" was but a clerical omission, and does not render the execution void.

[3] The issue joined between the parties in this cause was: Was the car of oats at the time of the levy of execution the property of Brown Grain Company, or was it the property of appellant? This was the only issue made either by pleading or evidence, and this issue was decided against appellants on sufficient evidence. Appellants cannot without pleading or proof attack the validity of the execution, if indeed they might do so at all in such cases as the one before us. It is said in the case of Webb v. Mallard, 27 Tex. at page 84:

"It would present, it appears to me, quite an anomaly if a party not in possession, and seemingly having no interest in the property, should be permitted by the interposition of a claim for the trial of the right to it to recover a judgment merely by proof of defects or irregularities in the execution."

Appellants' second assignment is overruled. We find no error in the judgment of the trial court, and therefore the same is in all things affirmed.

Affirmed.

GRIFFITH v. SHOFNER. (No. 5585.)
(Court of Civil Appeals of Texas. Austin.
Feb. 2, 1916.)

**BROKERS — §55(1) — RIGHT TO COMPENSATION
— SUFFICIENCY OF SERVICES — NEGOTIATIONS
THROUGH OTHER AGENT.**

Where a broker employed to sell realty, knowing that he had not the exclusive agency, had a prospective buyer look at the property, but on his refusal to purchase took no further action, on sale to the same purchaser through the active efforts of another broker, the first broker is not entitled to commission where he refrained from further efforts to make the sale on account of representations by the second broker and not on account of any interference or fault of the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55(1).]

Appeal from Travis County Court; Wm. Von Rosenberg, Jr., Judge.

Action by R. D. Shofner against F. L. Griffith. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Edwin H. Yelser, of Austin, for appellant.
E. C. Gaines, of Austin, for appellee.

KEY, C. J. R. D. Shofner brought this suit against F. L. Griffith to recover a sum of money alleged to be due him as a commission for procuring a purchaser to whom the defendant Griffith sold certain real estate in the city of Austin. The defendant answered denying liability, but it is not necessary to make any further statement as to the pleadings, further than to say that the defendant alleged that the plaintiff did not have the sole agency, and that the sale of the property was in fact negotiated by Hal Hailey, another agent with whom the defendant had listed it; that Hailey, and not the plaintiff Shofner, was entitled to the commission; and that the defendant had settled the same with Hailey. At the trial the court submitted to the jury and required them to find whether Shofner or Hailey was the procuring cause of the sale of the property, and in response thereto the jury made a specific finding that Shofner was the procuring cause of the sale. Thereupon the court rendered judgment for Shofner against the defendant Griffith for \$205.25, and the latter has appealed.

We sustain the first and second assignments, and hold that the court erred: First, in not giving appellant's requested instruction directing a verdict for him; and, second, in not setting aside the verdict and judgment and awarding a new trial. The proof shows that Griffith, the owner of the property, had listed it for sale or exchange with both Hailey and Shofner, and perhaps with other agents, and that Hailey and Shofner were aware of that fact and understood that neither of them had an exclusive agency. While there is some conflict in the testimony as to what was done by Shofner in reference to the sale of the property, the

most favorable view that can be taken of it in his behalf is that, a short while after the property was listed with him, he offered it for sale or trade to one Wright, who became interested in it; that on the next day he notified Griffith, the owner, that he had interested Wright in the property, and that the latter would come and look at it in a short time; that on account of Shofner's efforts Wright kept his promise to Shofner, went and looked at the property, but declined to purchase or trade for it. Shofner testified, himself, that he never mentioned the matter to Wright but the one time, and that he never mentioned it any more to Griffith, the owner of the property, until after he had made the trade and deeded it to Wright, when he demanded his commission for making the sale and notified Griffith that he would hold him responsible for the same. The undisputed testimony of Griffith, the owner of the property, Wright, the purchaser, and Hailey, the other agent, shows that Hailey, who was agent to sell the property in question for Griffith and also agent to sell certain real estate belonging to Wright, took the matter up with Griffith and Wright in a day or two after Shofner had reported to Griffith that he had interested Wright as a prospective purchaser; that Hailey exerted himself actively for some time, but failed to bring about any agreement between Griffith and Wright. Several months thereafter, Hailey took the matter up again, and, after considerable effort on his part, he succeeded in getting Griffith and Wright to agree to a trade, by which Griffith sold to Wright the property involved in this controversy, and Griffith bought from Wright the property which he had authorized Hailey to sell, Griffith taking it as part of the consideration for the property sold by Griffith, the balance of the consideration being purchase-money notes. As said before, Shofner did nothing toward effecting a sale of Griffith's property to Wright after he notified Griffith that he had found Wright as a prospective purchaser and that the latter would come and look at the property. The only reason given for not participating any further in the matter is Shofner's testimony to the effect that Hailey called him on the telephone, and asked him why he was "butting in" to his affairs; that he (Shofner) told Hailey that Wright was his customer for the sale of the property, and that he was the first one to interest him in the matter; and that thereafter, in a personal interview with Hailey, the latter told him that he had made considerable effort to sell Wright's property, and that Wright would not make any trade with Griffith for the property here involved. If the transaction was to be handled by him (Shofner). Whereupon he (Shofner) told Hailey that, if Wright did not want him to handle his property, it was all right, but

that, if Wright bought the property in question from Griffith, he (Shofner) would claim his commission from Griffith.

This case is analogous to, and involves the same principles and rules of law that were announced and applied in, *Edwards v. Pike*, 49 Tex. Civ. App. 30, 107 S. W. 586, decided by the Court of Civil Appeals for the Sixth District, and we quote as follows from that case:

"The general rule is that a real estate agent having a contract authorizing him to effect a sale is entitled to the commissions agreed upon, where he procures a buyer who consummates the purchase of the property on terms satisfactory to the owner. Ordinarily, the application of this rule to the facts of a given case is not difficult; for, when it is shown that the agent was instrumental in bringing the buyer and seller together, the fact that the agent was the procuring cause of the sale afterwards consummated is sufficiently established. But when each of two or more brokers within the knowledge of the other has a contract authorizing him to effect a sale of the same property, the fact that one was instrumental in bringing the parties together fairly cannot be made the test of the liability of the owner of the property for commissions claimed. The owner has a right to authorize more than one broker, each independently of the other, to effect a sale of his property; and, so long as he remains neutral, he ought to be permitted, without incurring liability for commissions to more than one of them, to consummate the sale of the property through the one who first produces a person ready to buy it, whether the agent producing the purchaser is the one who first brought him and the buyer together or not.

"The practical test which ought to control in fixing the liability of the property owner on the facts of a case like this is: Within the knowledge of the owner at the time, was the sale consummated on terms agreed upon between the buyer and the broker who brought the parties together; or was it consummated on other terms as the result of negotiations between another broker and the buyer, and after the latter had abandoned the contract made by him with the other broker? In the absence of special circumstances which would make it proper to so charge him, the owner ought not to be held liable for commissions to more than one broker, and, after actually selling his property to a purchaser produced by one broker on terms negotiated by such broker and not by another, he ought not before paying him the commissions be required, as suggested by the charges refused, at his peril to determine whether some other broker was not, in fact, the procuring cause of the sale. In such a case, the risk of finally effecting by his agency, on terms agreed upon between him and the buyer, a sale of the property, ought to be borne by the broker. His services towards effecting one are performed with a knowledge on his part that another broker has authority similar to that conferred upon him; and if, before a sale is completed, the buyer quits him and on other terms consummates it through another agent, it is a contingency he should be held to have contemplated at the time he undertook the service, and about the happening of which he has no right to complain. *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733; *Farrar v. Brodt*, 35 Ill. App. 617; *McGuire v. Carlson*, 61 Ill. App. 295. The broker who undertakes a sale of property with full knowledge that another broker has also undertaken to sell it ought not to expect more of the owner than that he will not interfere in favor of the one or the other. It is then an even contest between them, where the chances of success in contemplation

of the competition to be expected should be presumed to have been duly weighed by each; and if, as a result of such competition, without interference or fault on the part of the owner, the sale is actually consummated by his competitor, the broker who brought the prospective purchaser and the owner together, but failed to consummate a sale upon the terms agreed upon between him and the buyer, ought not to be permitted to charge against the owner the loss sustained by him, not by the owner's fault, but as a result of acts of his competitor and conduct of the purchaser which he reasonably should have contemplated might ensue when he undertook and performed the service. Such a case is not at all like the one where the broker, having the exclusive right to sell, or ignorant of the fact that another broker has a right equal to his own, brings the purchaser and the owner together, when the sale is consummated by the owner himself or by the direct agency of another broker. There the broker bringing the parties together should be held to be entitled to his commissions if the sale is consummated by the owner himself, because he is entitled to same by the terms of his contract; and if the sale is consummated by another broker, because his services were performed on the faith of his contract and without reference to risks of failure which a knowledge that he had a competitor would have caused him to weigh and, perhaps, provide against."

That case was much stronger than the instant case in favor of the agent who first took the matter up with the party who thereafter purchased, because it was shown that he made a verbal contract with the prospective purchaser which was more favorable to the owner of the land than the contract which was subsequently made by another agent, who he knew was authorized to sell it. But, notwithstanding that fact, the court held that, inasmuch as the purchaser was not bound by his verbal contract with the first agent, he had the right to abandon it and accept the offer thereafter made by the other agent, and that having done so, and bought the land upon the terms submitted by the latter, that agent, and not the one who had formerly negotiated a different though more favorable contract to the owner, was the procuring cause of the sale of the property. In the case at bar, it was not shown that Wright, the purchaser, entered into any agreement with Shofner for the purchase of the property, and the agreement which was finally made and consummated was procured by Halley.

We fail to perceive wherein what was said by Halley to Shofner in reference to Wright's not being willing to purchase the property if Shofner negotiated the deal can have any bearing in determining Griffith's liability as owner of the property to pay a commission. Under the law, the agent who was the procuring cause of the sale was entitled to the commission. The undisputed facts show that Halley was that agent, and although, in order to place himself in that position, and thereby earn the commission from Griffith, he may have said or done something which induced Shofner to make no further efforts to consummate the sale, still that fact can properly have no force in this case. Halley is not a

party to this suit, and Shofner is not seeking any redress from him, but seeks to hold Griffith, the owner of the property, for the commission which Shofner claims that he might have earned, if he had not been prevented from doing so by certain wrongful acts of Halley. It is not claimed that Griffith was in any wise responsible for the alleged misconduct of Halley, and if Shofner has any legal ground of complaint against him it cannot be litigated in this case, unless Halley is made a party and afforded an opportunity to defend himself.

Hence we hold that as the undisputed evidence shows that Halley, and not Shofner, was the procuring cause of the sale, therefore appellant is not liable to Shofner for commission for effecting the sale. Upon another trial, unless testimony is produced which materially strengthens the plaintiff's case, the trial court should direct a verdict for the defendant.

For the error indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

JONES HARDWARE & FURNITURE CO. v. GUNTER. (No. 934.)

(Court of Civil Appeals of Texas. Amarillo. March 1, 1916.)

1. GARNISHMENT \S 178—ANSWER—EFFECT.

A garnishee, having appeared by answer to the writ served on him, placed himself in court, and no commission was required to be issued to take his answer after his answers had been stricken out.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 329-334; Dec. Dig. \S 173.]

2. GARNISHMENT \S 178—DEFAULT JUDGMENT—SETTING ASIDE—STATUTE.

Under Rev. St. 1911, arts. 281, 292, authorizing the rendition of judgment against the garnishee for the full amount of the judgment against the defendant in the proceeding in which the writ issued if the garnishee fails to make full answer to the interrogatories, a garnishee company which undertook to answer the interrogatories in a writ, and which without willful intent and through oversight failed to answer a question interlined in ink near the bottom of the page, which was faint, as to whether a defendant owned shares in the garnishee corporation, and which on its motion to set aside a default judgment showed that the defendant owned no shares, was entitled to have the judgment set aside, and to be allowed to file its answer.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 329-334; Dec. Dig. \S 178.]

3. GARNISHMENT \S 93—WRIT—STATUTE.

Under Rev. St. 1911, arts. 275, 276, 284, and 287, requiring that it appear from the affidavit that the garnishee is a corporation and that the debtor has shares therein, and, if otherwise, the writ cannot require the garnishee to answer as to the number of shares the debtor owns in the company, a writ purporting to recite the affidavit, not alleging that the judgment debtor owned shares in the garnishee corporation was faulty and calculated to mislead the garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 180, 174-180; Dec. Dig. \S 93.]

Appeal from Roberts County Court; J. Kinney, Judge.

Action by H. L. Gunter against W. H. Brown and another, with garnishment against Jones Hardware & Furniture Company. Judgment against the garnishee by default, motion to set aside judgment overruled, and the garnishee appeals. Reversed and remanded, with instructions to set aside the judgment and permit the garnishee to answer.

Hoover & Dial, of Canadian, for appellant. J. A. Holmes, of Miami, for appellee.

HUFF, C. J. H. L. Gunter obtained judgment in the county court of Roberts county, Tex., for the sum of \$816.09, against W. H. Brown and M. Frankness Reed. In that suit Gunter filed his affidavit that he had reason to believe that the Jones Hardware & Furniture Company, a corporation, whose residence was alleged to be in the town of Canadian, Hemphill county, Tex., was indebted to W. H. Brown or had in its hands effects belonging to him, and that Brown is the owner of shares in the above-named corporation and had an interest therein. This affidavit is dated April 7, 1915. On the 8th day of April, a writ of garnishment was issued by the clerk of the county court of Roberts county, directed to the proper officers of Hemphill county, reciting therein that Gunter had made affidavit to the effect that he had recovered judgment against Brown and Reed for \$816.09 and \$9.65 costs, "that said judgment still remains due and unsatisfied, and that defendant has not within the knowledge of affiant property in his possession within this state subject to execution sufficient to satisfy said judgment, and that affiant has just reason to believe that the Jones Hardware & Furniture Company, a corporation duly incorporated, is indebted to the said W. H. Brown, or has effects of the said W. H. Brown in its hands, and has applied for a writ of garnishment against the said Jones Hardware & Furniture Company, a corporation duly incorporated," directing that appellant be summoned to answer at the next term of the county court of Roberts county, at Miami, which convened July 5, 1915, what, if anything, it was indebted to Brown, and what when the writ was served, what effects, if any, of Brown it had in its possession and when the writ was served, and what other person, if any, within its knowledge, was so indebted, etc., "and, further, to answer what number of shares, if any, the said W. H. Brown owns in said company and owned when such writ was served." This last clause is added after the interrogatories as to indebtedness, effects, and what others were indebted or had effects of Brown. The original writ is sent up in this transcript by order of the court. The interrogatory with reference to shares is interlined at the bot-

tom of the writ by a typewriter, the ribbon of which was evidently badly in need of ink, as it is very dim, requiring close attention to read it. On July 5th the garnishee, appellant herein, answered, denying indebtedness to Brown or that it had any effects of his, etc., but failed to answer as to whether Brown had any shares in the corporation.

At the October term of the county court, on the 5th day of October, the appellee, Gunter, filed his exception to the answer of the garnishee, because it had failed to answer as to the number of shares, as required, and moved to strike out the answer upon that ground. The trial court sustained the motion and struck out the answer, and on the 5th day of October, 1915, rendered judgment against appellant for the full amount of the judgment theretofore rendered against Brown and Reed, for the sum above specified.

On the 7th day of October, 1915, appellant filed a motion to set aside the judgment by default, setting up several grounds, among which were that its failure to answer the writ as to the shares owned by Brown in its corporation was an oversight and a clerical error, and was not willfully made or omitted; that, as a matter of fact, Brown did not own any shares in the corporation at the time of the service of the writ or at the time of making the motion, etc. The appellant offered evidence of C. C. Shaller, appellant's secretary and treasurer, which evidence was rejected by the trial court. The evidence offered is to the effect that he (Shaller) prepared the answer, and that he faithfully undertook to answer the interrogatories, and, if any were left unanswered, he failed to see it; that the question unanswered was interlined down near the bottom of the page on the writ and was not very plain, and his failure to observe it was the cause of its not being answered; that he undertook faithfully to make answer to all the interrogatories; that his failure was not prompted by any desire to mislead or harass the appellee in any manner. He then testified that Brown owned no shares in the corporation, and fully negatived all the questions in the writ.

The trial court sustained objections to this evidence made by the appellee to the effect that the evidence was immaterial and irrelevant; that it came too late; that the garnishee had failed to answer, and was then attempting to get before the court another answer. The trial court refused to set aside the judgment by default, and overruled the motion of the appellant, to which action exceptions were taken and this appeal prosecuted.

The appellant assigns error on the part of the trial court in overruling and in not sustaining the motion, on the grounds above set out, because the allegations and proof offered raised the question as to whether Brown owned any shares, and whether or not the failure of the garnishee to inset that fact in

his answer was an oversight or a clerical error, and whether it was willfully made or omitted for the purpose of injuring the appellee. The trial court in his conclusions of law filed herein says that, appellant having failed to answer the writ as required and having failed to appear and answer on appearance day, the appellee was entitled to recover, and that the motion to set aside the judgment was too late and should be overruled.

[1] Appellant, having appeared by answer to the writ served on him, placed himself in court, and no commission was required to be issued to take his answer after his answer had been stricken out. *Gay Ranch Co. v. Pemberton*, 23 Tex. Civ. App. 418, 57 S. W. 71, and authorities cited.

[2, 3] Under articles 281 and 292, R. C. S., judgment may be rendered against the garnishee for the full amount of the judgment against the defendant in the proceedings out of which the writ issued, if the garnishee failed to make full answer to the interrogatories. *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697; *Melton v. Lewis*, 74 Tex. 411, 12 S. W. 93; *McDowell v. Bell*, 46 S. W. 400. The question, however, remains: Did the court err in refusing to set aside the default under the facts of this case? There is no question raised but that the garnishee showed a meritorious defense, and that it was not liable for the debt. The mere omission to observe the interrogatory and a clerical mistake in drawing the answer which omitted to answer the interrogatory may not be sufficient ordinarily to excuse the omission. Appellee relies upon the case of *Freeman v. Miller*, 51 Tex. 443. In that case there was no motion made to set aside the default in the trial court, but it was sought to be corrected by appeal to the Supreme Court. The court therein said:

"If from accident, mistake, or other cause injustice has been done the garnishee, he himself must take the initiative, and, by motion made in due time, or other proper proceedings, seek to set aside the judgment."

Afterward the garnishee in the *Freeman Case* presented a petition for injunction, setting up that a justice of the peace drew up the answer, and it was alleged that he was ignorant of the law and inexperienced, etc. The trial court upon motion dissolved the injunction. From his order the case was again taken to the Supreme Court (53 Tex. 372), and that court reversed the action of the trial court in dissolving the injunction. When the *Freeman Case* was first before the Supreme Court, the case of *Dowell v. Winters*, 20 Tex. 794, was cited as being in point upon the proper practice in a case of that character. In the case cited it is said:

"But where the trial has not been delayed, and there is an affidavit of merits, we think the default should be set aside and the answer received, upon some showing by way of excuse for the failure to plead in time. The excuse proffered in this case was certainly very slight.

But it appears that the counsel acted under a mistake of law, * * * and there is reason to apprehend that, if not allowed to make defense, irreparable injury may be the consequence."

In this case the motion to set aside the judgment was timely, less than two days after the rendition of the judgment, and at the same term of court, and no serious delay could have resulted. It is stated there was an oversight in making the answer and a clerical error, and that there was no purpose to mislead or delay the plaintiff in this case. The grounds as an excuse is slight, and perhaps does not come up to that full measure required in showing no fault in failing to properly answer; but such an oversight can readily be understood when the writ itself is examined. It is on a printed form, with all the questions save the one not answered printed, and this one is crowded between the printed interrogatories and the direction to the officer to make return of the writ, and so dimly typewritten that it is difficult to perceive it. The party making the answer gives this as his excuse for not answering the interrogatory. In addition to the dimness of the interlineation, the writ purports to set out what the affidavit for the writ states. The affidavit, according to the writ, did not state that affiant had cause to believe that Brown, the judgment debtor, owned shares in the appellant corporation. That was omitted from the writ in its recitation of the affidavit. Under articles 275, 276, 284, and 287, R. C. S., it must appear from the affidavit that the garnishee is a corporation or joint stock company, and that the debtor has shares therein; otherwise the writ is not authorized to require the garnishee to answer what number of shares the debtor owns in such company. *Le Tulle, etc., v. Markham, etc.*, 94 S. W. 417. The writ recited what purported to be the contents of the affidavit, which, if true, did not require an answer as to the shares owned by Brown. The appellee at least was in fault to the extent in procuring the writ which was calculated to mislead the garnishee, who was a nonresident to the county of the suit. In a suit against a garnishee for conversion of effects it is required that the facts relied upon establishing liability for such conversion be alleged. *Holloway Seed Co. v. Bank*, 92 Tex. 187, 47 S. W. 95, 516.

In this case the appellee, by procuring the writ issued which it did, notified the appellant that under the law it was not required to answer what shares Brown owned in the company. This writ, together with the interlined dim question, was reasonably calculated to procure the answer as made and to omit from the answer the shares owned or not owned by Brown. In the case of *Jemison v. Scarborough*, 56 Tex. 358, it is said, "The interrogatory not answered in form is misleading," and for that reason it was suggested that the default should not be allowed.

It is doubtless contended by appellee that appellant in this case, being in court, by answer, should take notice of the affidavit, but, as the facts show, it was not personally present, and when it prepared its answer in another county it answered all the interrogatories the law required, under the recitation in the writ, and we believe that fact should be looked to on the question of its negligence. We think it may be said that the omission in the answer was not willful, but due to an oversight on the part of appellant, and, no delay which would have affected the rights of the parties appearing, the court ought to have granted the motion to set aside the judgment and to have permitted the appellant to file its answer. *Bank v. Robertson*, 3 Tex. Civ. App. 150, 22 S. W. 100, 24 S. W. 659; *Simmons v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. 719; *Capps v. Bank*, 134 S. W. 808; *Wood v. Edwards*, 9 Tex. Civ. App. 537, 29 S. W. 418; *Heath v. Jordt*, 31 Tex. Civ. App. 535, 72 S. W. 1022.

The case will be reversed and remanded, with instructions to the trial court to set aside the judgment against appellant and to permit it to answer.

Reversed and remanded, with instructions.

RILEY et al. v. TOWN OF TRENTON et al. (No. 1550.)

(Court of Civil Appeals of Texas. Texarkana.
Jan. 29, 1916. Rehearing Denied
Feb. 3, 1916.)

1. MUNICIPAL CORPORATIONS \S 279—STATUTORY PROVISIONS—ADOPTION BY ELECTION—NECESSITY OF PETITION.

Rev. St. 1911, art. 1016, providing that the benefits of that chapter should apply to any city when the governing body shall submit the question to the voters and the majority shall vote in favor thereof, and that whenever 100 qualified voters of any city shall petition for an election for that purpose, it shall be the duty of the governing body to order it, does not make a petition by the voters a prerequisite to the calling of the election by the governing body.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 739; Dec. Dig. \S 279.]

2. CONSTITUTIONAL LAW \S 63(2)—STATUTES \S 90(1)—MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL—ELECTION—CONSTITUTIONALITY.

Rev. St. 1911, art. 1016, authorizing cities not incorporated under the title including that article to adopt by election the provisions of the chapter thereof relating to street improvements, is not a delegation of legislative power, and does not violate Const. art. 11, § 4, providing that cities and towns having a population of 5,000 or less may be chartered alone by general law any more than does article 1034, which provides for a vote by residents of a territory on the question of becoming incorporated, since in both cases the law is already adopted and the vote merely brings about a condition to which by its terms the law is made applicable.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 109, 111, 112, 114; Dec. Dig. \S 63(2); *Statutes*, Cent. Dig. § 98; Dec. Dig. \S 90(1).]

3. CONSTITUTIONAL LAW \Leftrightarrow 42—PERSONS ENTITLED TO RAISE QUESTION—INTEREST.

Property owners cannot restrain a city from constructing a sidewalk in front of their premises on property which is part of the public thoroughfare because of the unconstitutionality of the statute under which the city is proceeding, since no right of theirs is being invaded.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. \Leftrightarrow 42.]

Appeal from District Court, Fannin County.

Suit by E. J. Riley and others against the Town of Trenton and others. Judgment for the defendants, and plaintiffs appeal. Affirmed.

Cunningham & McMahon, of Bonham, for appellants. C. A. Wheeler and Rosser Thomas, both of Bonham, for appellees.

HODGES, J. The conceded facts in this case show that the town of Trenton, one of the appellees, was incorporated in 1890 under the provisions of what is now known as chapter 14 of title 22 of the Revised Civil Statutes of 1911, relating to the incorporation of towns and villages. In 1915 the board of aldermen of the town of Trenton, acting without any petition therefor, ordered an election to be held by the qualified voters to determine whether or not the town of Trenton should adopt the provisions of chapter 11 of title 22 of the Revised Civil Statutes relating to the cities and towns. An election, the regularity of which is not questioned, was accordingly held, and resulted in favor of the adoption of those provisions of the statute. The article of the statute which is relied on as authority for this action is article 1016, a part of chapter 11, and contains the following provision:

"The benefits of the provisions of this chapter shall apply to any city, and the terms thereof be extended to the same, when the governing body thereof shall submit the question of the adoption or rejection hereof to a vote of the resident property taxpayers who are qualified voters of said city at a special election called for the purpose by said city."

Then follow certain requirements as to the proceedings which shall be adopted in holding the election and making the returns. The article concludes with the following:

"Whenever the provisions of this chapter shall have been adopted by any city the governing body thereof shall have full power to pass all ordinances or resolutions necessary or proper to give full force and effect thereto and to every part thereof. Whenever one hundred qualified voters in any city shall in writing petition for an election to determine the adoption of this chapter, it shall be the duty of its governing body to order such election."

Some time after the election above referred to the board of aldermen of the town of Trenton ordered the construction of certain street improvements, consisting of sidewalks, on what is known as Pearl street. The character of the improvements was such as was authorized by the provisions of chapter 11,

which had been adopted. The cost of construction was assessed, in accordance with those provisions, against the owners of property abutting on the street. More than 20 days after these assessments had been made the appellants, claiming to be the owners of property on Pearl street, prayed for and obtained a temporary injunction restraining the town of Trenton and its officers from the further prosecution of the street improvements theretofore entered upon. The petition contains the following, among other averments:

"That plaintiffs are the owners in fee simple of land in said town of Trenton situated on Pearl street thereof; that defendants are illegally and unjustly deprecating upon the premises of plaintiff, and are now engaged in digging the same up preparatory to laying a cement walk on same at points not on the street line, but in such a way as to leave land of plaintiffs between the actual street and the sidewalk as it is about to be constructed; that defendants, unless enjoined and restrained, will continue to deprecate upon said land and complete the building of such sidewalk, to the irreparable injury of plaintiffs and their said property."

The petition then proceeds to state that the defendants were claiming to act under the provisions of chapter 11, title 22; that the election ordered and the referendum vote taken were without constitutional authority and void. They further allege that no petition as required by law had been submitted asking for such an election, and for that reason the election was void.

On final hearing the temporary order theretofore granted was dissolved, and the perpetual injunction prayed for was refused. In their appeal from that judgment the appellants urge two grounds for a reversal. The first is that article 1016, by virtue of which the election was held, is in violation of the Constitution, which does not permit the Legislature to delegate any part of its legislative functions. The second is that the election was void because ordered and held without a petition theretofore having been filed asking for such an election.

[1] Of the second ground referred to it is sufficient to say that article 1016 is not susceptible of the construction placed upon it by the appellants. It does not provide, either expressly or by implication, that a petition is essential to authorize a submission of the question to the qualified voters of the city or town. That portion relating to a petition is merely designed to provide a method for compelling the proper authorities to submit the question to the voters when for any reason they have failed or refused to do so.

[2] The next question then is: Has the Legislature the power to authorize cities and towns and villages incorporated under the general laws of the state to determine for themselves whether or not they will adopt any provisions of the statute relating to the incorporation of cities, towns and villages not otherwise expressly made applicable?

Article 11, section 4, of the Constitution contains the following:

"Cities and towns having a population of five thousand or less may be chartered alone by general law."

Title 22, with its 17 chapters, contains the general laws enacted at different times by the Legislature in an effort to comply with that provision of the Constitution. The first 13 chapters of that title relate exclusively to cities and towns containing a population of 1,000 or over. Article 762, with which chapter 1 begins, provides:

"Any incorporated city, town or village in this state, containing one thousand inhabitants or over including those incorporated under chapter 14 of this title, or chapter 11 of title 18 of the Revised Statutes of 1895, and other laws general or special, may accept the provisions of this title relating to cities and towns, in lieu of any existing charter by a two-thirds vote of the council of such city, town or village," etc.

The article following is as follows:

"The provisions of this title shall not apply to any city, town or village until such provisions have been accepted by the council in accordance with the preceding article."

Chapter 11, which relates to street improvements, contains article 1016, which has been previously quoted, and which permits towns and villages that are unable or unwilling to avail themselves of all the provisions enacted for the benefit of cities and towns of 1,000 or more, to adopt the provisions of chapter 11 alone. The infirmity of the article assailed in this instance, if it has any, consists in the fact that it makes the application of the general law embraced in chapter 11 dependent upon the will of the people of a particular locality. The contention is that the Legislature alone has the power to say when, to whom, or to what conditions a law shall apply, or who shall be governed by its provisions. This objection, if tenable, will apply with equal force to article 1034, the only article now embraced in the statute which provides a method of procedure for becoming incorporated cities, towns, and villages under the general law; and would render unavailable all the general provisions of title 22 not otherwise specially applied. By the terms of the law providing for the incorporation of municipalities, such as cities, towns, and villages, the initial steps and the essentials required to become subject to any general incorporation law are matters to be determined by the people of the particular territory by a referendum vote. If it can be said that the objection would not apply to the original formation of the corporation because of the constitutional provision quoted, it may with propriety be said that it should not apply to those laws designed to enlarge or extend the corporate powers. These are also parts of the general law relating to the incorporation of cities and towns. If the Legislature, in the first instance, may permit the inhabitants of a given territory to determine for themselves whether they shall become incorporated and

be subject to the duties and liabilities incident to incorporation as prescribed by the laws relating thereto, there seems to be no good reason why the Legislature may not also provide a similar means for enlarging or extending the corporate powers. The article assailed is just as much a part of the general laws relating to the incorporation of cities and towns as any of the other provisions of title 22. In voting to adopt certain statutory provisions, the voters do not in reality adopt the law; they merely bring about a situation to which the law by its terms has been made applicable. The law is the finished product of the Legislature, and it only awaits the existence of the conditions to which by its terms it is made applicable in order to be enforced. We think the following authorities settle that proposition: *Stanfield v. State*, 83 Tex. 321, 18 S. W. 577; *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321; *San Antonio v. Jones*, 28 Tex. 31; *Graham v. City of Greenville*, 67 Tex. 62, 2 S. W. 742. To these may be added the cases collated in the notes of *State v. Butler*, 18 Ann. Cas. 489, and *State v. Frear*, 20 Ann. Cas. 633.

In *Johnson v. Martin* the controversy involved the right of the Legislature to authorize the commissioners' courts of the different counties to order an election for a public weigher. After referring to some constitutional provisions, the court said:

"The law as it stands was enacted by the Legislature in accordance with constitutional form, and as a law was complete by the legislative enactment. The commissioners' courts have no power to revise or modify the act in any respect. They merely have the right to put the law in force by having an election; to organize by calling an election for the officer, who is to execute the law as it came from the hands of the Legislature. It might be said that the law is to take effect upon the happening of a subsequent event; that is, the decision of the commissioners' courts that it is necessary in their respective counties. Such discretion to the council boards of subordinate branches or divisions of the government is not unusual and is not unconstitutional. It is allowed to them because in matters of local regulation it may be fairly supposed they are more competent to judge of their needs than a central authority. The Legislature cannot merely propose a law to be adopted for the people; but where there is affirmative legislation its enforcement in counties, districts or towns, when the law so provides, may be left to the option of such localities. * * * The privilege of the electors of a district to be affected by a law to say whether they will accept its provisions, the law giving them the right to accept or reject, is now generally permitted and regarded as constitutional."

In *Stanfield v. State* the court had occasion to pass upon the validity of that provision of the statute which authorized commissioners' courts to determine whether or not there should be held an election for a county superintendent. The authority was sustained, and the following argument was made:

"It will be seen that the act of the creation of the office was made to depend in each county upon the action of its county commissioners court as to its taking effect there, and we are

not able to see any material distinction in regard to their constitutionality between the act that authorized the county commissioners' courts to bring the office into existence and the one that authorized it to abolish it. It has been said by this court in a general way that laws can only be made by the votes of the representatives of the people in their legislative capacity. *State v. Swisher*, 17 Tex. 448. There seems to be a well-recognized distinction in respect to the question under consideration between the laws affecting only the municipal subdivisions of the state and such as affect the state at large; and whatever differences of opinion there may be about the application of the rule to the general laws that affect alike the whole state, it seems to be well established that the maxim that the legislative power is not to be delegated and is not trampled upon when the legislation merely bestows upon the municipal organization of the state certain powers of local regulation. *Cooley, Constitutional Limitation*, p. 143; *Werner v. City of Galveston* [72 Tex. 22], 7 S. W. 726 [12 S. W. 159]. Our Constitution and statutes each provide for the adoption of laws in particular localities, according to and dependent upon the expressed will of the people to be affected, and such statutes have not in every instance been expressly directed by the Constitution. A city containing one thousand inhabitants or over may by a vote of its council accept or reject the general incorporation law of this state for cities and towns. The inhabitants of the town or village may by vote accept or reject the incorporation act provided for them; and, having once incorporated such towns or villages may by their own vote, abolish the corporation, including the officers."

The latter part of the paragraph quoted would seem to be directly in point, and unquestioned authority for the action of the trial court, if that particular provision of the statute had been under consideration. But as the reference was only in the way of an illustration, it is persuasive only. But we think it is in line with the principle announced as controlling the case there under consideration.

[3] There is another reason, which was doubtless sufficient, to justify the court in refusing the writ of injunction, regardless of the validity of the statute assailed. The petition is undertaking to restrain the municipal authorities from constructing certain street improvements, not the assessment or collection of a tax. The conditions upon which they apparently rely for a right to maintain a suit of this character are the depredations, as they term the street improvement work, committed upon their land. The court in his findings of fact concludes from the evidence that the land upon which the street improvements were being made was a part of the public thoroughfare and had become such by limitation. It follows from this that no rights claimed by appellants were invaded, and for that reason they were not entitled to maintain a suit to enjoin the public officers from performing that character of work merely because they were exceeding their authority. In *M., K. & T. Ry. Co. v. Shannon*, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681, our Supreme Court says:

"The principle, as we understand it, is, that the courts have no power to enjoin the officers of a state from taking action under a statute claimed to be unconstitutional and deemed to be prejudicial to the complainants, unless the officers are about to do some act which, if not authorized by a valid law, constitutes an unlawful interference with their rights."

See, also, *Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523.

For reasons stated, the judgment of the district court is affirmed.

HOUSTON E. & W. T. RY. CO. v. HOOPER et al. (No. 1567).*

(Court of Civil Appeals of Texas. Texarkana. March 2, 1916. Rehearing Denied March 9, 1916.)

1. CARRIERS \S 320(1) — TAKING CASE FROM JURY—PEREMPTORY INSTRUCTION.

In an action for injuries to a passenger in descending from the car platform, where there was evidence sufficient to carry one of the alleged acts of negligence to the jury, the refusal of a peremptory instruction was not error.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 1315, 1317; Dec. Dig. \S 320(1).]

2. APPEAL AND ERROR \S 1033(4)—REVIEW—HARMLESS ERROR—REQUEST FOR PEREMPTORY INSTRUCTION.

The refusal of a peremptory instruction for defendant as to one act of negligence alleged by plaintiff was not injurious, where the jury found for defendant on the issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4058; Dec. Dig. \S 1033(4).]

3. CARRIERS \S 318(11) — INJURIES TO PASSENGERS—ACTION—EVIDENCE.

In an action for injuries to a passenger in descending from the car platform, evidence held to authorize the jury to find that there was insufficiency of light which was the producing or proximate cause of the injury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. \S 318(11).]

4. APPEAL AND ERROR \S 237(6)—PRESENTING QUESTIONS TO TRIAL COURT — SETTING ASIDE FINDING.

To predicate error on the refusal to set aside a finding of the jury, there must be a motion to set it aside.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 1302½; Dec. Dig. \S 237(6).]

5. APPEAL AND ERROR \S 1170(10)—REVIEW—HARMLESS ERROR.

Under Court of Civil Appeals rule 62a (149 S. W. x), providing that no judgment shall be reversed for error at the trial unless the appellate court shall be of opinion that the error amounted to such a denial of the rights of appellant as to probably cause the rendition of an improper judgment, where, after eliminating findings by the jury not sustained by the evidence, there still remain findings supported by pleading and evidence which in legal effect entitle appellee to the judgment rendered, the error in submitting the former issue does not warrant reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4066, 4544; Dec. Dig. \S 1170(10).]

6. APPEAL AND ERROR \S 1067 — HARMLESS ERROR—SUBMISSION OF ISSUES.

The refusal of a special charge as to contributory negligence was not error, where it as-

sembled practically the same facts which the court authorized the jury to consider by a question submitted for finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067; Trial, Cent. Dig. § 475.]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Action by Mrs. Lizzie Hooper and others against the Houston East & West Texas Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Mrs. Lizzie Hooper was a passenger on appellant's regular passenger train, and as she was alighting from the coach at night-time at the station of her destination she fell from, or down, the steps of the coach and was seriously injured. She, joined by her husband, brought the suit for damages, alleging that the injuries were proximately caused by the negligence of appellant (1) in failing to provide lights at or near the place of exit from the passenger coach to enable passengers in alighting to see sufficiently the several steps of the coach, (2) in failing to keep the steps of the passenger coach clear of obstructions that would cause passengers to fall, and (3) in negligent failure of the porter and the conductor to assist her to get off the train. The defendant by answer denied any negligence, and pleaded, in a general way, contributory negligence on the part of Mrs. Hooper in alighting from the train. There was a trial before a jury on special issues, and the court, on the verdict of the jury, entered judgment for appellees.

The evidence shows that the train reached Timpson, Tex., between 3 and 5 o'clock on the morning of December 18, 1914. It was a dark morning. When the train stopped at the station, Mrs. Hooper arose from her seat and came to the platform of the coach to alight therefrom, having in her hands a small lady's handbag and a suit case filled with clothes and other articles. As she started down the steps of the coach, she suddenly fell down off the steps, striking her body against the steps, and thereby receiving severe bodily injury. According to the testimony of bystanders, Mrs. Hooper fell by reason of her foot overreaching or overstepping the second step of the coach. According to the evidence of Mrs. Hooper herself, it happened as follows:

"As I started to get off, I stepped on something that rolled under my foot, and of course my foot slipped, and I did not have any way to catch myself, and I fell down the steps. * * * Whatever that was that I stepped on caused my foot to slip or roll from under me, and that caused me to fall. * * * I walked out and could see the step dimly and stepped on the first step, when I stepped on something that slipped or rolled, and that caused me to fall."

There was evidence showing that one light was burning in front of the depot about 90 feet, and one at the baggage platform about 100 feet, from the place provided for passengers to get off and on the train, and that there were lights in the coaches of the train.

The evidence, though, was conflicting respecting whether the lights were bright, and whether they lighted up or reflected on the platform and steps of the coach. There is sufficient evidence to support the finding of fact of insufficiency of light upon or reflected upon the platform and steps of the coach to permit appellee to safely descend the steps. Mrs. Hooper testified:

"I think I remember about the condition out there as to whether it was light or dark. I remember that when I got out in the vestibule it was kind of dark. I could not see objects on the steps around me out there. * * * I could not see very well out there; it was not light. If there were any lights burning at all out there in the vestibule, it was very dim when I got out there. * * * I was being as careful as I could in undertaking to get down those steps and off that train. I would guess that I saw the first step sufficient to put my foot on it. I could tell there was a step there—at least, enough to put my foot on it. I might not could have seen all of the entire steps, but I could see sufficiently to tell there were steps there. * * * I knew there were steps there, or just imagined they were there. I knew that steps were ordinarily on passenger coaches, and where they were located. * * * The lights were not sufficient out there for me to tell how many steps there were, and I do not know how many. * * * I was looking down towards the steps to see if I could see them. I did not see them. Of course, I could see them a little bit, but I could not see them plainly. I could not see them because it was dark out there and the lights were so dim. * * * Both of my eyes are good, and I was using both of them in undertaking to come down those steps."

The jury made answer to the special questions that Mrs. Hooper in attempting to alight from the passenger train at Timpson slipped and fell and was injured by reason of placing her foot, in descending the steps, too far forward on or on the outer edge of one of the steps, due to insufficient light to enable her to see her way down the steps; and that the failure to provide sufficient light at the place was an act of negligence, which was the direct and proximate cause of her injury. The jury further found as a fact that Mrs. Hooper was not guilty of contributory negligence in the manner and under the circumstances of alighting. The evidence supports these findings of fact, and they are here adopted, and the evidence warrants the amount of the verdict.

John T. Garrison, of Houston, and Guinn, Imboden & Guinn, of Rusk, for appellant. W. J. Townsend, Jr., of Jacksonville, W. M. Harmon, of Beaumont, and W. B. O'Quinn, of Lufkin, for appellees.

LEVY, J. (after stating the facts as above). [1, 2] The appellant requested, and the court refused to give, a peremptory instruction to return a verdict for the defendant company; and error is predicated upon the ruling of the court. Appellant bases the contention for error upon the insistence that the petition of appellee, properly construed, seeks recovery only upon the alleged act of negligence in permitting "some hard substance to

be and remain upon the step of its passenger coach," proximately causing her to slip or fall from the steps, occasioning injury; and insists that the evidence fails to establish, as a matter of law, the alleged negligence, for that there is no evidence showing that such obstruction had been upon the step a sufficient length of time for the employes of appellant to have by reasonable care discovered same. It is believed the assignment of error should be overruled. The petition of appellee alleged three distinct acts of negligence, and there was ample evidence to carry the case to the jury upon one of the alleged acts, which was the failure to provide sufficient light to enable passengers to descend the coach steps in safety. And viewing the instruction as asking the court to instruct a verdict only in respect to the alleged act of permitting obstruction on the step, it is thought reversible errors cannot be predicated on the refusal to give such information. The jury made the affirmative finding of fact that Mrs. Hooper did not step on anything in getting off the coach, and that there was no obstruction on the platform to cause her to fall. The legal effect attaching to this finding was to find in favor of the defendant on this particular act of alleged negligence, and it must be assumed that the court gave that legal effect to the verdict, and did not rest the judgment for appellee upon that ground of alleged negligence. Consequently no injury would appear to the appellant by the refusal of the instruction.

[3] By the second assignment of error it is contended that the appellant was entitled to a judgment in its favor on the finding of the jury that plaintiff did not slip upon or fall by reason of an obstruction on the step, because the other findings of the jury respecting the alleged acts of negligence were without any evidence to support them. It is believed the assignment should be overruled. It is not thought that there is insufficient evidence of an insufficiency of light and that such negligence proximately caused the injury. If the want of sufficient light, as appears, to enable the appellee to properly see the steps, caused her, in descending the steps, to place her foot on one of the steps as she did, whether on an obstruction or on the edge of the step, the jury were authorized to find, as they did, that the insufficiency of light was the producing or proximate cause of the injury.

[4] By the third, fourth, sixth, eighth, and thirteenth assignments of error the appellant assails the verdict of the jury in respect to finding negligence proximately causing injury in not having sufficient light to enable appellee to alight safely, as being unsupported by and contrary to the evidence.

It does not appear that appellant made a motion to set aside this finding of the jury, as must be done in order to predicate error on the action of the court in refusing to set it aside. *Smith v. Hessey*, 134 S. W. 256. And treating the assignments as a refusal of the court to grant a new trial upon the grounds stated, it is thought the assignments should be overruled, for there was sufficient evidence to support the finding of the jury, and the court would not be warranted in saying as a matter of law that there was no sufficient evidence to make an issue for the jury.

[5] The fifth and ninth assignments of error pertain to the findings of the jury on the alleged act of negligence in not assisting the plaintiff from the train. We conclude that, had this been the only act of negligence alleged and proven, the appellee could not, on the record, sustain the recovery. Negligence is not, as a matter of law, in this respect proven. But eliminating these findings as not authorizing a recovery, there still remain findings of fact, supported by pleading and evidence, which in legal effect entitle appellee to the judgment rendered. The error of the court is therefore without injury to appellant, and does not warrant reversal. Rule 62a (149 S. W. x).

[6] The tenth assignment of error complains of the refusal to give a special instruction regarding contributory negligence of Mrs. Hooper in getting off the train. The special charge practically assembled the same facts that the court's question authorized the jury to consider. The court submitted to the jury for finding, "Was the plaintiff Mrs. Hooper guilty of contributory negligence in attempting to alight from the said train in the manner and under the circumstances as she did?" The jury answered, "No." The question as submitted was sufficiently broad enough and enabled the jury to consider all matters properly arising in the evidence. This station was the destination of Mrs. Hooper, and it was her duty to leave the train at that point, and in leaving the train she was required to take her grip with her. If contributory negligence arises at all, it was, as submitted, respecting the manner and conduct of Mrs. Hooper in descending the steps.

The eleventh assignment of error complaining of the action of the court in giving special issues 4, 5, and 6 should be overruled, for it does not appear that "the ruling" of the court was excepted to; and, if it had been excepted to, the evidence made the issues for decision by the jury.

The remaining assignments present no error, and it is concluded should be overruled. The judgment is affirmed.

OTTO v. WREN, County Judge, et al.
(No. 6522.)

(Court of Civil Appeals of Texas. Galveston.
Feb. 28, 1916.)

1. MANDAMUS \Leftrightarrow 57(1) — TRANSCRIPT — DUTY OF COURT — STATUTE.

Under Acts 32d Leg. c. 119, touching the duties of court stenographers, where plaintiff in an action filed an affidavit of inability to pay the costs of appeal or give security therefor, which affidavit the judge of the county court, upon contest, held sufficient, correct, and true, and ordered that plaintiff be allowed to appeal on such affidavit without giving a cost bond, etc., it was the duty of such judge compellable upon refusal by mandamus, to order the special stenographer, appointed for the trial, to transcribe his shorthand notes of the proceedings without charge.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 114, 115, 117-120; Dec. Dig. \Leftrightarrow 57(1).]

2. MANDAMUS \Leftrightarrow 57(1) — COURTS OF CIVIL APPEALS — JURISDICTION.

Under Rev. St. 1911, art. 1502, conferring upon Courts of Civil Appeals the power to issue writs of mandamus to enforce jurisdiction, such a court has power to issue such writ to compel the official stenographer of a county court to prepare a transcript free of charge in connection with a pauper appeal, as required by Acts 32d Leg. c. 119.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 114, 115, 117-120; Dec. Dig. \Leftrightarrow 57(1).]

3. MANDAMUS \Leftrightarrow 57(1) — STENOGRAPHER — COMPELLING PREPARATION OF TRANSCRIPT.

A court stenographer may be compelled by mandamus to transcribe his shorthand notes of proceedings in court taken by him by virtue of his appointment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 114, 115, 117-120; Dec. Dig. \Leftrightarrow 57(1).]

4. MANDAMUS \Leftrightarrow 57(1) — OFFICERS — STENOGRAPHER — PAUPER'S APPEAL — PREPARATION OF TRANSCRIPT.

A special stenographer in a county court appointed under Acts 32d Leg. c. 119, to act in a single case, who did so for three days, receiving his pay of \$15 could be compelled thereafter by mandamus to prepare a transcript for the plaintiff, a pauper, free of charge, since under the statute it is the stenographer's legal duty to make such transcript, so that he does not cease to be an officer of the court when his pay ceases.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 114, 115, 117-120; Dec. Dig. \Leftrightarrow 57(1).]

Mandamus proceeding by H. B. Otto against Clark C. Wren, County Judge, and others. Order made in favor of relator.

Stanley Thompson, of Houston, for relator.
Stevens & Stevens, of Houston, for respondents.

LANE, J. This is an original proceeding in this court, instituted by H. B. Otto as relator against Clark C. Wren, judge of the county court at law of Harris county, and O. R. Triay, appointed by the judge of said court, at the request of the defendant in a case pending in said court, wherein H. B. Otto, relator, was plaintiff, and Harris county et

al. were defendants, to serve as court stenographer under the provisions of section 12 of an Act of the 32d Legislature of 1911, p. 264, H. L. Washburn, county auditor, and the county of Harris.

The undisputed and admitted allegations of the petition are that on the 18th day of November, 1915, at a regular term of the county court at law of Harris county, of which court the respondents Wren and Triay were judge and special stenographer, respectively, a certain cause, entitled H. B. Otto v. Harris County et al., was tried and judgment rendered in favor of said county, and against relator, Otto; that in due time relator filed and presented his motion for new trial, which was by the court overruled, at which time relator in open court excepted and gave notice of appeal to this court; that in due time relator filed his affidavit of inability to pay the costs of appeal or give security therefor, which affidavit was contested, and upon said contest respondent Clark C. Wren, judge, heard, held, and adjudged that said affidavit was sufficient, correct, and true, and that relator Otto could not pay the costs of appeal, or any portion thereof, and that he could not give bond to secure same, and ordered that H. B. Otto be allowed to appeal on his said affidavit without giving a cost bond; that the clerk of said court was directed to prepare a transcript of the record, as required in other appealed cases; that thereafter, in due time, relator made and filed his affidavit and motion asking respondent Clark C. Wren, said trial judge, to require the respondent O. R. Triay, special court stenographer, who had theretofore been appointed to report the proceedings of the trial of said cause under the Act of the 32d Legislature of 1911, p. 264, and who had accepted said appointment and made shorthand notes of said proceedings as required by law, and received \$5 per day for such services as provided by said act, to make and file a transcript of notes of the testimony taken by him at said trial; that said motion was refused by respondent Wren, who caused an order to be entered in which he finds that relator is unable to pay said stenographer cash for his transcript and is unable to pay any part thereof, or to give security therefor; that the said stenographer was duly appointed to take the testimony in said cause, and did take the same; but that no oath of any kind was administered to or taken by said stenographer; that he took no steps to qualify as official stenographer; that there is no provision of law authorizing the granting of said motion, and to this order relator, in open court, excepted. It is also alleged that said Triay, stenographer, has refused, and still refuses, to make said transcript of said notes and file it with the clerk of said court as required by law, unless relator pays for same, which relator is unable to do, as shown by

his affidavit and the findings of the trial judge. It is also alleged that it took three days to try said cause, and that a number of witnesses were examined and gave testimony, and a number of documents were introduced in evidence, and that it is practically impossible for relator or his counsel to reproduce said testimony unless aided by the transcript of the notes of said stenographer; that he has a meritorious cause of action; and that unless he can have a statement of facts before this court he cannot properly present the points relied upon by him for reversal of the judgment rendered against him in the trial court on his appeal in this court. He further alleges that he has no adequate remedy at law to enforce his rights. Upon the foregoing pleadings, he prays that this court order and direct respondent Clark C. Wren to issue an order to respondent C. R. Triay to forthwith transcribe his notes of the testimony taken by him at the trial of said cause without pay, and that said Triay be required to make said transcript in manner and form as required by law, and that the costs of these proceedings be taxed against respondents, etc.

Respondents Wren and Triay both admit all the material facts stated by relator's petition, but assert that the \$15 paid to said Triay for his services was paid by the defendant Harris county. Said respondents further answer as follows: That respondent Clark C. Wren has judicially acted upon the matter in controversy, and that this court has no jurisdiction to issue a mandamus against him regarding the matter; that he acted purely within his judicial discretion, and that his acts cannot be corrected by mandamus proceedings; that a stenographer appointed under the provisions of the act of the Legislature, supra, is not a public officer within the meaning of the word "officer"; that if it be held that he was a de facto officer his position as such de facto officer ceased to exist when he was paid his \$5 per diem for his services in reporting said cause; and that, as he is no longer an officer (if indeed he ever was such), mandamus will not lie to compel him to perform an official act.

[1] Section 4 of the Act of the Legislature of 1911, p. 264, known as the Stenographer's Act, provides that it shall be the duty of the stenographer to take full shorthand notes of all oral testimony offered in every case tried in the court wherein he is stenographer, etc., to preserve all such shorthand notes for future use or reference for four years, and to furnish to any person a transcript in question and answer form of all such evidence or any portion thereof, upon payment to him of the compensation provided by law.

Section 5 of the same act provides that in cases appealed the stenographer shall transcribe the testimony taken by him in the case in duplicate, in the form of question and answer, certifying that such transcript is

true and correct, and shall file the same in the office of the clerk of the court within such reasonable time as may be fixed by written order of the court; that he shall be paid 15 cents per folio of 100 words for the original copy and no charge shall be made for the duplicate copy; that the sum so paid shall be taxed as costs in the case.

Section 6 of said act provides that the stenographer shall, when requested by the party appealing, prepare from the transcript filed by him, as provided by section 5, a statement of facts in narrative form, in duplicate, and deliver the same to the party appealing, for which he shall be paid by said party the sum of 15 cents per folio of 100 words for the original copy, and that no charge shall be made for the duplicate copy; that the amount so paid shall not be taxed as costs.

Section 8 provides that, in any civil case where the appellant or plaintiff in error has made the proof required to appeal his case without bond, such appellant or plaintiff in error may make affidavit of such fact, and, upon the making and filing of such affidavit, the court shall order the stenographer to make a transcript as provided in section 5 of said act and deliver same as provided in other cases, but the stenographer shall receive no pay for same.

Section 12 provides that, whenever either party to a civil case pending in the county court shall apply therefor, the judge of the court shall appoint a competent stenographer to report the oral testimony given in such case. Such stenographer shall receive compensation to be not less than \$5 per day, which shall be taxed and collected as costs. In such case, the provisions of this act with respect to preparation of statement of facts * * * shall apply to all statement of facts in civil cases tried in the county court, and all provisions of law governing statement of facts * * * to be filed in district court and the use of same on appeal shall apply to civil cases tried in the county court.

Since it is shown by the undisputed and admitted facts that relator has filed such affidavits and proof as the law requires to entitle him to have the benefits of the stenographer's transcribed notes without first paying for or giving security for the payment of the fees due the stenographer for transcribing his shorthand notes of the proceedings had at the trial of his case, and that the trial judge had so found, the trial judge should have ordered the stenographer to transcribe said notes on motion of relator. The trial judge having judicially found that relator had filed such affidavits as required by law in such cases, and that said affidavit was true and correct, the law directs that he shall order the stenographer to make a transcript of his notes. The law under such case left nothing further to the discretion of the judge; but the declaration of law that he shall order the transcribed

notes is mandatory, and he must make such order and cannot be heard to say that he has acted judicially, and therefore cannot be compelled by mandamus to perform a mandatory duty. *Middlehurst v. Collins*, 100 Tex. 349, 99 S. W. 1025; *Applebaum v. Bass et al.*, 113 S. W. 173; 26 Cyc. p. 208.

In the last case cited the court said:

"It is a general doctrine that mandamus will lie to prevent a failure of justice upon reasons of public policy and to enforce official action. Where a trial judge refuses to make and file a statement of facts for use on appeal, as required by statute, mandamus will lie to compel him to do so. *Reagan v. Copeland*, 78 Tex. 556, 14 S. W. 1031; *Railway v. Lane*, 79 Tex. 648 [15 S. W. 477], 16 S. W. 18; *Osborne v. Prather*, 88 Tex. 211, 18 S. W. 613; *Guerguin v. McGown*, 53 S. W. 585. The reason in support of the right of this court to issue mandamus is convincing. Having acquired jurisdiction of the case by appeal, and a completed record being the basis of the exercise of appellate jurisdiction, the Court of Civil Appeals would have power to issue the mandamus to compel the proper closing and completion of the record for appeal, because the restoration to the record for use, on appeal, of a statement of facts of the case, signed and certified by the trial judge as required by law, is a matter in furtherance of, and that affects the exercise of, its appellate jurisdiction. The statute clearly prescribes and directly creates the duty of the trial judge to approve a statement of the facts presented to him for use on appeal by the parties, or to make up and file one for use on appeal in case of disagreement of the parties."

[2] However, we think no good can be subserved by this court in entering an order to respondent Clark C. Wren, county judge, to direct and order C. R. Triay, stenographer, to perform a duty imposed upon him by law, when this court has the authority and power to directly order said stenographer to perform such duty (*Rice v. Roberts et al.*, 177 S. W. 149; 26 Cyc. 208), and therefore we will not grant the writ prayed for, as to respondent Wren.

[3] That a court stenographer may be compelled by mandamus proceedings to transcribe his shorthand notes of the proceedings, taken by him by virtue of his appointment we think is no longer an open question. *Rice v. Roberts et al.*, 177 S. W. 149; *Routledge v. Elmendorf*, 54 Tex. Civ. App. 174, 116 S. W. 156; 26 Cyc. 208, and authorities there cited.

[4] The respondent Triay, however, contends that, if he was an officer by reason of his appointment as special stenographer, he was only a de facto officer, and that such office ceased to exist when he was paid his per diem of \$15 for his three days of service. This contention is not tenable. The law under which respondent Triay accepted the appointment of stenographer, and as such performed services, provides, as has already been shown, that when requested to transcribe his shorthand notes, under the facts

of this case, it is his legal duty to make such transcript; therefore he is in error in his contention that when he received his pay his duties ceased. The purpose of the law in requiring or permitting the appointment of a stenographer, to take shorthand notes of the proceedings in any case is that the record of such proceedings might be preserved for the information of the court, jury, and parties to the suit, and it would be a narrow construction to put upon it to say the court has no means by which it, or the parties interested, could utilize the record so preserved for their information. Such construction would render the law, in many instances, worse than useless. We take it that no one would contend that should a court stenographer voluntarily resign, immediately after taking shorthand notes of court proceedings in his official capacity, the court, or parties to the suit, would be powerless to obtain the use of the transcript of such notes on the theory that the stenographer was no longer an officer, and therefore not subject to mandamus proceedings. The act of transcribing his shorthand notes, under certain conditions, is a continuing duty of the stenographer, and such duty may be enforced by mandamus proceedings. *Middlehurst v. Collins*, 100 Tex. 349, 99 S. W. 1025; *Rice v. Roberts*, 177 S. W. 149; *Routledge v. Elmendorf*, 54 Tex. Civ. App. 174, 116 S. W. 156; 26 Cyc. 208; *State v. Supple*, 22 Mont. 184, 56 Pac. 20.

In the case of *Rice v. Roberts et al.*, supra, it is said:

"Nor is it any answer for the stenographer to say (which we grant as true) that any appellant has the right to prepare a statement of facts independent of the stenographer's notes and transcript. While he has such right, he also has the right to have the benefit of the report of the case made by the official stenographer during the trial to aid him in making a statement of facts. Besides, in this case it is stated in relator's petition, and is not denied by either respondent, that it will be [practically] impossible to make a correct statement of facts without the aid of the stenographer's transcript of his notes."

Having reached a conclusion in support of relator's application, it is ordered that respondent C. R. Triay transcribe the testimony in the form of questions and answers, and transcribe the other proceedings recorded by him in the case of *H. B. Otto v. Harris County et al.*, No. 12406 on the docket of the county court at law, of Harris county, tried during the month of September, 1915; that he certify that such transcript is true and correct, and file the same in the office of the clerk of said court within 20 days from this date. It is also ordered that the costs of this proceeding be taxed against respondent Triay.

KEPPLER et al. v. TEXAS LUMBER MFG. CO. et al. (No. 80).*

(Court of Civil Appeals of Texas. Beaumont. Feb. 17, 1916. Rehearing Denied March 16, 1916.)

1. APPEAL AND ERROR ⇨1040(10)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS.

Overruling a special exception to the petition for its failure to set out the first link in plaintiffs' chain of title was not prejudicial, where common source of title to the land in controversy was agreed upon by the parties at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4105; Dec. Dig. ⇨1040(10).]

2. STIPULATIONS ⇨14(9)—TRESPASS TO TRY TITLE—EVIDENCE.

In trespass to try title, where the parties agreed that the parties might read from the county clerk's or district clerk's records any paper they desired to offer in evidence, and each waived the filing, three days' notice, and affidavits of loss of originals, with the understanding that plaintiffs should furnish a list with book references in their chain of deeds 10 days before trial and file certain original powers of attorney, and the list of references was furnished as agreed, the admission of the title papers was not error, though the powers of attorney were not produced till the trial.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 33; Dec. Dig. ⇨14(9).]

3. APPEAL AND ERROR ⇨301—PRESENTING QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.

Where no complaint was made in a motion for new trial to the description of land in a power of attorney offered in evidence, the objection cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753–1755; Dec. Dig. ⇨301.]

4. PLEADING ⇨245(4)—TRIAL AMENDMENT—DISCRETION OF COURT.

In an action of trespass to try title, where there was evidence that plaintiffs were innocent purchasers for value without notice of deeds and conveyances, an allowance of a trial amendment, alleging that they were owners by virtue of being innocent purchasers for value without notice of any deeds or conveyances under which defendants claimed, was not an abuse of discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 660, 664–666; Dec. Dig. ⇨245(4).]

5. APPEAL AND ERROR ⇨662(4)—RECORD—DEFECTS AND OBJECTIONS.

A statement of facts prepared by the trial court, counsel having failed to agree on a statement, cannot be called in question as not stating the facts proven on the trial, and assignments challenging its correctness cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2852; Dec. Dig. ⇨662(4).]

Appeal from District Court, Hardin County; J. Llewellyn, Judge.

Action by the Texas Lumber Manufacturing Company and others against Mrs. Julia A. Keppler and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Smith & Kemble, of Waxahachie, and B. L. Aycock and A. M. Hill, both of Kountze, for appellants. Greer, Nall & Bowers and W. W. Cruse, all of Beaumont, for appellees.

BROOKE, J. This suit was filed on the 24th day of November, 1914, by plaintiffs, against Ida May Wingate, Walter Wingate, Mattie Wingate, Eula R. Davis and husband, Walter A. Davis, Jessie C. Billups and husband, W. F. Billups, Traynham Smith, Mrs. Julia A. Keppler in her individual capacity and as guardian of the person and estate of the said Traynham Smith, an idiot, and her husband, Charles E. Keppler, R. H. Smith, Mrs. Mamie Whitlock and husband, Arthur Whitlock, and the unknown heirs of R. H. Smith, deceased, their heirs or legal representatives, defendants, in trespass to try title for certain lands in Hardin county. Plaintiffs pleaded their title and prayed that they have judgment for the title and possession of the land and premises described, and prayed, further, that the cloud cast upon the title by the alleged claim of the defendants be removed, and that the plaintiffs be quieted in their title to the property, and for rents and damages and costs of suit. Afterward the plaintiffs, in open court, announced that they would dismiss the suit as against the unknown heirs of R. H. Smith and the unknown heirs of James Walea, deceased. Judgment was taken by default against Ida May Wingate, Walter Wingate and Mattie Wingate. The defendants answered by special exception, to the effect that the original petition did not allege that "title accrued to the unknown heirs by death of ancestor dying intestate, or give otherwise the particulars of such accrual, or set out the consecutive chain of title from the sovereignty of the soil," and by general denial and plea of not guilty, and answered, claiming title to three-eighths of the land in controversy through R. H. Smith. Evidence was introduced, and at the conclusion of the introduction of plaintiffs' testimony, defendants filed a motion to strike out the evidence with reference to plaintiffs being innocent purchasers for value without notice of deeds and conveyances, which motion was sustained. Thereupon the court permitted the plaintiffs to file a trial amendment, alleging that they were the owners of the three-eighths interest in the land described, as claimed by the defendants, they being innocent purchasers of the same for value, without notice of any deeds or conveyances under which the defendants claim, which said action of the court in permitting the plaintiffs to file said trial amendment was excepted to by the defendants. After all the evidence was heard, the court instructed the jury to return a verdict for the plaintiffs, which was accordingly done, and the case is before this court for adjudication.

[1] The action of the trial court, by the ap-

pellants' first assignment of error, is challenged as error in not sustaining defendants' special exception to the original petition, because in setting out their chain of title the first link was omitted, failing to allege marriage or descent from James Walea, or showing any marriage or marriages, or wife or wives. Appellees alleged in their petition that the land was patented to James Walea, and then set out the names of the parties, saying they were heirs of James Walea, deceased. Appellees dismissed from their suit, as stated above, the unknown heirs of R. H. Smith, deceased, their heirs and legal representatives, and the unknown heirs of James Walea, deceased, their heirs and legal representatives, and upon the trial of the cause, common source of title to the land in controversy was agreed upon by appellants and appellees. Therefore, if error was committed by the trial court, it was not prejudicial. The first assignment is therefore overruled.

[2] By appellants' second assignment of error, it is complained that the court erred to defendants' prejudice in that, over their objection, plaintiffs were permitted to introduce title papers, because the agreement to waive notice and filing of deeds was not complied with, in this: That the said agreement was signed by defendants' counsel with the proviso that they should have the originals of certain powers of attorney filed at least 10 days before the trial, and that such title papers were not filed until announcement of ready for trial was made. The agreement was as follows:

"It is hereby agreed that either party hereto may, on the trial of this cause, read from the records in the office of the county clerk and the district clerk of Hardin county, Texas, any instrument or paper they desire to offer in evidence, and each party waives the filing, three days' notice and affidavits of loss of originals, subject, however, to relevancy and competency. [Signed by attorneys for plaintiffs and defendants.]

"This is signed with the understanding that plaintiffs will furnish defendants' counsel a list with book references in their chain of deeds ten days prior to the trial at the July term of the district court and file the original powers of attorney to Steve Chenault (if procurable) and case to stand continued after transfer to the Seventy-Fifth district."

This agreement was filed in this cause. Appellees proved that they furnished defendants with a list of their title papers on March 16, 1915, in accordance with the agreement to read from the records, and produced the original powers of attorney upon the trial of the cause. It does not appear from appellants' bill of exceptions or from this record that any injury resulted to appellants by the action of the lower court, and there is no intimation that appellants were not furnished a list showing the book and page where the said powers of attorney were recorded. We see no error in the action of the trial court in this matter, especially as it is shown that the original instruments were admissible without the filing and three days' notice.

[3] By the third assignment of error, appellants complain that the court erred because it permitted to be read the power of attorney of Michael Walea, over objection that the land described in said instrument did not describe the land sufficiently to authorize sale of any particular 1,500 acres of land in Hardin county, and that it was a patent ambiguity. The power of attorney is not incorporated in this record, and we have no means of arriving at the contents of the same, but no complaint was made in appellants' motion for a new trial with reference to the description contained in said instrument; therefore we are constrained to overrule this assignment.

[4] By their fifth and sixth assignments of error, the appellants complain of the action of the trial court in permitting the appellees to file their trial amendment after the evidence had been closed. It has been held that the pleadings may be amended by leave of the court after the opening argument had been made. *Telegraph Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554; *First National Bank v. Sharpe*, 12 Tex. Civ. App. 223, 33 S. W. 676; *Railway Co. v. Howe*, 15 S. W. 198. It has also been held that the allowance or refusal of a trial amendment rests in the discretion of the trial judge, which will not be disturbed on appeal in the absence of abuse. *Dublin v. Taylor B. & H. Ry. Co.*, 49 S. W. 667; *Fields v. Rye*, 24 Tex. Civ. App. 272, 59 S. W. 306; *White v. Provident National Bank*, 27 Tex. Civ. App. 487, 65 S. W. 498; *Goodney v. International & G. N. Ry. Co.*, 51 Tex. Civ. App. 596, 113 S. W. 171; *Hastings v. Townsend*, 136 S. W. 1143; *Gilliland v. Ellison*, 137 S. W. 168; *San Antonio & A. P. Ry. Co. v. Miller*, 137 S. W. 1194. It has been held that the allowance of a trial amendment to the petition after the testimony was closed was not ground for reversal. *Lewis v. Hoeldtke*, 76 S. W. 309. It is also held that whether a party to a suit should be permitted to amend his pleadings, after the argument had begun, is a matter within the discretion of the trial court. *St. Paul Fire & Marine Ins. Co. v. Cronin*, 131 S. W. 649. Trial amendments to conform to the evidence were held not ground for reversal in *Merchants' Ins. Co. v. Reichman*, 40 S. W. 831, also in the case of *Fleming v. Pringle*, 21 Tex. Civ. App. 225, 51 S. W. 553. No abuse having been shown of the discretion of the court in this record, the said assignment is overruled.

[5] Counsel for appellants will understand that, the statement of facts having been prepared by the court, counsel for appellees and appellants having failed to agree on a statement, the said statement, of facts, as prepared, cannot be called in question as not stating the facts proven on the trial of said cause, and purported assignments challenging the correctness of said statement of facts cannot be considered by this court.

We have carefully reviewed the record in

this cause, and have considered the various assignments of error, as presented by appellants, and are of the opinion that the record shows no error such as would warrant a reversal of this cause. Therefore the judgment of the court below is in all things affirmed. It is so ordered.

LOVING et al. v. HAZELWOOD et al.*
(No. 932.)

(Court of Civil Appeals of Texas. Amarillo.
Feb. 23, 1916. Rehearing Denied
March 22, 1916.)

1. JURY \S 19(1) — RIGHT TO JURY TRIAL — LUNACY PROCEEDINGS.

A jury trial in lunacy proceedings either in the probate court or in the district court on appeal was part of the judicial system at the time of the adoption of the Constitution in 1876, and was guaranteed by article 1, section 15 thereof, providing that the right of trial by a jury should remain inviolate.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 104, 113, 120, 127-131, 133; Dec. Dig. \S 19(1).]

2. JURY \S 33(1) — LUNACY INQUISITION — STATUTE—"JURY" TRIAL.

The commission for trial of charges of lunacy provided for by Acts 33d Leg. c. 163, which is to be appointed by the probate judge to consist of three members, as many of whom as possible shall be physicians, and each of whom shall have the power to administer oaths, compel attendance of witnesses and punish them for contempt, which commission need not remain together, but a majority of whom must be present at any hearing and each member must personally examine the respondent, and which must make a report agreed to by a majority of the members, is not a "jury," and the law is therefore void as violating constitutional guarantee of jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 223, 227; Dec. Dig. \S 33(1).]

For other definitions, see Words and Phrases, First and Second Series, Jury.]

3. INSANE PERSONS \S 51 — BOND FOR CUSTODY—VALIDITY.

The bond given to secure the release of one adjudged a lunatic under the void act of 1913 (Acts 33d Leg. c. 163), the condition of which was that the obligors will restrain and take care of the lunatic and have him placed under treatment, and which by the terms of the statute renders the obligors liable for damage done by the lunatic, cannot be given effect as a common-law bond to render the obligors liable for such injuries.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. \S 83; Dec. Dig. \S 51.]

4. INSANE PERSONS \S 51 — BOND FOR CUSTODY—VALIDITY.

Since the bondsmen who secured the release of an adjudged lunatic under the provision of the void act of 1913 (Acts 33d Leg. c. 163) cannot, because of the invalidity of the statute, surrender the lunatic to the sheriff or to an asylum, and thereby be released as provided by statute, part of the consideration for the bond is void, and since it cannot be separated from the good consideration, the whole bond is void.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. \S 83; Dec. Dig. \S 51.]

Appeal from District Court, Potter County;
Hugh L. Umphres, Judge.

Action by Mrs. Frances Loving and others

against R. R. Hazelwood and others. Judgment for the defendants on demurrer to the petition, and plaintiffs appeal. Affirmed.

C. E. Gustavus, of Amarillo, for appellants.
Boyce & Davidson, Veale & Davidson, and
Crudgington & Works, all of Amarillo, for
appellees.

HENDRICKS, J. The Acts of the Thirty-Third Legislature of 1913, c. 163, in regard to proceedings in lunacy, provide that, upon an affidavit, charging that a certain person is insane, the county judge shall issue a writ for the apprehension of such person and the cause is docketed as an ex parte proceeding on the probate docket of said court. The judge appoints a commission composed of six persons to inquire into the charge of lunacy and in counties of a population of less than 5,000, one of the members of the commission shall be a physician; the number of physicians appointed on the commission being increased in proportion to the population of the county in which the proceedings are pending, the statute directing, where the population is 50,000 or over, each member of said commission shall be a physician—the law also containing a general clause that in any county as many of the commissioners shall be physicians as the county judge can obtain, regardless of population. The county judge administers an oath to each commissioner to make due investigation into the allegations of the affidavit, and the commission is then organized by electing one of its members as the chairman thereof, empowering a majority of the commission to fix the time and place of hearing, with notification to the county attorney, who represents the person making the affidavit, and to the respondent's attorney, selected by him, or in lieu thereof to be appointed by the county judge.

"The commission need not remain together at any time, but a majority of same must be present at the hearing of any testimony, * * * but each member of said commission shall personally examine the respondent."

Each member has the power to administer oaths to witnesses, to have process issued by the clerk and to compel their attendance, and to punish said witnesses for contempt, "as is fully provided by law for the county court." It is required to conclude its investigation within ten days, and, as determined by a majority, shall file with the county clerk a report of its findings, which report, if insanity is found, is read to the respondent in the presence of a majority of the commission. The report shall state: (a) Whether or not the respondent is of unsound mind; and (b) if the respondent is of unsound mind, whether he should be placed under treatment for such mental condition; and (c) if he is of unsound mind, whether or not he should be placed under restraint.

If a majority of the commission find and report all three of the conditions mentioned above, the county judge pronounces judgment in the presence of the "respondent," as he is termed, adjudging him a lunatic and ordering him to be conveyed to an asylum of the state for restraint and treatment. The execution of this writ is, however, held in abeyance until the county judge is notified by the superintendent of asylums of a vacancy, and that the patient can be accommodated in one of the asylums of the state:

"Provided further, however, that the person to whom such writ is directed shall not execute same. * * * If some persons execute and file with the county judge a bond to be fixed by the county judge, payable to the state of Texas, with two or more good and sufficient sureties, to be approved by the county judge, conditioned that the party giving such bond will restrain and take care of such lunatic and have such lunatic placed under the treatment for his mental condition so long, in all three instances, as his mental unsoundness continues, or until he is delivered back to the sheriff of the county of such adjudication for conveyance to a state lunatic asylum, or is delivered to the superintendent of one of the lunatic asylums of the state and writ obtained therefor, which bond shall be filed with and constitute a part of the records of the proceedings, and may be sued and recovered upon by any person injured in his own name."

The appellants allege that Robert Hazelwood was adjudged a lunatic in the county court of Potter county, under the provisions of this law; that when he was under restraint, preliminary to his conveyance to an asylum, the appellees executed the bond mentioned for the purpose of releasing him from such restraint and from the execution of the judgment (we assume, subject to the stipulations in the bond); that while at liberty he committed a murderous assault upon Mrs. Loving, one of the appellants herein, inflicting painful and permanent injuries and ensuing mental anguish—the appellants praying for a recovery upon the bond, for the sum of \$1,000, the full penalty therein.

The district judge of Potter county sustained a general demurrer to this petition, and appellees endeavor to vindicate this action, by asserting the unconstitutionality of said statute, upon two grounds: (1) That it is in violation of the Bill of Rights (article 1, § 15), providing that "the right of trial by a jury shall remain inviolate;" and (2) that it brooks the due process clauses of the state and federal Constitutions, in that the tribunal as constituted is not competent, within the meaning of the organic law, to deprive a person of his liberty, and neither does the statute provide for adequate notice.

[1] We think the following analysis and résumé by appellees, upon investigation, is correct:

"Section 13, art. 4, Texas Constitution of 1836, provided that the Congress of the Republic should, as soon as practicable, put into effect the common law of England. By an act of the Congress of the Republic of December 20,

1836 (Laws 1836-37, p. 148), the Chief Justice of the county court was authorized to hold a probate court and to appoint guardians for lunatics. That by section 26 of that act, an appeal was given from all decisions of the probate to the district court; and that by section 41 of the same act, the courts of Texas were required to follow the common law of England in reference to injuries and evidence when not in conflict with some other law enacted by Congress; that sections 31 to 33, the District Court Act of December 22, 1836 (Laws 1836-37, p. 207) provided for the drawing of juries and shows that the trial of cases by jury in the district court was considered as a matter of course. That the probate act of February 5, 1840 (Laws 1840, p. 110), contained a provision (section 43) giving the right of appeal from all probate decisions to the district court, and provided, in effect, that there should be a trial de novo in the district court; that this condition existed until the act of March 20, 1848, which gave the Chief Justice of the county court power to summon a jury in the first instance to try a lunacy case and so remained until February 5, 1858 (Acts 7th Leg. c. 93), when practically the identical provision was incorporated by section 8 in an act of that date, organizing an asylum, and that this continued in effect until the Constitution of 1876 was ratified."

It may be there was no provision for a jury in a lunacy case in the county court in the first instance until the act of March 20, 1848, but there was a right of appeal to the district court, where a trial by jury could be had.

The case of *Cockrill v. Cox*, 65 Tex. 669, was one where the county judge, on account of his disqualification to try a contest over the probate of a will, transferred the cause to the district court. The contestants demanded a jury over the protest of the proponents. The Supreme Court said:

"All the Constitutions of the Republic and state of Texas have reserved the right of trial by jury, in the same language. * * * A provision preserving the right of trial by jury, expressed in substantially the same language, it is said, is to be found in all the state Constitutions, and it has been uniformly construed to perpetuate the right in the cases in which it exists, under the laws in force and practice prevailing at the date of the adoption of the particular Constitution. Cooley on Constitutional Limitations, 506. Thus, when the Constitution of Michigan was adopted, a party in possession of land was entitled to a jury trial of a suit against him, involving a title. It was held that the Legislature could not deprive him of this right by authorizing his adversary to proceed against him by will to remove cloud. *Tabor v. Cook*, 15 Mich. 322. In Indiana, at the date of her Constitution, a party was entitled to have a jury assess the damages in condemnation proceedings, and this right was held to be inviolable. * * * The provision in the Constitution of 1876, that the right of trial by jury shall remain inviolate, must be considered as perpetuating the right in the cases, in which, at the date of its adoption, it had been so universally recognized and firmly established, as in the contest arising over the proof of wills."

If a jury trial in lunacy proceedings was a part of our judicial system at the time of the adoption of the Constitution of 1876, and if this act, providing for the appointment of a commission by the county judge (without the right of appeal to the district court where a jury could be had) in matters of lunacy,

abridges this right, such act is unconstitutional.

[2] Upon an analysis of this law, upon the question whether this commission constitutes a jury, and that its proceedings would constitute a jury trial, we observe that a quorum of the commission has the power to hold sittings, swear the witnesses, commit them for contempt, receive any evidence it desires, and thereupon its findings and report are final. When the judgment of the court is pronounced, based upon the findings and report, in the presence of the respondent, adjudging him a lunatic, and ordering him conveyed to an asylum, the mentality of the judge, as an act of discretion and judgment, has been as foreign to the proceedings as that of the clerk of the court when he enters the judgment upon the docket of the court. The judge's mission is a ministerial function without any participation in the proceedings, except as stated, and with no other alternative than to make the report of the commission the judgment of the court ordering the respondent to the asylum, without any judicial control whatever to vacate said judgment, and from which there is no appeal. While each member of the commission is required under the law to personally examine the respondent, any two members of said commission may absent themselves from any hearing or sitting, when testimony of the man's sanity or insanity is adduced. There is no privilege granted in the statute for the presence, or compulsory attendance, of the respondent required before the commission sitting as a board of inquiry, when in custody of the sheriff, unless you imply that such tribunals would always require such persons present as an orderly and proper presentation of his defense. If four constitute a quorum, it is easily discerned, in analyzing this law, that, if a commission has successive sittings, the members of the same, as a whole, may not be the same at any one hearing.

It is entirely possible, and probable, in some cases, for such a commission to have a division of opinion on entirely different evidence—some of the members having heard certain evidence and others different testimony. If the whole personnel need not remain the same at successive sittings, if a majority, or even the entire number, conclude to report that a respondent is insane and should be treated and confined, they can agree, some upon a certain character of testimony, and others upon testimony of an entirely different nature.

Relatives, or friends, who are anxious to incarcerate the respondent, or zealous in preventing it (whichever way their inclinations or interests lead them), could testify, some before one quorum and some before another, and, some of which testimony a portion of the commissioners may have never heard, according to the change in quorums. Some may

not have heard any and join in a majority report relying upon their sole personal examination of the respondent, while in custody of the sheriff, and what the others might tell them of the testimony at the hearing. The quorum, actually hearing the testimony, may divide in opinion as to the sanity of the respondent, and the other two, not sitting, can favor one side, or the other, as their judgment, based upon a personal examination, would dictate.

In fact, this commission does not have to have any sitting. Where is the power to command otherwise? The county judge, after its organization, has no connection with this body, except to pronounce a judgment upon a finding of the whole or a majority thereof. Each member of this commission may make a personal examination of the respondent, and the next day the commission, or a majority, may report him insane, upon which the county judge must order him to an asylum. There is no contrary interdiction, as a compulsory duty, to prevent it. While each member has to examine the respondent, however, any two, at any different hearings, may absent themselves from the same; hence it is clearly implied that this personal examination by each of the members is not, necessarily, at a hearing when the commission is sitting as a tribunal.

"By the English chancery practice the court had no inherent and general jurisdiction over idiots and lunatics as it did of infants. * * * This special jurisdiction of the chancellor was exercised as follows: Some friend of the lunatic would address a petition to the chancellor personally, setting forth the fact that such person was a lunatic, thereupon the chancellor would issue a special commission, directing a judicial inquisition of the alleged lunacy, which was always tried by a jury. Upon the return of the commission and inquisition, if the party was found to be a lunatic the chancellor appointed a committee, whose duty it was to take charge of the person and property of the lunatic." *Howard v. Howard*, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; *Buswell on Insanity*, p. 85.

"At common law an insane person may be temporarily restrained without legal process, and if need be in an asylum, if his going at large would be dangerous to himself or to others, preliminary to the institution of judicial proceedings for the determination of his mental condition, and such a restraint does not violate any constitutional provision [citing authorities]. When, however, * * * the confinement is permanent in nature, the person thus confined is deprived of his liberty which, in order to be lawful, must be in pursuance of a judgment of a court of competent jurisdiction, after such person has had sufficient notice and an adequate opportunity to defend." *In re Allen*, 82 Vt. 371, 73 Atl. 1080, 26 L. R. A. (N. S.) 238. Also *In re Phillips*, 158 Mich. 165, 122 N. W. 554.

"Trial by a jury," in the primary and usual sense of the term at common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts (except on acquittal of

a criminal charge), to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion." *Capital Traction Co. v. Hof*, 174 U. S. 13, 19 Sup. Ct. 585, 43 L. Ed. 877, 878.

The above opinion, in stating twelve men as constituting a jury, has reference of course to the common law on the subject where the number was not designated nor changed by law.

The El Paso court, in passing upon this question, and applying the case of *Cockrill v. Cox*, 65 Tex., supra, says:

"The right of trial by jury in lunacy inquiries seems to have been one of 'the cases in which the right existed and had been uniformly and universally recognized and firmly established' by the statutes of the state at the time of the adoption of the present Constitution."

"* * * The Constitution does not in words guarantee the right of trial by jury in lunacy cases, and the right in such cases is one that comes in by interpretation and adoption, because by 'statutory provision and practice it had become established.'" *White v. White*, 183 S. W. 369, opinion rendered January 14, 1916, not yet officially published.

It is probably the rule that it is competent to deny to parties the privilege of a trial before a jury in a court of first instance, provided the right is allowed on appeal. *Cooley on Constitutional Limitations* (7th Ed.) p. 591.

The same author, in referring to a constitutional right of this character, says:

"The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before."

Where secured, he further says:

"The party is therefore entitled to examine into the qualifications and impartiality of the jurors, and to have the proceedings public; and no conditions can be imposed upon the exercise of the right that shall impair its value and usefulness." *Pages 590, 591.*

There is no provision in this law, giving the right to respondent or his attorney, to challenge the qualifications of any commissioner, after having been appointed, on account of any interest, or of any bias, or prejudice, as to his propriety in serving upon the same.

It is clear that this body is not a jury, nor that the proceeding before it constitutes a jury trial, in accordance with a conception of the law of the land as applied to such subjects.

It is argued with some persuasiveness that, on account of the ministerial and perfunctory duty of the county judge, such a respondent is not tried by a court. Though the commission has some of the powers of a court, viz., the right to commit witnesses for contempt, which constitutes a judicial power inherent in all courts, and, in reality, its findings and report, stripped of form and looking to the substance, has a finality attached to it, with the county judge exercising only a ministerial function, in propounding the judgment thereupon; still, however, it lacks several essential elements, one of which particularly it had no jurisdiction to render, nor power to

enforce, a judgment. *Henderson v. Beaton*, 52 Tex. 29, wherein the Supreme Court held the old Commission of Appeals not a court; *Accoual v. Stowers Furniture Co.*, 83 S. W. 1105.

The Supreme Court of Michigan held that, by the term "courts," as used in the Constitution of Michigan (article 6, § 1), providing for the investiture of judicial power in the Supreme Court, in circuit, probate, and in justice courts, is meant a permanent organization for the administration of justice, and not those special tribunals occasionally called into existence by particular exigencies and that cease to exist with such exigencies. *Bisell v. Heath*, 98 Mich. 472, 57 N. W. 586.

If a person charged with insanity is entitled to a jury trial, and we think he is, and if such a commission, as constituted by the statute, is a mere appanage to the county court, whose proceedings are violative of that right, without the right of appeal to a court for a jury trial de novo, the law is unconstitutional. We think this law is void.

[3] On the question of the validity of the bond, Chief Justice Phillips held, in the case of *Watkins v. Minter* (Sup.) 180 S. W. 229, that the bond in that proceeding, though not in accordance with the statute, was good as a common-law obligation, for the reason that it was not executed in relation to a right which the defendants were entitled to exercise without the giving of a bond, and also that it was a voluntary obligation, supported by a sufficient consideration—the discharge of Claude Minter from custody. In that cause the sureties, in their obligation, outside the statute then in vogue, agreed to faithfully protect all animal and human life, and become responsible for all damages that may hereafter arise by reason of the acts of Minter, and it was said:

"Under these terms it is plain that a suit could be maintained on the bond * * * for the use of any one injured" by the negligence of the bondsmen.

The plaintiff sounds his case entirely upon the judgment of insanity, the execution of the bond, the tortious acts of Robert Hazelwood, and the failure to restrain him as a breach of the bond. This bond is merely payable to the state of Texas, conditioned that the parties will restrain the lunatic, take care of, and place him under treatment for his mental condition, so long as his mental unsoundness continues, "or until he is delivered back to the sheriff of the county * * * for conveyance to a state lunatic asylum, or is delivered to the superintendent of one of the lunatic asylums of the state and receipt obtained therefor." It is perforce of the statute, and not in the bond, that it "may be sued, and recovered upon, by any person injured, in his own name."

Justice Lipscomb said, in the case of *Johnson v. Erskine*, 9 Tex. p. 10:

"We believe that, if a bond, intended to be taken by the authority of a statute, cannot be sustained as a statutory bond, that it cannot

be valid as a common law, voluntary bond, unless it will stand as such, without the aid of the statute by which it has been repudiated."

See, also, *Hillman v. Mayher*, 38 Tex. Civ. App. 378, 85 S. W. 818, and cases cited.

Article 161, providing for the issuance of the writ, carrying into execution the judgment of lunacy, places the respondent in the custody of the sheriff for conveyance to a lunatic asylum—its execution suspended until a vacancy occurs. Such person is classed as a public patient, "adjudged insane, by a court of competent jurisdiction, * * * and ordered to be conveyed to the asylum." Section 1, article 184.

The bond prescribed by article 161 is to prevent the execution of the judgment and the writ in pursuance thereof, with the added feature of recovery thereupon "by any person injured."

[4] If the judgment and the writ are void, there is no final adjudication of lunacy, and the sheriff, of course, could not convey to the asylum, nor could the superintendent receive the respondent; neither could the bondsmen redeliver the respondent to the sheriff or to the superintendent for that purpose. If the judgment and the writ are void we think the bond is also void; and if you eliminate the statute wholly from the bond, which gives the right to any person injured to sue upon the same, it is merely an obligation to the state of Texas that the bondsmen will restrain Hazelwood and treat him for his mental unsoundness until they return him to the sheriff for conveyance to the asylum, or deliver him to the superintendent of the same.

The rules are rather familiar as to the right of a third person in equity to enforce a contract made for his benefit, though not a party thereof. Page on Contracts, vol. 3, §§ 1318, 1319. The case of *Watkins v. Minter*, where the bondsmen specifically obligated themselves to protect all human life "and become responsible for all damages that may hereafter arise by reason of the acts of * * * Claude Minter," falls into that class. The Supreme Court said:

"Being only a common-law obligation, the bond derives no aid from the statute. But its terms are such as to clearly render it enforceable without reference to the statute."

There are cases, of course, where a bond is void as a statutory bond, by reason of being made payable to the wrong person. A replevy bond, void as a statutory delivery bond, on account of being payable to the officer instead of to the plaintiff in execution, is a valid common-law obligation, because the sureties become liable for the payment of the debt to the extent of the value of the property which has been surrendered; the proceedings show the beneficiary of the bond. *Jones v. Hays*, 27 Tex. 1; also see *Bank v. Lester*, 73 Tex. 543, 11 S. W. 626.

In *San Francisco Lumber Co. v. Bibb*, 139

Cal. 192, 72 Pac. 964, it was held that a bond given to secure a building contract and executed in pursuance of a void section of a particular statute, which made the bond expressly inure to the benefit of all persons who perform labor for or furnish materials to the contractor, is wholly void and could not be sustained as a common-law bond.

It is said, however, in the case of *Stevenson v. Morgan*, 67 Neb. 207, 93 N. W. 180, 108 Am. St. Rep. 629, that if a bond is executed in pursuance of a statute declared unconstitutional, and rests upon a consideration independent of the statute, it may be enforced as a common-law obligation.

If an instrument rests partially upon a void consideration and partially upon a good consideration, if you are unable to sever the consideration as actuating the promisor, the whole instrument is void. Clark on Contracts, p. 473. The bondsmen in this instance would have the right and privilege, if the instrument and the writ were valid, to deliver Hazelwood to the superintendent of the asylum; if invalid, that right is destroyed. If this bond cannot be aided by the statutory provision permitting some third person to sue and recover upon it, we do not think the instrument on the face of it, under the case made gives the right, nor can it be implied from its terms that any third person has any beneficial right of enforcement on account of its breach; hence we think the cause could not be maintained on the bond.

HOOVEN-OWENS-RENTSCHLER CO. et al. v. T. SCHRIVER & CO. et al.

(No. 5586.)

(Court of Civil Appeals of Texas. Austin. Feb. 23, 1916.)

1. VENDOR AND PURCHASER ~~283~~—VENDOR'S LIEN—FORECLOSURE—COSTS OF RECEIVERSHIP.

Plaintiff owned real estate upon which was a sugar mill, parts of the machinery in which were mortgaged to different parties. It conveyed the property, reserving a vendor's lien, and entered into an arrangement with the purchasers, under which a part of the cash payment and certain of the purchase money notes were deposited with a bank, the proceeds of collections thereof to be distributed among the mortgage creditors. The purchasers defaulted, and plaintiff brought suit to foreclose the vendor's lien, and asked that the mortgagees be required to set up their respective claims. A receiver was appointed, and an interlocutory judgment rendered, establishing the claims of the mortgagees, and they were notified to intervene, and, pursuant to such notice, filed pleas of intervention, setting up the indebtedness to them and their liens, more than a year after the suit was filed, and more than nine months after the receiver was appointed. The property was sold, and the mortgagees made bids for the property covered by their mortgages of less than the mortgage indebtedness. Held, that the court erred in requiring the mortgagees to make a payment on their bids for the purpose of paying the costs of the receivership in excess of what would have been the cost to them of collecting

their debt by independent suits to foreclose, as their appearance had only the effect of determining the amounts due them and of fixing their liens, and they received no benefits from the suit that could not have been obtained in a separate suit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 795; Dec. Dig. ☞ 283.]

2. VENDOR AND PURCHASER ☞ 283 — VENDOR'S LIEN — FORECLOSURE — COSTS OF RECEIVERSHIP—LIABILITY.

That the mortgagees received from the bank money, distributed under the agreement placing the notes with the bank, did not affect their rights under their mortgages any more than if such payment had been made by the plaintiff who owed the debt; the trust agreement and the notice to the mortgagees thereof having stated that the agreement would not affect mortgage liens.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 795; Dec. Dig. ☞ 283.]

3. VENDOR AND PURCHASER ☞ 283 — VENDOR'S LIEN — FORECLOSURE — COSTS OF RECEIVERSHIP—LIABILITY.

That a considerable portion of the costs adjudged by the court was for taxes due on the property did not affect the mortgage liens, where there were more than sufficient funds to pay the taxes after satisfying the mortgage liens.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 795; Dec. Dig. ☞ 283.]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by the San Benito Sugar Manufacturing Company against T. Schriver & Co. and others. From the final judgment, the defendants Hooven-Owens-Rentschler Company and others appeal. Reversed and remanded, with instructions.

Frank C. Pierce and Ira Webster, both of Brownsville, for appellants. J. M. Mothershead, of San Benito, for appellees.

Findings of Fact.

JENKINS, J. On April 24, 1913, the San Benito Sugar Manufacturing Company, a corporation duly incorporated under the laws of Texas, filed in the district court of Travis county its original petition, in which it alleged, among other things, that on or about the 12th day of April, 1912, plaintiff executed and delivered to W. C. Shaw a deed for three tracts of land, describing the same, situated in Cameron county, Tex., upon the first of which was situated a sugar mill and other improvements; that the consideration for the sale and conveyance of said property was, among other things, the execution by said Shaw and delivery to plaintiff of eight promissory notes, the second of which was for the sum of \$110,000, due January 10, 1913; the third and fourth for the sum of \$16,500 each, due March 12, 1913; the fifth, sixth, seventh, and eighth for the sum of \$33,000 each, due, respectively, March 12, 1914, 1915, 1916, and 1917; that on January 17, 1913, there was paid on note No. 2, \$18,000; that each of said

notes, as well as the deed, retained a vendor's lien on the land sold; that each provided that if the same was not paid at maturity, all of said notes might become due at the option of the holder thereof; that said note No. 2 was past due and unpaid, and that plaintiff had exercised its option to declare all of said notes due; that in the purchase of said property and the execution of said notes W. C. Shaw was acting for himself and Augustus Heinze; that on May 3, 1912, said Shaw entered into an agreement with plaintiff, by the terms of which it was agreed that \$26,491.57 of the cash payment received by plaintiff, and a note for \$40,000, being No. 1 of the series aforesaid, and a note for \$110,000, being No. 2 of said notes, and said notes Nos. 3 and 4, should be deposited in the Farmers' State Guaranty Bank of San Benito, Tex., to be collected by said bank and the proceeds thereof to be distributed among and paid to the creditors of said San Benito Manufacturing Company, according to a schedule attached to said contract and made a part thereof; that said schedule of creditors included each of the defendants herein set out, other than defendants Shaw, Heinze, and the Southern Irrigation Company. In said schedule 14 creditors were named, and the amounts due to each, respectively, were set out, including Hooven-Owens-Rentschler Co., \$29,420; Sugar Apparatus Company, \$16,500; that contemporaneous with the purchase and conveyance of the property above referred to defendant Shaw, acting for himself and said Heinze, purchased parcels of real estate and other property, situated in Cameron county, Tex., describing the same; that this property was purchased as part of a general plan by said Shaw and Heinze, to establish in the Rio Grande Valley a business of raising sugarcane and manufacturing sugar therefrom, the carrying out of said plan being one of the inducements to plaintiff to sell said property; that it was a part of the plan agreed on that said Shaw, acting for himself and Heinze, should form a corporation to take over said property, and in accordance with said agreement the Southern Irrigation & Sugar Company was formed, and on the 15th day of March, 1913, said Shaw conveyed said property to said Irrigation & Sugar Company, which assumed all the debts owing by said Shaw to plaintiff, as above stated; that said Shaw and Heinze and the said Irrigation & Sugar Company have failed to pay the notes deposited with said bank, by reason of which plaintiff has been unable to meet its debts hereinbefore referred to; that the debts due by plaintiff and secured by the deposit with the Farmers' State Guaranty Bank of the notes aforesaid, except a debt to the Peden Iron & Steel Company, August Erhardt, Farmers' State Guaranty Bank, A. F. Delbert, and J. W. Blower, are secured by liens upon particular parts of the machinery of

said sugar mill; that said debts are past due and unpaid, on account of the failure of said Shaw and Heinze and said Irrigation & Sugar Company to pay said notes; that if said liens be foreclosed separately, said mill will be destroyed and dismantled, and plaintiffs' securities for the payment of the debts and notes mentioned will be impaired and destroyed, as the mill will be rendered incapable of operation; that such foreclosures are now threatened by said defendants; that said mill is in need of repair and of preparation for the milling season of 1913-1914; that it is necessary, in order that same may be operated, that contracts now be made with sugar planters for the furnishing and delivery of cane for grinding for said season; that the failure to use said mill for the season will cause great and irreparable deterioration of the mill and irreparable loss to the plaintiff; that neither the said Shaw and Heinze nor the said Irrigation & Sugar Company have any property in this state, except the property conveyed to Shaw and by Shaw to the Irrigation & Sugar Company, as stated; that the Irrigation & Sugar Company is taking steps to mortgage and encumber the lands conveyed to it by defendant Shaw other than the lands above referred to. Plaintiff prayed for judgment against defendants Shaw, Heinze, and the Southern Irrigation & Sugar Company on the notes herein sued on, with foreclosure of its vendor's lien; that the said bank be discharged of its trust, and that the other parties mentioned in said petition be required to set up their respective claims against plaintiff and the property aforesaid, and that judgment be rendered adjudicating their several rights; that defendants Shaw, Heinze, and the Irrigation & Sugar Company be enjoined from selling or encumbering any of their property as described in said petition pending the disposition of this cause; and that a receiver be appointed to take charge of and operate said sugar mill.

On April 24, 1913, the court set May 10, 1913, to hear the application for injunction and receiver. On June 2, 1913, said hearing having been postponed, the court refused to grant an injunction or to appoint a receiver, subject, however, to further order of the court. On August 30, 1913, Shaw and the Irrigation & Sugar Company filed their answers, and asked that a receiver be appointed, and on said day Samuel L. Dworman was appointed receiver, who accepted and qualified as such. On May 8, 1914, the court rendered an interlocutory judgment, establishing claims against plaintiff, among others, that of appellants herein, the said Hooven-Owens-Rentschler Company and the Deming Apparatus Company for the amounts due them as shown by the petition, and establishing their lien on specific machinery therein described; and all creditors, including these appellants, were notified to intervene in said cause on or before June 15, 1914. On said

date appellants herein filed their plea of intervention, setting up the indebtedness to them and their said liens. On November 14, 1914, the interlocutory judgment above referred to was entered nunc pro tunc. Receiver's certificates were issued under order of the court, and said sugar mill was leased pending this litigation. At the July term, 1914, of the district court the receiver was ordered to appraise the said sugar mill and the various parts thereof, and to report same to the October term, 1914; at which time, upon request of the receiver, he was granted until December 15, 1914, to make said report. On December 17, 1914, the receiver filed his report, from which, among other things, it appeared that the court had rendered judgment in favor of Hooven-Owens-Rentschler Company for \$36,861.89, and establishing its lien on one 30x40 Hamilton Corliss engine, No. 3412, and nine-roller mill and crusher plant, appraised at \$37,500 and rendered judgment in favor of said Deming Sugar Apparatus Company for \$19,978.66, establishing its lien upon a quadruple effect evaporator, with all fittings and necessary fixtures and engines, to operate its centrifugal pumps, with a capacity to concentrate 250,000 gallons of hot, clarified cane juice per 24 hours, appraised at \$16,500; also the amount adjudged to be owing to other creditors who had specific liens, and describing the property upon which they held such liens; and also the value of the land and the amount of debts owing to unsecured creditors. Said receiver was instructed to receive bids on said property in whole or in parts, and on November 20, 1914, he reported to the district court the several bids received, including a bid from the Hooven-Owens-Rentschler Company of \$36,612.90 for the property upon which its lien had been established, and bid by the Sugar Apparatus Manufacturing Company of \$14,000 for the machinery upon which it had been adjudged to have a specific lien. This report was received and approved by the court January 9, 1915, and the receiver was ordered to make conveyances to said bidders upon their paying in cash 23 per cent. of their bids, to be used in paying the court costs, including receiver's certificates and attorneys' fees and taxes on said property. This order was afterwards, on February 15, 1915, changed, requiring the bidders to pay only 15 per cent. of their respective bids in cash. The report included the sale of the entire property, and the judgment of the court established the claims of all creditors, secured and unsecured, and judgment was given in favor of the receiver for his services, attorneys' fees, receiver's certificates, taxes, and insurance, amounting to \$6,011.87, to be taxed as costs in the case. The report of the receiver showed that he had received on cash bids \$30,864.74, and had paid the same into the registry of the court. We copy from the final judgment as follows:

"The defendant Hooven-Owens-Rentschler Company, Deming Apparatus Company, and Bauerle & Morris acknowledge the correctness and reasonableness of the amount of costs, taxes, and other expenses hereinbefore adjudged to be paid, but insist that they should not be compelled to pay any of such costs, taxes, and expenses in excess of 3 per cent. of the amount of their respective bids; and they except to the ruling and judgment of the court to the effect that they should pay such costs, taxes, and expenses to the amount of 15 per cent. of their respective bids, and to so much of this order and decree as taxes and adjudges the costs, taxes, and expenses against the Hooven-Owens-Rentschler Company, Deming Apparatus Company, and Bauerle & Morris, in excess of 3 per cent. of the amounts of their respective bids they except, and in open court give notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas."

Hooven-Owens-Rentschler Company and Deming Apparatus Company perfected their appeal and present their assignments of error herein.

Opinion.

[1] It is the contention of appellants herein that, inasmuch as they had a prior lien, duly recorded, upon portions of the mill to secure their debt, which they could have foreclosed in any court having jurisdiction thereof at the ordinary and usual costs in such suits, and, inasmuch as they did not ask for a receiver to be appointed herein, and did not need the services of such receiver, and did not receive any benefit from such services, that they ought not to be held to pay any of the costs of this suit in excess of what would have been the cost to them of collecting their debt by independent suit. To this appellees reply that appellants intervened in said suit and received the benefits of the receiver's services, as well as all other proceedings herein, for which reason they should pay their full pro rata of the costs herein, including receiver's certificates, compensation for the receiver's services and his attorney's fees and taxes due on all of the property.

It is true that the appellants intervened in this case, after being notified by the district court so to do, but their answer as such interveners and defendants herein was not filed until more than a year after the original suit had been filed, and until the court had adjudged the amount of their claims and awarded them specific liens on the property upon which they held mortgages, and not until 9½ months after the receiver had been appointed. The appearance of appellants herein had only the effect of determining the amounts due them (if they had not been parties hereto they would not have been bound by the judgment of the court in reference thereto) and of fixing their lien. All of the benefits that they received from the judgment in this case could have been obtained in a separate suit to collect their debt and foreclose their mortgage. It is made to appear from the record herein that 3 per cent. of the amount of their respective

bids would be amply sufficient to cover such costs, including the commission to the receiver for making the sale, such as would have been allowed to a sheriff under similar circumstances. In *Houston Ice & Brewing Co. v. Clint*, 159 S. W. 409, judgment by the Court of Civil Appeals for the Fourth District, which judgment was approved by the Supreme Court in *Clint v. Houston Ice & Brewing Co.* (Sup.) 169 S. W. 411, the court held, among other things, that the six different purposes to which moneys in the hands of the receiver should be applied, beginning with the payment of court costs, did not apply to prior mortgages, and did not displace the same, and the Court of Civil Appeals in that case, among other things, said:

"The appointment of the receiver must be governed by the established rules in equity courts applicable to junior mortgages. One of those rules is that 'when the first mortgagee has not taken possession of the property, equity may properly interfere in behalf of subsequent mortgagees or equitable incumbrancers and creditors, and may appoint a receiver for their protection, but without prejudice to the rights of the first mortgagee.' High on Receivership, § 632. No rule, consistent with justice and equity, can be formulated that will contravene the terms of the rule stated. * * * So far as appellant was concerned, there was no necessity for a receivership."

The court quotes from *Bradford v. Coolidge*, 103 Ga. 753, 30 S. E. 579, as follows:

"If we apply this proper and just principle to the facts in this case, it must be held that so much of the fund in the hands of the receiver, realized from the sale of the mortgaged property, as was necessary to pay off the amount due on the mortgage cannot be diminished by the costs of the case and expenses of the receivership or any proportion thereof, and that so much of such costs and expenses as could not be met by the general fund arising from the sale of the property of the debtor, in excess of the amount due on the mortgage or not covered by the mortgage lien, should properly have been taxed against the plaintiffs. As to the mortgaged creditor in this case, there was no necessity for the receivership; and in the preservation of her lien as required by law, she must be treated as having a superior right to an appropriation of the proceeds arising from the sale of the mortgaged property to the full extent of the amount due thereon; and it would, under the facts as they appear, be inequitable to charge her with any of the costs or expenses in this case."

We quote further from the opinion as follows:

"The consensus of opinions in the United States is opposed to destroying the mortgage lien of a person not a party to receivership, and to the consumption of the mortgaged property in paying the expenses of a receiver not desired by the mortgagee."

Said opinion quotes from *Houston Ice Co. v. Fuller*, 26 Tex. Civ. App. 239, 63 S. W. 1048, as follows:

"We are of the opinion that the court erred in adjudging the expenses of the receivership to be a superior lien to the appellant's mortgage. The receivership was not ordered at the suit of the appellant, and it would be inequitable to exhaust his security with the expenses of a receivership taken out at the instance of other parties. High on Receivership, § 796. Revised Statutes 1895, art. 1472, has application wheth-

er the receivership is at the instance or for the benefit of the lienholder.' * * * It should be a question of costs alone, and appellant should be given the benefit of that method which will cost the least money."

It is true, in *Houston Ice & Brewing Co. v. Clint*, the Ice & Brewing Company was not a party to the suit in which the receiver was appointed, but we think this can make no difference, where the receiver was not appointed at the instance of the party resisting the payment of receiver's expenses, and where such receivership is not necessary to preserve for him the corpus of the property. We had a similar question before us in *First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co. et al.*, and our opinion in that case in 178 S. W. 1015, as well as the opinion in full in *Houston Ice & Brewing Co. v. Clint*, *supra*, is here referred to as a fuller expression of our views upon the issue in this case.

[2] As stated in the findings of fact, certain notes and cash were deposited with the Farmers' State Guaranty Bank in trust to be collected and distributed among the creditors. The bank received some cash from the plaintiff, and collected part on the second note, which was distributed in accordance with the agreement, and the appellants received a part of the same. This, however, did not affect their rights under their mortgages any more than if such payment had been made by the plaintiff herein, who owed the debt. Appellants were notified of this trust agreement, and made no objection thereto, but in the notice which they received, it was stated that this agreement would not affect mortgage liens, and it was so provided in the agreement.

[3] A considerable portion of the costs adjudged by the court was for taxes due on the property, but it appears that there are more than sufficient funds to pay such taxes after satisfying the mortgage liens. We cannot see that the case is any different than if the plaintiff had paid such taxes, in which event, of course, it would not have affected appellants' debts or their mortgage lien.

For the reasons stated, the judgment of the trial court is reversed and remanded, with instructions to the court below to ascertain the amount of costs due by appellants in accordance with this opinion.

Reversed and remanded, with instructions.

CREWS et al. v. POWERS et al. (No. 891.)
(Court of Civil Appeals of Texas. Amarillo.
March 1, 1916.)

1. STIPULATIONS \S 18(6)—DOCUMENTARY EVIDENCE—AGREEMENT TO ADMIT.

A party agreeing to admit a field note book would preclude him from moving to strike it from the evidence after its recitals were found to be unfavorable to him.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. \S 43-50; Dec. Dig. \S 18(6).]

2. APPEAL AND ERROR \S 548(4)—REVIEW—BILLS OF EXCEPTION.

The action of the court upon motion to strike out evidence should be presented by bills of exception in order to be reviewed by the Court of Civil Appeals.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2439; Dec. Dig. \S 548(4).]

3. TRESPASS TO TRY TITLE \S 40(6)—EVIDENCE—FIELD NOTE BOOK.

In trespass to try title, where the trial court's findings showed that both parties agreed that a field note book should go into the record in so far as it related to certain surveys in a certain block, the relevant entries contained therein should have been considered by the court in passing on the issues.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. \S 60; Dec. Dig. \S 40(6).]

4. APPEAL AND ERROR \S 1010(1)—FINDINGS—REVIEW.

In trespass to try title involving a dispute as to boundaries, tried to the court without a jury, findings of fact, being peculiarly within the province of the trial court, supported by the evidence, would not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3979-3981; Dec. Dig. \S 1010(1).]

Appeal from District Court, Childress County; J. A. Nabers, Judge.

Trespass to try title by S. K. Powers and others against C. E. Crews and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jos. H. Aynesworth and W. G. Gross, both of Childress, for appellants. M. J. Hathaway and W. B. Howard, both of Childress, for appellees.

HALL, J. This is a boundary suit. The allegations in the petition are in the form of trespass to try title to survey No. 2, in block No. E, in Childress county. The land is described in the petition as beginning at a point in the N. boundary line of survey No. 15, of the F. P. Knott surveys 400 varas S., 80° 30' east from its N. W. corner; thence N. 80° 30' W., 400 varas with the north boundary line of said survey No. 15, a cedar post marked "XI"; thence N. 76° W., 979 varas, with the N. boundary line of survey No. 16, F. P. Knott, original survey, to a point on top of a sand hill, from which a china berry tree 18 inches in diameter bears S. 50° E., 6 varas; thence S. 76° 30' W., 979 varas, with the N. B. line of survey No. 17, F. P. Knott, a pipe line, the N. E. corner of survey No. 18, F. P. Knott; thence S. 70° W., 1,011 varas, with the N. B. line of said survey No. 18, to a set stone in the E. B. line of survey No. 19, F. P. Knott, original surveys; thence N. 488 varas with the E. B. line of said survey No. 19, to a pipe N. E. corner of same; thence S. 78° 30' W., 970 varas, with the N. B. line of said survey No. 19, to a pipe set in the S. bank of Red river, the N. E. corner of survey No. 20, F. P. Knott original survey; thence N. 59° 52' E., 1,099 varas, with the meanders of said

river, a point; thence N. 81° 19' E., 961 varas, with the meanders of said river, a point; thence E. 950 varas with the meanders of said river, a point; thence S. 77° 39' E., 972.4 varas, with the meanders of said river, a point; thence S. 38° 29' E., 637 varas, with the meanders of said river to the place of beginning, containing 338.8 acres of land.

The land described lies immediately north of the F. P. Knott surveys in Childress county, and is bounded on the north by Red river. Appellees claim the land as original, unappropriated public domain, which had been surveyed and sold to them by the state as public school land. Appellants insist that the land in controversy is a part of the various F. P. Knott surveys described in the field notes; in other words, that the F. P. Knott surveys, by their original calls, extended north to the river bank, and that no vacancy exists north of said surveys, which the state could sell to appellees.

Defendants below answered by general denial: That the lands in controversy were included in the lands owned by them, and that the northern boundary of their surveys was the south bank of Red river. They deny that the cedar post alleged to be an original corner, as designated in the second call in the petition, was an original corner; that the northern boundary lines of the several Knott surveys are correct calls and that the original calls, marking, and corners, were on the bank of the river; that said land was formerly public domain and was sold by the state to F. P. Knott, and surveyed in sections of 640 acres each, as required by law; that said surveys were made by the proper officers and field notes thereof duly returned to the land office and patents issued; that, in the applications for the purchase of said land made by the said Knott, each survey was described to follow the meanders of the south bank of Red river, and the field notes thereof show that they were surveyed accordingly; that the field notes in the patents call for the south bank of the river, and it was the intention of the said Knott, in making such application, to bound the same on the north by the south bank of the river; that it was likewise the intention of the officer making the survey to comply with the law and bound the same on the north by the south bank of the river; that it was also the intention of the state in approving the field notes, and in the issuance of the patents, to part with all its right, title, and interest therein, to the south bank of the river. They claim through mesne conveyances under the said Knott, alleging that they acquired the lands, relying upon the records of the surveyor's office, of field notes returned to the General Land Office and set out in the patents, and have been in quiet and peaceable possession thereof from the date of the original sale to F. P. Knott, up to this time.

A jury being waived, the court tried the case, rendering judgment for the plaintiffs below. The substance of the findings of facts and conclusions of law we state as follows: This case involves the title to some 338 acres of land on the south bank of Red river, in Childress county, being, if plaintiff's contention is correct, state school land, sold to plaintiffs; and, if defendants' contention could be sustained, it is a part of the north end of surveys 15, 16, 17, 18, and 19, of the F. P. Knott sections, to which defendants have title. The field notes of surveys 15 and 16, at their common north corner, call for a stake marked X with a cottonwood and a chittim bearing tree, giving course to said trees, but not distance. These field notes are of a survey made by T. Windsor Robinson, in May, 1882. At a point in the valley at the southeast corner of the land in controversy, there is now to be found a cedar stake, marked X, by the side of which there is an iron pipe put in by one Crews; that is, where Crews put in the iron pipe, reversing the call for course, and running from a cottonwood marked < as it now shows, would miss this corner 38 varas to the east of it. No chittim can be found, but there is a chittim stump which will fit within a few feet the call for course to a chittim running in a westerly direction. In the course called for in the field notes of survey 16, from this stake, at the distance called for in said field notes for the northwest corner of said survey 16, there is found a china tree which fits within a few varas the call in the field notes at this point. This tree is mostly buried in a sand hill, and some of the witnesses have dug down about 16 feet into the sand and to the roots of the tree, in an effort to find marks on it, but discovered none which could be identified as surveyor's marks. Continuing courses called for for the north line of 17 and 18, to the northwest corner of said survey 18, and thence north 488 varas to the northeast corner of 19, and south 78½° west along the north lines of surveys 19, 20, 21, and 22, to the northwest corner of 23, would pass south of a salt spring and along a rocky bluff, which is the south bank of Red river along the north lines of 20 and 21. Following the river bank about a mile and leaving it at about the northeast corner of 23, the course pursued throwing the line away from the river, and at the northwest corner of 23 as thus located is found the original corner, fully identified by bearings called for in the original field notes. The field notes of surveys 16, 17, 18, and 19 call for stakes on the bank of Red river, and to meander said river. But the line above described does not meander said river, but runs for the most part along the south line of the land in controversy, and nearly half a mile south of the river. I find, also, that in 1884 there was a stake, not marked, about 30 yards north and east of the cedar post, and iron stake,

first above described. It is not there at this time and its exact position is not certain. By running course and distance north 76° west, 961 varas, as called for in the field notes of the north line of 16, will reach a basin in the sand hills and continuing will, on the north side of survey No. 19, follow a rocky bluff and pass over or close to a salt spring, passing into the river for about a mile and a half, reaching the bank again at the northeast corner of 23, or north of where it is now found and identified, about 300 varas, at which point there is some timber. I also find that it is conclusively shown by the evidence that Red river, along the north boundary of the land in controversy, has its banks in substantially the same place as when the original survey was made in May, 1882. I find from this evidence that following the footsteps of the original surveyor would be the lines first above described; that before he reached the northeast corner of 16 he had left the river bank and cut across the bend for some reason; and that he did not thenceforth meander the river, nor was his line a meander line, until he again reached the river at a point just before reaching the northwest corner of 19. I also find that this line is shown to be the line actually run on the ground by the original surveyor, by all the other evidence in the case, including the maps herein introduced, showing the position of surveys throughout the block; that in theory it would locate these surveys, 16, 17, 18, and 19, on the river bank, would change the south line of said surveys, disturbing and pulling them apart from their surveys on the south, or would pull the whole block of surveys north into Red river, and north of the original corners. On the whole, I find that the line first described herein is the original line run by T. Windsor Robinson, the original surveyor.

The court then applies the Bertillon system, "to the face of nature instead of to the face of some human being," and concludes that any "one finding a cedar stake marked X in the neighborhood of where a stake or post marked X was called for in the field notes as a corner might have a suspicion that such was the corner; should he find in the neighborhood a cottonwood marked < and which said mark might at one time have been a part of an X, and find that the same field notes call for such a cottonwood, and further find that the course called for in the field notes was reasonably close to the course actually found, the suspicion would likely become strengthened; then, examining the field notes, should he find that they also call for a chittim, a certain course from the said corner, he finds a chittim stump, the suspicion would begin to ripen into a belief; and then should he run from this stake the course and distance called for in the field notes, and there find a china tree reasonably corresponding to that called for

in the field notes, the belief would naturally ripen into a conviction; then continuing should he afterward, passing along a rocky bluff on the bank of a river, where same is called for in the field notes, arrive at a point where there is a corner so well identified by marked trees that it is not questionable, then his conviction would become a certainty." The court concludes as a matter of law that when a line can be identified by the footsteps of the original surveyor it is the correct line of the survey; that a meander line may be placed back a reasonable distance from a stream and nevertheless be a meander line, and include in the grant the line to the stream, but when it is so far back, for instance nearly half a mile as in this case, as to show it is not in fact a meander line, but a cut-off, and the footsteps of the surveyor are actually found crossing the cut-off, then it is not in fact a meander line, and the surveyor is presumed to intend to locate the line where he actually does locate it. While the law presumes the surveyor does his official duty, and in making surveys all calls are correct, yet this presumption may be overcome by proof positive to the contrary. The fact that the Knott surveys are made four times as long as they are wide has probative value to show that they front on a stream, and also that the call for a stream shows, not conclusively however, that he did go to the stream, and that, if in future years the river is found further away, it might very well be presumed, and should be, that the river has changed its course so as to harmonize the facts found with the calls, rather than to say they are incorrect. Yet notwithstanding all these presumptions, when it is shown to a moral certainty that the river has not changed its course, and also to such certainty that the surveyor did not follow the meanders of the stream, it is the duty of the court to follow the certain footsteps of the surveyor, and there locate the line. The evidence shows that the defendants have their full quota of land, without adding to it the land sued for herein; that it is not a state of facts which could possibly include any excess north and south, there being no original corners on the south to hold an excess, so that it is only a question of showing defendants' land north of the river and leaving that amount of land on the south out of his survey, or letting his survey remain where Robinson and Crews and all other surveyors have heretofore put it, without disturbing the south line in any way; they still having fully 640 acres.

[1, 2] The first three assignments of error insist that the court erred in considering the entries in what is designated as "Little Book M." This seems to be the field note book, made by T. Windsor Robinson, at the time of the original survey, and was called for by appellants' counsel. It appears from the record that, after the pleadings had been

read to the court, one of the attorneys for appellants, who had requested the court to bring the note book to Childress, announced that he was going to introduce it in evidence. He afterwards objected to the book, when the county surveyor was being interrogated, with reference to some matters contained in it, and withdrew his objections and agreed that it might go in as evidence. The trial judge states in his findings of fact that, before adjourning in the evening, both parties agreed that the book should go into the record in so far as it related to surveys 14 to 23 of the F. P. Knott block. If we could properly consider the objection as presented here, we think appellants' agreement to admit the book would preclude them from moving to strike it from the evidence, after its recitals were found to be unfavorable to them. *Kempner v. Beaumont Lumber Co.*, 20 Tex. Civ. App. 307, 49 S. W. 412. This matter, however, is not properly presented. The action of the court upon motion to strike out evidence in order to require review in this court should be presented by bills of exception, and no bill whatever is found in the record. *Holt v. Cave*, 38 Tex. Civ. App. 62, 85 S. W. 309.

[3] In the present state of the record, we must take the court's statement of the facts relating to the introduction of "Little Book M" as true, and conclude that the relevant entries found in it should have been taken into consideration by the court in passing upon the issues. In the consideration of several boundary suits, we have learned from a review of the work of the pioneer surveyors in this part of the state, done when the public domain was almost limitless and lands were barely worth the cost of surveying and pre-empting them, that lines were not run and corners and calls were not fixed and made with that degree of care and accuracy which the law required. Time and the demand for fuel and fence posts have in most instances caused the disappearance of bearing trees, and the shifting sand dunes of the river bottoms and the erosion of river banks have frequently changed the face of nature to such an extent as to render the location of lines and corners a matter of much doubt.

[4] We think the court's findings of fact are supported by sufficient evidence, even without taking into consideration the facts shown in "Little Book M." The "gun barrel corner," being the northeast corner of section 41, is an undisputed, long and well established corner in that neighborhood. The beginning corner adopted by the court, and concerning which the testimony is sharply conflicting, we think is sufficiently established by the course and distance, reversing the calls from the "gun barrel corner." There can be no controversy with reference to the rules of law quoted in the briefs of parties,

and the whole question has resolved itself into one of fact. This being peculiarly within the province of the trial court, we do not feel called upon to disturb his findings, since we think they are supported, not only by sufficient evidence, but by a preponderance thereof. Under the evidence, as introduced, the court could have located the line according to the contention of either party; but he has seen fit to disregard the evidence of several witnesses which tend to locate the line north of where it is fixed by his findings, and we feel it our duty to adopt his conclusion as our own.

The judgment is therefore affirmed.

SNAMAN v. LANE. (No. 5591.)*

(Court of Civil Appeals of Texas, Austin.
Feb. 9, 1918. On Motion for Rehearing, March 29, 1916.)

1. TRIAL \S 191(1)—INSTRUCTION—ASSUMPTION OF FACTS.

The court should not assume in its charge the existence of material facts controverted by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 420, 421, 435; Dec. Dig. \S 191(1).]

2. PARTNERSHIP \S 247—LIABILITY OF SURVIVING PARTNER.

Where brothers for a number of years conducted a partnership business and bought a hotel with partnership funds, collecting and disbursing the rents therefrom in the name of the partnership, and one of such brothers employed an architect to prepare plans for an addition to such hotel, such brother being in charge of the business when the other was absent, and such other knowing that the plans had been prepared and made, making no objection, such other brother was liable for the charge of preparing the plans upon the death of the brother who ordered them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 524-528; Dec. Dig. \S 247.]

3. PARTNERSHIP \S 247—PERSONAL LIABILITY FOR DEBT OF DECEDENT.

Where two brothers owned a hotel, and one died, the survivor being made independent executor and sole legatee and probating the will, having charge and control of the entire estate and paying the debts, disposing of the hotel, and converting the greater portion of the estate to his own use and benefit, receiving assets greatly in excess of an amount which his deceased brother owed an architect for preparing plans for an addition to the hotel, such surviving brother was personally liable for the debt.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 524-528; Dec. Dig. \S 247.]

On Motion for Rehearing.

4. PARTNERSHIP \S 258(8) — CONTRACT BY PARTNER—SUFFICIENCY OF EVIDENCE.

In an action against a surviving partner for services as an architect in drawing plans for an addition to the firm's hotel, evidence held sufficient to show that the deceased partner employed plaintiff to draw the plans.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 580-582, 596; Dec. Dig. \S 258(8).]

Appeal from District Court, McLennan County; Edwin J. Clark, Special Judge.

Suit by Roy E. Lane against Joe Snaman. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Webb and Marshall Surratt, both of Waco, for appellant. Sleeper, Boynton & Kendall, of Waco, for appellee.

RICE, J. This suit was brought by Roy E. Lane against Joe Snaman to recover on a quantum meruit for services performed as architect in making cost estimates, drawing plans, and performing work incident thereto for the erection of an addition to the St. Charles Hotel in Waco, payment for which had been refused by appellant, alleging that Joe Snaman and his brother Harry, now deceased, were partners doing business under the partnership name of H. & J. Snaman, and as such owned and operated the St. Charles Hotel in said city. The right to recover against Joe Snaman is based on the theory, first, that he was liable as surviving partner, the work having been performed at the instance and request of his brother Harry; and, second, against him in his individual capacity on the ground of acquiescence and ratification of such employment; and, third, that he was the independent executor and sole legatee under the will of his brother, which had been probated and administration thereon closed, and from whose estate he had received more than sufficient assets to pay said claim.

Appellant, answering, admitted the partnership, but alleged that the same was a commercial partnership, and denied that he and his brother owned the hotel as partners, but asserted that they were joint owners and tenants in common thereof, and that such partnership was separate and distinct from their commercial partnership and denied that he or his brother had ever employed appellee to perform such services.

A jury trial resulted in a verdict and judgment in behalf of appellee for the sum of \$1,650, from which this appeal is prosecuted. The first assignment urges that the court erred in charging the jury, in effect, that if they believed from a preponderance of the evidence that appellee, in compliance with the request of Harry Snaman, deceased, performed the services as architect as claimed, in preparing certain sketches, cost estimates, and plans, and that the same were placed at the disposal of the said Harry Snaman, deceased, or the defendant, Joe Snaman, or either or both, then and in that event they would find for appellee as against appellant the reasonable value of such services, if any, not to exceed the amount claimed, with interest. It is asserted on the part of appellant that this charge assumed the existence of a partnership in the ownership and operation of said hotel on the part of Harry and Joe Snaman, or that they held themselves out as such, or that the alleged employment of appellee by Harry Snaman was with the consent of appellant, or that the administration of

the estate of Harry Snaman, deceased, by appellant as independent executor had ceased and the estate closed, and that as neither of such facts was established by the uncontroverted evidence, to so charge was error.

[1] It is unquestionably true, as asserted by appellant, that the court should not assume in its charge the existence of material facts controverted by the evidence; but in reply thereto appellee insists that this charge is not erroneous in this respect, because the uncontradicted evidence showed that appellee, in compliance with the request of Harry Snaman, deceased, performed the services alleged, and that the defendant, Joe Snaman, was liable therefor, because from the undisputed evidence it appeared that Harry and Joe Snaman were partners, and that as such they owned the St. Charles Hotel property, or, at least, that they held themselves out as such, and that the indebtedness sued upon was a partnership debt, for which appellant is liable as surviving partner.

[2] We agree with appellee in this contention. Appellant admits that he and his brother Harry had for a number of years conducted a partnership business under the firm name of H. & J. Snaman; that the hotel in question was bought with partnership funds, and the rents therefrom collected and disbursed in the name of the partnership. The uncontradicted evidence also shows that H. Snaman employed appellee to prepare the plans in question; that he was in charge of the business when appellant was absent; and that appellant knew that the plans had been prepared and made no objection thereto, because it is shown that he saw a picture of the proposed structure, drawn by appellee, which hung for a considerable time in the hotel building, and under which was written: "St. Charles Hotel, H. & J. Snaman." It was shown that both appellant and his brother were frequently in appellee's office, looking over the plans and making suggestions as to changes therein during the progress of the work; and the uncontroverted evidence further shows that appellant admitted, after the death of his brother, that appellee had been employed by them to prepare the plans.

We believe, therefore, from the uncontradicted evidence that this hotel was the property of said partnership, and that Harry Snaman employed appellee to perform the services upon which this suit is predicated; for which reason we think appellant was liable to appellee as surviving partner, and hence hold that the court did not err in giving the charge complained of.

[3] Besides this, we think the judgment should be affirmed on the ground that the uncontradicted evidence showed that Harry Snaman employed appellee to prepare said plans; that upon his death appellant, under his will, was made independent executor and sole legatee; that he probated the will, took charge and control of the entire estate, paid all the debts thereof, disposed of the hotel,

and converted the major portion of the property of the estate to his own use and benefit, receiving therefrom assets largely in excess of the debt sued upon, from which circumstances the administration thereon may be regarded as closed and the appellant thereby became personally liable for the debts thereof. Hence the court did not err, as urged by appellant in his second assignment, in telling the jury that if the alleged services were performed by appellee at the request of Harry Snaman, the deceased, the appellant would be liable therefor. See *Runnels v. Knownslar*, 27 Tex. 532; *Houston v. Mayes*, 66 Tex. 299, 17 S. W. 729; *Patterson v. Allen*, 50 Tex. 25; *Solomon v. Skinner*, 82 Tex. 345, 18 S. W. 698; *McClelland v. McClelland*, 46 Tex. Civ. App. 26, 101 S. W. 1171; *Mayes v. Jones*, 62 Tex. 365; *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549; *Webster v. Willis*, 56 Tex. 468; *McCampbell v. Henderson*, 50 Tex. 601; *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931; *Middleton v. Pipkin*, 56 S. W. 242.

No reversible error being shown, the judgment of the court below is in all things affirmed.

Affirmed.

On Motion for Rehearing.

[4] Appellant assails our holding to the effect that the uncontradicted evidence shows that H. Snaman employed appellee to draw the plans for the hotel, citing the evidence of Joe Snaman, wherein he states, in effect, that appellee would draw the plans and specifications, and if the matter did not go through he would not charge anything for same. Notwithstanding this, however, the uncontradicted evidence shows that appellant admitted that his brother Harry had a half interest in the building, and that Harry ran the business when appellant was away, and that appellant ran it when his brother was away; and appellee testified, without contradiction in this connection, that he had a conversation with Harry Snaman relative to the cost of the

plans, and informed him that the regular fee therefor would be 5 per cent. of the amount of the cost of the improvements, "which I then told him would probably be from \$25,000 to \$30,000, upon which he replied to go ahead and prepare the plans; that after this Harry was frequently at the office to see about it and how the plans were getting along, giving instructions and directions and suggesting changes therein."

Even if we were to concede, however, that appellant's contention in this respect is correct, there is ample evidence under other phases of the case to justify the affirmance of the judgment. After a full and thorough investigation of the record, in the light of appellant's motion for a rehearing, we have concluded that there is no merit in same, and that it should be overruled; and it is so ordered.

Motion overruled.

WATKINS v. MINTER et al. (No. 968.)

(Court of Civil Appeals of Texas. Texarkana.
Feb. 3, 1916. Rehearing Denied
Feb. 16, 1916.)

Appeal from District Court, Hopkins County;
R. L. Porter, Judge.

Action by J. O. Watkins against L. B. Minter and others. From a judgment for defendants sustaining general demurrer to petition and dismissing the case, plaintiff appealed, and questions presented were certified to the Supreme Court. Questions answered (180 S. W. 227). Reversed and remanded.

J. H. Beavers and Harris, Suiter & Britton, all of Winnsboro, for appellant. D. Thornton, of Sulphur Springs, for appellees.

HODGES, J. This appeal is from a judgment sustaining a general demurrer to the appellant's amended original petition and dismissing the case. The questions presented on appeal were certified to the Supreme Court in April, 1912. They have recently been answered in an opinion which will be found in *Watkins v. Minter*, 180 S. W. 227. The answer returned necessitates a reversal of the judgment and a remand of the cause, and it will be, accordingly, so ordered. It is unnecessary for us to add anything to what is said in the opinion of the Supreme Court.

CONSOLIDATION COAL CO. v. PRATT.

(Court of Appeals of Kentucky. April 14, 1916.)

1. EVIDENCE \S 13 — JUDICIAL NOTICE — KICKING PROPENSITY OF THE MULE.

The kicking propensity of the mule is a matter of common knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 18; Dec. Dig. \S 13.]

2. MASTER AND SERVANT \S 238(6)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

It is contributory negligence on the part of an employé to stoop down near a mule's hind feet and at the same time strike the mule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 748; Dec. Dig. \S 238(6).]

Appeal from Circuit Court, Letcher County.

Action by John M. Pratt against the Consolidation Coal Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

A. W. Young and Wm. G. Dearing, both of Whitesburg, and O'Rear & Williams, of Frankfort, for appellant. Ira Fields, Felix G. Fields, and Fields & Newman, all of Whitesburg, for appellee.

CLAY, C. This is a personal injury action in which plaintiff, John M. Pratt, recovered of the defendant, the Consolidation Coal Company, a verdict and judgment for \$500. The company appeals.

Plaintiff, while in the employ of defendant, was kicked by a mule. He predicates his case on the fact that the mule was dangerous, vicious, and unsafe, and, upon being whipped, beaten, or annoyed would kick at persons, and thereby endanger their lives and safety; that these facts were known to defendant, or could have been known to it by the exercise of ordinary care, and were not known to plaintiff and could not have been known to him by the exercise of ordinary care. In addition to the foregoing facts, his petition alleges in substance that, because of the difficulty in inducing the mule to enter the mine, plaintiff was ordered by the superintendent to whip the mule, and that the superintendent assured plaintiff that the mule was gentle and safe and would not kick; that on the occasion of the accident he, in obedience to the direction of defendant's superintendent, whipped the mule for the purpose of forcing it to enter the mine, and while so doing, and as a result of said whipping, the mule kicked and injured plaintiff.

In support of the allegations contained in his petition, plaintiff testified in substance as follows: He had been doing grade work for the company for four or five months. The superintendent then directed him to drive in the mines. He worked the mule that kicked him for two days. The superintendent said that "the mule was good conditioned, but would not stop," and told plaintiff to be careful and not let the car run on him when it

started, but did not say anything about its kicking. The superintendent also told him to whip the mule and make it go into the mine. While driving the mule on the third day, he hit the mule and it kicked him. Before that he had trouble with the mule every time he started into the mouth of the mine. At the time of the accident, another employé was pulling on the mule with a bridle or halter. Plaintiff was stooping down trying to get hold of the tail-chain. A part of the work that plaintiff was to do was to hook and unhook the chain. On cross-examination plaintiff stated that he had worked on a farm practically all of his life. During that time he had hoed corn, grubbed, and done similar kinds of work. While he had plowed some, he had never driven any teams except oxen. He was assigned to the duty of driving the mule because he had applied to the superintendent for a job with more money. When he went to work he knew that the mule would not stand, but that was all. The chain was near the mule's feet. He stooped down to get the chain and at the same time hit the mule. He struck him with a limb or little whip. When he first went to work the superintendent helped him to whip the mule. Plaintiff further says that he did not know that the mule would kick. He had never seen it make any demonstrations of that kind.

[1, 2] While plaintiff bases his right of action on the fact that the mule was dangerous and vicious, and this fact was known to the master, or could have been known to him by the exercise of ordinary care, he fails to show that the mule ever kicked or showed any vicious tendencies on any previous occasion. On the contrary, he shows that he had driven the mule into the mine a number of times and had repeatedly whipped him, and that the mule bore his punishment with remarkable complacency and never attempted to injure plaintiff in any way. It was only when plaintiff took a position near the mule's hind feet and reached down to pick up the tail-chain, and at the same time struck the mule with a whip, that the mule gave way to his natural propensity and kicked plaintiff. The kicking propensity of the mule is a matter of common knowledge and has been the subject of comment from the earliest time. It is almost as universally recognized as the fact that a duck will swim or a cat will scratch. However, a duck cannot indulge his propensity without water and, ordinarily, a cat will not scratch unless irritated or attacked. But the mule requires no particular setting for the exercise of his high prerogative. He is liable to kick at any time, and no one can plead ignorance of this tendency. This is not a case where the mule was shown to be more than ordinarily dangerous or vicious. It is not a case where the unexpected happened. It is a case where plaintiff not only invited disaster, but actual-

ly provoked it. He made himself a convenient target by stooping down and placing himself near the mule's heels. Not being satisfied with this invitation, he actually applied the lash. Of course, there may be instances where a mule will sometimes surprise you and refuse to kick, even though the circumstances be unusually propitious. But this is not such a case. Here the mule would have been untrue to himself and false to every tradition of his breed if he had passively acquiesced in such treatment and kept his heels on the ground. The quality of plaintiff's act cannot be the subject of dispute. All reasonable men will agree that he showed an utter disregard of his own safety. An employé cannot court danger by inviting and provoking a mule to kick him, and then recover of the master for a consequent injury, on the ground that he is a bona fide cripple without notice. *Tolin v. Terrell*, 133 Ky. 214, 117 S. W. 290. It follows that the trial court should have directed a verdict in favor of defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

KEETON v. BOOTH.

(Court of Appeals of Kentucky, April 12, 1916.)

BILLS AND NOTES \S 527(1) — PAYMENT — WEIGHT OF EVIDENCE.

In an action on a \$500 note executed by defendant to plaintiff's assignor, subject to two credits of \$60 each, in which defendant pleaded two additional payments of \$120 each, verdict for plaintiff held against the weight of the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1847, 1850-1855; Dec. Dig. \S 527(1).]

Appeal from Circuit Court, Whitley County.

Action by T. A. Booth against C. H. Keeton. Judgment for plaintiff, and defendant appeals. Reversed, with directions to grant defendant a new trial.

H. C. Gillis, of Williamsburg, for appellant. C. N. Smith, of Williamsburg, for appellee.

TURNER, J. This is an action on a \$500 note executed by appellant Keeton and his sureties to Elijah Smith, dated the 27th of February, 1908, and bearing interest from date, subject to two credits of \$60 each, paid respectively in 1911 and 1912. In 1914, Smith assigned the note to the appellee Booth, who was the plaintiff below. The principal and the sureties filed an answer pleading two payments in addition to the ones admitted in the petition, to wit: February 14, 1912, \$120; and January, 29, 1914, \$120—each of which payments are alleged to have been made before the assignment of the note by Smith to Booth. The reply denied that either of these payments had been made, and that was

the only issue. The defendant Keeton testified that during the period covered by these two disputed payments he was the assistant cashier of the First National Bank of Williamsburg, and that for more than 20 years prior to 1909 he had been assistant cashier of the Bank of Williamsburg, another banking institution in that place. He produced the books of the First National Bank, which showed that on February 14, 1912, there had been transferred from his (Keeton's) account in that bank to the account of Smith, the then owner of the note, the sum of \$120; that he notified Smith of this fact. The books of the bank further showed that on January 29, 1914, there was transferred from the account of Keeton's wife to the account of Smith the sum of \$120, and the check for that amount bearing Mrs. Keeton's signature was produced in evidence and shows on its face that it was for a credit on the note. The check for the payment of \$120 on February 14, 1912, is shown to have been destroyed in a fire in 1914. Keeton's evidence further shows that the entries in the bank book were true and correct, and that the money represented by those entries was deducted from the accounts of himself and wife and added to the account of Smith, and that thereafter Smith had drawn the money out of the bank. It was agreed on the trial that the cashier of the bank would testify that the bank books produced by Keeton were the books of the bank, and that the entries therein were treated by the bank and its officers as correct and true, and that the money was paid out by the bank according to the said entries.

The only evidence introduced by the plaintiff bearing on these two payments was that of Smith, who testified that the only payments made to him on the said note were the two \$60 payments credited thereon: that he never received any notice from the bank or Keeton that any deposits had been made to his account by Keeton or any one else; that, when he finally closed his account at the bank, he had about the amount therein which he thought he ought to have; that he held two notes against one A. R. Humble for \$1,000 each, dated September 22, 1909, one of them due in six months and the other in nine months; that on February 11, 1912, Humble paid him \$120 which is a credit on one of the said \$1,000 notes; and that he within a few days thereafter deposited the same in bank, but did not remember in which bank he made the deposit as he had an account in each bank.

It will be observed that the \$120 payment on the Humble note was made three days before the deposit of \$120 by Keeton to the credit of Smith on February 14, 1912, and from this it is argued that the deposit was the payment by Humble, and not the Keeton payment; but this argument loses sight entirely of the fact that the bank's books show

that on the 14th of February, 1912, \$120 was not only credited to the account of Smith, but was charged against the account of Keeton. As to the other credit of \$120, dated January 29, 1914, charged against the account of Mrs. Keeton and credited to the account of Smith and represented by the check produced, there can be no question, for there is no payment shown to have been made to Smith on the Humble notes, or otherwise, of that amount, or any other amount within several months of that time. The records of the bank are most convincing, if not conclusive, that these two payments of \$120 each were charged to the accounts of Mr. and Mrs. Keeton and received by and drawn out by Smith while he was the owner of the note; and particularly is this true of the last payment.

Several witnesses were introduced to impeach the reputation for truth and veracity of the defendant Keeton, most of whom admitted personal aggrevances against him; but this evidence seems to be sufficiently rebutted by the admitted fact that for a quarter of a century he has occupied positions of trust and confidence in the community. However that may be, while the jury under the evidence might have been justified in disregarding the statements of Keeton, they were not authorized to return a verdict directly contrary to the record evidence introduced. The verdict is flagrantly against the evidence on this issue, and the lower court should have granted the appellant a new trial.

The appeal is granted, and the judgment is reversed, with directions to grant appellant a new trial and for further proceedings consistent herewith.

LOUISVILLE & N. R. CO. v. TAYLOR'S ADM'R.

(Court of Appeals of Kentucky. April 12, 1916.)

RAILROADS — 381(9) — INJURY ON TRACK — CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, an elderly man whose eyesight was not shown to be bad, and whose hearing did not appear to be more defective than usual with men of his age, who, while in a safe place between two of defendant's tracks on a bright, clear day, attempted to cross the track in front of a fast passenger train, and was struck and killed, was guilty of contributory negligence defeating a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1293; Dec. Dig. — 381(9).]

Appeal from Circuit Court, Gallatin County.

Action by John C. Taylor's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, with direction to grant defendant a new trial.

Robt. B. Brown, of Warsaw, and Benjamin D. Warfield, of Louisville, for appellant. Botts & Perry, of Owenton, for appellee.

TURNER, J. On May 17, 1913, appellee's intestate, John C. Taylor, a man 68 years of age, was struck at or near Sparta, in Gallatin county, by one of appellant's fast north-bound passenger trains and killed. In this action by his administrator for damages because of the alleged negligence of appellant which caused his death a verdict for the plaintiff for \$2,000 was returned, upon which judgment was entered, and the company has appealed. As we have concluded that the directed verdict asked for by appellant should have been given on the trial below, it is unnecessary to consider any other question.

At the point of collision there were two railroad tracks running parallel with each other, the main track upon which the north-bound train was running and a switch track. At that place the center of the switch track was 13 feet from the center of the main track, which left a space of something over 7 feet between the east rail of the main track and the west rail of the switch track. Just before the accident the decedent was walking south between the two tracks, and nearer to the switch track, and the train was coming north, so that he was facing it. There was a curve south of the point of collision around which the north-bound train came, and from the place where decedent was struck a train could be seen for a distance of 594 feet as it came around that curve. The decedent at the time was staying at the house of his son-in-law, which was only a short distance west of the main track, and there was a pathway leading off from the main track to this house. As he walked south in between the two tracks the main track was between him and the house of his son-in-law, to which place he was evidently bound.

The plaintiff on the trial did not introduce any witness who saw the train strike the decedent, but did introduce one witness who saw the decedent just before the accident walking south between the two tracks, and whose evidence is entirely in harmony with the evidence of the only eyewitness to the collision subsequently introduced by the defendant.

The engineer, who occupied a position in his cab on the outside of the curve, did not see the decedent at all, but the fireman, who was maintaining a lookout from his side on the inside of the curve, being the only eyewitness to the collision, testified that after they came around the curve he saw the decedent walking south between the two tracks in a place of perfect safety and on the east side of the main track, but that for an instant his view was obstructed by the front of the engine, and when he again saw the decedent he was on the west side of the main track right at the rail, and the train was right on him.

As before stated, the home of the decedent's

son-in-law, at which he was then staying, was on the west side of the track, and it is perfectly apparent from the whole evidence and from the map on file that he saw the train as it came around the curve, he at the time facing the train and being between the two tracks in a place of safety, but concluded that he could cross the main track to his place of destination before the train reached there. There is no evidence in the record to show that his eyesight was bad or to show that his hearing was more defective than is usually the case with men of his age. He was facing the train, it was a bright clear day, and between 10 and 11 o'clock in the morning, and there is no explanation of the collision upon any other theory than that he mistakenly assumed that he could cross the track safely in front of the approaching train.

The case of *L. & N. R. R. Co. v. Trower's Adm'r*, 131 Ky. 539, 115 S. W. 719, 20 L. R. A. (N. S.) 380, was where the decedent had been intrusted with a mail bag to be placed on a local train. Instead of the local approaching, as he thought, a special train running at a high rate of speed was coming, and he saw it and attempted to cross the track in front of it, and was killed. The court, after an extensive review of the authorities, said:

"So long as we have the rule of law which makes contributory negligence a defense, instead of measuring the results of the negligence of the defendant and that of the injured party, and fixing liability in proportion of one to the other, the rule must be applied that he whose negligence is the proximate cause of the injury is one at fault in law, and is the loser. Appellant's negligence in running its train too fast by the station was not the proximate cause of the intestate's death. His own negligence in going upon the track with knowledge of the defendant's negligence, or rashly or recklessly ignoring its negligence and 'taking chances,' was the proximate cause of his injury; for but for it appellant's negligence would have been harmless as to him. In all the cases cited where the fact was undisputed that the injured party knew of the train's approach, and heedless of it, or miscalculating the results, went upon the tracks just in front of the train, a recovery was denied. From these authorities we gather the principle of law to be that it is such negligence for one to go upon the railroad track just in front of a rapidly approaching train, which he sees or knows to be then coming in, that for his injuries inflicted by it he cannot recover from the railroad company, not because it was free from negligence, but because his own negligence was the immediate and nearest cause of his injury."

In the case of *L. & N. R. R. Co. v. Fentress' Adm'r*, 166 Ky. 477, 179 S. W. 418, the decedent knew that the train was approaching, and ran down the track toward the station so as to board it when it stopped. There were two tracks, and he erroneously assumed that the train was approaching from the rear on the side track while he was on the main track. The court in that case referred to and approved the *Trower's Case*, above quoted, and denied a recovery.

In this case, as in the two cases referred to, it is unnecessary to determine whether the company or its agents were guilty of negligence. The undisputed facts and all fair inferences deducible from them show unmistakably that the decedent, with knowledge of the train's approach, placed himself in a place of danger, but for which the collision would not have occurred.

That class of cases in which one is suddenly placed in a dangerous position by the negligence of the defendant, and who is compelled to immediately choose between two methods of extricating himself from the danger, and chooses the wrong method, and is injured when he would not have been if he had chosen the other, has no application. In this case the decedent was in a safe place between the two tracks, and voluntarily placed himself in a dangerous position by attempting to cross the track in front of the approaching train.

The motion for a directed verdict should have been sustained, and the judgment is reversed, with directions to grant appellant a new trial and for further proceedings consistent herewith.

COMMONWEALTH v. ADKINS.

(Court of Appeals of Kentucky. April 14, 1916.)

1. BASTARDS §36 — BASTARDY LAWS — PROCEEDINGS—JURISDICTION.

Under Ky. St. §§ 167-169, allowing the mother of a bastard born in the state to proceed against the father in the county of the birth, proceedings by her in another county are void, and the courts have no jurisdiction therein.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 91-97; Dec. Dig. §36.]

2. BASTARDS §44—APPEARANCE—JURISDICTION ACQUIRED—OVER CAUSE OF ACTION.

In a bastardy proceeding void because brought in the wrong county, a general appearance by defendant before making objection to the jurisdiction does not waive the objection that the court has no jurisdiction of the subject-matter, under Civ. Code Prac. §§ 92, 118, allowing objection to jurisdiction by a special demurrer, answer or other pleading, and providing that failure so to object waives objections, except to jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 115-117; Dec. Dig. §44.]

Appeal from Circuit Court, Pike County.

Bastardy proceedings by the Commonwealth against Nelson Adkins. From judgment sustaining special demurrer, the Commonwealth appeals. Affirmed.

E. J. Picklesimer and J. S. Cline, both of Pikeville, for the Commonwealth. Roscoe Vanover, of Pikeville, for appellee.

HURT, J. This was a proceeding in the name of the commonwealth of Kentucky, for the use and benefit of Orpha Branham, and her bastard child, under chapter 10, Kentucky Statutes, against Nelson Adkins to require him to contribute to the support of the

illegitimate child of Orpha Branham, of which Adkins was accused of being the father. The warrant, which was issued by the clerk of the Pike county court, charged the appellant with being the father of the illegitimate female child of Orpha Branham, which was born on the 11th day of November, 1913, in Letcher county, Ky. Adkins, on the 26th day of September, 1914, being before the judge of the Pike county court, executed bond for his appearance before that court, as required by section 168 of Kentucky Statutes. The record does not show any order to have been made in the case at the October term of the county court, but at the December term, 1914, the appellee obtained a continuance of the case, and at the January term the appellee filed a special demurrer to the proceedings, upon the ground that the Pike county court did not have the jurisdiction of the subject-matter of the action. The county court sustained the demurrer and dismissed the proceedings. The appellant appealed from the judgment of the county court to the Pike circuit court. Upon a hearing in the circuit court, the demurrer was sustained, and the cause dismissed, and from this judgment the commonwealth, by the county attorney, has brought the case to this court upon appeal.

The grounds relied upon for reversal of the judgment of the circuit court and county court are that the court erred in adjudging that the Pike county court did not have jurisdiction of the subject-matter of the action, and, furthermore, erred in adjudging that the appellee did not waive his right to object to the jurisdiction of the court by entering his appearance to the warrant and obtaining a continuance of the case at the December term of the county court before filing his special demurrer.

[1] This character of action is a special proceeding and is in the nature of a civil action, and is governed by the provisions of chapter 10 of the Kentucky Statutes. Sections 167, 168, and 169 of the statute, *supra*, provide that an unmarried woman may go before the clerk of the county court of the county wherein she has been delivered of a bastard child, or of the county of her residence if she was delivered thereof in another state and accuse any person of being the father of the child. If the child appears to be less than three years of age, the clerk is directed to issue a warrant for the individual accused of being the father, requiring the person accused to be arrested and brought before the county judge of the county wherein he may be found, who shall require him to execute bond for his appearance to answer the charge in the county court of the county in which the warrant issued. If the person accused fails to give the bond required of him, the judge shall commit him to the jail of the county where the warrant issued and to remain until he enters into the re-

quired bond or be discharged by due process of law. Section 172, Kentucky Statutes, provides that the fact that the child was delivered in another state shall be no cause for dismissing the warrant if the mother be a bona fide resident of this commonwealth at the time the child was begotten or born. From these requirements of the statute it appears that where a bastard child is born in this state, the county of the residence of the mother of the child does not control the venue of the action, which may be instituted against the father to require him to contribute to the support of the child or the assistance of the mother in maintaining it. It is only when a bastard child is born in another state of a mother who has a residence in the state of Kentucky, when the child is begotten or when it is born, who may institute a proceeding against the father in the courts of the county of her residence. The provisions of the statute, *supra*, confers jurisdiction upon the court of the county wherein the child is born, only, and not upon the court of the county of the residence of the mother, for the purpose of determining who may be the father of the illegitimate child and to require him to contribute to its maintenance. In the proceedings at bar, the warrant expressly charges that the child was born in Letcher county, and hence there is no provision of the statutes which authorizes the mother to institute a prosecution against the father in any other county than the one in which she was delivered of the child. Hence the county court and the circuit court did not have jurisdiction to hear and determine the action, and the clerk of the Pike county court was without authority to issue a warrant for the accused.

[2] The contention that the appellee, by entering his appearance to this action and asking for a continuance of the case until another term, waived his right to object to the jurisdiction of the Pike county court, is not well made. Section 92 of the Civil Code provides that a special demurrer may be made as an objection to a pleading which shows: (1) That the court has no jurisdiction of the defendant or of the subject of the action; or (2) that the plaintiff has not legal capacity to sue; or (3) that another action is pending in this state, between the same parties, for the same cause; or (4) that there is a defect of parties, plaintiff or defendant.

Subsection 4 of section 92, *supra*, provides that if either of the above-mentioned grounds are shown to exist by a pleading, it is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing so to make it. Likewise section 118 of the Civil Code provides that a party may, by an answer or other pleading, make any of the objections which are mentioned in section 92, which are not shown by the pleading of his

adversary, and a failure so to do is a waiver of any of said objections, except that to the jurisdiction of the court of the subject of the action. Hence it appears that a defense, to the merits of an action is a waiver of the right to object because of the court's want of jurisdiction over the person of the defendant, and wherever the court has jurisdiction of the subject-matter, the objection for want of jurisdiction over the person of the party may be waived by consent; but where the court has no jurisdiction of the subject-matter, the consent of the parties cannot give jurisdiction to it. *Fidler v. Hall*, 2 Metc. 461; *Barton v. Barton*, 80 Ky. 212; *Hughes v. Hardesty*, 13 Bush, 364; *Baker v. L. & N. R. R. Co.*, 4 Bush, 619.

In the case at bar the jurisdiction which the Pike county court did not have was that over the subject-matter of the action, and hence the failure of the appellee to demur to the warrant until after having entered his appearance and sought a continuance of the case was not a waiver of his right to object to the jurisdiction of the court of the subject-matter of the action.

The judgment is therefore affirmed.

RICE & HUTCHINS' CINCINNATI CO. v. J. W. CROGHAN & CO.

(Court of Appeals of Kentucky. April 12, 1916.)

1. PRINCIPAL AND AGENT §111(5)—POWERS OF AGENT—TRAVELING SALESMAN.

A mere traveling salesman, with authority to solicit orders subject to his principal's approval, has no power, without special authority, to make a contract postponing the payment of debts due his principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 331, 376; Dec. Dig. §111(5).]

2. PRINCIPAL AND AGENT §22(1)—POWERS OF AGENT—EVIDENCE—DECLARATIONS OF AGENT.

Neither his agency nor its scope can be established by the mere declarations of the agent as to either.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. §22(1).]

3. PRINCIPAL AND AGENT §21—POWERS OF AGENT—TESTIMONY OF AGENT.

An agent is a competent witness to prove his agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 39; Dec. Dig. §21.]

4. PRINCIPAL AND AGENT §20(1)—POWERS OF AGENTS—EVIDENCE—ADMISSIBILITY.

Any evidence to prove agency, direct or indirect, is admissible, although not full and satisfactory.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 87; Dec. Dig. §20(1).]

5. PRINCIPAL AND AGENT §111(5)—POWERS OF AGENT—COLLECTION OF DEBTS.

A traveling salesman's instructions held to authorize him to extend the time of payment of a debt due his principal by a dissolving partnership.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 331, 376; Dec. Dig. §111(5).]

Appeal from Circuit Court, Fayette County.

Action by the Rice & Hutchins' Cincinnati Company against J. W. Croghan & Co. From judgment for defendants, plaintiff appeals. Affirmed.

Williamson & Adams, of Lexington, for appellant. J. A. Edge, of Lexington, for appellees.

HURT, J. Previous to February 6, 1913, J. W. Croghan, James Redfern, and Mrs. Lucy Elkins were partners, conducting the business of merchants in Lexington, Ky., under the style of J. W. Croghan & Co. At this time the partnership owed debts to various persons, aggregating the sum of about \$4,500. Among its creditors was the appellant in this case, to whom it owed something over the sum of \$900, but its largest creditor was Brandt & Lear, of Cincinnati, Ohio, which was the same place at which the appellant was engaged in business. Another creditor of the partnership was the Manty Manufacturing Company, of Cincinnati, Ohio. Dissensions grew up between the partners, which rendered it impracticable to longer continue the partnership, and resulted in a suit between the partners, in which one or the other sought the appointment of a receiver for the business and assets of the partnership and a closing out of its business by the receiver. J. W. Croghan called up the firm of Brandt & Lear by telephone and informed it of the trouble in which the partnership was involved, and requested the firm of Brandt & Lear to send a representative to Lexington to assist in making some arrangements by which J. W. Croghan & Co. might continue in business and to make some adjustment of the matters in dispute between the partners.

The appellant had in its employ a traveling salesman, whose name was Schwenbeck, who had been accustomed for several years to solicit trade for the appellant and to sell its goods in the territory in which Lexington is situated, and he had, on numerous occasions, made sales of goods for the appellant to J. W. Croghan & Co., and had received payment from them for purchases of goods which he had sold them. Schwenbeck was in Lexington on the 5th day of February, 1913, and called upon J. W. Croghan & Co., where he received information of the trouble in which the partnership was involved, and, it occurring to him that the appellant ought to have notice of the condition of affairs, called up appellant by telephone and informed it of the troubles of J. W. Croghan & Co., and inquired what he should do about it. He was informed by appellant that it would advise him, as to his course, by telegram, letter, or otherwise. George Lear, of the firm of Brandt & Lear, when he received information as to the trouble in which J. W. Croghan & Co. were involved, and the request to

came to Lexington to assist in adjusting its affairs more satisfactorily, interviewed the appellant in regard to the matter by telephone. On the 6th of February Lear came from Cincinnati to Lexington, and on the morning of the same day Schwenbeck received a telegram from the appellant, directing him to call at the hotel and to see Lear. Schwenbeck went immediately to the hotel, where he found Lear, who was expecting him, and after they conferred as to what steps should be taken, they proceeded to have a conference with J. W. Croghan. When Schwenbeck met Lear at the hotel, Lear informed him that he was authorized to act for his own firm of Brandt & Lear and appellant and the Manty Manufacturing Company. After their conference with J. W. Croghan, they met representatives of Redfern and Mrs. Lucy Elkins, when the following arrangements were agreed upon: Mrs. Elkins agreed to purchase Redfern's interest in the partnership, and to execute to him a note for \$2,650, and to pay to him at least \$12.50 per week until the debt should be satisfied, and to release him from any obligation to pay any part of the debts of the partnership by assuming the payment of them herself, and to secure the note which she gave him for his interest in the business by a mortgage upon all the assets and effects then in the hands of the partnership or thereafter to be acquired by it. This agreement was reduced to writing, and signed by Redfern and Mrs. Elkins; and J. W. Croghan gave his consent to the arrangement in writing, which he signed, and at the same time another writing was prepared, by which Brandt & Lear, and appellant agreed to release Redfern from any obligation to pay any portion of the debts which they held against the partnership, and to hold him harmless against any attack which might be made by any existing creditor upon the mortgage which Mrs. Elkins was to execute to Redfern, and further agreed to the execution of the mortgage to Redfern by Mrs. Elkins to secure the amount which she had agreed to pay him for his interest in the partnership and its assets. This writing was signed by Brandt & Lear, per George Lear, and the name of appellant was subscribed thereto by Schwenbeck. The appellees J. W. Croghan and Mrs. Elkins also claim that at the same time the transactions, above stated, were had, in consideration of the agreement by Croghan and Mrs. Elkins to release Redfern from any obligation to pay any part of the debts of the partnership, and to assume their payment themselves and the purchase of Redfern's interest by Mrs. Elkins, and the execution of the mortgage to him and the payment to him of \$2,650 for his interest in the partnership, at the rate of \$12.50 or more per week, and the further agreement on the part of Croghan and Mrs. Elkins to pay the debts to the various creditors of the firm, other than Redfern, at the rate of \$150 or

\$200 per week, the appellant and Brandt & Lear agreed to not require the payment of the indebtedness owing to them until after the indebtedness to the other creditors of the firm and that due to Redfern should be paid. This alleged agreement was not reduced to writing, and the making of it is denied by the appellant.

In a short time after these arrangements had been effected, the appellant filed a suit against Redfern, Croghan, and Mrs. Elkins, seeking to recover of them the debt which the firm of J. W. Croghan & Co. owed it. Redfern filed an answer, in which he relied upon the agreements above stated as a defense, and Croghan and Mrs. Elkins answered, setting up the transactions above stated, and as a defense pleaded that the debt of appellant was not due, because of the agreement which it had made to postpone the collection of its debt until after the other indebtedness of the partnership had been satisfied. The appellant, by reply, denied the making of any agreement with either Redfern, or either of appellees, as alleged by them, and denied the authority of Schwenbeck to make any agreement for it. The case came on for trial in March, 1914, but before this time the appellant dismissed its action against Redfern, and proceeded against Croghan and Mrs. Elkins alone. The appellees admitted owing the debt sued for to the appellant, and the only defense was that the debt was not due, as under the terms of the alleged agreement, which they had with appellant, the debt was not yet due. The trial resulted in a verdict of the jury and a judgment of the court in favor of appellees. The court, upon the trial, held that the burden of proof was upon the appellees, and at the conclusion of the testimony offered by them, the appellant moved the court to direct the jury to return a verdict in its behalf, and at the conclusion of all the evidence renewed its motion to that effect, but the motions were overruled by the court, to which the appellant excepted.

The grounds relied upon by appellant for reversal of the judgment are that the court erred in the admission of incompetent testimony prejudicial to it, and in overruling its motion for a direct verdict in its behalf.

[1] It is insisted for appellant that there is no evidence conducing to show that Schwenbeck or Lear had authority from appellant to make the agreements relied upon by appellees as a defense. The evidence does not admit of any doubt that the appellees, in entering into the arrangements, by which the interest of Redfern was purchased and they assumed the burden of all the indebtedness of the partnership, acted in perfect good faith, and with full reliance upon the authority of Lear and Schwenbeck to make the agreement for their principals and to bind them, since at the time of the trial, they had paid Redfern about one-half of the debt owing to him, and had paid all of the other

creditors, except Brandt & Lear and appellant, the entire amounts owing to them, and which amounted to the sum of about \$3,000, and had paid to appellant and Brandt & Lear, each, the sum of \$250 upon the debts owing to them. It cannot be contended that Schwenbeck, as a mere traveling salesman, with authority to solicit orders for the sale of goods from customers, and which orders the appellant might approve or disapprove, had any authority to make for appellant the contract relied upon by appellees. It was necessary that he should have special authority from appellant before it could be bound by a contract entered into by him for appellant to postpone the collection of its debts, until the other creditors should be paid.

[2, 3] It is also true, as insisted by appellant, that neither the authority of an agent, nor the scope of his agency, can be established by the mere declarations of the agent as to his authority or the extent of it. *Huffcut on Agency*, § 137; *B. & O. S. W. R. R. Co. v. Clift*, 142 Ky. 575, 134 S. W. 917; *Peyton v. Woolen Mills Co.*, 122 Ky. 361, 91 S. W. 719, 28 Ky. Law Rep. 1303; *L. & N. R. R. Co. v. Byrley*, 152 Ky. 85, 153 S. W. 36, Ann. Cas. 1915B, 240; *White Plains Coal Co. v. Teague*, 163 Ky. 110, 173 S. W. 360; *Edmiston v. Hurley*, 90 S. W. 259, 30 Ky. Law Rep. 557; *Dieckman v. Weirich*, 73 S. W. 1119, 24 Ky. Law Rep. 2340. The agent, however, is a competent witness to prove his agency, or to prove the existence of facts from which his agency can be inferred. In 31 Cyc. 1650, it is said:

"The testimony of the agent is competent to establish the fact of his agency, at least where the authority was verbally conferred; and to refuse to allow him to testify and be cross-examined is reversible error. It is held, likewise, that the testimony of the alleged agent is competent to negate the existence of the agency."

This doctrine is upheld in *Peyton v. Old Woolen Mills Co.*, supra, and in *Bruen v. Grahn*, 5 Ky. Law Rep. 312. In 2 C. J. § 689, it is said:

"The rule that the declarations of an agent are, as against his principal, inadmissible to prove the fact of his agency does not apply to his testimony as a witness on a trial in which such fact is in issue, and consequently the testimony of an agent, unless he is disqualified for some other reason, is competent to establish the fact of his agency, and the existence of facts from which the agency may be inferred, at least where the authority was verbally conferred."
* * *

Hence the testimony of the alleged agent, Schwenbeck, was properly admitted by the trial court, in proof of the existence of facts from which his agency could be inferred.

[4] It is true, there was no direct proof of the agency of Schwenbeck, in the case at bar, but agency is a fact, and can be proven in any way by which any other fact may be proven, and—

"any evidence which is otherwise competent that has a tendency to prove or disprove agency or the authority of an agent is admissible, even

though it is not full and satisfactory, as it is the province of the jury to pass upon it, and it follows from the several ways in which an agency may be created that the evidence of the appointment may be either direct or indirect." 2 C. J. § 688.

[5] It was proven by Humphreys, an officer of appellant, that Lear conferred with him in regard to the affairs of J. W. Croghan & Co. as soon as Croghan had informed Lear of the troubles of the partnership, and requested him to come to Lexington. It was proven by Schwenbeck that on February 5th, when he learned of the embarrassment of Croghan & Co., that he at once conferred with appellant and requested to be advised what to do in the premises and appellant informed him that it would advise him by telegram, letter, or otherwise. Lear came to Lexington on the day following, and Schwenbeck received a telegram from appellant, directing him to go to the Phoenix Hotel and see Lear. Lear was there and looking for him. He asked Lear what appellant said about it, and Lear informed him that he had authority to act for appellant, and directed Schwenbeck to enter into the arrangements for appellant, which were consummated on that day with the partners of J. W. Croghan & Co. The fact that Lear was expecting Schwenbeck shows, beyond dispute, that he had previous information that Schwenbeck would call upon him, and the fact that Schwenbeck had requested directions from appellant in regard to the matters, and had been informed that appellant would advise him, and then directed him to go and meet Lear at the hotel, is evidence tending strongly to prove that appellant sent the message to Schwenbeck by Lear which it had promised Schwenbeck, and which invested him with authority as its agent to act for it in the premises and it was communicated to him by Lear. Although Lear was a resident of Cincinnati, the appellant does not offer his evidence to prove that it did not confer authority upon Schwenbeck, through Lear, to make the contract with appellees. That Schwenbeck, who was a trusted employé of appellant, concluded from all the circumstances that he had authority to make the contract there is no doubt. Humphreys testified, it is true, that it did not give authority to Lear, nor to Schwenbeck, to make the contract relied upon by appellees, but only agreed to assist in investigating the condition of Croghan & Co. He fails to explain why he directed Schwenbeck to go to Lear for directions, or to explain what investigations were necessary, or what he hoped from any investigations. Without reciting all the facts in evidence, in addition to the ones enumerated, which tend to prove the agency of Schwenbeck, the evidence was such, in our opinion, as to justify the submission to the jury of the question as to whether or not appellant had authorized Schwenbeck to make the contract relied upon for it. The evidence was such that an agency such as

is contended for could be inferred from it. The issue was submitted by instructions, of which there is no complaint, to the jury, which found from all the facts and circumstances in evidence that the agency was created by appellant, and that the making of the contract was within the scope of the authority conferred. The evidence is sufficient to support the verdict.

Hence the judgment is affirmed.

BARKER v. ILLINOIS SURETY CO.

(Court of Appeals of Kentucky. April 12, 1916.)

1. APPEAL AND ERROR ⇨485(1) — SUPERSEDEAS—EFFECT.

The effect of a supersedeas is to preserve the status in quo pending the appeal; it is not retroactive, and does not undo what has already been done, and destroys no rights acquired by the judgment, but merely suspends those rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264, 2265, 2267; Dec. Dig. ⇨485(1).]

2. SUBROGATION ⇨7(1) — PRINCIPAL AND SURETY.

A surety who has paid the debt of his principal is at once subrogated to all the rights, remedies, securities, liens, and equities of the creditor for the purpose of obtaining his reimbursement from the principal debtor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 24, 29, 77, 88, 92; Dec. Dig. ⇨7(1).]

3. PRINCIPAL AND SURETY ⇨97—DISCHARGE OF SURETY—CHANGE IN OBLIGATION.

Where a creditor without the consent of his surety does any act which in the contemplation of the law alters the surety's liability, increases his risk, or deprives him of the right to pay the debt and assume the position of creditor, or of his right to seek indemnity, the surety is thereby absolutely discharged, even though not actually injured, and whether the property released was sufficient to discharge the whole debt or not.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. ⇨97.]

4. APPEAL AND ERROR ⇨1227—BOND—DISCHARGE OF SURETY—CHANGE IN OBLIGATION—LOSS OF RIGHT AGAINST PRINCIPAL.

The sureties on an appeal bond will be released from the necessity of satisfying an affirmed judgment by the act of the obligee done with the fraudulent intention of preventing them from exonerating themselves from the property of the principal judgment debtor, or by any act of the obligee having that effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4736-4748; Dec. Dig. ⇨1227.]

5. APPEAL AND ERROR ⇨1227 — BOND — RIGHTS OF SURETY—LIEN—ACCRUAL.

The right of a surety on a supersedeas bond executed by a debtor against whom plaintiff had obtained a judgment for the keeping of stock to the benefit of the plaintiff's valid lien on the stock accrued when the appeal bond was executed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4736-4748; Dec. Dig. ⇨1227.]

6. APPEAL AND ERROR ⇨1227 — BOND — RIGHTS OF SURETY — RELIANCE ON JUDGMENT FOR PRINCIPAL.

A surety on a supersedeas bond staying proceedings on a personal judgment against the principal for the keeping of stock had the right to rely on the security afforded by the judgment and on the implied agreement of the judgment creditor that he would not deprive it of such security, and, where he on his own initiative shipped the stock out of the state to the principal, the defendant in such action thereby depriving the surety of the right to enforce the judgment lien, the surety was released, not pro tanto, but entirely.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4736-4748; Dec. Dig. ⇨1227.]

7. ANIMALS ⇨26(5)—AGISTER'S LIEN—JUDGMENT.

In such action the agister holding a judgment against the principal, if holding the stock as agent of the commissioner to sell, might turn it over to the commissioner, or, if holding the stock as an individual and unable to keep it, might apply to the court to make other provision for its keep.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 66-69; Dec. Dig. ⇨26(5).]

Appeal from Circuit Court, Carroll County.

Action by R. M. Barker against the Illinois Surety Company. Judgment dismissing the petition, and plaintiff appeals. Affirmed.

Smith & Greene, of Carrollton, Turner & Turner, of New Castle, and F. O. Greene, of Carrollton, for appellant. Winslow & Howe and Arthur W. Cox, all of Carrollton, for appellee.

OLAY, C. R. M. Barker brought suit against Alfred Von Cotzhausen to recover certain amounts alleged to be due for the keep of four stallions, thirteen mares, and four yearling colts. On final hearing he was awarded a personal judgment against Von Cotzhausen for the sum of \$1,849.91, and a lien on the stock to secure the payment thereof. The master commissioner was directed to take charge of and sell the stock, or so much thereof as might be necessary, and apply the proceeds to the payment of plaintiff's debt, interest and costs. In the event it was not necessary to sell all of the stock, he was to turn the remainder over to Von Cotzhausen. The commissioner advertised the stock for sale, but left it in the possession of Barker until the day of sale. Before the sale was made Von Cotzhausen executed a supersedeas bond with the Illinois Surety Company as surety, and a supersedeas was issued directing Barker and the officers of the court to stay proceedings. The judgment below was affirmed on appeal. Von Cotzhausen v. Barker, 154 Ky. 624, 157 S. W. 1093.

On the filing of the mandate below Barker brought this suit against the Illinois Surety Company to recover on the supersedeas bond. Besides other defenses, which it is not necessary to notice, the surety company pleaded, in substance, that at the time the appeal bond

was executed all the stock upon which plaintiff was adjudged a lien was in his possession; that after the execution of the bond plaintiff, without the knowledge and consent of the defendant, shipped the stock outside of the state, thereby altering and changing the liability of the defendant and depriving it of the right to pay the judgment and be subrogated to plaintiff's lien. In his reply plaintiff pleaded that he retained the stock in his possession as agent for the master commissioner; that on the execution of the supersedeas bond he shipped the greater part of the stock to Von Cotzhausen, the owner, who lived in Wisconsin, and the stock was received by Von Cotzhausen. A demurrer was sustained to the reply, and the petition dismissed. Plaintiff appeals.

[1] The effect of a supersedeas is to preserve the status in quo pending the appeal. It is not retroactive in effect. It does not undo what has already been done. It destroys no rights acquired by the judgment. It merely suspends those rights. Runyon v. Bennett, 4 Dana, 599, 29 Am. Dec. 431; Hey v. Harding, 78 S. W. 136, 25 Ky. Law Rep. 1454; Johnson v. Williams, 82 Ky. 45; Newman's Pleading & Practice, § 682. It therefore follows that plaintiff's lien on the stock was not discharged by the supersedeas, but remained in full force pending the appeal.

[2] A surety who has paid the debt of his principal is at once subrogated to all the rights, remedies, securities, liens, and equities of the creditor for the purpose of obtaining his reimbursement from the principal debtor. Hill v. Flemming, 128 Ky. 201, 107 S. W. 764, 32 Ky. Law Rep. 1065, 16 Ann. Cas. 840; Ryan v. Logan Co. Bank, 132 Ky. 625, 116 S. W. 1179, 119 S. W. 768; Dine v. Donnelly, 134 Ky. 776, 121 S. W. 685; Lewis' Adm'r v. U. S. Fidelity & Guaranty Company, 144 Ky. 425, 138 S. W. 305, Ann. Cas. 1913A, 564; Dunlap v. O'Bannon, 5 B. Mon. 398; Smith v. Latimer, 15 B. Mon. 75; Joyce v. Joyce, 1 Bush, 474; Fleming v. Beaver, 2 Rawle (Pa.) 129, 19 Am. Dec. 629; Hawpe v. Bumgardner, 106 Va. 91, 48 S. E. 554.

[3] It is also the rule that, if the creditor, without the consent of the surety, does any act which, in contemplation of the law, alters the surety's liability, increases his risk, or deprives him even for a moment of the right to pay the debt and assume the position of creditor, or of his right to seek indemnity, the surety is thereby discharged, and the fact that the surety may not have been actually injured is immaterial. Calloway v. Snapp, 78 Ky. 561. In many of the states the surety is released pro tanto, or entirely, according to the value of the security released, but in this state any agreement or active interference by an obligee whereby the surety may be injured releases him absolutely, and it is not material whether the property so released was sufficient to discharge the whole

debt or not. Sneed's Executor v. White, 3 J. J. Marsh. 525, 20 Am. Dec. 175.

[4] Accordingly it is held that the sureties on an appeal bond will be released from the necessity to satisfy an affirmed judgment by an act of the obligee which is done with the fraudulent intention of preventing them from exonerating themselves from the property of the principal judgment debtor, or by any act of the obligee which has that effect. 2 Cyc. 949; Dill v. Cecil, 4 Bush, 579; Atkinson v. Fitzpatrick, 60 S. W. 516, 22 Ky. Law Rep. 1364; United States Fidelity & Guaranty Co. v. Boyd, 94 S. W. 35, 29 Ky. Law Rep. 598.

[5, 6] In the case under consideration, Barker had a valid lien on the stock, which was not discharged or in any wise affected by the supersedeas. The surety company's right to the benefit of this lien accrued when the appeal bond was executed. Nelson v. Williams, 22 N. C. (2 Dev. & B. Eq.) 118; Forbes v. Jackson, L. R. 19 Ch. Div. 615; Dixon v. Steel, 70 L. J. Ch. N. S. 794. As a part of the contract of suretyship it had the right to rely on the security afforded by the judgment, and on the implied engagement of plaintiff that he would not, by an act of his, deprive it of such security. Plaintiff, while alleging that he held the stock as agent for the master commissioner, does not claim that he sent the stock out of the state to the judgment debtor in pursuance of any order or direction of the commissioner. In other words, he acted without authority and on his own initiative. The result is that by his own act and fault he deprived the surety of the right to take his place and enforce the judgment lien on the greater portion of the stock. Under the circumstances the surety was released not pro tanto but entirely.

[7] This view is attacked on the ground that it imposes too great a burden on a poor man who might not be in a position to keep the stock, or to obtain reimbursement out of the stock because the judgment lien exceeded its value. The answer to this contention is that, if he holds the stock as agent for the commissioner, he may turn it over to the commissioner. If he holds the stock as an individual, and for any reason is unable to keep the stock, he may apply to the court to make other provisions for its keep. As the judgment conforms with the views herein expressed, it follows that it is correct.

Judgment affirmed.

PEMBERTON v. PEMBERTON.

(Court of Appeals of Kentucky. April 13, 1916.)

1. DIVORCE ~~6-286~~—APPEAL—REVIEW—SCOPE. Although there is no power to reverse a decree of divorce, the appellate court may consider

the evidence to determine whether or not alimony was properly awarded.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.]

2. DIVORCE § 238—ALIMONY—GROUNDS FOR REFUSAL.

In a suit for divorce and alimony, where it appeared that defendant drank to excess, the fact that the plaintiff had reprimanded him for drinking will not deprive her of the right to alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 670-672, 703; Dec. Dig. § 238.]

3. DIVORCE § 240(5)—ALIMONY—EXCESSIVE ALIMONY.

In a suit for divorce and alimony where the family consisted of plaintiff, defendant, and defendant's infant son by a former marriage, and where the defendant had a net estate of \$22,000, with an expectancy of equal value, and plaintiff had no property, an allowance of \$5,000, or less than one-fourth of the defendant's actual estate, as alimony is not excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 678, 680; Dec. Dig. § 240(5).]

4. DIVORCE § 182 — RELIEF — EXPENSES OF WIFE—"PENDENCY."

Under Civ. Code Prac. § 424, and Ky. St. § 2121, empowering the circuit court to grant the wife maintenance during the pendency of an action for divorce and alimony, since an action is pending whether in the circuit court or in the appellate court on appeal the circuit court has power to grant maintenance pending the appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. § 182.]

For other definitions, see Words and Phrases, First and Second Series, Pending.]

5. DIVORCE § 215 — EXPENSES OF WIFE — MAINTENANCE PENDING APPEAL.

In a suit for divorce and alimony, where the wife is without means of support, maintenance in the sum of \$30 per month pending an appeal was not excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 632-634; Dec. Dig. § 215.]

6. DIVORCE § 231—PLAINTIFF'S ATTORNEY'S FEE.

In an action for divorce and alimony by agreeing to dispense with proof and let the chancellor determine the amount of the plaintiff's attorney's fee, defendant's counsel did not waive right to appeal from the chancellor's decision.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 765; Dec. Dig. § 231.]

Appeal from Circuit Court, Hopkins County.

Action by Lucy Pemberton against Henry Pemberton. Judgment for the plaintiff, and defendant appeals. Reversed.

Laffoon & Waddill and Jonson & Jennings, all of Madisonville, for appellant. Gordon & Gordon & Cox and Virgil Y. Moore, all of Madisonville, for appellee.

CLAY, C. In this action for divorce and alimony Lucy Pemberton against her husband, John Henry Pemberton, plaintiff was granted a divorce and awarded alimony in the sum of \$5,000. She was also awarded the sum of \$30 per month as maintenance, pending this appeal, and her attorney's fees were fixed at \$750. Before the appeal was

perfected the defendant died, and, by agreement, the action was revived in the name of his administratrix.

Appellant insists that plaintiff was not entitled to alimony, that the fee allowed her attorneys is excessive, and that the chancellor was without authority to award her maintenance pending the appeal.

[1] While we have no power to reverse the decree of divorce, we may, nevertheless, consider the evidence and determine whether or not alimony was properly awarded. Beall v. Beall, 80 Ky. 675; Evans v. Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. Law Rep. 628; Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1.

[2] It would serve no good purpose to set out at length the evidence bearing on the relations of the parties. We have examined the record with great care and conclude that the charge of cruel and inhuman treatment is not only made out by the testimony of plaintiff's witnesses, but is, in a large measure, sustained by the admissions of the defendant himself. It clearly appears that defendant drank to excess, and while in this condition, and occasionally when sober, he abused and handled his wife in a very rough and offensive manner and took advantage of numerous opportunities to humiliate her when in the presence of her friends. While defendant's evidence tends to show that his wife took delight in picking a fuss with him and frequently beat him with clothes brushes and other articles, we are not inclined to place much credence in these statements. It does not appear reasonable that a man, whose temper was such that he would disconnect the telephone wires and drive his wife from the telephone merely because he was irritated by the fact that she talked too long, and who weighed about 180 pounds, would submit to a beating at the hands of his wife, who weighed only about 110 pounds. While it may be that she reprimanded him when he was drinking, this is certainly a privilege which the law will not deny to the wife under such circumstances, or hold that it constitutes such a grievous fault on her part as to deprive her of the right of alimony.

[3] We shall next consider whether or not the alimony allowed was reasonable. At the time of the award defendant's estate had a net market value of about \$22,000. Besides this, he had an expectancy of equal, if not greater, value. He (plaintiff) and an infant son by a former marriage were the only members of his family. Plaintiff had no property of any kind. It therefore appears that the allowance made plaintiff was less than one-fourth of the estate which he actually owned. Under these circumstances, we cannot say that the allowance is excessive.

[4-6] The further point is made that the chancellor was without authority to award plaintiff maintenance pending the appeal. Both by the Civil Code and by the statutes

the circuit court is empowered to grant the wife maintenance during the pendency of an action for divorce and alimony. Civil Code, § 424; Kentucky Statutes, § 2121. An action is pending whether in the circuit court or here on appeal. We therefore conclude that the circuit court has the power to grant maintenance pending the appeal. This view is sustained by the weight of authority. *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885; *State v. District Ct.*, 31 Mont. 511, 79 Pac. 13; *Maxwell v. Maxwell*, 67 W. Va. 119, 67 S. E. 379, 27 L. R. A. (N. S.) 712; 1 R. C. L. § 20, p. 882. Since plaintiff was without means of support, we conclude that the chancellor did not err in allowing her maintenance in the sum of \$30 per month pending the appeal.

Lastly, it is contended that the fee allowed plaintiff's attorneys is unreasonable. It appears that plaintiff's counsel offered to submit proof on the question, but defendant's attorneys announced to the court that they were willing for the court to fix the amount of the attorney's fee from his knowledge of the record gained from the trial of the cause, and on submission of the motion for an allowance the chancellor fixed the fee at \$750. By agreeing to dispense with the necessity for proof and to let the chancellor determine the amount of the fee from his knowledge of the record, defendant's counsel did not waive defendant's right to appeal from the chancellor's decision. This court, therefore, has the right to consider the same record and determine whether or not the fee allowed is reasonable. After carefully examining the record and giving due consideration to the character and extent of the services which it shows that plaintiff's attorneys rendered, as well as to the amount of property involved, we conclude that the allowance of \$750 is excessive. On the return of the case the chancellor will fix the fee at \$400 as full compensation for all services performed by plaintiff's counsel.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

RAMEY et al. v. FRANCIS, DAY & CO.

(Court of Appeals of Kentucky. April 13, 1916.)

1. EXECUTORS AND ADMINISTRATORS — SALE OF LAND—VACATING ORDER—FAILURE TO CONFIRM.

The fact that the commissioner sold all the lands of a decedent to pay his debts without first offering to sell a part, and that his report of sale was never confirmed, does not justify setting aside the judgment ordering the sale, since the order of confirmation is separate from the order for sale and itself an appealable final order, and until it is entered the validity of the sale is still before the lower court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1448; Dec. Dig. § 348.]

2. EXECUTORS AND ADMINISTRATORS — SALE OF LAND—VACATING ORDER—GROUNDS.

That the petition to sell lands of a decedent to pay his debts did not state the amount of the debt, or that the land was not subject to sale for the debts, or that the debts were not proper proof as claims against the estate, does not authorize vacating the order for sale on motion of parties who were before the court when the order was entered.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1448; Dec. Dig. § 348.]

3. PROCESS — 164(3)—SUMMONS—AMENDMENT OF RETURN.

Under Civ. Code Prac. § 49, providing that an erroneous return of summons may, with leave of the court, be amended according to the truth, the chancellor can permit a sheriff to amend his return of summons in a suit to sell real estate of a decedent to pay his debts, so as to show service on two of the defendants who were in fact served, but were not shown by the return to have been served.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 245, 246; Dec. Dig. § 164(3).]

4. PROCESS — 147—SERVICE—EVIDENCE—PROOF OUTSIDE THE RECORD.

Under Civ. Code Prac. § 670, providing that the clerk shall enter in full on the docket the return of the officer executing a summons, and that the entry shall be evidence of the service if lost, where the record is silent as to whether a summons that was issued was returned, proof may be heard to supply the record, and, if such proof shows that the summons was actually served and the defendants present in court, the judgment will not be set aside.

[Ed. Note.—For other cases, see *Process*, Dec. Dig. § 147.]

5. APPEAL AND ERROR — 1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error, if any, in admitting evidence outside the record to show service of summons is harmless, where the defendants summoned were in court at the hearing, and under Civ. Code Prac. § 756, forbidding reversals for errors in prejudicing the substantial rights of the parties, does not require a reversal, since parties not served are entitled to relief against a judgment only if they were not present when it was rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. § 1050(1).]

6. EXECUTORS AND ADMINISTRATORS — SALE OF LAND—VACATING ORDER—IMPEACHING RETURNS.

Under Ky. St. § 3760, providing that unless in a direct proceeding against himself or his sureties no fact officially stated by an officer in respect of a matter about which he is required by law to make a statement shall be called in question, except for fraud or mistake, an order for the sale of a decedent's real property to pay his debts cannot, in the absence of the showing of fraud or mistake, be set aside as to two defendants who were shown by the sheriff's returns to have been summoned, though the court found that the summons was not, in fact, served on them.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1448; Dec. Dig. § 348.]

7. EXECUTORS AND ADMINISTRATORS — SALE OF LAND—VACATING ORDER—PARTIES.

A purchaser of land from a grantor who bought it at the commissioner's sale to pay the debts of a decedent is a necessary party to a motion to set aside the order for sale for fraud

or mistake of sheriff in returning a summons as served on two defendants, who were not, in fact, served.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1448; Dec. Dig. § 348.]

Appeal from Circuit Court, Knott County.

Suit by Francis, Day & Co. against Sam Ramey and others to have land owned by a decedent sold to satisfy his debts. From a judgment setting aside the order of sale as to two of the defendants and affirming as to the rest, the defendants appeal, and plaintiffs file a cross-appeal. Affirmed on the original appeal, and reversed on the cross-appeal.

H. T. Bailey, of Hindman, for appellants.
Smith & Combs, of Hindman, for appellees.

CLARKE, J. On March 2, 1912, appellees, who were creditors of John Ramey, deceased, filed this suit in the Knott circuit court against the widow, the ten children, and the administrator of said John Ramey, all of whom are appellants here, alleging that said decedent died intestate, the owner and in possession of a small tract of land that is described; that he left no personal property; that he left debts due appellees in the sum of ——— dollars. Two summons and thirteen copies were issued, and a guardian ad litem was appointed for two of the children who were infants, by an order entered by the clerk in vacation, in which it is recited that said infants had theretofore been served with summons, but upon what date this order was made by the clerk does not appear in the record.

The master commissioner, pursuant to an order of reference, advertised for claims against said decedent's estate, and upon the date fixed, having received the claims of appellees, and no other, at the next term of court filed a report allowing these claims against said estate, although from the report itself it is apparent that the claims were not properly proven. The report at a subsequent day of said term, no objections thereto having been filed, was confirmed, the guardian ad litem filed his answer, and, the case being submitted, the court on July 27, 1912, entered a judgment directing a sale by the master commissioner of a sufficiency of the land to pay said claims and costs. At a subsequent term of court the master commissioner reported that he had sold the whole of said land for the sum of \$146, the amount of the debt, interest and costs, without stating whether or not bids were requested at the sale for the amount of the debts, interest, and costs for a less quantity than the whole of the land. The record does not show that the sale was ever confirmed, that a deed was ever made to the purchaser, or that anything else was ever done in the case until on July 16, 1914, when appellants filed the following motion in said action to vacate and set aside the judgment:

"The defendants, Sam Ramey, Kenas Ramey, Bob Ramey, George Ramey, Charlie Ramey, Willie Ramey, Katherine Ramey-Thacker, Margarette Conley, Hannah Conley, Martha Conley, Mary Conley, Christenna Ramey, and K. J. Day, administrator, move the court that this cause of action be redocketed, and the judgment rendered against them herein at the July term of the Knott circuit court, 1912, recorded in Order Book No. 8, on page 301, and the commissioner's deed executed by James Stamper, the commissioner to Kelley J. Day and H. C. Francis, placed upon said judgment, be vacated, set aside, and canceled, because these defendants were not before the court at the time the judgment was rendered against them.

"(2) Because the master commissioner's report was never confirmed by the court.

"(3) Because the petition on which the judgment was rendered did not state a cause of action against these defendants, and that the action was instituted to settle the estate of John Ramey, deceased, and the petition did not disclose the amount of the deceased's indebtedness to either of the parties, that is, of either of the plaintiffs in the action, nor did it disclose the value of the real estate owned by the deceased, John Ramey, at the time of his death, in which they were seeking to sell to satisfy plaintiffs' claims therein.

"(4) Because the land sought to be sold in the action was only worth about \$350, and that at the time of John Ramey's death he left a widow and two infant children who were residing upon the land sought to be sold at the time this suit was instituted, and that same was all of the property owned by the deceased, John Ramey, at the time of his death.

"(5) Because the plaintiffs in this action failed to prove their claims against the deceased, John Ramey, as required by law, and the court had no right to enter judgment for the plaintiffs unless the claims were properly proved.

"(6) Because the master commissioner sold the whole of said tract of land to satisfy plaintiffs' demands, without offering to sell a part of same to satisfy plaintiffs' claim, and for the reasons above stated the judgment rendered herein is absolutely void, and that the sale and master commissioner's deed executed under the said judgment are void.

"Wherefore the plaintiffs pray the judgment of the court."

On November 18, 1914, appellants moved to redocket the case and set aside the judgment. On March 12, 1915, appellees moved the court to permit the ex-sheriff to amend his return on the summons, which motion was sustained by the court, but the amended return is not in the record.

The return of the officer upon the summons stated that the summons had been executed upon all but two of the defendants to said suit. The court, after hearing testimony upon the question whether or not the defendants were before the court when the original judgment was rendered, entered a judgment adjudging that the two defendants, who by the record were shown not to have been summoned, had been summoned in fact, and were before the court when the judgment was entered, but that three of the defendants in said action, who by the return on the summons were shown to be before the court, had not been summoned in fact, and were not before the court when said judgment was rendered; and the court thereupon set aside and held for naught the judgment,

sale, and deeds to the purchaser and his vendee, in so far as same affected the interests of the three appellants whom the court held had not been summoned when the judgment was entered, but holding said judgment, sale, and deeds valid and binding against the other parties to said action. It will be seen from this judgment that a deed had been made to the purchaser, and that the purchaser had conveyed the land to another, who is not a party hereto.

Appellants are appealing from so much of said judgment as held valid the former judgment, sale, and deeds to said land, and appellees have been granted in this court a cross-appeal from so much of said judgment as held invalid and set aside said former judgment, sale, and deed so far as same affect the interest of Martha Conley, Charley Ramey, and Willie Ramey who were held not to have been before the court when the judgment was entered.

The first reason assigned in the motion to set aside the original judgment in this case is the only one of the six set out in said motion that present any difficulties, and is the only one that seems to have been considered in the lower court or that is seriously argued here; so, for convenience, we will leave it until the last, and first dispose of the others in their order.

[1] 1. The second reason assigned in said motion is that the master commissioner's report of sale was never confirmed by the court. It is true that the record does not show that this report was ever confirmed, or that deed was ever made to the purchaser of the land, but those facts do not constitute ground for setting aside the judgment ordering the sale. The validity of a sale is distinct from the validity of the judgment (*Bean v. Haffendorfer*, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. Law Rep. 739), and an order confirming or refusing to confirm a sale is a final order and appealable (*Dawson v. Litsey*, 10 Bush, 408; *Kincaid v. Tutt*, 88 Ky. 392, 11 S. W. 297, 10 Ky. Law Rep. 1006; *Allen v. Graves*, 3 Bush, 491; *Hughes v. Swope*, 88 Ky. 254, 1 S. W. 394, 8 Ky. Law Rep. 256). The trial court has not yet disposed of this question, and until it does the validity of the sale is not here. The same condition exists with reference to the sixth ground assigned.

[2] 2. The third, fourth, and fifth reasons assigned in said motion, if true, would not render the judgment void, and are not grounds for setting aside the judgment upon motion in the trial court, and, if the parties were before the court, they are precluded by the judgment as to each of these matters, and cannot now complain thereof.

[3] 3. The first reason assigned in said motion to set aside the judgment is that the defendants were not before the court at the time the judgment was rendered against them. The officer's return upon the summons in the record shows that summons had been executed upon all of the defendants ex-

cept Kenas Ramey and Bob Ramey; that a guardian ad litem had been regularly appointed for the two infant defendants, Charley Ramey and Willie Ramey, after service of the summons upon them, and that he had filed his answer.

The record further shows that two sets of summons had been issued by the clerk when the petition was filed, and that but one of said summons was to be found in the papers. Upon this question the court permitted evidence to be introduced on behalf of all of the parties, from which it was shown that a summons was executed by another officer upon the two appellants not served by the officer who made the return on the summons, but that, if the officer who executed the summons upon them ever made return thereof, the same had been lost.

Appellants contend that it was error for the chancellor to permit the officer to amend his return so as to show that Kenas and Bob Ramey had been summoned, or to hear proof whether or not they were, in fact, before the court, when they did not show they had been summoned, but there is no merit in this contention. It has long been the rule in this state and generally that an officer may amend his return upon leave of court even after judgment and after his term of office expires. Section 49 of the Civil Code; *Irvine v. Scobee*, 5 Litt. 70; *Newton v. Prather*, 1 Duv. 100; *Thompson v. Moore*, 91 Ky. 80, 15 S. W. 6, 12 Ky. Law Rep. 664; *Tyler v. Jewell*, 11 S. W. 25, 10 Ky. Law Rep. 887; *Russell v. Durham*, 29 S. W. 16, 16 Ky. Law Rep. 516; 32 Cyc. 537; 23 Cyc. 872.

[4] And, where the record is silent as to whether a summons that was issued was returned, proof may be heard to supply the record, as it is provided by section 670 of the Civil Code that the clerk shall enter in full upon the docket the return of the officer executing a summons, and that the entry shall be evidence of the service if lost. And it has been held by this court that the entry is merely secondary evidence (*Robinson v. Mobley*, 1 Bush, 196; *Jones v. Edwards*, 78 Ky. 6), and entitled to more weight than the recollection of the defendant and officer (*Lemming v. Mullins*, 6 Ky. Law Rep. 523; *Chandler v. Inman*, 140 Ky. 786, 131 S. W. 789; 32 Cyc. 540; *Slatton v. Jonson*, 4 Hayw. [Tenn.] 197; *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25; *Doty v. Deposit Building & Loan Ass'n*, 108 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. Law Rep. 625, 43 L. R. A. 551, 554).

[5] In the instant case two sets of summons were issued, and but one returned, as appears from the record. From the proof heard upon the trial of the motion it was shown that Kenas and Bob Ramey were actually served with summons, presumably from the set not returned or returned but lost. They were present at the trial of the motion, and did not testify, no doubt, be-

cause they would have had to admit the summons had been executed upon them. Clearly the chancellor did not err in refusing to set aside the judgment as to them; and, even if it had been error, which it was not, for the chancellor to hear proof to supply, not contradict, the record, they were not prejudiced thereby, because they were entitled to the relief sought only if, in fact, they were not before the court when the judgment was rendered. Civil Code, § 756.

[6] 4. Appellees complain on the cross-appeal that it was error for the lower court to set aside the judgment as to Martha Conley, Charley Ramey, and Willie Ramey, who were before the court on the record when the judgment was entered.

Section 3760 of the Kentucky Statutes provides:

"Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

This is not a direct proceeding against the officer or his sureties, and there is no allegation of fraud upon the part of the parties benefited or of mistake upon the part of the officer.

It therefore results that the verity of the return of the officer showing that all of the defendants had been summoned except Kenas Ramey and Bob Ramey could not be called in question in this proceeding, except upon the ground of fraud or mistake, and that the lower court erred in setting aside the judgment as to Martha Conley, Charley Ramey, and Willie Ramey in the absence of a showing of fraud or mistake. 32 Cyc. 517; *Barbour v. Newkirk*, 83 Ky. 529; *Utter v. Smith*, 80 S. W. 447, 25 Ky. Law Rep. 2272; *Byers v. First State Bank, etc.*, 150 Ky. 135, 166 S. W. 790; *Pribble v. Hall*, 13 Bush, 61; *Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135; *Shoffet v. Menifee*, 4 Dana, 150; *Thomas v. Ireland*, 88 Ky. 581, 11 S. W. 653, 11 Ky. Law Rep. 108, 21 Am. St. Rep. 356; *Doty v. Deposit Building & Loan Ass'n*, 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. Law Rep. 625, 43 L. R. A. 551, 554.

Statements in the opinions in *Francis v. Lilly's Ex'r*, 124 Ky. 236, 98 S. W. 996, 30 Ky. Law Rep. 391, and *Duff v. Combs*, 132 Ky. 710, 117 S. W. 259, contrary to the plain provisions of section 3760 of the Statutes are mere dicta, and are disavowed.

[7] And, even if fraud or mistake had been asserted, the vendee of the purchaser of the land was a necessary party, entitled to notice and to be subrogated to the rights of the purchaser at the sale, the purchase money having been used to pay the debts and costs against the estate of the decedent, John

Ramey, from whom appellants inherited the land subject to these charges.

Wherefore the judgment is affirmed on the original and reversed on the cross appeal for proceeding consistent herewith.

SIZEMORE'S ADM'R v. LEXINGTON & E. RY. CO.

(Court of Appeals of Kentucky. April 14, 1916.)

1. RAILROADS — 357 — OPERATION — INJURIES TO PERSONS ON TRACK — DUTY AS TO TRESPASSERS.

The rule, requiring those operating railroad trains to anticipate the presence of persons on the right of way and to maintain a lookout for them and give warning of the movements of trains, is confined to cities or thickly populated communities, and does not extend to rural communities or sparsely settled places, though the tracks at those places may be used by a large number of persons.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1235; Dec. Dig. — 357.]

2. RAILROADS — 359(1) — OPERATION — INJURIES TO PERSONS ON TRACK — DUTY AS TO TRESPASSERS.

A railroad's servants in charge of a train owe a trespasser on the right of way no duty other than ordinary care to avoid injuring him after discovery of his peril.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1238; Dec. Dig. — 339(1).]

3. RAILROADS — 372(4) — OPERATION — INJURIES TO PERSONS ON TRACK — RATE OF SPEED.

The rate of speed of a train is immaterial to the question of the railroad's liability for injuries to a trespasser.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1271, 1272; Dec. Dig. — 372(4).]

4. RAILROADS — 355(1) — OPERATION — INJURIES TO PERSONS ON TRACK — LOOKOUT AND SIGNALS.

That a railroad accident occurred within 100 feet of a public crossing does not affect the right of recovery against the railroad, since the duty of maintaining a lookout or giving signals at crossings is not for the benefit of persons on other parts of the right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1220, 1223, 1227, 1235; Dec. Dig. — 355(1).]

5. RAILROADS — 398(4) — OPERATION — INJURIES TO PERSONS ON TRACK — EVIDENCE.

In an action for the death of a person on a railroad track, evidence held to show that the train operatives, though maintaining a lookout, could not have prevented the accident after discovering the presence of the decedent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1360, 1361; Dec. Dig. — 398(4).]

6. RAILROADS — 381(5) — OPERATION — INJURIES TO PERSONS ON TRACK — CONTRIBUTORY NEGLIGENCE.

Where a person 47 years of age of average intelligence, without defect of vision or hearing, walking between the rails of a railroad track, paid no attention to repeated blasts of the train whistle and was struck and killed, his contributory negligence bars recovery for his death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1290; Dec. Dig. — 381(5).]

Appeal from Circuit Court, Perry County.

Action by A. B. Sizemore's administrator against the Lexington & Eastern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

F. J. Eversole, Hogg & Johnson, and Miller & Wheeler, all of Hazard, for appellant. Wootton & Morgan, of Hazard, Samuel M. Wilson, of Lexington, and Benjamin D. Warfield and Charles H. Moorman, both of Louisville, for appellee.

SETTLE, J. A. B. Sizemore was run over and killed November 10, 1912, by a work train owned by the appellee, Lexington & Eastern Railway Company, and operated by its servants. The accident occurred near the village of Krypton, in Perry county, and at a point about 100 feet from where a county road crosses the railroad track. The administrator of the decedent's estate sued in the Perry circuit court to recover damages for his death, alleging in the petition that it was caused by the negligence of appellee's servants in charge of the work train. The answer of the appellee denied the negligence charged in the petition, and alleged contributory negligence on the part of the decedent, and the latter plea was controverted by reply. On the trial the circuit court, after the introduction of the appellant's evidence, on appellee's motion, peremptorily instructed the jury to return a verdict for the latter, which was accordingly done. From the judgment entered upon that verdict this appeal is prosecuted.

At the time of the accident appellee's railroad had not been completed, but had been in operation to Krypton and for some distance beyond for about six months. No permanent station or depot had then been established at Krypton, but trains operated on the road were stopped at a temporary station in use there. About a quarter of a mile west of Krypton appellee's railroad track is crossed by a county road, and the decedent was admittedly killed at a point 100 to 110 feet west of the road crossing in question. Whether he was then returning to Krypton from Glenn, a store and post office on the railroad three-fourths of a mile west of the crossing, or from a church near Glenn, at which religious services were being held on that day (Sunday), does not appear from the evidence; but the evidence does show that he was walking on the railroad track and between the rails thereof at the time he was overtaken and killed by the train. Between Glenn and the road crossing near which the decedent was killed the railroad track passes through a deep cut known as the Campbell cut, the eastern end of which terminates about 200 yards from the crossing near which the accident occurred, but between the end of the cut and the crossing there is a long sharp curve upon a heavy fill, the fill being constructed over the Campbell creek near its

mouth. Between the crossing and the mouth of the cut there is no roadway paralleling the railroad track, but there was another traveled way contiguous to the railroad track which could be used, and was used, by persons in going from Krypton to Glenn and from Glenn to Krypton. There were, perhaps, a half dozen families and residences between Krypton and Glenn, but none of these residences were situated immediately upon the railroad.

[1] Several of appellant's witnesses testified that persons in passing between Krypton and Glenn frequently, and even daily, walked appellee's railroad track. They differed, however, as to the number of persons using the track, the estimate ranging from 10 to a larger number daily; that of one witness, the appellant, being that it was probably used by 100 people daily. But it was neither alleged in the petition, nor shown by the evidence, that such use of appellee's railroad track, between the points mentioned, was necessary, was assented to by it, or had continued such a length of time as shows appellee's acquiescence therein. In other words, the evidence fails to show such use of appellee's track at the place of the accident as imposed upon it, in operating its trains, the duty of anticipating the presence of persons thereon, or of maintaining a lookout for them and giving warning of the movements of the trains. The rule requiring these precautions upon the part of those operating railroad trains is confined to cities or thickly populated communities, and cannot be extended to rural communities, or sparsely settled places, although the tracks at those places may be used by a large number of persons. *C. & O. Ry. Co. v. Nipp's Adm'r*, 125 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131; *L. & N. R. Co. v. Redmon's Adm'r*, 122 Ky. 385, 91 S. W. 722, 28 Ky. Law Rep. 1293; *Miller's Adm'r v. I. C. R. Co.*, 118 S. W. 348; *Cumberland R. Co. v. Walton*, 166 Ky. 371, 179 S. W. 245.

There are, however, some other cases—such as *Chesapeake & O. R. Co. v. Warnock's Adm'r*, 150 Ky. 75, 150 S. W. 29; *Corder's Adm'r v. C., N. O. & T. P. Ry. Co.*, 155 Ky. 536, 159 S. W. 1144; *C. & O. Ry. Co. v. Dawson's Adm'r*, 159 Ky. 296, 167 S. W. 125—in which it was held that the question whether the party injured was a mere trespasser or a licensee must depend, not upon the fact whether the accident happened in an incorporated city or town, but on the number of persons using the track at the place of the accident, and, further, that the question should be left to the decision of the jury under a proper instruction from the court; but as in the instant case the evidence failed to show such use of appellee's track as imposed upon it, while operating its train, the duty of anticipating the presence of persons on it at the place of the accident, or of maintaining a lookout for them and giving warning of the movements of the train, there was

no reason for submitting this question to the jury.

It is, however, apparent from appellant's evidence that appellee's servants in charge of the train on the occasion in question, in operating it, exercised all the care that could have been required of them had the deceased been a licensee. Practically all the witnesses agreed that the engine whistle was blown either as the train approached the cut or after it entered it. Jack Hibbard, an eyewitness to the killing of the decedent, testified that when the train came out of the cut it sounded the whistle three times, the deceased then being about 30 or 40 yards ahead of it, but that the latter kept walking along the track and seemed to pay no attention to the whistle or noise of the train; that the train was composed of an engine, tender, two cars and a caboose, one of the cars, a flat, being in front of the engine. The witness further testified that when the train came in sight Rowlan, appellee's brakeman, was standing on the front end of the flat car ahead of the engine, and that the engineer was, at the same time, maintaining a lookout from his cab; that Rowlan made signals with his hand, and as the car got close decedent attempted to strike him with his hat; but whether the signals given by Rowlan with his hand were intended for the engineer or decedent the witness was unable to say. The whistling of the train while in the cut or approaching it was evidently for the crossing near which the decedent was killed, and the three blasts heard by Hibbard after it emerged from the cut must have been given to warn the decedent of the danger he was in from the train; and, if so, while the train could not have been stopped within the 30 or 40 yards intervening between the flat car and the decedent, the latter could, if he had heeded the signal, have stepped from the track in time to save his life. The testimony of Hibbard is corroborated in all essential particulars by that of Isaac Hamden, the only other witness, besides Hibbard, who had the decedent directly in view when the train struck him. There was a diversity of statement among appellant's witnesses as to the speed of the train at the time of the accident, but it is evident from the evidence as a whole that its speed was not so great as to be unusual or unsafe in approaching a crossing.

[2-4] If at the time he was struck and killed by the train the decedent was a mere trespasser upon appellee's railroad track—and such the evidence convincingly shows was his status—appellee was clearly entitled to the peremptory instruction given by the trial court. As the decedent was a trespasser, appellee's servants in charge of the train owed him no duty, other than to use ordinary care to avoid injuring him, after the discovery of his peril. It is therefore not material whether the train that killed

him gave the statutory, or any, signal of its approach to the public crossing, nor does the speed at which the train was running enter into the case. Under the circumstances attending his use of the railroad track, those in charge of the train were not required to anticipate his presence thereon, and it owed him no lookout duty. That the accident happened near—that is, within one hundred feet of—a public crossing did not add to the appellant's right of recovery. A trespasser is none the less a trespasser because struck and injured on the track near a crossing. As said in *Helton' Adm'r v. C. & O. Ry. Co.*, 157 Ky. 380, 163 S. W. 224:

"The fact that the decedent was struck by the train near the crossing furnishes no stronger ground for a recovery than if there had been no crossing."

And, as also said in *L. & N. R. Co. v. Redmon's Adm'r*, 122 Ky. 385, 91 S. W. 722, 28 Ky. Law Rep. 1293:

"While it is the duty of those in charge of trains, in approaching a public crossing, whether in a city or the country, to give the customary and necessary signals for the protection of persons having the right to use such crossing, this duty need not be performed for the benefit of trespassers who may be using the track elsewhere." *Willis' Adm'r v. L. & N. R. Co.*, 164 Ky. 124, 175 S. W. 18.

[5] It is manifest from the testimony of Hibbard and Hamden, the only witnesses who were in a position to see and know all that occurred at the time of the accident, that appellee's brakeman on the car in front of the engine and the engineer in the cab of the engine, though both were maintaining a lookout along the track in front of the train, were prevented by the walls of the cut, and the great curve in the track after leaving the cut, from seeing the decedent until the front car was within 30 or 40 yards—that is, from 90 to 120 feet—of him, and that it was impossible for the train to have been stopped within that distance before striking him. So, if it be assumed that the engineer and brakeman actually discovered the decedent's peril before the train struck him, the conclusion is inevitable from the evidence that they could not, by the exercise of ordinary care, have stopped the train in time to prevent it from striking and killing him.

[6] Giving to the appellant's evidence all the weight to which it is entitled, it nevertheless failed to show that the death of the decedent was attributable to the negligence of appellee's servants in charge of the work train, and, on the contrary, conduced to prove that it was caused by his own negligence, as it conclusively shows an absolute failure upon his part to take any precaution for his own safety. It appears from the evidence that the decedent was a strong, healthy man, about 47 years of age, possessed of average intelligence, without defect of vision or hearing. His conduct in walking on the railroad track and giving no heed to the noise of the approaching train or the whistling of its

engine, which were heard by all other persons in the vicinity of the accident, manifested a reckless disregard for his own safety that constituted negligence of the grossest character, which so contributed to his death that, but for such negligence, he would not have been killed. In brief, there is no escape from the conclusion that the decedent's death was caused solely by his own negligence; and on this ground, if no other had been shown by the evidence, the giving of the peremptory instruction, directing a verdict for appellee, was authorized.

Judgment affirmed.

WICKLIFFE MFG. CO. v. WILSON.

(Court of Appeals of Kentucky. April 13, 1916.)

1. APPEAL AND ERROR \S 1004(1)—REVIEW—VERDICT—WEIGHT OF EVIDENCE.

In an action to recover wages and expenses and a share of the profits of the business, a verdict, finding an amount of profits flagrantly against the weight of evidence, will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3944, 3946; Dec. Dig. \S 1004(1).]

2. TRIAL \S 11(2) — TRANSFER TO EQUITY DOCKET.

An action to recover wages and expenses and a share of the profits of the business should be transferred to equity, and referred to a commissioner to ascertain the state of the accounts between the parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 39; Dec. Dig. \S 11(2); Action, Cent. Dig. \S 812.]

Appeal from Circuit Court, Ballard County.

Action by Luther Wilson against the Wickliffe Manufacturing Company. Judgment for the plaintiff, and defendant appeals. Reversed, with directions.

Henry F. Turner, of Wickliffe, for appellant. J. B. Wickliffe, of Wickliffe, for appellee.

CARROLL, J. The appellee, Wilson, as plaintiff, brought this suit in ordinary against the appellant as defendant. In his petition the plaintiff stated, in substance, that in 1913 he and the defendant entered into a contract for the operation of a sawmill in Ballard county, under the terms of which the defendant was to pay him \$2.50 a day for his personal time and all expenses of every kind incurred by him in connection with the operation of the mill, and in addition to this he was to have one-half of the profits arising from the business. He claimed that the defendant was indebted to him in the sum of \$372.61 on account of wages and other sums of money paid out by him for it, and in addition thereto he claimed that the receipts of the venture amounted to \$4,472.29 and the expenses to \$3,906.48, leaving a profit of \$567.81, to one-half of which, namely \$283.90, he was entitled, making a total indebtedness

of the defendant to him \$846.61, for which he asked judgment. He filed with his petition itemized statements, showing the amount of which he was entitled for services and expenses, and the amount paid out and received in the operation of the business. The answer of the defendant, except one irrelevant paragraph to which a demurrer was sustained, was merely a denial of the averments of the petition. On the trial of the case there was a judgment in favor of the plaintiff for the full amount claimed, and the defendant appeals, asking a reversal on several grounds; but, in view of the conclusion we have reached, it will only be necessary to notice that one asking a new trial because the verdict is flagrantly against the evidence.

[1] There was sharp conflict in the evidence as to whether Wilson was employed by or had any contract with the Wickliffe Company, and as to the amount claimed by him on account of services and expenses, but on these issues there was sufficient evidence to sustain the finding of the jury that he had a contract with the company, and that it was indebted to him in the amount claimed and allowed. But the finding of the jury that there was a profit of \$283.90 in the operation of the business is flagrantly against the weight of the evidence, and for this reason the judgment will be reversed.

[2] On a return of the case we think it should be transferred to equity and referred to the commissioner to ascertain and report the state of the accounts between the parties, allowing each party to take such proof as he desires.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

NICOLL v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 14, 1916.)

1. CRIMINAL LAW \S 507(1)—EVIDENCE—ACCOMPLICE.

One who was charged in the indictment as having conspired with defendant to kill deceased is not an accomplice on whose uncontradicted testimony a conviction cannot be based under Cr. Code Prac. \S 241, where there was no evidence that he took any part in any altercation between the parties leading up to the homicide, but instead the evidence showed he had acted as peacemaker between them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1082, 1084, 1087, 1091, 1095; Dec. Dig. \S 507(1).]

2. HOMICIDE \S 341 — APPEAL — HARMLESS ERROR.

In a prosecution for murder, the failure of the court to define "malice" and "aforethought" is not prejudicial to defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 721; Dec. Dig. \S 341.]

3. CRIMINAL LAW \S 814(15)—TRIAL — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction as to the corroboration of an accomplice's testimony which failed to state that one accomplice cannot corroborate the evi-

dence of another is not erroneous, where only one of the witnesses for the prosecution was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1860, 1979; Dec. Dig. ¶ 814(15).]

4. HOMICIDE ¶ 309(3) — INSTRUCTIONS — MANSLAUGHTER—NECESSITY.

Where there was no evidence of any quarrel or altercation between defendant and deceased, or that defendant was concerned in a quarrel between deceased and another, an instruction on manslaughter is not necessary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 652; Dec. Dig. ¶ 309(3).]

Appeal from Circuit Court, Warren County.

Arm Nicoll was convicted of murder, and he appeals. Affirmed.

Chas. Drake, of Bowling Green, for appellant. M. M. Logan, Atty. Gen., and Overton Hogan, Asst. Atty. Gen., for the Commonwealth.

TURNER, J. The appellant, Judge Robinson, and Boyd Finn were jointly indicted in the Warren circuit court charged with the murder and aiding and abetting in the murder of Alfred Buford. It is charged that Nicoll, while in a conspiracy with the other defendants, and pursuant to such conspiracy, struck and wounded Buford upon his body and neck with rocks, sticks, and other deadly weapons, by which his neck was broken and from which he died. Appellant on his separate trial was found guilty, and sentenced to confinement in the penitentiary for life, and from that judgment this appeal is prosecuted.

The evidence is that the four parties named on Sunday afternoon in August, 1915, procured a one-half gallon jug of whisky in a large bottle or jug with a handle and bale on it and went on the bank of the river near Bowling Green, and there engaged in drinking the whisky and shooting craps. The place where they were so engaged was immediately on the bank of the river, where there was a small embankment. After they had consumed a large portion of the whisky some dispute arose as to the game between Robinson and the decedent, Buford. They had some two or three altercations, and were each time separated by appellant and Finn. Finally, however, decedent again assaulted Robinson, and they were clinched, when Robinson again called upon Finn to come and again take Buford away, but appellant said, "Never mind; I will stop the damn son of a bitch," and immediately struck him in the back of the neck with the whisky bottle or jug, and at the time pushed him, and he and Robinson both went over the bank into the river. Robinson managed to get out, but Buford's body never came to the surface, and was afterwards discovered with his neck broken and bruises on the back of his neck indicating that a blow had been struck there. The three survivors then agreed among themselves that they would tell that the de-

cedent was drowned while he was trying to swim across the river and back five times, as he had boasted he could do, and did tell this story; but on the trial of this case in the circuit court Robinson and Finn both told the story substantially as above recited, admitting that they had told the other story according to an agreement with the appellant.

Appellant in his own evidence substantially admits the whole story told by the other two witnesses, except that he denies he struck the decedent with a bottle or at all, and claims that Buford did come to the surface of the water. The evidence further showed that when the body was recovered that there was no water in the stomach or in the lungs.

[1] The first reason given for reversal is that the court should have directed an acquittal because there was no evidence tending to connect appellant with the commission of the crime other than that of Robinson and Finn, who were accomplices; it being provided by section 241 of the Criminal Code that a conviction cannot be had under the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and that such corroboration shall not be sufficient if it merely shows that the offense was committed. It is true that Robinson and Finn were the only two witnesses introduced by the commonwealth who were eyewitnesses to the occurrence, and, if they are in law accomplices, the contention of the appellant must be sustained. But the mere fact that one is charged in an indictment with being in a conspiracy to commit murder, and that another defendant pursuant to such conspiracy did commit murder, does not of itself make him an accomplice. The facts must determine whether or not he is an accomplice, and not the mere allegations in an indictment. As said by this court in the case of Richardson v. Commonwealth, 166 Ky. 570, 179 S. W. 458:

"In order to make one an accomplice, it is necessary that his criminal participation in the crime charged be shown by evidence."

And as said in the case of Levering v. Commonwealth, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192, 19 Ann. Cas. 140:

"The test generally applied to determine whether or not one is an accomplice is: Could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice."

There is in the evidence in this case no suggestion even that the witness Finn was ever at any time engaged in any altercation with the decedent, or that there was any conspiracy to which he was a party looking to the injury of Buford; on the contrary, all of the evidence is that throughout the whole transaction Finn was a peacemaker

and had assisted two or three times in separating Robinson and Buford, and was called upon by Robinson to again do so just before the appellant struck Buford with the bottle. From the evidence, if Finn had been on trial, either as a principal or as an accomplice, the trial court would of necessity have been compelled to direct a verdict finding him not guilty.

It therefore follows, at least as to Finn, there was no evidence showing any participation in the crime or any connection therewith such as would have in any event made him an accomplice.

[2] The contention that the court should have defined the words "malice" and "aforethought" cannot be sustained. While it may be admitted a better practice in such cases to correctly define these expressions in instructions, yet it has been frequently held not to be prejudicial to defendant, as such failure is more apt to be to the detriment of the commonwealth. *Collier v. Commonwealth*, 160 Ky. 338, 169 S. W. 740.

[3] It is further urged for appellant that the instruction given by the trial court that the defendant cannot be convicted upon the testimony of an accomplice unless corroborated by other evidence was erroneous, because it failed to say to the jury that one accomplice cannot corroborate the evidence of another so as to bring about a conviction. *Howard v. Commonwealth*, 110 Ky. 356, 61 S. W. 756, 22 Ky. Law Rep. 1845. But in this case, as we have already seen, Finn cannot properly be treated as an accomplice, and for that reason it was unnecessary to incorporate this idea in the instruction.

[4] It is finally argued that there should have been an instruction on manslaughter; but counsel cannot be serious in this contention, for there was a total lack of evidence to show that there was any quarrel or altercation whatever between appellant and the decedent prior to the time he struck him with the bottle, or that appellant was concerned in the quarrel between Robinson and Buford.

Appellant has had a fair trial, and we see no reason to disturb the judgment of the lower court, and it is affirmed.

HOUSTON et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 12, 1916.)

1. NEW TRIAL \S 117(3)—PROCEEDINGS TO OBTAIN—SAME TERM OF COURT.

Under Civ. Code Prac. \S 340, 342, a motion to vacate a verdict and judgment and file an answer cannot be treated as a motion for a new trial if not made at the term in which the judgment was rendered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 239-241; Dec. Dig. \S 117(3).]

2. NEW TRIAL \S 111 — PROCEEDINGS TO OBTAIN—PARTIES ENTITLED.

Under Civ. Code Prac. \S 340, a motion to vacate a verdict and judgment and file an an-

swer cannot be treated as a motion for a new trial, if not made by a party to the action in which the judgment was rendered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 232; Dec. Dig. \S 111.]

3. JUDGMENT \S 342(1) — VACATING — PERSON ENTITLED.

Under Civ. Code Prac. \S 518, a motion by one not a party to the action in which a judgment was rendered, to vacate the judgment and file an answer, cannot be treated as an application for the vacation of a judgment after the term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 668; Dec. Dig. \S 342(1).]

4. JUDGMENT \S 148 — BY DEFAULT — OPENING — PERSONS ENTITLED.

One not a defendant nor successor in interest of a defendant in an action in which default judgment is entered may not proceed under Civ. Code Prac. \S 414, to secure its retrial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 259; Dec. Dig. \S 148.]

5. APPEAL AND ERROR \S 518(1) — RECORD — QUESTIONS PRESENTED — PLEADINGS.

To obtain a review of a ruling refusing the filing of a pleading tendered, the pleading must be made part of the record either by order of court or bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2342, 2343, 2351, 2853, 2354; Dec. Dig. \S 518(1).]

6. JUDGMENT \S 707 — CONCLUSIVENESS — PARTIES NOT JOINED.

The rights of persons not parties nor claiming under parties to a judgment are not affected thereby.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1230; Dec. Dig. \S 707.]

Appeal from Circuit Court, Leslie County.

Motion by Emma Houston and others to vacate a judgment in favor of the Commonwealth of Kentucky. From a judgment overruling the motion, plaintiffs appeal. Affirmed.

Lewis & Lewis, of Hyden, W. L. Brown, of London, and Hazelrigg & Hazelrigg, of Frankfort, for appellants. Cleon K. Calvert, of Hyden, and Ira Fields, of Whitesburg, for the Commonwealth.

SETTLE, J. On June 10, 1911, the commonwealth of Kentucky, by Ira Fields, commonwealth's attorney of the Thirty-Third judicial district thereof, instituted in the Leslie circuit court against Horatio Nelson Sproston and others an action to forfeit, under the provisions of article 3, chapter 22, Acts of 1906, the title and claim of the numerous defendants named in the petition to a 40,000-acre survey of land situated in Leslie county, granted by the commonwealth by patent No. 47832 to one John S. Sausade, the boundary being specifically set out in the petition. The defendants were all nonresidents of this state. None of them was served with summons, but all were proceeded against by warning order and constructively brought before the court.

The ground relied on for the forfeiture of the title to the land in question was the

alleged failure of the defendants, owners thereof, to list it for taxation in or for the years 1901, 1902, 1903, 1904, and 1905. Following the filing of a report by the attorney for the nonresidents, a trial of the case was had before a jury, resulting in a verdict of forfeiture, upon which the court rendered judgment. The trial was had and judgment rendered at the February term, 1913, of the Leslie circuit court. Before entering upon the trial, however the action on motion of the plaintiff was dismissed without prejudice as to Edwin J. Houston, one of the defendants named in the caption and body of the petition and alleged therein to be a joint owner of the land sought to be subjected to forfeiture. Consequently, he was not a party to the action at the time of the trial or when the judgment of forfeiture was rendered.

Thereafter, viz., March 1, 1914, Edwin J. Houston died in the city of Philadelphia, state of Pennsylvania, testate, he being at the time a resident of that city. His will was on the 29th day of April, 1914, duly probated and admitted to record in the orphans' court of the county, city, and state of his residence. By the terms of his will the testator, after providing for the payment of his debts, devised his estate, real and personal, to his two sisters, the appellants Emma Houston and Edith L. Houston, and they, together with the Philadelphia Safe Deposit & Insurance Company, executor of the will of Edwin J. Houston, deceased, on October 7, 1914, and on the third day of the October term, 1914, of the Leslie circuit court, filed a written motion therein to vacate the verdict of the jury and judgment of the Leslie circuit court of February 14, 1913, in the action of the Commonwealth of Kentucky v. Horatio Nelson Sproston et al., forfeiting the land embraced in the 40,000-acre Sausade patent, No. 47832, notice of which motion had previously been duly served upon the plaintiffs, commonwealth of Kentucky, and Ira Fields, commonwealth's attorney. The grounds of the motion were: (1) That Edwin J. Houston became the exclusive owner of the land included in the Sausade patent in the year 1900 and was the exclusive owner thereof at the time of its attempted forfeiture by the commonwealth; that at his death the title thereto, by the provisions of his will, passed to and became vested in the appellants Emma Houston and Edith L. Houston, who are now the owners thereof; and that the other defendants mentioned in the petition in the action brought by the commonwealth were not at the time of the institution thereof, or when the judgment of forfeiture was rendered, the owners of the land or any part thereof; (2) that the land was assessed for taxation as the property of Edwin J. Houston during each of the five years mentioned in the petition, and the tax assessed for each of such years had been duly paid by Edwin J. Houston as of the

dates they were due and collectible, respectively.

At the time of making the motion to set aside the judgment of forfeiture the appellants Emma Houston, Edith L. Houston, and the Philadelphia Safe Deposit & Insurance Company, executor of the will of Edwin J. Houston, produced in open court and offered to file a petition to be made parties to the action of the Commonwealth of Kentucky v. Horatio Nelson Sproston et al., which petition they asked be taken as their joint and several answer to the petition in that case. This pleading alleged, as in the motion, the title of Emma Houston and Edith L. Houston to the land, its assessment for taxation and the payment of the tax thereon for and during each of the years it was claimed by the commonwealth the tax had not been paid, and denied the right of the commonwealth to the forfeiture prayed in its petition. The court, however, overruled the motion to set aside the verdict and judgment of forfeiture rendered in the action referred to, and refused to permit the petition and answer to be filed. These rulings are shown by the judgment then entered, and from that judgment this appeal is prosecuted.

[1,2] It will be observed that the judgment appealed from was rendered more than a year after that to forfeit the land embraced by the Sausade patent to the commonwealth. The attempt of the appellants to set aside the latter judgment cannot be treated as a motion for a new trial on any of the grounds allowed by section 340, Civil Code, for the motion was not made, as required by section 342, at the term in which the judgment was rendered, nor were the appellants or Edwin J. Houston parties to the action in which that judgment was rendered.

[3] Nor, for the latter reason, can it be treated as an application for the vacation of a judgment after the term at which it was rendered as allowed by section 518, Civil Code. In other words, one who was not a party to the action in which the judgment sought to be vacated was rendered, can have no right under either of these sections of the Code to obtain at the hands of the Court of Appeals a new trial or review of such judgment. *Jones v. Yantis*, 113 S. W. 111 (not elsewhere reported).

[4] It is, however, insisted for appellants that they were, under section 414 of the Civil Code, authorized to move for the vacation of the judgment of forfeiture and also to file the pleading offered by them at the time of making the motion. Section 414 provides:

"A defendant against whom a judgment may have been rendered upon constructive service of a summons, and who did not appear, may, at any time within five years after the rendition of the judgment, move to have the action retried; and, security for the costs being given, shall be admitted to make defense; and thereupon the action shall be retried, as if there had been no judgment; and, upon the new trial, the court may confirm the judgment or modify or set it aside, and may order the plaintiff to restore any

money of such defendant paid to him under it, or any property of the defendant obtained by the plaintiff under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored. * * *

It will be observed that this section only permits "a defendant against whom a judgment may have been rendered upon constructive service of summons, and who did not appear," to move to have the action retried. So, in attempting to proceed under this section, appellants meet with the same difficulty that would have confronted them had they proceeded under either section 340 or 518. Although appellants were and are nonresidents, as neither they nor Edwin J. Houston were defendants in the action in which the judgment of forfeiture was rendered or were constructively served with a summons therein, the right to them to proceed as attempted is not conferred by section 414 of the Code.

[5] For yet another reason we are precluded from reviewing the ruling of the circuit court in refusing to allow to be filed the petition and answer tendered by appellants at the time of making the motion to vacate the judgment of forfeiture, namely, the absence from the record of an order or bill of exceptions identifying and making a part of the record the rejected pleading. It is well settled that in order to obtain a review by the appellate court of a ruling of the inferior court refusing the filing of a pleading tendered, the pleading must be made a part of the record either by an order of the court or a bill of exceptions. *Holmes v. Robertson* County Court, 89 S. W. 106, 28 Ky. Law Rep. 283; *Dudley v. Herring*, 98 S. W. 289, 30 Ky. Law Rep. 270; *Welmer's Adm'r v. Smith*, 101 S. W. 327, 30 Ky. Law Rep. 1311; *Patrick v. Patrick*, 101 S. W. 328, 30 Ky. Law Rep. 1364; *Krish & Co. v. Ky. Jeans Clo. Co.*, 102 S. W. 803, 31 Ky. Law Rep. 436.

The conclusions we have expressed make it unnecessary for us to determine whether, as claimed by appellees, so much of section 4076d, Kentucky Statutes, as declares that the judgment of forfeiture had thereunder shall not be subject to the provisions of section 414 and other sections of the Civil Code therein mentioned, would have prevented appellants, had they or Edwin J. Houston been parties to the action in which the judgment sought to be vacated was rendered, from attacking it in the manner attempted by them.

[6] As neither appellants nor Edwin J. Houston were parties to that action or to the judgment, appellants' legal rights were in no way affected by the provision of the section, supra, or the judgment of forfeiture. If, as claimed by them, Edwin J. Houston, under whose will they obtained title to the land covered by the Sausade patent, was the owner thereof at the time the judgment of forfeiture was taken and during the years

for which it was claimed by the commonwealth the taxes had not been paid thereon, they were not deprived of their title to the land by the judgment of forfeiture; nor are they precluded thereby from yet asserting, by resorting to the proper remedy, their right thereto. It is a well-recognized rule that one not a party to an action cannot be deprived of his rights by a judgment rendered therein. *Jones v. Yantis*, 113 S. W. 111.

Judgment affirmed.

BOARD OF TRUSTEES OF HIGHLAND PARK GRADED COMMON SCHOOL DIST. NO. 46 et al. v. McMURTRY et al.

(Court of Appeals of Kentucky. April 18, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS — 158(1) — HEALTH OFFICERS — POWERS — VACCINATION.

Under Ky. St. § 2049, authorizing the state board of health to make regulations to obstruct and prevent spread of infectious and contagious diseases, and section 2055, providing for county boards of health, authorizing them to enforce the rules and regulations adopted by the state board and directing that the local board shall appoint a health officer whose duties shall be to see that the rules and regulations provided for therein and the rules and regulations of the state board of health are enforced, a rule of the state board of health that no person should become a member of a public school without furnishing a certificate that he had been vaccinated and revaccinated at least once every seven years, did not authorize the county health officer on his own volition and without express direction from either the state or county board to direct that all children attending one or more public schools should be vaccinated or denied the privilege of attending the schools.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 829; Dec. Dig. — 158(1).]

2. HEALTH — 6 — HEALTH OFFICERS — POWERS.

Under the sections aforesaid, each of the boards is charged independently with preserving the public health and taking such action as in the exercise of a reasonable discretion may be deemed necessary to suppress and prevent the spread of infectious and contagious diseases, and local boards may exercise the authority conferred upon them without the advice or consent of the state board.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 5; Dec. Dig. — 6.]

3. SCHOOLS AND SCHOOL DISTRICTS — 158(2) — HEALTH OFFICERS — POWERS — VACCINATION.

The state board of health or a county board has authority to order that school children be vaccinated or excluded from the schools when they believe there is reasonable apprehension of an epidemic, and that the vaccination of the school children is the only means by which it can be prevented.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 829; Dec. Dig. — 158(2).]

4. HEALTH — 23 — HEALTH OFFICERS — POWERS.

What boards of health shall do to prevent epidemics and how it shall be done are matters left to their sound discretion, though they cannot adopt unreasonable or arbitrary rules or regulations or, without cause, harass the public, unless they have reasonable grounds to believe that the

action is necessary to prevent or suppress the disease sought to be controlled.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 26; Dec. Dig. ¶23.]

5. INJUNCTION ¶74—BOARDS OF HEALTH—RESTRAINING UNAUTHORIZED ACTS.

Courts may restrain boards of health if they undertake to exert authority not fairly within the powers conferred by statute or plainly not needed for the purpose of conserving or protecting the health of the people or preventing the outbreak or spread of infectious or contagious diseases.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 142, 150; Dec. Dig. ¶74.]

6. HEALTH ¶68—BOARDS OF HEALTH—CONTROL BY COURTS.

The discretion lodged in boards of health in the exercise of their powers will not be interfered with, unless plainly abused.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 5; Dec. Dig. ¶6.]

7. SCHOOLS AND SCHOOL DISTRICTS ¶158(2)—VACCINATION—EPIDEMIC—SUFFICIENCY OF EVIDENCE.

In a suit to restrain a county board of health and the county health officer from enforcing an order directing the vaccination of all school children attending a school, evidence held to show a reasonable apprehension that an epidemic of smallpox might find a starting place in the school, and hence the action of the board was authorized.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 329; Dec. Dig. ¶158(2).]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Suit by the Board of Trustees of the Highland Park Graded Common School District No. 46 and others against F. L. McMurtry and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

W. S. Sanford, of Louisville, for appellants. A. Scott Bullitt, Co. Atty., and J. L. Sullivan, Asst. Co. Atty., both of Louisville, for appellees.

CARROLL, J. This suit was brought by the board of trustees of the Highland Park graded common school district against the members of the county board of health of Jefferson county and Dr. Whittenburg, the county health officer, for the purpose of enjoining them from enforcing an order directing vaccination by a day named in the order of all school children attending the graded school in question who had not been vaccinated within seven years preceding the issue of the order. After the issues had been made up, the case was submitted on the evidence and an agreed state of facts and the petition dismissed.

Section 2049 of the Kentucky Statutes, which is a part of the chapter devoted to the powers and duties of the state board of health, provides, in part, that:

"The board shall have general supervision of the health of the citizens of this state; * * * and are further empowered to make and enforce rules and regulations to obstruct and prevent the introduction or spread of infectious or contagious diseases to or within the state."

In section 2055 provision is made for the appointment of local boards of health for the respective counties in which they reside, and these county boards "are authorized and shall have power to enforce the rules and regulations adopted by the state board of health." It further provides that:

"Such local boards are empowered and it shall be their duty to inaugurate and execute and to require the heads of families and other persons to execute such sanitary regulations as the local board may consider expedient to prevent the outbreak and spread of cholera, smallpox, yellow fever, scarlet fever, diphtheria and other epidemic and communicable diseases, and to this end may bring the infected population under prompt and proper treatment during premonitory or other stages of the disease, and they are empowered to go upon and inspect any premises which they may believe are in an unclean or infectious condition, and it shall be empowered to fix and determine the location of an eruptive hospital for the county, sufficiently remote from human habitation and public highways as in its judgment is safe."

And also directs that:

"The local board shall appoint a competent practicing physician who shall be the health officer of the county and secretary of the board, whose duties shall be to see that the rules and regulations provided for in this act, and the rules and regulations of the state board of health are enforced."

In the chapter on smallpox, embracing sections 4607-4618 of the Statutes, further provision is made for the prevention and spread of smallpox and the duty enjoined on parents, guardians, and other persons having the care, custody, or control of children to have the same vaccinated.

The graded school district here in question is located in Jefferson county, outside the corporate limits of the city of Louisville, and Dr. Whittenburg is the health officer for Jefferson county appointed by the local board of health of the county, which board in turn had been appointed by the state board of health.

It further appears that the state board of health had adopted a regulation known as rule 35, reading:

"No person shall become a member of any public school within the jurisdiction of this board, as teacher or scholar, without furnishing a certificate from some reputable physician that he or she has been successfully vaccinated, and has been revaccinated at least once every seven years."

On January 10, 1916, Dr. Whittenburg, in his capacity as health officer for Jefferson county, and purporting to act by order of the Jefferson county board of health, served on each of the trustees of the graded school a notice in writing, which notice, after setting out rule 35 of the state board, recited that:

"Information has come to this office that the rules concerning vaccination in your school are not being carried out in accordance with the instructions of the board of health. * * * I expect each child enrolled to bring a certificate of successful vaccination, and file same with the teacher and principal in charge. You have at present an infection of smallpox in your imme-

diate school vicinity. * * * Vaccination must follow immediately, and certificates must be on file by the twentieth day of this month from all children who have not already complied with the above instructions. In case of failure, they must be sent home."

It appears, however, that Dr. Whittenburg issued this order or notice without having been expressly so directed to do by the county board or the state board of health; and the trustees of the graded school refusing to obey the instructions contained in the notice, the county board of health, on February 4, 1916, held a meeting and adopted a resolution reciting that:

"It appearing that there are a number of smallpox cases in Highland Park and in the vicinity of the schoolhouses in district No. 46, and that an epidemic is threatened in that neighborhood, and it further appearing that the board of trustees of the Highland Park graded common school district No. 46, and the principal of the school, willfully refused to enforce rule No. 35 adopted by the state board of health; * * * now therefore it is ordered by the county board of health that the county health officer, Dr. Whittenburg, shall take all necessary steps by taking out warrants and instituting prosecutions against said parties, to the end that the vaccination laws of the state of Kentucky and the rules and regulations of the state board of health be vigorously enforced and the lives of the school children and other residents of Jefferson county be protected."

When this resolution was adopted by the county board of health Dr. Whittenburg again notified in writing each of the school trustees to have all children attending school and not holding a certificate of successful vaccination to be sent home and not allowed to re-enter without first showing a certificate of successful vaccination from some reputable physician. This notice further directed the trustees that it must be obeyed within 24 hours after its service.

Aside from the stipulation of fact, in which it was agreed that there was a county board of health in Jefferson county composed of certain named persons, and that Dr. Whittenburg was the duly appointed health officer of the county, and that rule 35 had been adopted by the state board of health, the only evidence in the case consists of the deposition of Dr. Whittenburg. In his evidence he said, in substance, that he issued the notice of January 10th under what he conceived to be his authority as health officer of the county and without having been expressly directed to do so by either the state board of health or the county board of health. That when this notice was not obeyed, the county board of health had a meeting and adopted the resolution which was served on the trustees on February 4th. He further said that at the time of or before the issuance of the notice in January, there was a child in the graded common school district who was afflicted with smallpox, and that subsequently several other cases of smallpox developed at different places on the border line of this school district, although none of the persons afflicted lived in the school district.

Further testifying, he was asked and answered the following questions:

"Q. In your opinion, and from what you know of the situation out there, has the existence of those five cases of smallpox also caused a considerable exposure of other people to smallpox? A. Yes; I think so; there can be no question about that. Then you can't tell how far these exposures run. Q. Doctor, at the time you sent these communications about which you have testified, with reference to enforcing this rule 35 of the state board of health, was or not the smallpox situation out there dangerous, or what was the nature of the situation? A. I considered it dangerous. On one occasion here we had one infection here in Louisville, a negro man, and I followed it thoroughly through, and tried to see if I could get in touch with where there were other cases around here, and I was unable to; that I did in the state generally and that winter we had 641 cases from that one negro man. I mention this to show how it will spread where people are unvaccinated. Q. Does the presence of five cases of smallpox constitute an epidemic or create any danger of an epidemic breaking out? A. Yes; there is no question about that. Q. Doctor, from your knowledge and experience as a physician, and especially your knowledge and experience with reference to this disease of smallpox, state whether or not vaccination is a prevention of smallpox. A. It is an absolute, positive, preventive for seven years, and thereafter immunity may partially run out, and a mild form may occur later in life, the frequency of its occurring depending on the length of time from vaccination, and I have never seen any one die that had been vaccinated at any time in life, even in infancy, from smallpox. It is the only known method of preventing the disease throughout the civilized world, the only preventive of the disease indorsed by all civilized countries on earth. Q. After a period of seven years has elapsed from vaccination, does or not the efficacy of it diminish? A. Yes; you lose a part of your immunity. In some cases you do not lose any. Q. Can or not that immunity be regained by a fresh vaccination after seven years have elapsed? A. Yes; if you lose immunity, it is restored by revaccination, and a positive preventive again for the next lease or the next length of time. Q. Is it or not the generally accepted view of the medical profession that vaccination should be repeated after seven years have elapsed, at intervals of seven years? A. Yes; that is accepted by all reputable physicians. Q. Now, Doctor, though a case of smallpox is mild or may be mild, is it or not by reason of that fact any the less likely to give smallpox to other persons? A. No; I have seen them where they were in the very mildest form give it to others, of the most malignant type and die. I have seen that in my own experience. Q. Is the requirement of vaccination every seven years one which is necessary to prevent the spread of the disease? A. Yes; that is necessary to prevent the spread of it, and by following that system up we can get rid of it entirely. It is an absurd thing for a person to have smallpox. Q. What is the opinion of the medical profession as to the efficacy of vaccination? A. The medical profession stands practically as a unit on that. I have had occasion to look at that carefully, and I have never found any reputable physician opposing vaccination. I have found some few physicians that were ignorant along medical lines opposing it, but found no reputable physician opposing vaccination. Q. Now, Doctor, why would you state, as you have stated, that the presence of five cases of smallpox in the neighborhood of or adjacent to the Highland Park school district No. 46 constitutes an epidemic or imminent danger of an epidemic—why would you state that from your knowledge of the nature of the disease? A. All the epidemics that have spread here in Louisville in the last four-

teen years spread practically in the same manner; a case brought in, you know, and people not properly vaccinated, and it spread just in that way. All epidemics spread just from one case. That has been my business for the last fourteen years. Q. State what is the nature of the disease with reference to the degree of contagiousness. A. It is highly contagious, one of the most highly contagious diseases I think known to the medical profession. Q. In your opinion, did the smallpox situation in or near this school district at the time you took these steps that you have testified about, did the situation at that time in your opinion require that this rule of the state board of health be enforced? A. Yes, sir. Q. Is that the situation at present? A. Yes. Q. If such rule were not enforced would or not there be danger of a serious epidemic? A. Yes; in that vicinity. There are a good many people out there and children unvaccinated, and all the schools in the city and the rest of the county are vaccinated very thoroughly, except in one of the most distant parts of the county. Q. In your experience how many people have you vaccinated? A. Between 60,000 and 70,000. Q. Have you ever known in your experience any of them to die that you vaccinated from vaccination? A. I never knew anybody to die from vaccination per se. Q. Is or not vaccination dangerous? A. No; there is not a possible chance for anybody to die, I didn't think, from vaccination, unless they do not take the proper care of it. If there is any death at all, it will come from some infection like a scratch with a pin or something like that. A person can die from a scratch from a pin causing blood poisoning, but from vaccination there is no chance for them to die. That has been my experience. Q. Is that the general experience of the profession? A. Yes, sir."

[1] On behalf of the school trustees the argument is made that Dr. Whittenburg, in his capacity as health officer for Jefferson county, was without power or authority to demand the observance of the notice issued by him on January 10, 1916, because he had not been expressly directed by either the state board or the county board to take the action set forth in this notice, and we may first dispose of this question.

It will be noticed that under section 2055 of the statutes it is the duty of the health officer of the county "to see that the rules and regulations of the state board of health are enforced," and among the rules adopted by the state board of health was rule 35 heretofore set out, providing that no person shall become a member of any public school without furnishing a certificate that he or she has been successfully vaccinated once every seven years; and it is the contention of counsel for the local board of health that under authority of this rule and the power conferred by the statute, Dr. Whittenburg, as health officer, independent of any action on the part of the local board, had power to take the action set out in the notice of January 10th.

The health officer of the county is primarily the agent and executive officer of the local board, and is charged with the duty of enforcing such rules and regulations as the state board or the county board may adopt within the scope of the powers conferred upon them by the statute. But we are not prepared to say that without express authority

from either the state board or the county board the health officer would have power to take the responsible action assumed to be exercised in this notice of January 10th. It is quite a serious matter to order, as was done in this notice, that all of a great number of children attending a public school shall be vaccinated within a certain time or denied the privilege of attending school, and we are inclined to the view that before the health officer undertakes to demand the enforcement of a preventive regulation like this affecting so many people, he ought to have express authority so to do from either the state or the county board.

We do not of course mean to hold that before the health officer can act in any case he must be armed with express authority from one of these boards, because many matters might come up in connection with the duties of his office that he should be permitted to perform, in the exercise of a sound discretion and within the scope of his general authority, without having the express sanction of either the state or county board.

And so we do not think it would be wise or prudent to attempt to describe in detail the things a health officer may or may not do without the express direction of one of these boards. Sufficient for the purpose of this case is it to say that in our opinion it would be investing the health officer with more authority than was contemplated by the statute if he should be given the power on his own volition to direct that all children attending one or more public schools should be promptly vaccinated or else denied the privilege of attending the school. *Taylor v. Adair County*, 119 Ky. 374, 84 S. W. 209, 27 Ky. Law Rep. 36; *Hickman County v. Scarborough*, 150 Ky. 1, 149 S. W. 1116.

So far, however, as the questions arising in this case are concerned, it is not important whether Dr. Whittenburg did or did not have the authority attempted to be exercised at the time he gave the notice of January 10th, because subsequent to this, and after having been expressly directed by the county board so to do, he gave the notice of February 4th, and we may assume that the lower court, in dismissing the petition of the school trustees, considered that they were under a duty to enforce compliance with this last notice. And as this notice was given by direct authority of the local board of health, the principal question in the case is: Did the local board have power to direct the action set forth in this notice to be taken?

Counsel for the school board insist that neither the state board nor the county board of health had authority to adopt or enforce a regulation requiring the vaccination of school children as a condition precedent to their right to attend the public schools of the state. It is further contended in this behalf that there was not an epidemic or a threatened epidemic of smallpox in the Highland

Park graded school district at the time of the issue of the order of February 4th.

In disposing of these questions we will not stop to discuss the question raised that vaccination is not a safe and valuable preventive from smallpox. There may be some difference of opinion as to its efficacy, but the weight of medical authority supports the view that it is not only a safe, but a valuable, preventive. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.

[2] Nor is it necessary to determine whether the action was taken under rule 35 of the state board or by the directors of the local board under the power vested in it. Each of these boards is charged independently with preserving the public health and with taking such action as in the exercise of a reasonable discretion may be deemed necessary to suppress and prevent the spread of infectious or contagious diseases. The only substantial difference in their powers, in respect to taking such measures as may be necessary to conserve the health of the people of the state that the state board is invested by the statute with larger power and greater jurisdiction than the local boards. But the local boards may under the statute exercise the authority conferred upon them without asking the advice or the consent of the state board. So that the adoption of rule 35 by the state board was not necessary to confer upon the local board the power attempted to be exercised, as set forth in this notice, if the conditions were such as to justify the county board in adopting this method of preventing and suppressing the spread of smallpox in the school district.

[3] We are further of the opinion that the language of the statute is broad enough to confer on the state board and the local boards the authority to issue an order such as the one here in question when they believe there is reasonable apprehension of an epidemic of smallpox in a school district, and that the vaccination of the school children is the only means by which it can be prevented.

It is true that the precise questions as to the power of these boards to make vaccination a condition precedent to attendance upon the public schools when there is a reasonable apprehension of an outbreak of smallpox and in the judgment and discretion of the board it is necessary to require the vaccination of school children, has not heretofore come before this court, but it has frequently been adjudicated by other courts, and the uniform ruling is that when there is reasonable apprehension of the outbreak of a communicable disease such as smallpox, health boards have authority to take such action as was here directed. *State v. Zimmerman*, 86 Minn. 353, 90 N. W. 783, 58 L. R. A. 78, 91 Am. St. Rep. 351; *Blue v. Beach*, 155 Ind. 121, 56 N. E. 80, 50 L. R. A. 64, 80 Am. St. Rep. 195; *Duffield v. Williamsport*

School District, 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152; *Morris v. Columbus*, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, 66 Am. St. Rep. 243; *State v. Hay*, 126 N. C. 999, 35 S. E. 450, 49 L. R. A. 588, 78 Am. St. Rep. 691; *Bissell v. Davison*, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; *People v. Board of Education*, 234 Ill. 422, 84 N. E. 1046, 17 L. R. A. (N. S.) 709, 14 Ann. Cas. 943.

And although we have no direct statutory direction on this subject, a reasonable construction of the liberal powers conferred by the statute in the creation of these boards would imply a grant of authority to adopt in reference to public schools such measures as were here taken. Indeed, it would be extremely unfortunate if the Legislature had limited the power of these boards in respect to dealing with situations such as this, or if the court should restrain them from taking such measures as might be by them deemed necessary to prevent an outbreak and epidemic of this disease in public schools, because there is scarcely any place where an outbreak of smallpox would spread with more rapidity or over a wider territory than if it found a starting place in one of the public schools attended by hundreds of children.

[4, 5] The argument is made that this construction gives to these boards great power. This is true, but necessarily so. The conditions which they were created to deal with could not be successfully met, unless they had large power and discretion. In the very nature of things it would be utterly impracticable for the legislative department of the state to undertake to define the conditions that must exist before these boards could take such action as might be necessary to control situations that are constantly coming up in various forms; and so if these agencies of the state created for the purpose of conserving the health of the people are to accomplish the objects for which they were created, they must needs be given authority to take such prompt and effective action, in each case as it comes up, as in the exercise of their reasonable judgment and discretion may be deemed necessary to meet the exigencies of the occasion. They are not required to wait until an epidemic actually exists before taking action. Indeed, one of the chief purposes of their existence is to adopt and enforce such timely measures as will prevent epidemics. What they shall do and how it shall be done are matters left to their sound discretion. But of course these boards cannot adopt unreasonable or arbitrary rules or regulations or, without cause, harass the public or needlessly subject individuals to expense or inconvenience or act, unless they have reasonable grounds to believe that the action taken is necessary to prevent or suppress the disease sought to be controlled. And we

have no doubt of the jurisdiction of the courts to restrain these boards if they should undertake to exert authority not fairly within the powers conferred by the statute or plainly not needed for the purpose of conserving or protecting the health of the people or preventing the outbreak or spread of infectious or contagious diseases. These views are fully supported by the cases of *Hengehold v. City of Covington*, 108 Ky. 752, 57 S. W. 495, 22 Ky. Law Rep. 462; *Trabue v. Todd County*, 125 Ky. 809, 102 S. W. 309, 31 Ky. Law Rep. 332; *Allison v. Cash*, 143 Ky. 679, 137 S. W. 245; *Hickman County v. Scarborough*, 150 Ky. 1, 149 S. W. 1116; *Breckenridge County v. McDonald*, 154 Ky. 721, 159 S. W. 549; *Board of Health v. Kollman*, 156 Ky. 351, 160 S. W. 1052, 49 L. R. A. (N. S.) 354.

Whether the state board or the local boards have authority to order vaccination of all children as a condition precedent to their attendance on school, in the absence of reasonable apprehension of an outbreak of this disease, is not before us in this case, and it is not necessary to a decision of this case that we should express an opinion on this subject.

[6, 7] The remaining question is: Did the facts authorize the issuance and the enforcement of the order adopted by the local board in respect to this graded school district? This may be shortly disposed of. Keeping in mind what we have said as to the power of the boards, and that the discretion lodged in them will not be interfered with, unless plainly abused, it is apparent from the evidence of *Dr. Whittenburg*, supplemented by the action of the local board, that there was a reasonable apprehension in the minds of the board that an epidemic of smallpox might find a starting place in this school. And to prevent a calamity like this the board was authorized to take the action it did.

The judgment is affirmed.

REAGER'S ADM'X v. PENNSYLVANIA CO. et al.

(Court of Appeals of Kentucky. April 14, 1916.)

1. MASTER AND SERVANT §78—CONCLUSIVENESS OF AWARD.

Where a member of a voluntary relief department of a railroad submitted to the superintendent of the department, and on appeal to the advisory committee in accordance with rules of the department, the question of his right to compensation for injuries, their decision is conclusive, and is a bar to relief on his original claim till the award is impeached for fraud or mistake.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §78.]

2. ARBITRATION AND AWARD §63—CONCLUSIVENESS OF AWARD—MISTAKE.

If arbitrators only determine the questions submitted to them, and do not go beyond the terms of the submission, a mistake of judgment in their conclusions, whether as to the law or the facts, if their conclusions are honestly ar-

rived at, is not ground for setting aside the decision.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 813-820; Dec. Dig. §63.]

3. ARBITRATION AND AWARD §63—CONCLUSIVENESS OF AWARD—ADMISSION OF ILLEGAL EVIDENCE.

Even where arbitrators have admitted illegal evidence, it is not ground for impeaching their award, unless the decision was so based on the improper evidence that but for it the decision would have been other than the one made.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 813-820; Dec. Dig. §63.]

4. ARBITRATION AND AWARD §63—CONCLUSIVENESS OF AWARD—MISTAKE.

A gross and palpable mistake as to the law or a fact which will constitute evidence of misconduct or undue partiality is ground for impeachment of an award.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 813-820; Dec. Dig. §63.]

5. ARBITRATION AND AWARD §64—CONCLUSIVENESS OF AWARD—MISCONDUCT.

Fraud, corruption, or misconduct of arbitrators or fraud by one of the parties in securing an award will vitiate the decision.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 321-327; Dec. Dig. §64.]

6. ARBITRATION AND AWARD §78—IMPEACHMENT OF AWARD—EVIDENCE.

Before a court can set aside an award, the evidence supporting the grounds of impeachment must be clear and strong.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 409-419; Dec. Dig. §78.]

7. LIMITATION OF ACTIONS §37(3)—COMPUTATION OF PERIOD—FRAUD—ACTION TO IMPEACH AWARD.

Under Ky. St. §§ 2515, 2519, requiring an action for relief from fraud or mistake to be instituted within five years from their discovery, and, when not instituted till more than five years after the commission of the fraud or mistake, it must appear that by reasonable diligence it could not have been sooner discovered, in an action against the relief department of a railroad for compensation for injuries in which the award of the advisory committee of the department was set up as a bar, a reply alleging fraud and mistake in the award, filed eight or nine years after the award was made, failing to show when the fraud or mistake was discovered, is barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 184; Dec. Dig. §37(3).]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by J. H. Reager's administratrix against the Pennsylvania Company, trustee, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Bennett H. Young and Henry Bedinger, both of Louisville, for appellant. Gibson & Crawford, of Louisville, for appellees.

HURT, J. This is the second appeal of this case. The opinion rendered upon the former appeal may be found in 152 Ky. 824, 154 S. W. 412, 52 L. R. A. (N. S.) 841, Ann. Cas. 1915B, 312, in which a full statement

of the facts is set out, which renders unnecessary a more particular history of the case than is herein set out. J. H. Reager, who was a car inspector for the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, received an injury on the 17th day of May, 1893. He was a member of the voluntary relief department of the Pennsylvania lines west of Pittsburgh. This department was organized by the various railroad companies comprising the Pennsylvania lines west of Pittsburgh, and its purpose was to provide sick and accident benefits for the injured and sick employes of the railroad companies, whether injured through negligence or not. Reager was paid as accident benefits by the department from the time of his injury, for 52 weeks, the sum of \$1.50 per day, and thereafter until July 31, 1904, the sum of 75 cents per day, aggregating about \$3,200. When an employe became a member of the voluntary relief department, he agreed in writing to be bound by the regulations of the department, among which are the following:

"I also agree for myself and those claiming through me to be especially bound by regulation No. 65, providing for final and conclusive settlements of all disputes by reference to the superintendent of the relief department and an appeal to the advisory committee."

Regulation No. 65 is as follows:

"All questions or controversies of whatsoever character arising in any manner, or between any persons in connection with the relief department, or the operation thereof shall be submitted to the determination of the superintendent of the relief department, whose decision shall be final and conclusive thereof, subject to the right of appeal to the advisory committee within thirty days after notice to the parties interested in the decision."

"When an appeal is taken to the advisory committee, it shall be heard by said committee without further notice at its next stated meeting, or at such future time as they may designate, and shall be determined by a vote of the majority of a quorum, or more, present at such meeting, and the decision so arrived at by the advisory committee shall be final and conclusive upon all parties, without exception or appeal."

Regulation No. 45 is as follows:

"Payments on account of disablement by accident will only be made upon the disablement being shown to have resulted solely from accidents occurring to members in the performance of duty in the service and to which they were assigned, or which they were directed to perform by proper authority, or in voluntarily protecting the property of the company in whose employ they are. This shall include accidents occurring to members at points upon the employing company's property, which they necessarily pass in going to or from work, and which do not result from their voluntarily or unnecessarily exposing themselves to danger. There must be exterior or other positive evidence of injury, and satisfactory evidence that it incapacitates the person for performing his duty in the service, or, when of a permanent character, to earn a livelihood in an employment suited to his capacity. Disablement from an accident occurring otherwise than as aforesaid will be classed with sickness."

"Questions as to the permanent character of disability and the continued payment of benefits on account of the same shall be determined by the advisory committee."

The injury which Reager suffered was permanent, but a controversy arose between him and the voluntary relief department as to whether his disability continued, or whether he was able to earn a livelihood in an employment suited to his capacity, and whether or not he was entitled to receive any further benefits from the relief department by reason of his membership therein and the injury he had received. After an investigation the superintendent of the relief department decided that Reager's disablement did not incapacitate him from earning a livelihood in an employment suited to his capacity, and on the 24th day of August, 1904, notified Reager of the decision, and that he could receive no further benefits from the department. Thereafter, on September 4, 1904, Reager filed a written appeal from the decision of the superintendent with the advisory committee, and requested the committee to review the decision and to set it aside. The advisory committee considered the appeal at its next regular meeting, of which time and place Reager had notice, and by a vote of the majority of the committee the decision of the superintendent was sustained and approved on the 28th day of October, 1904, and on the day following Reager was notified of the action of the advisory committee upon his appeal and its decision thereon.

On the 13th day of April, 1905, ignoring the decision of the superintendent and the decision of the advisory committee, Reager filed this action against the Pennsylvania Company, trustee, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and the voluntary relief department of the Pennsylvania lines west of Pittsburgh, in which he set out his injuries, which he alleged were caused by the gross negligence of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and its servants, and alleged that he was permanently disabled from labor and incapacitated from all kinds of railroad duties, the establishment of the relief department and his membership therein, and the failure to pay him accident benefits after July 31, 1904, and prayed that each of the appellees be adjudged to perform the conditions of the contract embodied in his certificate of membership in the relief department, and that he recover of them 75 cents per day for each day since July 31, 1904, and to have a continuation of the payment of the benefits as long as his disability continued. Thereafter several amended petitions were filed, among which was one filed March 22, 1911, in which Reager sought a judgment for the recovery of 75 cents per day from July 31, 1904, with interest thereon, and the further sum of \$4,229.43.

On May 27, 1905, the appellees filed an answer, in which they traversed the allegations of the petition, and also pleaded the decision of the superintendent and the advisory committee in bar of Reager's right of recovery. A demurrer was sustained to the

plea of the appellees, based upon the decisions of the superintendent and that of the advisory committee.

On the 20th day of July, 1911, Reager died, and the action was revived in the name of his administratrix, who is the present appellant. On the 8th day of January, 1912, a trial was had, which resulted in a judgment for appellant. The appellees appealed, and the judgment was reversed by this court, which held that the court below was in error in sustaining a demurrer to the paragraph of the answer of appellees which relied upon the decisions of the superintendent and the advisory committee as a defense, and remanded the cause for further proceedings.

On the 28th day of April, 1913, the appellant filed a reply, in which it was admitted that the superintendent of the relief department and the advisory committee had both adjudged that Reager was not so incapacitated from his injuries as to be unable to earn a livelihood in an employment suited to his capacity, but alleged that both decisions were false and fraudulent, and that the advisory committee, in making such decision, was guilty of either fraud or mistake, or both fraud and mistake. The allegations of fraud and mistake were controverted by a rejoinder. Thereafter the appellees filed an amended answer and rejoinder, in which the statute of limitations against relief on account of fraud and mistake was interposed. A demurrer was sustained by the court to this plea, to which appellees excepted.

Another trial was had in the court below, and at the conclusion of the testimony offered for appellant the appellees moved the court to instruct the jury to find for them. The court sustained the motion upon the ground that the evidence offered did not conduce to prove that the decisions of the superintendent and advisory committee were made through fraud or by mistake, and the action was dismissed. The appellant has again appealed to this court, and the sole ground upon which a reversal of the judgment is sought is that the court erred to the prejudice of appellant in directing a verdict of the jury in favor of appellees. The appellees insist that the court erred to their prejudice in holding that the appellant's cause of action was not barred by the statute of limitations, which bars a recovery or relief on account of fraud or mistake after five years from the discovery of the perpetration of the fraud or the making of the mistake.

[1] On the former appeal of this case it was held that it was within the power of an association such as the voluntary relief department to provide for a submission of the question as to whether or not a member who had suffered a permanent injury was incapacitated from same to earn a livelihood in an employment suited to his capacity to an impartial tribunal selected by the parties themselves, and make its decision final as to such question, in the absence of a showing

of fraud or mistake. It was further held that the advisory committee of the voluntary relief department, as constituted, was such a tribunal, as it was selected in accordance with the regulations of the department, and to become a member of which was a voluntary, and not a compulsory, act. Six of the members of the tribunal were selected by Reager and other contributing employes, and six were selected by the railroad companies, whose employes constituted the membership of the department. It was the same tribunal to which Reager submitted his case in the first instance and which granted to him accident benefits from May 27, 1893, until July 31, 1904. He voluntarily submitted his case again to this tribunal when he appealed from the decision of the superintendent. He had notice of the time and place at which the advisory committee would sit and determine his appeal. In the first instance, when he had the choice of either proceeding against the railroad for damages on account of his injury, or submitting his claim for benefits to the relief department, he chose the latter course, and received in benefits over \$3,200. It would be very inconsistent to hold that Reager was bound by the first decision, which was in his favor, and therefore entitled to the benefits of such a decision, but was not bound by the last decision because it was adverse to his contentions. This tribunal being organized by the parties themselves for the decision of such questions as were in issue between Reager and the department, and the questions for decision being voluntarily submitted to it by the parties, if its decision should be treated as an ordinary award made by arbitrators, its decision would be conclusive upon the parties, unless the decision was made through fraud or made by mistake. The decision of the advisory committee was a final adjudication by a court of the parties' own choice. There is no contention that the award was not regular upon its face, and the decision rendered was within the terms of the submission. Hence the decision was conclusive of the merits of the controversy, and it appears that the intention of the parties was that the decision should be final and conclusive. This judgment of the advisory committee then operated to extinguish any claim which Reager had which was embraced in the submission, and the judgment constituted a bar to any action on his original demand. Until the judgment of the advisory committee was impeached upon sufficient grounds, in a proceeding appropriate to the case, it was conclusive. *Shackelford v. Purket*, 2 A. K. Marsh. 435, 12 Am. Dec. 422; *Tevis v. Tevis*, 4 T. B. Mon. 46; *Evans v. McKinsey*, Litt. Sel. Cas. 262; *Logsdon v. Roberts*, 3 T. B. Mon. 255; 3 Cyc. 728, 729. If the decision had been favorable to Reager, thereafter it would have constituted the basis of his rights as to all matters embraced within the submission. The decision being adverse to him, it was binding upon

him and his privies until it was impeached upon the ground that it was caused by fraud or made by mistake. He could not maintain a suit for relief upon his original claim before impeaching the judgment because his original claim was extinguished by the judgment, and hence, the judgment being voidable only, and not void, it constituted a complete bar to his action until it was impeached and set aside.

In 3 Cyc. 728, this doctrine is stated:

"As between the parties and their privies an award is entitled to that respect which is due to the judgment of a court of last resort. It is, in fact, a final adjudication by a court of the parties' own choice, and until impeached upon sufficient grounds, in an appropriate proceeding, an award which is regular on its face is conclusive upon the merits of the controversy submitted, and it is not for the courts to otherwise inquire whether the determination was right or wrong, for the purpose of interfering with it, unless such power has been specially vested in them by statute, or unless the parties have intended that the award shall not be final and conclusive."

[2] If the arbitrators only determine the questions submitted to them, and do not go beyond the terms of the submission, a mistake of judgment in their conclusions as to the weight to be given to facts embraced in the testimony, if their conclusions are honestly arrived at, is not a ground for setting aside the decision. The same rule applies to alleged mistakes of law as well as of facts. *Rudd v. Jones*, 4 Dana, 229; *Galbreath v. Galbreath*, 10 Ky. Law Rep. 935; *Johnson v. Dulin*, 10 Ky. Law Rep. 403; *Whittaker v. Wallace*, 1 Ky. Law Rep. 271; *Harding v. Wallace*, 8 B. Mon. 536; *Lillard v. Casey*, 2 Bibb, 459.

[3-5] Even where arbitrators have admitted illegal evidence, it is not a ground for impeaching their award, unless it appears that the decision was so based upon the improper evidence that but for it the decision would have been other than the one made. A gross and palpable mistake as to the law or a fact which will constitute evidence of misconduct or undue partiality, however, is a ground of impeachment of an award. Fraud, corruption, or misconduct of the arbitrators or fraud used by one of the parties in securing an award will vitiate the decision. Arbitrators are not expected or required to always follow the strict and technical rules of law, but, if they have due regard for the rights of the parties and natural justice, it is sufficient.

[6] The evidence offered in the court below fails to show that the advisory committee, in arriving at their decision, were laboring under any mistake as to the actual facts of the case. It is only a question of fact which it was called upon to decide, and hence there was no evidence of any mistake of law. While a court or other set of men might have arrived at a different conclusion from the facts submitted, there is no evidence of such a gross or palpable mistake in judgment as to be evidence of misconduct or partiality

on the part of the members of the committee. It seems that they considered all the evidence of the facts in the case which was submitted to them, and there is nothing in the evidence heard upon the trial in the circuit court which proves any fraud, corruption, or misconduct of the members of the committee in making the decision, or any fraud upon the part of the prevailing party which affected the decision of the committee. Before a court is authorized to set aside an award the evidence supporting the grounds of impeachment must be clear and strong. *Johnson v. Dulin*, supra. Hence the trial court did not err in directing a verdict for the appellees.

[7] The original petition was a suit upon the contract embraced in the certificate of membership of Reager in the voluntary relief department, and neither it nor any of the amendments to the petition mentioned the fact of the decision of the advisory committee, nor sought to have it impeached, which appears must have been done by either a petition or an amended petition. No relief was asked in the suit in the way of setting aside the decision, either on account of fraud or mistake, nor was any action instituted or ascertained for that purpose. Under sections 2515 and 2519, Kentucky Statutes, an action for relief from fraud or mistake must in all cases be instituted within five years from the discovery of the perpetration of the fraud or the making of the mistake, and, when the action for that purpose is not instituted until more than five years after the commission of the fraud or mistake, it must appear that by the exercise of reasonable diligence it could not have been sooner discovered. *Providence Assurance Society v. Withers*, 132 Ky. 541, 116 S. W. 350; *Bennett Coal Co. v. East Coal Co.*, 152 Ky. 838, 154 S. W. 922; *Dye v. Holland*, 4 Bush, 635; *L. & O. R. R. Co. v. Bridges*, 7 B. Mon. 556, 46 Am. Dec. 528; *Green v. Salmon*, 63 S. W. 270, 23 Ky. Rep. 517; *Cavanaugh v. Britt*, 90 Ky. 273, 13 S. W. 922, 12 Ky. Law Rep. 204. The reply of the appellant did not contain any allegation that the alleged fraud or mistake was not known from the time the decision was rendered, or that it had been discovered within five years last past, or by the exercise of reasonable diligence it could not have been sooner discovered. Waiving the question as to whether the validity of the decision could be impeached upon the ground of fraud or mistake relied upon for the first time in a reply at all, the reply contained the first effort of the appellant to secure relief from the effect of the decision of the advisory committee, and, not having been made until eight or nine years after the alleged fraud or mistake was committed, the statute of limitations being a statute of repose, the plea of the statute of limitations was a defense to it, and hence the court erred in sustaining a demurrer to the rejoinder.

Wherefore the judgment is affirmed.

SHAPARD v. MIXON et al. (No. 204.)

(Supreme Court of Arkansas. Feb. 28, 1916.
On Rehearing, March 20, 1916.)

1. APPEAL AND ERROR ⇨14(4) — CROSS-APPEAL—STATUTE.

Under Kirby's Dig. § 1225, providing that an appellee may, at any time before trial, pray and obtain a cross-appeal against the appellant, where the controversies in an equitable suit between plaintiffs and M. and between M. and S. were entirely separate, S.'s appeal from the portion of the decree relating to his controversy with M. did not enable plaintiffs to bring up their branch of the case by cross-appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 57; Dec. Dig. ⇨14(4).]

2. APPEAL AND ERROR ⇨338(2)—TIME FOR APPEALING—STATUTE.

Act Feb. 17, 1915 (Laws 1915, p. 205), amending Kirby's Dig. § 1199, touching the time for appeals, by shortening it from 12 to 6 months after decree or judgment, fixes 6 months after the passing of the statute as the full limit of time in all cases, but does not apply to judgments rendered prior to its taking effect, where the unexpired time allowed under the old statute is less than 6 months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1880-1882; Dec. Dig. ⇨338(2).]

3. LIMITATION OF ACTIONS ⇨72(1)—DISABILITY—INFANTS—STATUTES.

Under Kirby's Dig. § 5056, touching limitations of actions for the recovery of lands, with a saving in favor of infants and others, or under section 5075, the general provision in favor of infants and other persons under disability, a married woman's action for the recovery of rents, commenced more than 8 years after she attained the age of 18 years, was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390, 393, 394; Dec. Dig. ⇨72(1).]

4. HOMESTEAD ⇨146—CONVEYANCE BY MINOR.

A girl over the age of 18 has power to convey her interest in the homestead derived from a deceased parent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 257; Dec. Dig. ⇨146.]

5. HOMESTEAD ⇨146—ABANDONMENT—CONVEYANCE.

Under the Constitution, providing that minor children shall enjoy the use of homestead premises whether they remain in possession or not, where two of three minors conveyed their interest in the homestead derived from their deceased mother, expressly recognizing the rights of the lessee of the premises from their father, a discount in the price being made on account of the outstanding lease, there was no abandonment by the conveying children of their rights in the homestead, giving the child who did not convey a right of action against the lessee for the whole of the rent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 257; Dec. Dig. ⇨146.]

6. HOMESTEAD ⇨142(1)—ESTATE OF INHERITORS.

A minor child inheriting a homestead has two separate and distinct estates in the homestead existing at the same time and incapable of merger, namely, homestead and inheritance, one of which may be alienated and the other reserved.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-273, 277-280; Dec. Dig. ⇨142(1).]

7. HOMESTEAD ⇨142(1)—RECOVERY OF RENTS.

Inheritors of a homestead from their mother, who repudiated their father's lease and sued the lessee for rents, could recover, not what the lessee agreed to pay, nor what he received, but only the net rental value of the premises.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-273, 277-280; Dec. Dig. ⇨142(1).]

8. HOMESTEAD ⇨153 — LEASE — EXTENSION — STATUTE.

Under Kirby's Dig. § 734, providing that if any person shall convey realty, and shall not have the legal estate, but shall afterwards acquire it, such estate shall immediately pass to the grantee, where a husband leased the homestead, left by his wife, before the majority of their children, in suit by such children to recover the rents of the lessee who had contracted for a term extending from one definite date to another, the decree extending the original lease to make it begin on the date of the expiration of the homestead right of the youngest child was improper, as making a new contract for the parties.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 306; Dec. Dig. ⇨153.]

9. APPEAL AND ERROR ⇨1033(9)—PARTY ENTITLED TO ALLEGE ERROR.

A decree giving appellees less than they were entitled to was not erroneous as to appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4061; Dec. Dig. ⇨1033(9).]

10. VENDOR AND PURCHASER ⇨228(7)—PURCHASER WITH NOTICE—MORTGAGE.

A purchaser of the homestead rights of minor children inherited from their deceased mother, with notice of a lease made by the father to a mortgagee to extinguish the mortgage debt, could not prevent the enforcement of the original mortgage; the consideration for the lease falling through the children's right in the lands.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 501; Dec. Dig. ⇨228(7).]

11. MORTGAGES ⇨316 — REINSTATEMENT — FAILURE OF CONSIDERATION.

Partial failure of consideration for the execution of a contract of lease intended to extinguish a mortgage debt gave the mortgagee the same rights in the direction of a revival of the mortgage as a total failure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 949-954; Dec. Dig. ⇨316.]

12. MORTGAGES ⇨316 — MERGER — LEASE — FAILURE OF CONSIDERATION.

Where a lease was made by a mortgagor to the mortgagee, extinguishing the mortgage lien as the parties intended, but the consideration for the lease partially failed on account of the homestead rights of the mortgagor's children, inheriting from their mother, the lessee could revive his mortgage lien in equity and enforce it, since the doctrine of merger will not be applied where there are equities which will thereby be defeated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 949-954; Dec. Dig. ⇨316.]

13. MORTGAGES ⇨316—LIMITATIONS.

Kirby's Dig. § 5399, providing that in suits to foreclose mortgages it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given, does not apply to a suit, to revive an original mortgage lien, by a mortgagee who satisfied his lien in return for a lease of the premises; the consideration for his satis-

faction thereafter failing on account of homestead rights of the mortgagor's children.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 949-954; Dec. Dig. ¶316.]

Hart and Kirby, JJ., dissenting.

On Rehearing.

14. HOMESTEAD ¶142(1) — RECOVERY OF RENTS—AMOUNT—EVIDENCE.

The rental value of homestead lands, inherited from their mother by children who repudiated their father's lease thereof and sued the lessee for rents, was not necessarily to be determined by ascertaining the gross amount of the rents received by the father's lessee, but the amount so received afforded some evidence of the rental value of the land, though not conclusive.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-273, 277-280; Dec. Dig. ¶142(1).]

15. HOMESTEAD ¶142(1) — RECOVERY OF RENTS—BURDEN OF PROOF.

In an action by children, who inherited from their mother a homestead and repudiated their father's lease thereof, to recover rents from the father's lessee, the burden was on plaintiffs to offer proof of the net rents received by the lessee after deducting taxes and the reasonable cost of necessary repairs, or proof of the rental value regardless of the amounts actually received.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-273, 277-280; Dec. Dig. ¶142(1).]

16. HOMESTEAD ¶142(1) — RECOVERY OF RENTS—AMOUNT RECOVERABLE—REDUCTION BY LESSEE'S EXPENDITURES.

Inheritors of a homestead from their mother, who repudiated their father's lease and sued the lessee for rents, could not recover the full rents received by him, where he had made necessary expenditures for repairs and taxes.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-273, 277-280; Dec. Dig. ¶142(1).]

17. HOMESTEAD ¶142(1) — RECOVERY OF RENTS — AMOUNT — SUFFICIENCY OF EVIDENCE.

In an action by inheritors from their mother of a homestead, who repudiated their father's lease and sued the lessee for rents, evidence held sufficient to warrant the chancellor's finding that the true rental value of the land was \$106.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-273, 277-280; Dec. Dig. ¶142(1).]

Appeal from Lee Chancery Court; Edward D. Robertson, Chancellor.

Suit by Birdie Douglas and others against B. L. Mixon, in which T. L. Shapard was made a defendant. From a decree for defendant Mixon, defendant Shapard and plaintiffs appeal. Decree affirmed and cause remanded, with directions to enter a decree foreclosing a mortgage.

Moore, Vineyard & Satterfield, of Helena, for appellants. E. H. McCulloch, of Little Rock, and H. F. Roleson and Daggett & Daggett, all of Marianna, for appellee.

MCCULLOCH, O. J. Harriet E. Bobbitt owned a farm in Lee county, containing 40 acres, which constituted her homestead, and she died in February, 1898, leaving surviving her husband, W. C. Bobbitt, and four minor

children, one son, V. A. Bobbitt, and three daughters, Birdie, Inez, and Vera. The land was occupied as a homestead several years thereafter by the father and the four children, but they finally removed therefrom, and the farm was occupied by tenants. In the year 1906 W. C. Bobbitt mortgaged his interest in the land to Mixon-McClintock Company, a mercantile corporation doing business at Marianna, Ark., the debt secured being for supplies furnished and to be furnished thereafter. The mortgage specified that it was to secure a note from W. C. Bobbitt to the Mixon-McClintock Company for \$500, and such further advances of merchandise, etc., as should thereafter be made. The mortgagee furnished supplies to Bobbitt during the years 1906, 1907, and also, to some extent, in the year 1908, and the account thereof fell within the terms of the mortgage. At the end of the year 1908 Bobbitt owed the Mixon-McClintock Company the sum of \$531.23 balance, which was secured by the mortgage, and on January 19, 1909, he executed to R. L. Mixon, acting for the mortgagee, a contract, whereby he leased the premises to Mixon for the period of 5 years, ending on December 31, 1913, the contract reciting on its face that the consideration was the sum of \$531.23, the amount of the mortgage debt. Mixon was the agent of the mortgagee in the transaction, and the lease was accepted for the latter's benefit. The evidence in the case establishes the fact beyond dispute that the lease was executed by Bobbitt and accepted by the Mixon-McClintock Company in satisfaction of the debt due under the mortgage. The original note for \$500 was surrendered to Bobbitt by the mortgagee, and the latter also gave Bobbitt an instrument, stating that the live stock and wagon, also embraced in the mortgage, were released. There was, however, no indorsement of the satisfaction of the mortgage, made upon the record. The son, V. A. Bobbitt, joined in the lease contract. That contract contained an express covenant on the part of the lessors that they had a good and lawful right to make and enforce the contract, and that they would—

"for the consideration aforesaid, and the payment of taxes as hereinbefore mentioned, warrant, defend and protect said lessee in the quiet enjoyment of the use of said land for the period of time, together with the uses, rents and profits thereof inuring to him under and by virtue of this lease."

Neither Bobbitt nor his children were living on the premises at that time, but the same had been rented out for several years prior thereto. Mixon held the premises for the full period of the lease, and rented it out to different parties, receiving the gross rental of \$145 a year for each year during the lease. At the time the lease contract was executed, each of the three girls, Birdie, Inez, and Vera, was under the age of 18 years. Subsequent-

ly, three of the children, V. A. Bobbitt, Birdie Douglas (née Bobbitt), and Inez Bobbitt, severally conveyed their interests in the land to T. L. Shapard. V. A. Bobbitt conveyed in August, 1910, Mrs. Douglas conveyed in November, 1910, and Inez Bobbitt conveyed in November, 1912. The proof shows that the conveyance of each of the children made to Shapard was in subordination to the rights of Mixon, and that a discount in the price was made on account of the outstanding lease. W. C. Bobbitt also conveyed his interest in the land to Shapard by quitclaim deed dated November 22, 1910, which was the same date as the deed of Mrs. Douglas to Shapard, and the deed recites a consideration of \$1 paid. On January 16, 1914, the three daughters of Mrs. Bobbitt, deceased, namely, Birdie Douglas, Inez Bobbitt, and Vera Bobbitt, instituted the present action against Mixon to recover of his the rental value of said premises during the period of said lease, and they alleged in their complaint that they were infants under the age of 18 years at the time the lease was executed; that the premises constituted their homestead which they derived from their mother; and that the lease was for that reason void. Mixon answered, setting up the foregoing facts with reference to the execution of the lease and the consideration therefor, and pleaded in defense that the consideration of the original debt was supplies furnished to W. C. Bobbitt for the benefit of his minor children, and he also pleaded the statute of limitation. A cross-complaint was filed against W. C. Bobbitt and T. L. Shapard, setting forth the fact that the conveyance from Bobbitt to Shapard was executed without valuable consideration, and that Shapard, at the time he received the conveyance, did so with full knowledge of the rights of Mixon, and there was a prayer that, in the event the plaintiffs recovered anything from Mixon, the original security be reinstated and enforced against the estate for Bobbitt's life, held by Shapard under the deed. It was alleged in the cross-complaint that the lease from Bobbitt was accepted upon the faith that the lessee would be allowed to retain the premises for the period of the lease and enjoy all the rents thereof, and that if the Bobbitt heirs were permitted to recover, it would constitute a failure of consideration of the lease. The suit was, without objection, transferred to equity and proceeded to a final hearing. The chancellor found that plaintiff Birdie Douglas was barred by the statute of limitation by reason of the fact that the suit was not instituted within 3 years after she reached the age of 18 years; that plaintiff Inez Bobbitt was entitled to recover of Mixon her proportionate part of the rent for each year during the lease, except the year 1913, which was after she had conveyed to Shapard in recognition of the outstanding lease; and that the plaintiff Vera Bobbitt, who was still under 21 years of age, recover her proportionate part of the rents

for each year during the lease. A decree was rendered in favor of Inez Bobbitt against Mixon for the sum of \$172, and in favor of Vera Bobbitt in the sum of \$228.80, which included interest at the rate of 6 per cent. per annum from the expiration of each year of the lease as the rents accrued. The net rental value of the land during each year of the lease was found by the chancellor to be \$106. The chancellor decided that Mixon was entitled to have the lease extended from November 28, 1917, which is the date Vera Bobbitt will come 21 years of age, for such length of time as the rents and profits will be sufficient to repay him the amount adjudged against him in favor of the two heirs, not extending, however, beyond the lifetime of W. C. Bobbitt. Shapard was immediately granted an appeal to this court, and since the transcript was lodged here the original plaintiffs cross-appealed. A motion was filed by the appellees, Mixon and others, to dismiss the cross-appeal, whereupon the three plaintiffs abandoned their cross-appeal and obtained a direct appeal from the clerk of this court.

[1] The first question for discussion relates to the status here of the original plaintiffs—whether or not they have brought their case here in the proper time for review. It is evident that the cross-appeal was not effectual for the purpose of bringing up the plaintiffs' branch of the case. The statute provides that an appellee may, at any time before trial, "pray and obtain a cross-appeal against the appellant or any coappellee." Kirby's Digest, § 1225. The plaintiffs are not appellees on the appeal of Shapard. The respective controversies between plaintiffs and Mixon, and between Mixon and Shapard, are entirely separate, and an appeal from the portion of the decree which related to one of the controversies did not bring up the other.

[2] The question whether or not the direct appeal of the plaintiffs was taken in time is a more difficult one. The final decree of the chancery court was rendered March 18, 1915, and the appeal of the plaintiffs was prayed more than 6 months after the rendition of the decree, but less than 1 year after such rendition, and less than 6 months after the new statutes shortening the time for appeals went into effect. The statute, it will be remembered, shortened the time for appeals from 12 months to 6 months after the rendition of the decree or judgment appealed from.

We held recently, in the case of *Stephens v. Williams*, 188 S. W. 527, that the new statute applied to judgments and decrees rendered prior to the time the statute went into effect, so as to shorten the time to 6 months after the statute went into effect. The authorities cited in the opinion in that case all tend to sustain the view that the new statute does not apply to judgments rendered prior to the time it went into effect, where the unexpired period of time allowed under the old statute does not equal the full time allowed under the new. One of the cases cit-

ed in the opinion was *Wilson v. Kryger*, 26 N. D. 77, 143 N. W. 764, 51 L. R. A. (N. S.) 760, where the court was passing upon a statute similar to the one in this case, which had reduced the time of appeal from 12 months to 6 months. In disposing of the matter, the court said:

"In order to give effect to the evident legislative intent we are required to hold that the new act applies only to those judgments the time for appealing from which under the old statute would extend more than 6 months after the taking effect of the new statute. In other words, the new statute is prospective in its operation, but applies to all judgments whether entered prior or subsequent to July 1st, which, but for such act, the period in which appeals might have been prosecuted therefrom would exceed 6 months from such date. As to other judgments, the period for appealing is governed by the old statute, and the new does not apply, for otherwise the new act would have the effect of enlarging rather than shortening the period for appealing therefrom, or else it would cut off all right to appeal on the date of the taking effect of such act, neither of which results was intended."

Another case which we cited with approval was *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381, dealing with a statute which shortened the time of appeals from 6 months to 30 days, and concerning its effect the court said:

"There is no indication in the act of 1903 that it applied to judgments rendered prior to the time the act took effect, so that judgments rendered more than 30 days prior thereto were barred of the right of appeal. It, therefore, under the rule above announced, applied only to judgments rendered subsequently, or to those where the right of appeal under the old law extended more than 30 days from the time the act took effect."

Our present conclusion finds support in the opinion in *State v. Railway*, 92 Ark. 74, 122 S. W. 627, where the rule appears to be laid down broadly that the new statute, shortening the time for appeals and writs of error in criminal cases, has no application at all to appeals from judgments rendered prior to the passage of the statute; but, as a matter of fact, the appeal in that case was taken within the period prescribed by the new statute, so the decision directly supports the conclusion we now reach with respect to the statute now under consideration. We think it is consistent with reason and the manifest intention of the Legislature to say, in the construction of the language of the new statute, that it was intended to fix 6 months after the passage of the statute as the full limit of time for appeals in all cases, but that it was not intended to restrict the time to less than 6 months. Under this view of the statute, the appeal of the plaintiffs was taken in apt time, and the decree of the chancery court on their branch of the case is now before us for review.

[3] The decree against Birdie Douglas, on the ground that her right of action against *Mixon* for the recovery of rents was barred by the statute of limitation, was correct. The action was commenced more than 8

years after Mrs. Douglas attained the age of 18 years, and she was barred, either under the exemption in the 7-year statute of limitation (*Kirby's Digest*, § 5056) or under the general exemption (*Kirby's Digest*, § 5075) in favor of infants and other persons under disabilities. *Brake v. Sides*, 95 Ark. 74, 128 S. W. 572.

The next contention is, on the part of the plaintiffs, that if they had the power at all to convey the homestead before they reached 21 years of age, the conveyance of the three older children to Shapard constituted an abandonment of the homestead right and gave the other child the right to recover all the rent. In other words, it is contended that the conveyance of Mrs. Douglas to Shapard, in November, 1910, gave the other two children, Inez and Vera, the right of action against *Mixon* for the whole of the rent for succeeding years, and that the conveyance of Inez Bobbitt to Shapard, in November, 1912, gave the youngest child, Vera, the right to recover the whole of the rent for the year 1913, which was the last year of the lease.

[4] There can be no doubt of the power of a girl over the age of 18, and under 21, to convey her interest in the homestead derived from a deceased parent. That point was expressly decided in the case of *Hargett v. Hill*. *Fontaine & Co.*, 101 Ark. 510, 142 S. W. 1137. In that case we said:

"The homestead is a privilege which she may relinquish or abandon after arriving at that age so long as the rights of other children are not affected thereby. Of course, if there were other minor children, under the Constitution if she attempted to convey or relinquish her homestead right after becoming 18 years old, she could not do so, for the rights of other children would be affected by her attempted relinquishment."

[5] It does not follow that a conveyance under all circumstances constitutes an abandonment so as to give the remaining minor children the exclusive right to the rent. The homestead is intended for the joint occupancy and enjoyment of all the children of the deceased homestead owner until they become 21 years of age, and neither of them has the right to use the property so as to interfere with the enjoyment of it by the others. Neither has one of the children a right to force an outsider upon the others in the joint occupancy of the premises. For instance, where all the children are enjoying the occupancy of a home, one of them cannot force into the family circle a stranger by a conveyance of the homestead right. But the Constitution expressly provides that the minor children shall enjoy the use of the premises, whether they remain in possession or not, and where they are not actually in possession a conveyance of the separate interest in the fee to the homestead would not necessarily amount to an abandonment of the right to enjoy the premises so far as concerns the other children. That is particularly true in a case like this, where the children are not in actual occupancy of the

homestead or using it as a home, but where it is leased out, and only the payment of rent is demanded. In such a case the sale of the homestead by one of the children does not interfere with the possession of the other children, and each of the children has the right to deal separately with his or her share of the rents. Here the children who sold to Shapard did so in express recognition of Mixon's rights under the lease, and there was evidently no intention to abandon the lease so as to confer upon the younger child the right to recover all the rents of the premises. If the older children saw fit to recognize the validity of the lease to Mixon, that fact did not enlarge the rights of the youngest child so as to give her a right of action against Mixon for the whole of the rent; nor does the fact that the former are barred by limitation from maintaining a suit against Mixon confer any greater rights on the youngest child. *Stubbs v. Pitts*, 84 Ark. 160, 104 S. W. 1110.

[6] Cases may be cited where it has been held that an attempt of the widow to alienate her interest in the homestead operates as an abandonment, but those cases do not present an analogous question to that involved concerning the effect of a conveyance by one of the children. A minor child who inherits the homestead has—

"two separate and distinct estates in the homestead existing at the same time and incapable of merger, namely homestead and inheritance." *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220.

Having thus two separate and distinct estates, one may be alienated and at the same time the other reserved, unlike the conveyance of a widow, who has only one interest which is inalienable. The conveyance by the minors, therefore, of their fee, in recognition of the rights of Mixon, constituted a ratification of the lease and not an abandonment, and it did not confer upon the other child the right to recover all the rents. *Stubbs v. Pitts*, supra.

We are of the opinion, therefore, that the chancellor did not err in refusing to render a decree in favor of Inez and Vera Bobbitt for the full amount of the rental value of the premises after the conveyance made by their sister, nor in refusing to decree in favor of Vera for the full amount after the date of the conveyance by Inez.

[7] It is also urged that the conclusion of the chancellor was contrary to the evidence as to the amount of the rental value, but when we consider that the plaintiffs repudiated the lease, and are entitled to recover, not the amount Mixon agreed to pay, nor what he received, but only the net rental value of the premises, we cannot say that the chancellor erred in reaching the conclusion he did as to the amount, so the decree as to each of the plaintiffs is affirmed.

[8] This brings us to the discussion of the controversy between Shapard and Mixon.

In the complaint there was a prayer for a foreclosure of the mortgage, but the relief granted was an extension of the original lease so as to make it begin on the date of the expiration of the homestead right of the youngest child. That feature of the decree is defended on the ground that the lessor, W. C. Bobbitt, had no right to execute the lease at the time, but that his right to do so will be complete when the youngest child becomes of age, and that Mixon's right to hold under the lease will inure to him at that time, pursuant to a statute which provides as follows:

"If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." *Kirby's Digest*, § 734.

[9] The difficulty of applying this statute in the way attempted in the decree is that the effect of the decree was not to confer an estate acquired subsequent to the execution of the deed of conveyance, but was to make a new contract of lease for the parties. The parties themselves contracted for a term of lease extending from one definite date to another, and for the court to attempt to fix another time would be to make an entirely new contract for the parties, and not merely to carry out the old contract. We are of the opinion that the decree in that respect was erroneous, but if it be found that appellees were entitled to a foreclosure of the original mortgage on the estate for the life of Bobbitt, then there is no error committed in extending the lease, for the effect of the decree was to give the appellees less than what was asked. The decree was, in other words, in Shapard's favor to that extent, and he does not complain, but insists that appellees are not entitled to any relief at all against him. That is the real inquiry involved in this branch of the case.

[10, 11] Now, the testimony is undisputed that Shapard purchased this interest, as well as the interests of the plaintiffs, with full knowledge of Mixon's rights under the lease and in distinct recognition thereof. The testimony does not show that he was a purchaser for value from Bobbitt, for his deed is a quitclaim and recites a consideration of \$1, and there is no other proof in the record tending to show that he paid anything. He was not only not a purchaser for value, but he was actually put upon notice as to all of the rights of the appellees in this case. He stands merely in Bobbitt's shoes, and if the appellees are entitled, as against Bobbitt, to have their rights re-established and enforced under the original mortgage, then Shapard's purchase does not prevent the enforcement of those rights. The parties in-

tended by the execution and acceptance of the lease to extinguish the mortgage debt, but the consideration failed to the extent that the children are permitted to recover the rents for the years covered by the contract. The partial failure of consideration for the execution of the contract is the same as a total failure, so far as affects the rights of the injured party to relief. *Webster v. Carter*, 69 Ark. 458, 138 S. W. 1006.

[12] *Bobbitt* is insolvent, and unless appellees have a remedy under the original mortgage lien, then there is no remedy for them at all. Will a court of equity provide a remedy? In the case of *Driver v. Jenkins*, 30 Ark. 120, this court said:

"Here there is a right without an adequate remedy at law. It is a maxim in equity that equity will not suffer a right to be without a remedy. This maxim is the foundation of equitable jurisdiction; because that jurisdiction had its rise in the inability of the common-law courts to meet the requirements of justice."

The effect of the acceptance by *Mixon* of the lease, if it served as an extinguishment of the mortgage lien, was to merge the equitable estate of the mortgagee into the legal estate for the time being under the lease. If there was no merger, then there was no extinguishment of the original lien. The principles involved in the disposition of this branch of the case are not new. Mr. Jones, in his work on Mortgages, vol. 2, § 873, said:

"Where a conveyance of mortgaged premises is made to the mortgagee in satisfaction of the mortgage debt, he taking the same in ignorance of a subsequent judgment lien thereon and canceling the mortgage of record, equity will not treat the conveyance as a merger of the mortgage lien in the absolute estate, but will revive such lien as against a purchaser on execution sale. It may, therefore, be deduced from the authorities as a general rule that, when the mortgagee acquires the equity of redemption in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance. The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend."

Many cases are cited in support of the text.

In *Stantons v. Thompson*, 49 N. H. 272, the court (quoting from the syllabus) held:

"Where, by a release of the right of redemption, the two estates are united in the mortgagee, the mortgage will be upheld as a subsisting source of title, whenever it is required by the justice of the case, or the intention of the parties."

In *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501, it was held:

"Where a conveyance of mortgaged premises was made to the mortgagee in satisfaction of the mortgage debt, who took same in ignorance of a subsequent judgment lien thereon and canceled the mortgage of record, equity will not treat the conveyance as a merger of the mortgage lien in the absolute estate, but will revive such lien as against a purchaser on execution sale."

The following cases are precisely in point on that question: *Lyon v. McIlvaine*, 24 Iowa, 9; *Snyder v. Snyder*, 6 Mich. 470;

Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245; *Mallory v. Hitchcock*, 29 Conn. 127.

The subject has been treated in decisions of this court, and we have reached the same conclusion concerning the doctrine of merger. The rule laid down by this court is that:

"The doctrine of merger never applies where there are any equities which will be thereby defeated." *Bemis v. First National Bank*, 63 Ark. 625, 40 S. W. 127; *Neff v. Elder*, 34 Ark. 277, 105 S. W. 260, 120 Am. St. Rep. 67; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659.

The application of the principle is not averted by the fact that there was no intervening incumbrance between the execution of the mortgage and the execution and delivery of the lease. Its application to this case rests upon the fact that *Bobbitt* obtained a satisfaction of the mortgage by granting a lease which the lessee was unable to enjoy because of the fact that the lessor had no right to execute it, and there was therefore a failure of the consideration for the satisfaction of the mortgage. The facts present a proper case, we think, for the interposition of a court of equity in order to prevent an injustice. *Bobbitt* is in no position to complain because his own warranty of title was broken and the consideration for the valuable things he received, i. e., the satisfaction of his mortgage debt, failed. We have already shown that *Shapard* is in no better condition, because he paid nothing more than a nominal consideration for the conveyance he obtained from *Bobbitt*, and he was in possession of full information concerning the rights of the appellees.

[13] But it is contended on behalf of *Shapard* that the remedy of appellees under the original mortgage is barred by limitations under the statute, which provides that in suits to foreclose mortgages—

"it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given." *Kirby's Digest*, § 5399.

The revival of the original mortgage lien makes it a creature of equity, and such liens are not subject to the terms of the statute concerning registration of mortgages and the period of limitations for the enforcement of mortgages. *Martin v. Schichtl*, 60 Ark. 595, 31 S. W. 458; *Ft. Smith Milling Co. v. Mikles*, 61 Ark. 123, 32 S. W. 493; *Sturdivant v. McCorley*, 83 Ark. 278, 103 S. W. 732, 11 L. R. A. (N. S.) 825; *Neff v. Elder*, supra; *Weaver-Dowdy Co. v. Martin*, 94 Ark. 503, 127 S. W. 705.

In *Sturdivant v. McCorley*, supra, Judge *Riddick*, speaking for the court, said:

"The statute of limitations * * * as to mortgages does not apply to equitable mortgages of this kind evidenced by absolute deeds without any written defeasance."

In *Neff v. Elder*, supra, we held (quoting from the syllabus) that:

"A purchaser of a defective title to land who was entitled to subrogation by reason of having

discharged a valid mortgage lien which was not barred at the time of such discharge may bring his action to enforce his right to subrogation within a reasonable time after discovery of the defect in his title."

We held that the statute of limitations with respect to the time within which foreclosure suits might be brought had no application to a suit of that kind.

The remedy was therefore not barred, and, there being no prejudicial error in the decree against Shapard, the same is affirmed.

HART and KIRBY, JJ., dissent.

On Rehearing.

McCULLOCH, C. J. It is insisted by counsel for the plaintiffs that we reached an erroneous conclusion with respect to the amount of rents for which Mixon is liable to them. They contend that according to the undisputed evidence Mixon received annually the sum of \$145 as rent of the lands, and that he is liable to the plaintiffs on that basis. The chancellor found the rental value to be the sum of \$106. The complaint contains no allegation as to the rental value of the lands, and there was no proof directed to that issue. It is merely alleged in the complaint that Mixon received \$145 each year, and that allegation is sustained by the evidence. The only testimony on that subject comes from Mixon himself. He testified that he accepted the lease in satisfaction of the Mixon-McClintock Company debt of \$531.23, and that he subrented the land each year for the gross sum of \$145. He also testified that he paid for certain repairs and paid the taxes on the land, but did not state the cost and amount thereof and was not asked to do so.

[14-17] The plaintiffs repudiated the lease made by their father, and cannot treat Mixon as a mortgagee in possession, but are confined in their recovery to the fair rental value of the lands. That is not necessarily determined by ascertaining the gross amount of rents received; but the amount so received affords some evidence of the rental value of the land, though not conclusive. The burden being on the plaintiffs, they should have offered proof of the net rents received, after deducting taxes and the reasonable cost of necessary repairs, or of the rental value regardless of the amounts actually received. They are not entitled to recover the full rental price received in face of the positive testimony that it was necessary to expend sums for repairs and taxes. Mixon testified that he agreed to pay \$531.23 by way of credit on the mortgage debt and to pay the taxes and repair bills, and the chancellor accepted that as the best evidence brought before him of the true rental value of the land. We cannot say that his conclusion was unwarranted. So the plaintiffs' petition for rehearing is overruled.

Shapard asks for a rehearing on each of

the points decided against him, but he offers no reasons, except those urged in the original briefs, and, as we are satisfied with the conclusions reached, the petition is overruled. He asks, also, that the judgment of affirmance be modified, so as to remand the cause, with directions to enter a decree foreclosing the Mixon-McClintock Company mortgage on the estate of the life of W. C. Bobbitt for the amount decreed against Mixon in favor of the plaintiffs. Appellees join in that request, and for that reason the modification will be made. It is so ordered.

PAGE v. COCKRUM et al. (No. 231.)

(Supreme Court of Arkansas. March 6, 1916.)

1. MORTGAGES \S 591(3)—RIGHT OF REDEMPTION.

Where a wife loaned money on a note secured by a mortgage, the papers being in the husband's name, the borrowers dealing with the husband without knowledge of his agency for his wife, and after foreclosure decree in the husband's suit, and before sale, it was agreed between the wife and the mortgagors that they should deed their land to her and she should deed the property back in case they paid the balance due, with interest, within a year, and such payments of balance and interest were stopped by garnishment proceedings by creditors of the husband, the borrowers still had the right of redemption, though the deed to the lender was not a mortgage, their stopping payments on account of the garnishment having been involuntary.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1701; Dec. Dig. \S 591(3).]

2. MORTGAGES \S 25(6)—PERSON ADVANCING MONEY—SUFFICIENCY OF EVIDENCE.

In suit by an alleged lender of money secured by mortgage against the borrowers, in which the creditors of the lender's husband intervened, evidence held sufficient to show that it was plaintiff's money, not her husband's which was lent.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 42; Dec. Dig. \S 25(6).]

Appeal from Baxter Chancery Court; G. T. Humphries, Chancellor.

Suit by Annie E. Page against John A. Cockrum and wife, in which L. J. Page, upon the application of defendants, was made a party, and the McGregor-Noe Hardware Company and the Ely Walker Dry Goods Company intervened. From a decree for defendants and the interveners, plaintiff appeals. Affirmed so far as in favor of defendants, and reversed so far as in favor of the interveners.

Allyn Smith, of Cotter, for appellant. S. W. Woods, of Marshall, for appellees.

SMITH, J. Appellant alleged in the complaint which she filed that she loaned appellee Cockrum in July, 1903, the sum of \$500, which was evidenced by a note for that amount and secured by a mortgage on the land in controversy; that this note was extended from time to time by the payment of the interest until an action was commenced

to foreclose the mortgage. The note was made payable to the order of L. J. Page, who is appellant's husband; but it is explained that a Mr. Eatman prepared the papers, and that when Mr. Page brought them to appellant to get a check for the amount of the loan, she called attention to the error in the papers, but her husband explained to her that this would make no difference, as the papers would be delivered into her possession, and, assuming this was correct, she drew her check on the Farmers' Bank at Siloam Springs for \$500. The foreclosure suit was brought in 1910 in the name of L. J. Page, and a decree was rendered, ordering the property sold; but before the sale it was agreed between Cockrum and Mrs. Page that Cockrum and his wife should deed the land to Mrs. Page, and that she should execute a bond for a deed under which she agreed to deed the property back to Cockrum in case he paid the balance then due, with the interest thereon, within one year from the date. About the time of this settlement a fire destroyed Mr. Page's store, as a result of which he became insolvent, and various creditors of the firm of which he was a member recovered judgments against him, and garnishments were run against Cockrum for the money alleged to be due to Page. On the part of appellees it was denied that Mrs. Page owned the original indebtedness, and it is insisted that the warranty deed to her was a mere change in the form of the security, and that the deed is, in fact, a mortgage.

Appellant contends that the deed is what it purported to be; that time was made of the essence of the contract to reconvey; that the title to the land was in her, and not in her husband; and she tendered back certain payments which had been made during the year under the bond for title. The court found that, notwithstanding the expiration of the year, Cockrum still had the right to redeem the land, and that Mrs. Page was not entitled to a strict foreclosure as against him, and that the money originally loaned was the property of L. J. Page, and not that of his wife, and that the judgment creditors were entitled to apply the balance due by Cockrum upon its being paid into court to the satisfaction of their judgments against Mr. Page. We think the proof shows that the \$500 was the individual money of Mrs. Page, which she derived from the estate of her father, and that her husband acted as her agent and advisor in making the loan, as he was shown to have done in other loans which were made of her money, and that they were both solvent at that time, and regarded it as immaterial that the note was made payable to Mr. Page, instead of Mrs. Page, as the papers were delivered to her and retained in her possession, and the suit to foreclose was brought in her husband's name because the note was so made payable, but when the compromise and set-

tlement was made, the deed was taken in her name because the transaction had been made for her benefit.

Appellant appears to have sold a farm which she inherited from her father for \$3,100 cash just before she removed to this state. There was exhibited with her deposition a statement of her account with the bank, which showed it was kept in the name of both herself and her husband, and the account was similarly kept when it was transferred to a bank in the Indian Territory. Mrs. Page drew checks against this account and the check for the \$500 which constituted the original loan, although it was drawn in the name of her husband. During this time Mrs. Page was shown to have made other loans, all of which were taken in her own name, and this particular loan was not so taken, according to the evidence in her behalf, because of the lack of specific directions to Mr. Eatman in the preparation of the papers. Mr. Page is an invalid, yet about the time of the original loan he transacted most of Mrs. Page's business for her, and Cockrum testified that in negotiating this loan he supposed he was borrowing the money from Mr. Page, as nothing was said to the contrary. Cockrum further testified that he was garnished by Mr. Page's creditors, and that he thereafter made no further payments upon his loan evidenced by the deed and the bond for title, although Mrs. Page's attorney advised him to ignore the garnishments upon the ground that the money due by him was due to Mrs. Page; but he offered at the trial to pay the balance due by him to be applied under the direction of the court.

[1] We think the court was warranted in holding that Cockrum still had the right of redemption, and this is true even though the deed to Mrs. Page was not, in fact, a mortgage, because the garnishment arrested the payments. Cockrum had the right to require that the garnishment against him be dismissed, or disposed of before he could be required to continue his payments, and this is especially true when it is remembered that he had dealt with Mr. Page without knowledge of the existence of his agency for his wife, and when he had reason to believe, and did believe, that the sum due by him was payable to Mr. Page. It is also shown that Cockrum offered to pay the balance due by him to Mrs. Page's attorney if they would protect him in the event the garnishment should be sustained against him, but they declined to accept his proposition and filed this suit. So much of the decree as gave Cockrum the right to pay the balance due will be affirmed.

[2] We do not agree, however, with the court below in the application of the money so to be paid. We think the proof reasonably clear that the money did, in fact, originally belong to Mrs. Page, although her ex-

planation of how and where she kept it is not entirely clear and satisfactory, and at the time of the original loan she and her husband were both solvent. Nor do we think this is a case where the wife has permitted her husband to take charge of her property, to assume control over it, and use it as a basis of credit. It is not contended that any creditor of Mr. Page had knowledge of this transaction. It is true that the mortgage was recorded, but none of the payments made on it were indorsed on the margin of the record where the instrument was recorded, and it was apparently barred by the statute of limitations, so far as the contrary was disclosed by the records, before the credit was extended which formed the basis of the judgments upon which the garnishments issued.

The portion of the decree which directs the application of the balance due by Cockrum to the satisfaction of the judgments against Mr. Page will be reversed, and the same is now ordered paid to Mrs. Page.

This appeal was perfected on October 16, 1915, and it is insisted that, under the act of February 17, 1915 (Acts 1915, p. 205), amending section 1199 of Kirby's Digest, it was not taken in time. But we have held to the contrary in the recent case of *Shapard v. Mixon*, 184 S. W. 399.

JUDKINS v. STATE. (No. 188.)

(Supreme Court of Arkansas. Feb. 21, 1916.
Rehearing Denied April 3, 1916.)

1. INDICTMENT AND INFORMATION §125(3)—FALSE PRETENSES—DUPLICITY.

Under Kirby's Dig. § 1689, making it an offense by false pretenses to obtain "money, personal property, right in action," etc., or "a signature of any person" to a written instrument, an indictment, charging defendant with obtaining by false pretenses the surrender of his promissory note and mortgage securing it, and inducing the defrauded person to sign a direction to satisfy the mortgage, charged but one offense, obtaining a "right in action" by false pretenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 335; Dec. Dig. §125(3).]

2. FALSE PRETENSES §32 — INDICTMENT — VALUE OF PROPERTY.

An indictment, charging defendant with having obtained by false pretenses the surrender of his note and chattel mortgage, enumerating the property covered by the mortgage and stating its value, is not defective as failing to allege the value of the right surrendered.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 42-44; Dec. Dig. §32.]

3. CHATTEL MORTGAGES §150(2)—RECORDING—NOTICE TO THIRD PERSONS.

Under Kirby's Dig. § 5395, providing that chattel mortgages shall be recorded in the county in which the mortgagor resides, the recording of a chattel mortgage in a county other than that of the mortgagor's residence is insufficient to constitute notice to third persons.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 250, 251; Dec. Dig. §150(2).]

4. CHATTEL MORTGAGES §92 — RECORDING NOT NECESSARY TO VALIDITY BETWEEN PARTIES.

An unrecorded chattel mortgage is good between the parties thereto, and constitutes a lien which may be enforced against the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 152; Dec. Dig. §92.]

5. FALSE PRETENSES §11—NATURE OF PROPERTY OBTAINED.

The securing by false pretenses by a mortgagor from his mortgagee of the release of his unrecorded chattel mortgage, constitutes an offense under Kirby's Dig. § 1689, the mortgage being effective between the parties.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 15; Dec. Dig. §11.]

6. FALSE PRETENSES §11—NATURE OF PROPERTY OBTAINED.

The securing by false pretenses by a mortgagor from the mortgagee of the release of the mortgage constitutes an offense under Kirby's Dig. § 1689, although the debt secured by the surrendered mortgage is usurious.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 15; Dec. Dig. §11.]

Smith, J., dissenting.

Appeal from Circuit Court, Pope County; M. L. Davis, Judge.

J. F. Judkins was convicted of false pretenses, and appeals. Affirmed.

U. L. Meade, of Russellville, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant was convicted under an indictment which charged him with obtaining from one J. M. Hoffman a promissory note in the sum of \$300 and a certain chattel mortgage on personal property to secure the same, by virtue of a false representation concerning the value of other security given in lieu thereof. It is charged in the indictment that appellant was indebted to Hoffman in the sum of \$370, evidenced by a promissory note for \$350 and bearing 10 per cent. interest, and to secure the payment thereof he executed to Hoffman a chattel mortgage on his one-third interest in a cotton gin and gristmill, one horse, three cows and calves, and one John Deere binder, all of the value of \$370.41, and that he induced Hoffman to surrender said note and release said chattel mortgage and accept in lieu thereof another mortgage on a tract of land by a false and fraudulent representation that there were only two prior mortgages on the land, when in fact there were three prior mortgages given to secure a sum equal to or in excess of the value of the land. On the trial of the case, the state adduced testimony tending to establish the allegations of the indictment. The testimony showed that Hoffman held the note of the appellant for the sum named, and the chattel mortgage to secure payment of the same, and that appellant induced him to surrender the note and chattel mortgage and to accept a new note secured by a mortgage on

land, upon representations that the land was unincumbered except by a mortgage to a certain loan company and to another party, when in truth and in fact a third party, named Hendrix, also held a mortgage on the land for a large sum. Appellant adduced testimony tending to show that he made no false representations, but correctly represented to Hoffman that there were three prior mortgages on the land. Appellant also introduced proof tending to show that the original note, which was surrendered pursuant to the alleged false representations, was void on account of usury. The proof tended to show that the note contained a stipulation for interest at the rate of 10 per cent. per annum from date, and that in addition to that appellant gave to Hoffman a cow of the value of about \$20, and agreed to release an account for repairing a well in the sum of \$5.

[1] It is contended in the first place that the indictment was void because there was an attempt therein to charge two offenses. We are of the opinion that only one offense was charged in the indictment. It is true that there was an allegation to the effect that Hoffman was induced to sign a note to the clerk and recorder, directing him to satisfy the records of the mortgage, but that did not constitute an attempt to charge a separate offense but was only put in as a part of the allegations showing the surrender of the securities. The statute makes it an offense for one to—

"designedly, by color of any false token or writing, or by any other false pretense, obtain a signature of any person to any written instrument, or obtain from any person any money, personal property, right in action, or other valuable thing or effects whatever." Kirby's Digest, § 1689.

If it be conceded that this section prescribed separate and distinct offenses, rather than different modes of committing the same offense, yet it does not follow that this indictment even attempted to set out two modes of committing the alleged offense, for we think it merely constitutes a charge that the surrender and the cancellation of the securities was obtained; and, if that be true, then it constituted an offense under that part of the statute which denounces the obtaining from any person any "right in action" by false pretense.

[2] Again, it is insisted that the indictment is defective in failing to allege the value of the security surrendered, but an inspection of the indictment reveals the fact that no such omission is found there. It is alleged that the secured debt was evidenced by a note in the sum of \$350, with accrued interest, and that the property described in the chattel mortgage, to wit, a third interest in a cotton gin and grist mill, and one horse, three cows and calves, and one John Deere binder, was of the value of \$370, and that Hoffman was induced by said false pretense to surrender said note and to release said mortgage lien. This constituted an allega-

tion of the "right of action" which appellant obtained by reason of the false pretense. There was testimony introduced concerning the value of the property described in the surrendered chattel mortgage, but in order to prove that the offense constituted a felony, it was only necessary for the state to show that the value of the property amounted to the sum of \$10, and the jury had the right to exercise their general knowledge of values to arrive at the conclusion that the property described was of at least that amount of value.

[3] The proof shows that appellant resided in Perry county, Ark., and that the chattel mortgage was recorded in Conway county. The record was therefore insufficient to constitute notice to third parties, for the statute provides that a mortgage on personal property must be recorded in the county in which the mortgagor resides. Kirby's Digest, § 5395.

[4] But an unrecorded mortgage is good between the parties thereto, and constitutes a lien which may be enforced as against the mortgagor. *Smead v. Chandler*, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353.

[5] Appellant requested the court to instruct the jury that if the recording of the mortgage in a county other than where the mortgagor resided gave it no validity as a lien, obtaining an order on the recorder for the surrender and cancellation of the mortgage did not constitute an offense. The instruction was obviously incorrect, and the court properly refused to give it. The lien of the mortgage being effective between the parties, it constituted an offense to obtain its release by means of false representations, even though it was not properly recorded.

[6] The principal ground urged for reversal of the judgment is that the court erred in refusing to submit to the jury the question whether or not the original debt secured by the surrendered mortgage was void on account of being usurious, and in refusing to instruct the jury that if the debt was usurious the obtaining by false pretense of the surrender of the mortgage did not constitute an offense. We find very little authority bearing on that question. The nearest approach to a decision of that question is a Missouri case. *State v. Clay*, 100 Mo. 571, 13 S. W. 827. It was there held that it was not an offense to obtain from a married woman, by false pretense, a written contract granting an option for the sale of her land, for the reason that such a contract was not binding on a married woman, and it was therefore not a thing of value. The statute of Missouri on that subject is not precisely the same as our statute, though it is, to some extent, similar. It provides that it shall constitute an offense to obtain from any person, by false pretense, "any money, personal property or other thing of value," but does not, as our statute does, embrace the words "right of action." Now a void obligation may not, in fact, consti-

tute a thing of value, but it does constitute a "right of action" within the meaning of the statute. A right of action may be asserted under an usurious contract, and recovery may be had unless a plea of usury is interposed; therefore the contract constitutes a right of action within the meaning of the statute. Especially is that true where the usury is not revealed in the face of the contract. The party who surrenders a contract valid on its face by reason of a false pretense is thus deprived of asserting a claim under the contract, and that is what was intended to be reached by the statute. *Quertermous v. State*, 114 Ark. 452, 170 S. W. 225.

"It is no defense," said Mr. Wharton, "that the prosecutor was not injured." 2 Wharton on Criminal Law, § 1508.

And it is generally held that:

"One who obtains money by false pretenses is liable to punishment, though the person from whom it was obtained parted with it in furtherance of an illegal purpose." *Rapalje on Forgery and Kindred Offenses*, § 435.

The principles above announced are not precisely the same as those involved in the present case, but they are applicable to the extent that one who obtains from another, by false pretense, the surrender and release of a written obligation which on its face constitutes a valuable right of action, cannot be heard to say that it is no offense under the law because the right could be avoided by a plea of usury. We are therefore of the opinion that the court did not commit error by refusing to submit that question to the jury. Judgment affirmed.

SMITH, J., dissents.

WOODS v. STATE. (No. 265.)

(Supreme Court of Arkansas. March 20, 1916.)

1. HOMICIDE \Leftrightarrow 253(1) — MURDER IN THE FIRST DEGREE—EVIDENCE.

Evidence in homicide *held* sufficient to warrant a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531; Dec. Dig. \Leftrightarrow 253(1).]

2. NAMES \Leftrightarrow 16(3)—IDEM SONANS.

Relative to variance, the names "Wood" and "Woods" are not idem sonans.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 14; Dec. Dig. \Leftrightarrow 16(3).]

3. HOMICIDE \Leftrightarrow 142(5)—VARIANCE—NAMES.

Evidence in homicide *held* sufficient to warrant a finding by the jury that defendant and deceased were as well known by the name "Wood," used in the indictment, as by their true name, "Woods," preventing a fatal variance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 254; Dec. Dig. \Leftrightarrow 142(5).]

Appeal from Circuit Court, Craighead County; W. J. Driver, Judge.

Henry Woods was convicted, and appeals. Affirmed.

Appellant, pro se. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. The defendant was indicted for the crime of murder in the first degree. He was tried before a jury, which found him guilty, and assessed his punishment at death by electrocution. From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

The facts proved by the state are substantially as follows: On July 19, 1915, the defendant killed deceased at a boarding house run by Rosa Tucker and her husband, Ferrell Tucker, in the Lake City district of Craighead county, Ark. The defendant, Henry Woods, and the deceased, Vina Woods, had formerly been husband and wife. They had lived a part of the time in the state of Oklahoma, and a part of their married life was spent in the state of Arkansas. While they were living in Craighead county, Ark., the defendant got into trouble about selling whisky, and went to the state of Oklahoma and remained away about 18 months. During the time he was gone he corresponded with his wife, but she obtained a divorce from him. At the time she was killed she lived with the Tuckers and slept in the same room with them. She had been keeping company with Monroe Helster, and was reputed to be engaged to him. He also boarded with the Tuckers. The defendant came back from Oklahoma for the purpose of trying to persuade his wife to marry him again. On the night of the 18th of July, 1915, he came to the home of Walter Gunn, who lived about a quarter of a mile away from the Tuckers, and asked him the way to their boarding house. When the defendant arrived at Gunn's house that night, he tapped on the doorstep with his pistol to wake Gunn up, and then shot off his pistol four or five times. Gunn showed the defendant the way to the Tuckers, and defendant arrived there soon after midnight. He went into the house occupied by the Tuckers and found his wife in that room. He got into the bed with her, and after they had talked for a while deceased got up and went into another room, and motioned for Rosa Tucker to follow her. She told Rosa that her husband had a pistol, which she had put in her trunk, and asked Rosa to lock the trunk. Rosa told her husband to lock the trunk, and while he was trying to find the key he found the pistol, and put it in his bosom, and gave his wife the key. Vina then got back on the bed with the defendant, and they continued to talk the rest of the night. Rosa Tucker said:

"We had breakfast before daylight. After breakfast the defendant asked me for the key to Vina's trunk. I gave the key to my husband. Vina said: 'Well, just as well give him the key, just as well now as any time; it is going to be

some time—that he is going to kill her.’ The defendant was given his pistol, and went out of the house, and in a short time came back and asked Vina to go walking with him. She refused, saying she didn’t want to go out there, because he was going to kill her. The defendant told her that he was not going to kill her, and insisted on her going walking with him. They went down the road a little piece and talked a while. The deceased then came back to the house, and the defendant went over to Walter Gunn’s. In a short time the defendant came in at the front door and asked where his lantern was. It was then daylight. Vina stepped inside the middle door and showed him where his lantern was. He picked up the lantern and jerked back his coat to pull his pistol, I ran. Vina cried out for him not to shoot, and commenced screaming.”

The husband of Rosa Tucker corroborated her testimony, and stated that he was at the mill at the time the shooting occurred, and went to the house at once, and that Vina was drawing her last breath when he got there. He stated that the pistol used by the defendant was a 32 Colt’s revolver; that he shot deceased near the center of the breast and in the head just below the right ear.

Walter Gunn told the jury about the defendant coming to his house and inquiring the way to the Tucker boarding house and stated the above. He then said that the defendant came back to his house the next morning between 6 and 6:30 o’clock; that the defendant came up to him and said he wanted to shake hands with him for the last time; that he said to the defendant, “What is the matter, Henry?” and the defendant said, “I am going to kill that damn bitch this morning.” Gunn then asked him who he was talking about, and he said, “That woman down there.” The defendant also said he was going to kill Chas. Craig and Monroe Heister. Gunn finally got the defendant to promise that he would not kill deceased and that he would go back to the boarding house and get his lantern, and then come back and stay with him. He said that defendant went down towards the boarding house, and after he had gone a little ways turned around and asked him if he had any 32 cartridges, and that he replied that he did not, and that defendant then said, “Well, what I have got will do,” and went in a trot from there to the boarding house; that some four or five minutes after that he heard the pistol fire.

Another witness who was standing near and heard most of the conversation between Gunn and the defendant corroborated the testimony of Walter Gunn.

Another witness for the state testified that he saw the defendant walk into the house, draw his gun, and commence shooting at deceased; that she threw up her hands and asked him not to do it; that he shot twice; that Vina fell over on the bed, and defendant went over towards her and shot again; and that she screamed until the last shot was fired. Vina died soon after she was shot by the defendant. The defendant ran off and

escaped into Canada. Later he was arrested there and brought back for trial.

The defendant testified in his own behalf as follows:

“My name is Henry Woods, not Henry Wood. My wife’s name is Vina Woods. My wife promised to remarry me, and we agreed to meet at Poplar Bluff for that purpose. I went there, but she did not come. I then went to Oklahoma and wrote her a letter stating that I was willing to carry out my promise to her. I received a letter from her in which she stated she was still willing to marry me. When I came back to Arkansas, I went up to the boarding house where my wife was staying and hollered. I then went into the room where she was and walked up to the bed and kissed her. She seemed cold to me, and when I asked her what was the matter, she replied that she was not going to live with me any more. I tried to persuade her to stick to her promise. I had taken my pistol off when I first got there and put it under the pillow. I threatened to blow out my brains. She asked me for the gun, and I gave it to her and she put it in the trunk. The next morning I asked my wife to go walking with me, and she did say she was afraid I would kill her. I told her that I would not hurt her. We walked off about 30 yards from the house and had a talk. She agreed to give up our little daughter. I did not want a stepfather over her. I went over to Walter Gunn’s on the morning of the killing, but he is mistaken in what he said. I did not say anything about killing my wife, and did not holler back and ask him if he had any 32 cartridges. I had no ill will towards my wife, and did not realize what I was doing when I shot her. After the killing I went through the bottom and escaped to Canada.”

[1] The evidence on the part of the state was sufficient to warrant a verdict of murder in the first degree. According to it, there was a specific intent to kill deceased formed in the mind of the defendant at or before the time he was at the home of Charley Gunn on the morning of the killing. He told Chas. Gunn in the hearing of another witness that he intended to kill her, at the same time referring to her by a vile name. He walked on back towards the boarding house, and killed deceased as soon as he entered it. There was no provocation whatever for the killing, and, according to the testimony of the state, it was the result of deliberation and premeditation. The defendant himself admits the killing, and the only excuse he gave for it was that he did not realize what he was doing. His insanity at the time of the killing was submitted to the jury under proper instructions. The court also gave the usual instructions on the question of homicide, of reasonable doubt and of the credibility of the witnesses. The guilt or innocence of the defendant was submitted to the jury upon competent evidence and under instructions which fully covered every phase of the case. The verdict of the jury was fully warranted by the evidence.

The defendant was indicted as Henry Wood, and he was charged in the indictment with killing Vina Wood. He testified that his name was Henry Woods, and that deceased’s name was Vina Woods. Therefore

his counsel insisted that there was variance between the indictment and the proof.

Charley Craig was a witness for the state, and testified that he was the uncle of the deceased, and had known her and the defendant all their lives. We quote from his testimony as follows:

"Q. Do you know Henry Woods? A. Yes, sir. Q. Do you know what is the name of the defendant, whether it is Henry Wood or Henry Woods? A. No, sir; I don't know which it is. I have heard it both ways; used both ways. I never knew for sure whether it was Wood or Woods. Q. Did you know Vina Woods? A. Yes. Q. What was her correct name, Vina Wood or Vina Woods? A. They have called it both ways. Q. Was she the wife of Henry Woods? A. Yes, sir. Q. Do you know of your own personal knowledge whether the Vina Wood mentioned in this indictment was one and the same person that was killed over there? A. Yes, sir. Q. Whatever her name might have been, whether it was Vina Wood or Vina Woods, she was one and the same person? A. Yes, sir. Q. And whatever Henry Wood's name may be, whether Henry Wood or Woods, he is one and the same person that is charged with the offense? A. Yes, sir."

[2] Counsel for the state insists there is no variance because the names come within the doctrine of idem sonans, but this court has decided adversely to that contention. In the case of *Semon v. Hill*, 7 Ark. 70, it was there said that the letter "s" terminating the letters of a name in our language is seldom silent, and that, if it appears as the last letter of a name, the pronunciation thereof conveys to the ear an entirely different sound than that conveyed when the consonant is omitted. In the case note to 52 L. R. A. (N. S.) p. 939, the author states that the great majority of the decisions seem to establish the general rule that the addition or omission of the final "s" to a name creates such a change in the sound of the name that the variant name cannot be said to be idem sonans. The decisions from quite a number of states to that effect are cited. The reason given is that the final "s" to a name is not silent.

[3] We are of the opinion, however, that the testimony of the state was sufficient to warrant the court in submitting to the jury the question of whether the defendant and deceased were as well known and called by the name of Henry Wood and Vina Wood, respectively, as Henry Woods and Vina Woods. This results from the doctrine of interchangeability of names.

Charles Craig was the uncle of the deceased, and had known both her and the defendant all their lives; and under his testimony the question of variance was one of fact for the jury. *Bennett v. State*, 84 Ark. 97, 104 S. W. 928. In that case the court said:

"The question of identity of the person described in the indictment with the one mentioned in the evidence is one of fact, to be established, like any other fact, to the satisfaction of the jury."

See, also, *Commonwealth v. Gormley*, 133 Mass. 590.

Under the testimony of Charles Craig, as above stated, the jury might have found that defendant and deceased were as well known and called by the name of Henry Wood and Vina Wood, respectively, as by the name of Henry Woods and Vina Woods. This question of fact was submitted to the jury under the following instruction:

"You are instructed that, if you find from the evidence beyond a reasonable doubt that Henry Wood and Vina Wood, named in the indictment, are one and the same persons, respectively, as the defendant and the deceased mentioned in the evidence in this case, then there would be no variance between the allegations of the indictment and the evidence, and it would be your duty to convict the defendant, provided you find him guilty under the instructions hereinbefore given you."

Another reason for not reversing the judgment on account of the alleged error in spelling the defendant's name is given in *Bridger v. State*, 183 S. W. 962. This case was so recently decided that it is not necessary again to state the reasons there given.

We have carefully examined the record, and find no prejudicial errors in it.

Therefore the judgment must be affirmed.

UNION STATE BANK OF SHAWNEE, OKL., v. FIRST NAT. BANK OF HUNTSVILLE, ARK. (No. 254.)

(Supreme Court of Arkansas. March 20, 1916.)

1. GARNISHMENT \S 38 — SUBJECT-MATTER — NEGOTIABLE INSTRUMENT.

A debt evidenced by a negotiable certificate of deposit is not subject to garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. \S 73-77; Dec. Dig. \S 38.]

2. APPEAL AND ERROR \S 1009(1)—REVIEW— FINDINGS BY CHANCELLOR.

A case appealed from the chancery court is for trial de novo on the record before the chancellor, whose findings are to be accepted unless against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3970, 3978; Dec. Dig. \S 1009(1).]

3. BILLS AND NOTES \S 497(2) — BURDEN OF PROOF—KNOWLEDGE OF DEFENSES.

In an action on a negotiable certificate of deposit by one who purchased it before maturity for full value, the burden is on the bank issuing the certificate to prove by a preponderance of the evidence that plaintiff had notice of the defenses or information sufficient to put it on inquiry.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1676, 1677, 1686, 1687; Dec. Dig. \S 497(2).]

4. BILLS AND NOTES \S 525 — EVIDENCE — KNOWLEDGE OF DEFENSES.

In a suit by a bank on a certificate of deposit issued by another bank to an insurance company and assigned to the plaintiff before maturity for value, evidence held not to show that the plaintiff had knowledge of any defense against the certificate arising from the fact that it had been given for the proceeds of a fraudulent sale of corporate stock by an agent of the insurance company, and that the bank issuing

it had been thereafter compelled in garnishment proceedings to pay it to the buyer of the stock.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.]

5. BANKS AND BANKING §116(1)—REPRESENTATION BY OFFICERS — PRESIDENT — KNOWLEDGE OF DEFENSES.

Where the president of an insurance company, who had knowledge that its agent had misrepresented the value of corporate stock sold, was also the president of the bank to which the certificate of deposit of the proceeds of the sale of the stock in another bank was assigned, the president's knowledge of the fraud is not imputed to the bank if he, in assigning the certificate to the bank, acted only for the insurance company.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 282; Dec. Dig. § 116(1).]

Appeal from Madison Chancery Court; T. H. Humphreys, Chancellor.

Suit by the Union State Bank of Shawnee, Oklahoma, against the First National Bank of Huntsville, Arkansas. Decree for defendant, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

McCULLOCH, C. J. Appellant instituted this action against appellee in the chancery court of Madison county to recover the amount of a time certificate of deposit for the sum of \$405 issued by appellee to the Shawnee Life Insurance Company, an Oklahoma corporation, and by the latter assigned to appellant for a valuable consideration. The certificate of deposit was issued on August 26, 1911, payable one year after date, with interest at the rate of 3 per cent. per annum, and was duly assigned by the payee to appellant on January 6, 1912, by written indorsement. The certificate was negotiable in form and constituted negotiable paper within the legal meaning of that term. Appellant purchased the certificate before maturity and paid full value therefor, according to the undisputed evidence, and the only question in the case is whether or not appellant was an innocent purchaser without knowledge of any defense against a suit on the instrument.

Appellee defended on the ground that it had, prior to the commencement of the suit, paid the money over to E. A. Routh and S. G. Parsley pursuant to a decree of the chancery court instituted by them against the Shawnee Life Insurance Company, and in which the appellee was summoned as garnishee. Appellee alleged in its answer that Routh and Parsley purchased stock in said Shawnee Life Insurance Company from an agent named McClung, who misrepresented the par value of the stock and fraudulently induced them to purchase the same, and that the deposit in appellee bank was a part of the money paid to said agent for the purchase price of said stock. It is also alleged that appellant, when it accepted an assignment of the certificate of deposit, had full

information of the fraud of said agent, and that it aided in the perpetration of said fraud by accepting the transfer of the certificate of deposit. The record of the former suit referred to was brought into the record in this case and shows that the chancery court rendered a decree in favor of Routh and Parsley for the recovery of the price paid by them for the stock, and that appellee was directed to pay the amount of said certificate of deposit over to said parties. This case was heard upon the depositions of witnesses and said record of the former case, and the chancellor found the issues in favor of appellee and dismissed the complaint for want of equity. No question is raised as to the case being brought in the chancery court instead of the circuit court.

[1-3] It was alleged in the complaint that the certificate of deposit had been destroyed by fire in a building in Shawnee, Okl., and the testimony established the fact beyond dispute that appellant purchased the certificates as aforesaid, and after maturity, and the refusal of the appellee bank to pay same, it was turned over to an attorney in Shawnee, whose office was destroyed by fire and the certificate of deposit was lost in the fire. Appellant has abundantly made out its right to recover the amount of the certificate unless it was a party to the fraud or had such information as would bar it from the right of recovery. The debt evidenced by the certificate of deposit, which was a negotiable instrument, was not subject to garnishment. We are not favored with any statement of the reasons upon which the chancery court denied the right of appellant to recover on the certificate of deposit, other than that appellant had knowledge at the time it accepted the assignment of the certificate of deposit of the alleged fraudulent conduct of the agent of the insurance company. The argument of the case here is confined solely to the question whether or not the proof is sufficient to establish a finding that appellant was not an innocent purchaser for value, and we therefore pass over without discussion any other question which might have been raised in the case. The case having been tried in the chancery court, it comes to us for trial de novo on the record made before the chancellor, and it is our duty to accept the finding of the chancellor unless it is found to be against the preponderance of the evidence. The proof is undisputed, as before stated, that appellant purchased the certificate of deposit before maturity and paid full value for it. The burden of proof is therefore upon the appellee to show that appellant had notice of the defenses against the enforcement of the paper, or was put in possession of such information as was sufficient to put it upon inquiry. That burden must be sustained by a preponderance of the evidence.

[4] Appellant was engaged in the bank-

ing business in Shawnee, Okl., and the Shawnee Life Insurance Company was also domiciled at that place. Appellee is engaged in the banking business at Huntsville, Ark. Appellant introduced its cashier as a witness, who testified that the purchase of this certificate of deposit was made along with other negotiable paper from the Shawnee Life Insurance Company, and that those acting for the bank in the transaction had no knowledge of any infirmities in the instrument so purchased or of any defenses against it. There is no contradiction whatever in the testimony, and it must be accepted as establishing the fact that appellant bank was an innocent purchaser of the paper, unless it be shown that information was otherwise brought to the attention of those who had charge of the affairs of the bank.

It appears from the testimony that M. C. Flemming was president of the appellant bank during the years 1911 and 1912, and that he was also president of the Shawnee Life Insurance Company. The testimony is undisputed, however, that he was president only in name and had nothing to do with the management of the affairs of the bank until June, 1912, which was about six months after the bank had become the owner of the certificate of deposit. Flemming testified as a witness, and his testimony, as well as that of the cashier of the bank, shows that he had nothing to do with the management of the affairs of the bank. He testified, also, that he had no knowledge or information that there was any defense to this paper. The testimony adduced by the appellee shows that in the autumn of 1911 Routh and Parsley wrote letters to the insurance company, informing the latter of the alleged fraud of its agent in misrepresenting the face value of the stock sold to them, and that they received replies to those letters signed by Flemming as president. Flemming testified that he signed the correspondence, which was very voluminous, that was brought to him from time to time by the secretary of the company, and that he signed without reading it. Flemming acted entirely for the insurance company in making the sale of said securities to the bank. Now, the alleged fraudulent conduct of McClung in misrepresenting to Routh and Parsley the value of the stock is important only in so far as it tends to show the fraud of the insurance company in divesting itself of title to its property, including this certificate of deposit. The insurance company owned the certificate of deposit and had the right to assign it, if done so without design to defraud creditors, notwithstanding the fact that its agent had perpetrated a fraud in making a sale of the stock to Routh and Parsley. There is no evidence whatever that the insurance company assigned its securities with any design to defraud its creditors, for the proof

is that the whole batch of securities was assigned, not for cash, but in exchange for other securities. Mere proof of the fact that the agent of the insurance company had been guilty of fraud in misrepresenting the face value of the stock would not under the proof in this case be sufficient to establish a fraudulent design on the part of the insurance company in transferring its securities.

[5] Moreover, the only proof relied on as carrying information to the bank is that Flemming, the president, was informed of the fraudulent conduct of the agent of the insurance company in making the sale of the stock; but, as before stated, Flemming was not acting for the bank in that transaction, but was acting entirely for the insurance company, and his knowledge under those circumstances is not imputable to the bank. The burden of proof being upon the appellee to establish the guilty knowledge of appellant in the alleged fraud of the Shawnee Life Insurance Company, we think that it has wholly failed to maintain that burden, and that the preponderance of the testimony is in favor of appellant.

That being true, it follows that the decree of the chancellor was erroneous, and that appellant is, upon the evidence adduced, entitled to a decree in the sum of \$405 with interest at 3 per cent. per annum from August 26, 1911.

The decree of the chancellor will be reversed, and judgment entered here accordingly.

DUNCAN et al. v. LIDDLE et al. (No. 211.)

(Supreme Court of Arkansas. Feb. 28, 1916.
Rehearing Denied April 8, 1916.)

1. REMAINDERS §5—CONSTRUCTION—INTEREST.

A husband and father conveyed land to his two minor children and their mother. The deed recited that the interest of the mother should continue through her natural life or widowhood in case she should survive the grantor, and at her death or remarriage should pass to the children, or any other children of the marriage who might be born. The father died, and the mother remarried. *Held*, that possibility of future issue of the marriage being determined, the infant children who acquired a fee-simple estate in the lands as tenants in common of an undivided one-third, with a contingent remainder in the interest conveyed to the mother, acquired the fee of the whole lands.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 4; Dec. Dig. §5.]

2. COURTS §472(4) — EXCLUSIVE JURISDICTION — PROPERTY OF INFANTS — COURT OF CHANCERY.

The probate court has exclusive jurisdiction to sell lands of minors for reinvestment, and a sale made under order of the court of chancery is void and the infants may thereafter recover the property.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1211; Dec. Dig. §472(4).]

3. ESTOPPEL \S 91(1)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

Where the land of infants was sold by the court of chancery without authority, and it did not appear that all of the proceeds were invested in other lands, or that the infants, after reaching their majority, received the proceeds from the other lands which were subsequently resold with knowledge of their rights in the first land, they were not estopped from recovering.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 257; Dec. Dig. \S 91(1).]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Action by John Duncan and another against Chas. E. Liddle and others. From a decree for defendants, plaintiffs appeal. Reversed and remanded, with directions.

The plaintiffs, John Duncan, a minor whose disabilities had been removed by an order of court, and James Duncan, a minor by his next friend, brought suit for the possession of certain lands in St. Francis county, conveyed to them and their mother by their father, Elijah Duncan, in August, 1902. The deed recites:

"* * * I hereby grant, bargain, sell and convey unto the said Emma F. Duncan, John Duncan and James Duncan all my right title, interest," etc. "* * * The interest of said Emma F. Duncan herein intended to be conveyed is to continue during the natural term of her life or widowhood, should she survive me, then at her death or marriage all the title to said lands shall pass to the said John Duncan and James Duncan and to any other children that may be born to Emma F. Duncan by her present marriage with said Elijah Duncan, share and share alike."

The habendum:

"To have and to hold said lands and lots to the said Emma F. Duncan and James Duncan, as aforesaid and to the heirs and assigns of the said John Duncan and James Duncan."

The defendant answered, admitting that the father of plaintiffs had been the owner of the land, and that he conveyed same by the deed as alleged in the complaint, under the terms of which it alleged a life estate was conveyed to the mother, with contingent remainder therein to the plaintiffs; that upon the petition of plaintiffs, their father as next friend, and their mother and father, the lands were ordered sold by the chancery court of St. Francis county for the benefit of petitioners, and the proceeds reinvested in other lands; that they were duly sold to L. E. Davenport for a consideration of \$5,500; that Davenport transferred his certificate of purchase to H. W. Robinson; and that the court confirmed the sale and ordered the deed made to said Robinson by its commissioner, which was done upon the payment of the purchase price by him.

It was alleged: That the defendants paid the purchase money to the commissioner, which was used by their father for the purchase of certain other lands in Lee county, describing them, which were conveyed to their mother and to them. A copy of the

deed was exhibited. That Emma F. Duncan, the mother, conveyed her interest in the last-purchased lands to one J. F. McDougal, for a consideration of \$1,500, and that plaintiffs also conveyed to McDougal an undivided two-thirds interest in said Lee county lands for \$3,000, of which \$500 was paid in cash to the plaintiff Jno. Duncan and two notes of \$500 each were executed to him, due November 1, 1911 and 1915, and one note was executed to Jas. Duncan, due April 1, 1915, with interest, which was made nonnegotiable. That the two \$500 notes of John Duncan's were paid to him in 1911. That the entire \$1,500 was received by him from J. F. McDougal after he was of full age and had full knowledge that said lands in Lee county were bought with the proceeds of the St. Francis county lands sold by order of the chancery court for reinvestment, and that his acceptance of said purchase money was a ratification of the sale, and estopped him from claiming any title to the lands in controversy. That Jas. Duncan, in the year 1912, after becoming of full age, made demand upon McDougal for the payment of the annual interest due upon the \$1,500 note, and thereby ratified the chancery sale of the St. Francis county lands, and that said James Duncan still had and held the \$1,500 note, given by McDougal as part of the purchase money for the Lee county lands, which were bought with the proceeds from the sale of the St. Francis county lands, as a valid demand against the maker.

It was also alleged that defendant had made valuable improvements upon the land at an expense of \$1,000, and paid the taxes thereon since the year 1906, much of the improvements having been made after plaintiff John Duncan became of age and Jas. Duncan was old enough to understand his rights, and both knew the improvements were being made and the taxes paid, and made no objection thereto; that the improvements were made and the taxes paid in good faith, relying upon the validity of the chancery court proceedings, and in the honest belief that they had acquired title to the lands thereunder.

They alleged, further, that they were entitled to be reimbursed for the purchase money paid for the lands if plaintiff recovered them, that an accounting would be necessary, and moved to transfer the cause to equity, which was done.

The petition for the sale of the lands, with the decree, report of the commissioner, the confirmation of the sale and deed, were all introduced in evidence, and there was testimony tending to show that a part at least of the proceeds realized from the sale of the lands in controversy was invested in the Lee county lands, which were afterwards sold by the plaintiffs as alleged in the answer.

Plaintiffs excepted to the documentary evi-

dence filed by defendants, relating to the decree and sale of the St. Francis county lands and the deed executed, because it appeared therefrom that the chancery court of St. Francis county was without jurisdiction of the matter, which exceptions were overruled.

The court found that the defendants were the owners of the lands, and decreed accordingly, from which decree this appeal is prosecuted.

J. W. Story and Walter Gorman, both of Forrest City, for appellants. H. F. Roleson, of Marianna, R. J. Williams, of Forrest City, and W. W. Hughes, of Memphis, Tenn., for appellees.

KIRBY, J. (after stating the facts as above). [1, 2] It is properly contended that this case is controlled by *Watson v. Henderson*, 98 Ark. 63, 135 S. W. 461. It was there held that the chancery court was without jurisdiction to order the sale of the lands of a minor for reinvestment, and, the proceedings of the St. Francis chancery court ordering the sale of the lands herein being without jurisdiction, its decree was void, and plaintiffs acquired no title to the lands through the deed of its commissioner, conveying same in accordance with the proceedings and decree therefor.

It is insisted for appellees that under the original conveyance from Elijah Duncan, the father of appellants, to them and their mother, they acquired only a contingent remainder in the lands, and that the chancery court had jurisdiction to make the sale, within the doctrine announced in *Bedford v. Bedford*, 105 Ark. 587, 152 S. W. 129. It is there held that courts of equity have jurisdiction to order the sale of contingent remainders for reinvestment, notwithstanding one of the remaindermen was an infant, and that its jurisdiction is inherent and not derived from or conferred by statute. Under the conveyance from Elijah Duncan the plaintiffs John Duncan and James Duncan acquired a fee-simple estate in the lands conveyed, as tenants in common of an undivided one-third each and the mother's one-third, contingent upon the termination of her estate by death or remarriage, and subject to be diminished by the birth of other children. The possibility of further issue of the marriage was determined upon the death of Elijah Duncan and the estate of the mother upon her remarriage long before suit brought herein. The exclusive jurisdiction to sell the lands of the minors for reinvestment was in the probate court, as already held in *Watson v. Henderson*, *supra*; and, the chancery court having no jurisdiction in the matter, the whole proceeding therein was void, and the purchasers at the sale acquired no title to the lands.

[3] It is insisted, in any event, that the plaintiffs acquired title to certain lands in

Lee county, purchased with the proceeds of their St. Francis county lands realized from the void sale thereof, and, with full knowledge that such was the fact, disposed of said Lee county lands after coming of age, and thereby ratified the chancery court's action in making the sale, and are estopped to deny the defendants' right to possession thereunder on that account. The testimony, however, does not show that the entire amount realized from the sale of the lands in St. Francis county was invested in said other lands in Lee county, and neither can it be said to establish the fact that said lands were sold by the minors and the proceeds enjoyed by them after knowledge of the unauthorized sale of their St. Francis county lands by the chancery court, nor that they still had the consideration therefor at the time of the institution of this suit or disposed of for that purpose. The defendants were in no wise induced to make the purchase of the lands, or in any way misled into a change of attitude or position, so far as said purchase was concerned by any acts of the minors after coming of age, and the facts are not sufficient to constitute an estoppel against plaintiff and cannot constitute such a ratification of the void sale as would make it effectual against them.

The chancellor erred in finding otherwise, and the decree is reversed and the cause remanded, with directions to render a decree in accordance with this opinion; and for further proceedings in determining appellees' right to compensation for betterments. It is so ordered.

TURNER v. COTTON. (No. 251.)

(Supreme Court of Arkansas. March 20, 1916.)

JUSTICES OF THE PEACE §44(2)—JURISDICTION—AMOUNT IN CONTROVERSY—HOW DETERMINED.

A justice of the peace has jurisdiction of an action to recover plaintiff's share of a crop and to enforce a landlord's lien where the complaint claims but \$300, although the proof showed a greater sum to be due, the amount owing being unliquidated.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 158, 162, 164, 167; Dec. Dig. §44(2).]

Appeal from Circuit Court, Yell County; M. L. Davis, Judge.

Action by W. E. Cotton against G. W. Turner. Judgment for plaintiff, and defendant appeals. Affirmed.

Jno. M. Parker, of Dardanelle, for appellant. W. E. Cotton, pro se.

McCULLOCH, C. J. The plaintiff, W. E. Cotton, owns a farm in Yell county, Ark., and rented it to the defendant, G. W. Turner, for the year 1914, for a certain share of the crop gathered. This is an action to recover the sum of \$300 for the plaintiff's share of

the crop and to enforce a landlord's lien. The suit was instituted before a justice of the peace, and upon the filing of the proper affidavit and bond an order of attachment was issued, under which the crop was seized. The case was tried before a jury in the circuit court, on appeal from the justice of the peace, and the verdict was in plaintiff's favor for the sum of \$200.

The principal ground urged here for reversal is that the evidence does not sustain the verdict. In fact, most of the numerous assignments of error may be disposed of in determining the legal sufficiency of the evidence. There is a sharp conflict in the testimony, and we think that it is sufficient to support the verdict.

Another contention is that notwithstanding the suit is for but \$300, the evidence adduced by the plaintiff tends to show an indebtedness considerably in excess of that amount, and that the court was without jurisdiction for that reason. The jurisdiction of the court must be determined by the allegations of the complaint, and not by the evidence subsequently adduced. *Lafferty v. Day*, 7 Ark. 260. The suit was to enforce an unliquidated liability, and the allegation of the complaint is that the amount due for rent was \$300. Therefore the allegations control for the purpose of fixing the jurisdiction of the court.

Some of the assignments of error relate to the instructions of the court, but exceptions were not properly saved, and other assignments are not of sufficient importance to discuss.

After a careful consideration of the points raised in the argument, we are of the opinion that the case was properly tried, and that the evidence was sufficient to support the verdict. Therefore the judgment must be affirmed; and it is so ordered.

HICKS et al. v. HICKS. (No. 274.)

(Supreme Court of Arkansas. March 20, 1916.)

1. SUBROGATION \S 41(1)—ADMINISTRATION—JURISDICTION.

The chancery court, having jurisdiction to assign dower, was the proper court to enforce the right of the widow and administratrix to subrogation to claims against the estate paid by her.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 109; Dec. Dig. \S 41(1).]

2. APPEAL AND ERROR \S 907(2) — PRESUMPTION—EVIDENCE TO SUPPORT DECREE.

Where the evidence in a suit in the chancery court was not preserved by bill of exceptions or otherwise, the Supreme Court on appeal must presume that if any evidence could have been offered which would have supported the decree rendered, such evidence was in fact heard.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2913, 2915, 2916; Dec. Dig. \S 907(2).]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Neoma G. Hicks against Allen W. Hicks, Jr., and others. Decree for plaintiff, and defendants appeal. Affirmed.

Vaughan & Akers, of Little Rock, for appellants. E. B. Buchanan, of Little Rock, for appellee.

SMITH, J. Appellee, who is the widow of A. W. Hicks, deceased, and the administratrix of his estate, brought this suit against the minor heirs of her husband to have dower and homestead assigned her. She also alleged that with her own funds she had paid claims which had been probated against her husband's estate, together with certain expenses of administration. The probated claims were designated as "Class A" and "Class B" claims, class A being such as were secured by specific liens, while those of class B were unsecured. Class C covered expenses of administration. Appellee prayed that she be subrogated to the rights of these claimants. The decree recites that the cause was heard on the pleadings, the testimony taken before the special master and reduced to writing and filed as depositions, the report of the special master and the report of the commissioners appointed to assign dower and homestead, and "testimony taken ore tenus at the bar of the court." This testimony so taken was not preserved by bill of exceptions or otherwise. This appeal has been prosecuted from a decree which granted appellee the relief prayed.

[1] It is urged by appellants that the chancery court had jurisdiction only in regard to the assignment of dower, and that appellee is not entitled to be subrogated to the claims paid except those which were secured by specific liens, and that the proper place for the settlement and accounting of the administratrix is in the probate court. There appears to be nothing in the record to show that any attempt was made to lift the administration out of the probate court; in fact, the suit appears to have been brought to enforce subrogation only as to probated claims and allowances. It is conceded that the chancery court had jurisdiction to assign dower, and it was, of course, the proper court to enforce the right of subrogation if such right existed.

[2] We do not know what evidence was heard before the court, and in such cases we must presume that, if any evidence could have been offered which would have supported the decree rendered, such evidence was, in fact, heard. That presumption must be indulged here; and, inasmuch as evidence might have been offered which would have entitled appellee to subrogation, the decree will be affirmed.

DODSON v. CLARK COUNTY LUMBER CO.
(No. 256.)

(Supreme Court of Arkansas. March 20, 1916.)

1. CARRIERS \S 235 — "COMMON CARRIER" — LOGGING RAILROAD.

To constitute a "common carrier," the business as such must be regular and customary in its character, and not casual only, and must be carried on as business and be of such a general and public nature that the carrier is bound to convey goods of all persons indifferently who offer payment for carriage; and hence a logging company operating a railroad to haul timber to its mill, on which it occasionally hauled material for others, but which did not carry passengers at all except gratuitously and under a stipulation exempting it from liability for negligence, was not a "common carrier" of passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 966, 967; Dec. Dig. \S 235.]

For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

2. CARRIERS \S 307(4)—LOGGING RAILROAD—CARRIAGE OF PASSENGER—EXEMPTION FROM LIABILITY.

A logging company, which constructed a railroad to haul the owner's material to its sawmill, and which agreed to haul material for plaintiff at a fixed charge, and in consideration thereof permitted plaintiff to ride on its train in going to and from the place where he was getting out the material and which obtained plaintiff's signature to a stipulation exempting itself from all liability for damages to plaintiff while riding on train, whether arising from its negligence or not, and requiring him to assume all risks of injury, was not liable for injury to plaintiff from a derailment due to its negligence, as the stipulation was binding on the plaintiff, regardless of whether he signed a stipulation for that particular trip or not.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1255; Dec. Dig. \S 307(4).]

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

Action by D. H. Dodson against the Clark County Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

H. B. Means, of Malvern, T. D. Crawford, of Little Rock, and McMillan & McMillan, of Arkadelphia, for appellant. McRae & Tompkins, of Prescott, for appellee.

McCULLOCH, C. J. The defendant, Clark County Lumber Company, is a domestic corporation organized, principally, for the purpose of operating sawmills and planing mills, but under its charter it was also authorized to operate a railroad. The corporation built, in connection with its sawmill, a railroad 12 miles in length running out from Smithton, a point in Clark county, Ark. The road was built out into the timber for the purpose of hauling material to the mill, but the testimony shows that occasionally material was hauled for others. The plaintiff, D. H. Dodson, was injured while he was a passenger on the train, and instituted this action to recover damages.

[1] The material facts are undisputed, and the trial court instructed the jury to return

a verdict in favor of the defendant. The plaintiff was getting out heading material near the terminus of the railroad, and entered into negotiations with defendant to haul material for him, and an agreement was finally reached by the manager of defendant's business, including the railroad, to haul the material for \$2 per cord, and there was a further agreement, in consideration of the price to be charged, that plaintiff should have the right to ride on the train when going to and from the place he was engaged in getting out the material. The defendant was not engaged in carrying passengers, but persons occasionally were allowed to ride without charge. The rule of the company was that no person should be allowed to ride without signing a written stipulation waiving the right to hold the company liable for damages on account of injuries received while being transported over the road. Plaintiff signed the stipulation, which is in the following words:

"I have asked permission to ride the Log Train of Clark County Lumber Company from Smithton, Arkansas, to Good-By, Arkansas, without charge. I know that it does not carry passengers, and is not equipped therefor, and in consideration of permission to ride thereon, I hereby release and discharge said company, its servants or employes from all liability for damages, that may result to me, my heirs or legal representatives, by reason of riding on said train, whether arising from its negligence or not, and hereby assume all risks of injury."

On September 26, 1913, the caboose in which plaintiff was riding was derailed, and plaintiff received serious injuries. The evidence is sufficient to warrant the conclusion that the derailment occurred by reason of negligence of the defendant in its track equipment. The ground upon which the court decided in favor of the defendant was that the stipulation waiving the right to recover damages was binding on the plaintiff. We are of the opinion that the court reached the right conclusion on that question.

We decided, in *St. Louis, I. M. & S. Ry. Co. v. Pitcock*, 82 Ark. 441, 101 S. W. 725, 118 Am. St. Rep. 84, 12 Ann. Cas. 582, that (quoting from the syllabus):

"A railroad company is liable to a passenger injured through its negligence, though at the time of his injury he was riding on a free pass which stipulated that he 'assumed all risks of accidents and damages without claim upon the company'; such stipulation being contrary to public policy."

That case related, however, to a public carrier of passengers, and the basis of the decision was that it was contrary to public policy to permit such a carrier to thus exempt itself from liability. In the present case, the defendant was not a public carrier of passengers. Indeed, the evidence is scarcely sufficient to show that it was a public carrier of goods, for the testimony is that it was only a log road that was being operated, and that defendant did not undertake to carry freight for all who applied, but merely

on some occasions did carry it for others.

We have stated the rule to be that:

"In order to constitute one a common carrier, the business as such must be regular and customary in its character, and not casual only. An occasional undertaking to carry goods will not make one a common carrier. But the business of carrying must be conducted as a business, and must be of such a general and public nature that a person carrying it on is bound to convey goods of all persons indifferently who offer to pay for the transportation thereof." *Arkadelphia Milling Co. v. Smoker Merchandise Co.*, 100 Ark. 37, 139 S. W. 680.

[2] But whatever the testimony may have been with respect to the carrying of goods, it is undisputed that the defendant was not a carrier of passengers for hire and did not carry passengers at all except gratuitously, and that, too, under a stipulation of exemption from liability. That being true, the doctrine of the *Pitcock Case*, supra, has no application, and there is no reason for holding that defendant, like any other person or corporation performing a service gratuitously, may not exempt itself from liability. In the *Pitcock Case* we recognized the contrariety of judicial opinion upon the question whether a public carrier of passengers could thus exempt itself, and we deliberately took our position on that question; but that has no bearing upon the law of private contracts which do not cover the performance of a public service. The Supreme Court of Texas, in the case of *Railway Co. v. McGown*, 65 Tex. 640, took the same position that we did in the *Pitcock Case*. But in the recent case of *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S. W. 179, that court decided that a corporation operating a log road for its own convenience, and not engaged as a public carrier, could exempt itself from liability. That position appears to us as being entirely sound, and we hold that the defendant in this case, even though it was carrying the plaintiff for a consideration growing out of the contract of carrying his material, was not a "public carrier," and, being engaged in performing purely a private service, had the right to prescribe the terms on which it would perform the same.

Now, the evidence adduced by the defendant is to the effect that the plaintiff signed the stipulation covering the trip during which he was injured, and the particular instrument signed by plaintiff and dated of that date was produced at the trial; but the plaintiff denied that he had signed the stipulation on that day. He admitted that he signed the particular instrument thus produced, which bore that date; but he claimed he did not sign it on that date. It may be said that there is a conflict as to whether or not he signed the stipulation for that particular trip; but there is no dispute as to the fact that he on numerous occasions signed those stipulations, and it is unimportant whether he signed one for that particular trip or not, for he was advised as to the conditions upon

which he could ride on the train, and he accepted those conditions when he took passage.

We are of the opinion therefore, upon the undisputed evidence, that the instruction of the court was correct; so the judgment is affirmed.

YAZOO & M. V. R. CO. v. SOLOMON et al.
(No. 280.)

(Supreme Court of Arkansas. March 20, 1916.)

1. CARRIERS §76 — CARRIAGE OF GOODS—CONTROL—TITLE—ACTIONS.

Where a contract of sale allows the vendee and consignee to refuse the goods if not in good condition on arrival, the consignor's title is not divested by delivery to the carrier, and he may sue the carrier for injury to such goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 256-271, 363; Dec. Dig. §76.]

2. APPEAL AND ERROR §209(4)—PRESENTATION OF GROUNDS OF REVIEW—OBJECTIONS—SUFFICIENCY OF EVIDENCE OF TITLE.

Where title is not questioned in the lower court, objection to lack of proof of title cannot be made upon appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1295; Dec. Dig. §209(4).]

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by J. L. Solomon and another against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Fink & Dinning, of Helena, for appellant. Andrews & Burke, of Helena, for appellees.

WOOD, J. The Solomon-Moore Land Company on February 19, 1913, shipped from Helena, Ark., to Memphis, Tenn., over the line of appellant a carload of cotton seed. The bill of lading showed that the car was consigned to the Chickasaw Oil Company. The appellees sued appellant, alleging that the car was rendered worthless to appellees through the negligence of appellant in delaying the transportation. Appellees recovered judgment, and appellant concedes that the evidence was sufficient to sustain the judgment as to negligence on the part of appellant, but insists that the judgment is erroneous for two reasons, viz.:

[1] First. Because the car was received by appellant f. o. b. Helena, Ark., consigned to Chickasaw Oil Mills, Memphis, Tenn., which appellant contends vested the title in the consignee. Appellant relies upon the case of *Warren & Ouachita Valley Ry. Co. v. Southern Lbr. Co.*, 170 S. W. 998, where the undisputed evidence showed that the sale was unconditional. We said:

"The delivery to the carrier under those circumstances constituted a delivery to the purchaser and completed the sale, the title to the goods then being in the consignee."

Again:

"There was no effort to prove, in this case, an intention not to pass the title by the deliv-

ery to the carrier. * * * The contract of sale being complete, the only remedy the vendor has is against his vendee to recover the price, and the latter has a remedy against the carrier for any damage which accrued by reason of the failure to deliver."

But in the case at bar there was testimony which at least would warrant a finding that the sale of the car of seed was upon condition that the vendee and consignee had the privilege to refuse the seed if they were not in good condition when they reached Memphis. If such were the fact, the sale was not unconditional and complete when the consignor delivered the goods to appellant for the consignee. The instant case is ruled by *Gibson v. Inman Packet Co.*, 111 Ark. 521, 184 S. W. 280, where we held that the consignor has a right of action against the carrier when it appears that it was not the intention of the parties to pass title to the property shipped by delivery to the carrier. Hence the court did not err in refusing appellant's prayer for instruction, telling the jury that the appellees had shown no beneficial interest or ownership in the seed, and hence to find for appellant.

[2] Second. Appellant next contends that appellees did not show title to the property before shipment. The appellant makes this objection here for the first time, and therefore such objection cannot avail. The cause without objection progressed through the lower court as if appellees were the owners of the car before same was offered for shipment, and that is the course it must take here. *Brown v. Le May*, 101 Ark. 95, 141 S. W. 759; *St. L. S. W. Ry. Co. v. White Sewing Mach. Co.*, 78 Ark. 1, 93 S. W. 58, 8 Ann. Cas. 208; *Shinn v. Plott*, 82 Ark. 260, 101 S. W. 742; *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251; *Allegheny Imp. Co. v. Weir*, 96 Ark. 500, 132 S. W. 462. See, also, *Telegraph Co. v. Freeman*, 180 S. W. 743.

The judgment is correct.

Affirmed.

DUTY, Constable, et al. v. JONES. (No. 255.)
(Supreme Court of Arkansas. March 20, 1916.)

SHERIFFS AND CONSTABLES §118—RELEASE OF PROPERTY—EXTENT OF LIABILITY.

While a constable is liable to the extent of the injury inflicted for an unauthorized release of property levied on and taken into his possession, no person can recover more than the value of his interest, unless he has a special ownership entitling him to recover the full amount; so that, he having released to the attacking creditor, against whom the debtor claimed to be entitled only to a certain amount on sale of the property, he is liable to the debtor only for that amount, and the rest of the proceeds received by the creditor on a sale made by him for their full value will be treated as applied by him in satisfaction of the debt due him.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 196-198; Dec. Dig. §118.]

Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

Action by R. T. Jones against R. B. Duty, Constable, and the sureties on his official bond. Judgment for plaintiff, and defendants appeal. Modified.

Allen H. Hamiter, of Lewisville, and T. D. Crawford, of Little Rock, for appellants. Searcy & Parks, of Lewisville, for appellee.

MCCULLOCH, C. J. Appellee was the tenant of T. J. Stewart for the year 1914 on the latter's farm in Lafayette county, and when the crop was gathered a controversy arose between the two parties as to the amount due the landlord. Stewart sued appellee in October, 1914, and obtained a judgment before a justice of the peace for a certain amount, and caused execution to be issued and placed in the hands of appellant Duty, who was constable of the township, and the latter served the writ by taking into his possession 7 bales of cotton. An appeal was prosecuted by appellee from that judgment, and a bond was executed superseding the judgment. While that suit was pending in the circuit court, Stewart instituted another suit against appellee in the justice of the peace court, and sued out a landlord's attachment, which was by appellant, as constable, levied on 5 bales of appellee's cotton, making 12 bales in all which came into the custody of appellant, as constable.

Before either of those suits was finally disposed of Stewart sold the cotton, with permission of the constable, as some of the evidence tends to show, and converted the proceeds to his own use. Stewart tendered to appellee the sum of \$43, which he claimed represented all the interest appellee had in the cotton, but the tender was declined. Appellee instituted this suit against the constable, and the sureties on his official bond, for the full value of the 12 bales of cotton, alleging that the constable had wrongfully permitted the cotton to be taken and converted by Stewart, and on trial before a jury a verdict was rendered in appellee's favor, assessing his damages at the full amount of the value of the 12 bales of cotton. During the pendency of the two suits instituted by Stewart against appellee those two parties met and attempted to settle their differences. The contention of appellee in the negotiations was that, if the cotton should be sold for 7 cents per pound, his interest would be \$216.81; but Stewart, on the other hand, contended that appellee's interest would only amount to \$43 if the cotton be sold at 7 cents per pound. It was, in fact, sold by Stewart for 7 cents per pound, and the latter tendered to appellee \$43, the amount he claimed was due, but, as before stated, the tender was refused.

It appears to us that the testimony greatly preponderates in favor of Stewart's state-

ment that there was an agreement between him and appellee that the cotton should be sold for 7 cents, and that pursuant to that agreement he made the sale and dismissed the suits; but appellee testified that he did not agree to the sale of the cotton, and that made a sufficiency of testimony to warrant submission of that issue to the jury. The only contention made by appellee, however, is that he was insisting on the amount which he claimed was due him out of the cotton if it was sold at 7 cents. He does not claim that the cotton was sold for less than its value, or that he had any objections to the sale at that price, but his sole objection was that he was entitled to the sum of \$216.81 in his settlement with Stewart if the cotton was sold at that price. In other words, the undisputed testimony is that the cotton was sold at its full value, and that appellee only claimed that his interest amounted to the sum of \$216.81, and we think the contention of appellant is sound that the amount of appellee's recovery should be confined to the actual amount of the interest he had in the property.

The constable was responsible to the extent of the injury inflicted for an unauthorized relinquishment of control of the property in his custody. *De Yampert v. Johnson*, 54 Ark. 165, 15 S. W. 363. But appellee was only entitled to recover the amount of his interest. The constable, by levying upon the cotton and taking it into his possession, obtained a special property therein, and was accountable to the several parties interested therein to the extent of their respective interests. 2 *Freeman on Executions*, § 202. His liability was to each party only to the extent of his interest, and for that reason appellee can only recover the value of his interest. This is the rule in all actions for conversion unless the plaintiff has a special ownership which entitles him to recover the full amount. But, where the suit is against one who holds under another person, or for another who has such interest, the amount of the recovery must be limited to the value of the interest asserted. *Jones v. Horn*, 51 Ark. 19, 9 S. W. 309, 14 Am. St. Rep. 17; *De Yampert v. Johnson*, supra; *Cocke v. Cross*, 57 Ark. 87, 20 S. W. 913; *Sunny South Lumber Co. v. Neimeyer Lumber Co.*, 63 Ark. 268, 38 S. W. 902; *Anderson v. Joseph*, 95 Ark. 573, 130 S. W. 165.

The remainder of the proceeds of the cotton must be treated as having been applied by Stewart in satisfaction of the debt due him by appellee, including that portion of the debt for which judgment was rendered in Stewart's favor by the justice of the peace. It is therefore unimportant whether or not Stewart dismissed that suit; for, according to the undisputed evidence, he has received satisfaction, and cannot enforce the judgment.

It follows that the undisputed evidence only sustains a recovery by appellee for the sum of \$216.81, and the judgment in excess of that amount is erroneous, and it will be modified so as to reduce it to the amount to which appellee is entitled. There were no exceptions saved to any of the instructions, and, assuming that the case went to the jury under proper instructions, we find that the evidence is sufficient to warrant a verdict to the extent of the amount above indicated.

The judgment will be modified in accordance with this opinion.

IZARD COUNTY v. WILLIAMSON. (No. 241.)

(Supreme Court of Arkansas. March 13, 1916.
Rehearing Denied April 8, 1916.)

COUNTIES \S 113(6)—PUBLIC BUILDINGS—SUPERVISION OF CONSTRUCTION—STATUTES.

Under Kirby's Dig. §§ 1012, 1024, providing that when a county court shall have made an order for the erection of public buildings it shall appoint some suitable person as commissioner, who shall superintend the erection and receive a reasonable compensation for his services, where a county court appointed a party commissioner of public buildings, calling him building commissioner, to supervise the construction of a new courthouse, making him an allowance for compensation, a separate allowance for the same purpose to another party, denominated associate commissioner in the order appointing him, was ultra vires, and the contract to pay him void, as beyond the authority of the county court, since the statute means that while more than one commissioner may be appointed, the compensation can only be a reasonable one for one person.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 180; Dec. Dig. \S 113(6).]

Smith, J., dissenting.

Appeal from Circuit Court, Izard County; Z. M. Horton, Special Judge.

J. W. Williamson presented to the county court of Izard county certain warrants in his favor, which were canceled by said court, and from a judgment of the circuit court, denying the county court's authority in the premises, the County appeals. Judgment reversed, and cause remanded for further proceedings.

Bradshaw, Rhoton & Helm, of Little Rock, for appellant. McCaleb & Reeder, of Batesville, for appellee.

HART, J. This is an appeal from the judgment of the circuit court denying the authority of the county court of Izard county to cancel certain warrants. The county court of Izard county made an order, calling in the county warrants of that county pursuant to section 1175 of Kirby's Digest for the purpose of cancellation and reissuance. J. W. Williamson, appellee, presented to the county court five warrants in the sum of \$200 each, issued on the 30th day of October, 1914. The county court entered an order

canceling the said warrants, and stated that each of said warrants had been thoroughly examined by the court, and found that none of the warrants was a just and legal evidence of indebtedness against said county. Williamson appealed to the circuit court. The facts are that the county court made an order, providing for the erection of a new courthouse. W. A. Wilson was appointed building commissioner. At a subsequent date, but prior to the erection of the building, the county court entered an order, appointing J. W. Williamson as associate commissioner. The county court made an allowance to W. A. Wilson in the sum of \$1,100 for his services. A separate order of allowance was made in favor of J. W. Williamson in the sum of \$1,000. The circuit court found that the warrants attempted to be canceled were issued on orders of the county court on matters over which it had jurisdiction, and that said orders had never been appealed from. The court held that neither the county court nor the circuit court on appeal had any right or authority to cancel said warrants. From the judgment rendered IZARD county has duly prosecuted an appeal to this court.

Section 1011 of Kirby's Digest provides under what circumstances a county court may make an order for the erection of a courthouse. Section 1012 provides that when such court shall have made an order for the erection of public buildings, it shall appoint some suitable person as commissioner of public buildings, who shall superintend the erection of the same. Section 1024 provides that the commissioner of public buildings shall receive reasonable compensation for his services. It is the contention of counsel for IZARD county that the county court had no authority to allow an associate commissioner compensation for services performed in superintending the erection of the building, and rely upon the case of *Hilliard v. Bunker*, 68 Ark. 347, 58 S. W. 362. Counsel for appellee rely on the same case, and contend that under it the court might appoint two or more commissioners, but that it might only allow a reasonable compensation for their services. They further contend that any error made by the court in the allowance of compensation should have been corrected by appeal, and cannot be inquired into in this proceeding. In the case of *Monroe County v. Brown*, 177 S. W. 40, the court held that:

"The mere fact that the county court has erroneously allowed a claim for an excessive amount does not call for reinvestigation and review in subsequent proceedings under the statute, but if fraud has been practiced in the allowance itself, the claim is an illegal one, and the judgment may be inquired into and set aside."

The reasoning of the court for so holding was quoted in the opinion of IZARD County v. Vincennes Bridge Co., 184 S. W. 67, this day rendered, and need not be repeated here.

As we have already seen, section 1012 of Kirby's Digest provides for the appointment of a commissioner of public buildings when the county court has determined upon the expediency of erecting a new courthouse. It is true W. A. Wilson was not called by that precise title, and the order denominated him as building commissioner. It is evident, however, that he was appointed commissioner of public buildings under the statute and performed the services required of him by statute. Williamson was denominated associate commissioner in the order appointing him. It is contended by his counsel that the name means nothing, and that the court had a right to appoint more than one commissioner of public buildings. In the case of *Hilliard v. Bunker*, 68 Ark. 340, 58 S. W. 362, the court said:

"The objection that the county court appointed three [only two were appointed], instead of one, is abstractly correct, but it only goes to the compensation to be allowed the commissioners for services."

Under the authority of that case, the court might employ more than one commissioner, but only one compensation could be allowed. In the case before us, compensation was allowed Wilson and Williamson separately. This the court had no authority to do. Wilson was first appointed as commissioner of public buildings. The Legislature provided for the appointment of such commissioner, and imposed upon him certain duties. Such regulation of the Legislature was binding upon the county court, and is exclusive of all other methods to be pursued by it. The making of the allowance to Williamson was *ultra vires*, and the contract is void, and to pay him separately at an agreed price or upon a quantum meruit out of the public funds was beyond the authority of the county court. Under the statute the county court had authority to appoint a commissioner of public buildings and to allow him a reasonable compensation therefor. The court has construed the statute to mean that more than one commissioner may be appointed by the county court, but that the compensation allowed could be only a reasonable one for one person. The reason is that it is the spirit of our laws to collect from the people only such an amount of money by taxation as may be allowed by law. If the county court had allowed Williamson and Wilson compensation in one order and they had accepted it, the court could not be concerned about how they divided it, provided only a reasonable compensation for one person had been allowed. In the case before us a separate compensation was allowed to Williamson, and this the court had no authority to do, for it had already appointed a commissioner to superintend the erection of the courthouse, and a fee was allowed him for that purpose.

It follows that the action of the court in making the allowance to Williamson was

without jurisdiction, and the county court was right in canceling the warrants. Therefore the judgment must be reversed, and the cause will be remanded for further proceedings according to law, and not inconsistent with this opinion.

SMITH, J., dissents.

GAILEY v. RICKETTS et al. (No. 232.)

(Supreme Court of Arkansas. March 8, 1916.
Rehearing Denied April 8, 1916.)

1. PARTITION \Leftrightarrow 46(1,2)—PARTIES—TENANTS.

In a suit between the heirs at law of a decedent for partition of his land, involving the right to a fund in the hands of a commissioner after sale, a tenant who claimed no interest in the fund and as to whose liability no question was made and against whom no judgment was asked, was not a proper or necessary party, as to make him a party would involve the determination of new issues changing the nature of the cause.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 114; Dec. Dig. \Leftrightarrow 46(1,2).]

2. PARTITION \Leftrightarrow 109(5) — SALE — NOTICE — RENTS.

A finding that the commissioner to make sale in partition employed an auctioneer, who announced that he was selling only the land, as against a decree for sale making no reservation of the crops and a deed containing no reservation, was insufficient to reserve the share cropper's rents.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 379; Dec. Dig. \Leftrightarrow 109(5).]

3. PARTITION \Leftrightarrow 106—PURCHASER'S TITLE—CONFIRMATION.

Until confirmed by the court, a commissioner's sale under a decree of court is not final, so as to pass the title, and the sale may be set aside before confirmation, upon sufficient grounds. Yet the purchaser does not acquire a mere option, but a right to a deed which becomes perfect upon the confirmation, and which, on confirmation, relates back to the time of the purchase, and conveys such interest as he would have acquired if he had received the deed at the time of his purchase.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 353-361; Dec. Dig. \Leftrightarrow 106.]

Appeal from Benton Chancery Court; T. H. Humphreys, Chancellor.

Suit for partition between Jas. M. Ricketts and others, heirs at law, of William Ricketts, deceased, in which T. O. Gailey filed an intervention, to which the other parties answered. Decree for the heirs, and the intervenor appeals. Reversed, and cause remanded, with directions.

McGill & Lindsey, of Bentonville, for appellant. E. P. Watson, of Bentonville, for appellees.

SMITH, J. In a suit in the chancery court between the heirs at law of William Ricketts, deceased, for the partition of the lands of the deceased, there was rendered, on the 14th day of April, 1914, a decree finding and declaring the several interests of the parties,

and a finding that the lands could not be partitioned in kind and an order that the lands be sold on a credit of three months for not less than two-thirds of their appraised value. The lands were appraised on May 23, 1914, and were thereafter advertised for sale by the commissioner appointed for that purpose. The notice of sale contained the following clause:

"Possession will be given to the entire premises November 1, 1914, for fall sowing October 15th, 1914."

The commissioner filed a report of sale on October 5, 1914, a day of the regular July term, with the appraisement and a copy of the notice of sale. The report showed that the land had been appraised at \$8,000, and had been sold on the 19th day of June, 1914, to appellant for \$6,050. No exceptions were filed to the report, and the report was approved and the sale confirmed. In the order of the court approving the sale there was a finding by the court that the land had been rented by William Ricketts to one Ira Chambers, and that possession could not be delivered until November 1, 1914, and that fact was so understood by the purchaser at the time of the sale, and so stated in the notice of sale. Appellant appeared in open court and offered to pay his note, with the interest then due; whereupon the deed of the commissioner was examined and approved and ordered delivered to appellant. Except as stated there was no reservation of any kind in the decree of partition, or the order approving the sale, and the deed contained all the usual clauses without reservations of any kind.

On August 4, 1914, appellant gave notice in writing to the tenant and to the administrator that he claimed all rents on the land. The tenant had been on the land for several years, but he was a share cropper and renewed his tenancy from year to year. On August 28, 1914, appellant filed an intervention in the partition suit in which he set up his claim of ownership to the rents, and alleged that there was a growing crop of 45 acres of corn which had not then matured, and he prayed an order that the rents be ordered delivered to him. On the same day, by consent of all parties, the court ordered the administrator to receive and hold the rent corn in dispute subject to the final order of the court, and by the subsequent agreement of the parties, made and filed November 12, 1914, the administrator was directed to sell the corn and hold the proceeds of the sale subject to the conditions of the order of August 28, 1914.

On December 4, 1914, appellees filed an answer to appellant's intervention, in which it was alleged that the tenant rented the land from year to year as a share cropper, but that he sowed wheat in the fall of 1913 and had planted the corn at the usual time in the

spring of 1914. It was alleged that William Ricketts died December 10, 1913, after renting the lands for the following year, and that all of the heirs had notice of this tenancy, and that the tenant was not a party to the partition suit, and was not bound by any orders entered therein; that when the lands were sold under the decree of partition the crops raised by the tenant were not sold, but were reserved from sale, and appellant had knowledge of that fact, and well knew that he was not purchasing the crop; and that, had the crops been taken into account, the land would have been appraised for a larger amount.

There is conflicting proof as to what announcements were made at the sale. An auctioneer was employed by the commissioner to cry the sale, and it is testified that he stated the crops were not being sold. The auctioneer testified that during the bidding some one in the crowd asked, "What about the crops?" and he said, "We sell the land," and another person asked, "Does the crop go?" and witness answered, "We are selling the land," and that he meant thereby to inform all persons that he was not selling the crops. Other witnesses who were present at the sale testified that they heard what was said and did not understand that there was any reservation of any kind. It is not claimed that the commissioner himself made any announcement about any reservation.

Appellant testified that he understood he was getting the crops, otherwise he would not have paid as much as he did, although he admits that he was told immediately after the sale by the attorney for the heirs, while he was fixing his note, that he did not get the crops, and he admits stating to the administrator that "your lawyer says I don't get the crop on the place, and if that is so I want a chance to buy it," and it is shown that he did buy some straw and hay, but this was done before he got his deed. He purchased the corn at the sale by the administrator, but this was done subject to an agreement that the rights of the parties should not be affected by this sale.

[1] It is insisted that any right which appellant has should be enforced in an independent suit at law against the tenant. It is true, of course, that the tenant would be entitled to a day in court before his liability for rents could be fixed, and it is no doubt true that he could not properly be made a party to this litigation for that purpose, as this would involve the bringing in of new parties and the determination of new issues, which would change the nature of the cause of action. But the tenant is not a necessary party here. There is no question about the nature and extent of his liability, and no judgment of any kind is asked against him. This litigation now involves a fund in the hands of the commissioner, and all of the parties who claim an interest in the fund are

before the court. The tenant claims no interest in this fund, and is not concerned about any decision which the court may render.

[2] It is very earnestly insisted that appellant is estopped from claiming the rents, and this appears to be the principal question in the case. It is insisted that the chancellor's finding that announcement was made that the crops were reserved from the sale is not against the preponderance of the evidence. It may be assumed that such is the case, and yet we think that finding would not be controlling. The decree made no reservation, and the authority of the commissioner relates to its provisions. The deed is made the final evidence of the property and the rights conveyed, and no reservation is found there. It is true the notice itself contained the reservation set out above. But if this notice was controlling, we think it insufficient to reserve the rents. It is not so stated in the notice. The language employed was that of the officer making the sale, and the reservation there contained relates only to the question of possession. It is not recited that the purchaser would not get the rents. Of course, it is generally true that the right to the rents follows the right to the possession, but here the right of possession was in the tenant, and the notice undertook to say when and for what purpose the purchaser might share the possession with the tenant. The right of chambers to his interest in the crops grown during the year 1914 could not be affected by any act of the parties, nor, for that matter, by an order of the court.

[3] It is settled that until confirmation by the court a sale made by a commissioner under a decree of court is not final and complete so as to pass the title to the property sold, and that such sale may be set aside before confirmation thereof upon good and valid grounds. Still the purchaser at such a sale does not acquire a mere option, but a right to a deed, which becomes perfect upon the confirmation of his purchase, and which, if confirmed, relates back to the time of his purchase, and the deed to him conveys such interests as he would have acquired if he had received his deed at the time of his purchase. *Brasch v. Mumey*, 99 Ark. 324, 138 S. W. 458, Ann. Cas. 1913B, 38; *Robertson v. McClintock*, 86 Ark. 255, 110 S. W. 1052. In the early case of *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233, it was held that, where a landlord leases land and afterwards conveys it in fee, without reservation of the growing crops, his interest in such crops passes to the purchaser. *Latham v. First National Bank*, 92 Ark. 315, 122 S. W. 922.

If there was no reservation of the right to the rents, then the deed of the commissioner conveyed to the purchaser that interest which a deed from the heirs, as of that date, would have conveyed. The crop at that time

had not matured and had not been gathered, and such a deed would have conveyed the entire interest of the landlord in the rents; and as we are of the opinion that the reservation set out above in the notice of sale was insufficient to reserve the right to the rents, we must hold that this right passed to appellant under his purchase and deed.

The decree of the court below will therefore be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. FENDLEY. (No. 236.)

(Supreme Court of Arkansas. March 27, 1916.)

TELEGRAPHS AND TELEPHONES §45—DISCRIMINATION IN SERVICE—PENALTY—STATUTE.

Under Kirby's Dig. § 7948, imposing a penalty on a telephone company for discriminating against a patron, a showing that after its wires were disconnected by the burning of its cable the company immediately started to renew the cable and restore the service, that a test to plaintiff's residence showed the connection, that it was again fixed a few days later, though not finally repaired until a week more, as soon as the defect could be located, without showing any intent to discriminate against, or refuse telephone connection to the plaintiff, at most showed mere negligence, not entitling the plaintiff to the penalty.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 16, 20½; Dec. Dig. §45.]

Appeal from Circuit Court, Searcy County; John I. Worthington, Judge.

Action by E. G. Fendley against the Southwestern Telegraph & Telephone Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause dismissed.

This appeal is from a judgment in favor of appellee for the penalty under the law, requiring telephone companies to supply applicants for telephone connection and facilities without discrimination or partiality.

It appears that E. G. Fendley, appellee, a physician, was a subscriber for telephone service in his residence at Leslie and had paid his rent in advance for the last quarter to the 1st of January, 1914. On November 20th a fire occurred in the town, which burned in two the cable carrying 50 pairs of wires, including the wires to the residence of Dr. Fendley. The telephone company immediately set about the repairs of the 19 telephones put out of use thereby. The telephone company got another messenger cable from Little Rock, cut the wires, and put them in the new cable, and on Monday evening, the 23d inst., had all the wires repaired. When the repairs were finished, the lines were tested from the cable to the residence, and the doctor's phone appeared to be in condition. It was not, however, and he complained two or three times and demanded that his phone be fixed and the service supplied, finally giv-

ing a notice in writing. Each time he complained, the manager agreed to fix the phone and thought it had been fixed the first time after the test from the cable to the dwelling, until after the complaint when he tried to call from the central station to the residence.

On the 1st of December, it was worked on again, the memorandum from the office showing "Clearing line fixed on P. B. Thomas and Dr. Fendley's telephones." It was fixed that day so it would work and was repaired finally, so there was no further trouble about it on December 8th. The lineman had difficulty in locating the trouble, after the connection was made of the wires and the cable, and finally discovered that the phone was placed on a bad pair of wires and remedied the defect.

The manager did all the repair work in Leslie and on the toll line from Heber Springs to other towns, and stated he made the repairs on appellee's telephone as soon as it could be done; that there was one time when complaint was made that he could not get to it immediately, being called off on trouble on the toll line.

Appellee testified that the manager of the telephone company was his friend and agreed every time he complained about the telephone to fix it right away, but that it was not fixed until 18 days after the fire, while the phones of the other subscribers that had been disconnected by the burning of the cable were repaired and the service resumed within 3 days after the fire.

The operator at the central station, when any calls came for the physician, tried to get him over other telephones near his residence and to notify him of all calls that came for him. Especially was this true of the night operator.

The court instructed the jury, and refused to direct a verdict for the telephone company.

A. P. Wozencraft, of Dallas, Tex., and W. J. Terry and E. B. Downie, both of Little Rock, for appellant. D. T. Cotton, of Leslie, for appellee.

KIRBY, J. (after stating the facts as above). In *Southwestern Telegraph & Telephone Company v. Murphy*, 100 Ark. 546, 140 S. W. 720, the court, in construing the statute providing the penalty (section 7948, Kirby's Digest), said:

"The manifest purpose of the statute is to inflict a penalty on a telephone company, not for negligence or inattention in failing to repair its instrumentalities for supplying service, but for willful refusal to furnish telephone connections and facilities without discrimination or partiality to all applicants who comply or offer to comply with the rules. The statute forbids discrimination, and mere neglect or inattention in repairing instruments does not constitute that. The most that the evidence tends to establish is negligence in failing to repair plaintiff's telephone. There is nothing to show that this was prompted by any intention to deprive

plaintiff of the use of his telephone, and for that reason we are of the opinion that the question of discrimination during that period should not have been submitted to the jury."

The undisputed testimony shows that all the telephones upon the wires carried by the cable that was burned, were disconnected and put out of service thereby, that the telephone company began work immediately to renew the cable and restore the service, working on the cable on the first three days after the fire; that the test from the cable to appellee's residence on the 24th of November showed the phone connected, that it was again fixed on December 1st, but the service was not good until it was finally repaired on December 8th. The trouble resulted from bad connection of the wires in the cable or from defective wires, and was remedied as soon as it could be located. The appellee stated that the manager of the telephone company was his friend and agreed every time when complaint was made to fix the phone immediately.

The delay in restoring the service was due to the failure sooner to locate the trouble, and the testimony shows no intention upon the part of the telegraph company to discriminate against or refuse to furnish telephone connection and facilities to the appellee. The testimony at most shows no more than negligence on the part of the company in failing to repair the line, causing the delay in furnishing the service and does not tend to show there was any intention to deprive appellee of the use of his phone and is not sufficient to show a refusal to furnish telephone connection without discrimination or partiality and entitle appellee to recovery of a penalty therefor.

The court erred in not directing a verdict in appellant's favor, and the judgment is reversed, and the cause dismissed.

RALSTON et al. v. DUNAWAY et al.
(No. 229.)

(Supreme Court of Arkansas. March 8, 1916.
Rehearing Denied April 8, 1916.)

ATTORNEY AND CLIENT §148(3) — **CLAIMS AGAINST UNITED STATES—FEES FOR PROSECUTING—VESTED RIGHTS—ALLOWANCE AND APPROPRIATION—"AMOUNT ALLOWED."**

Provision of Act Cong. March 4, 1915, c. 140, § 4, 38 Stat. 996, making appropriation for payment of a claim against the United States, previously allowed by the Court of Claims, limiting attorney's fees for services in connection with the claim to 20 per cent. of the amount appropriated, and making it unlawful to receive more, prevents action for more, the prior contract to pay the attorneys, for prosecuting the claim, a third of "the amount which may be allowed on said claim," and providing for the government paying the claim through them, and giving them a lien on the payment for the fee, creating no debt for services till the appropriation was made; the phrase in the contract "the amount which may be allowed on said claim," referring to the amount realized from the gov-

ernment, and not the mere allowance by the Court of Claims.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 852; Dec. Dig. § 148(3).]

Appeal from Circuit Court, Jackson County; Dene H. Coleman, Judge.

Proceedings by Jackson H. Ralston and another against William N. Dunaway, administrator, and others. From an adverse judgment, said Ralston and another appeal. **Affirmed.**

This appeal is prosecuted from a judgment of the circuit court, confirming the probate court's judgment of disallowance of the claim against the estate of Laura J. Dills, deceased, for a balance claimed to be due as attorney's fees.

Appellants were employed by deceased to collect her claim against the United States for property taken during the Civil War. The written contract, after stating that she has such a claim and has appointed Ralston & Siddons of Washington, D. C., her attorneys, recites:

"To prosecute the same before any of the courts of the United States, and, upon appeal, before the Supreme Court of the United States, or before any of the departments of the government, or before the Congress of the United States, or before any officer, commission, convention or tribunal authorized to take cognizance of said claim, as may be deemed best for my interests: Now, therefore, this agreement witnesseth, that in consideration of their services in the prosecution of said claim, I hereby agree to pay said Ralston & Siddons a fee or compensation equal to 33 1/3 per centum of the amount which may be allowed on said claim. The officers of the government are hereby directed to deliver to said attorneys the check, draft, certificate or other medium of payment that may be issued in settlement of said claim, and a lien upon said check, draft, certificate or other medium of payment is hereby recognized by me in favor of said attorneys, for said fee until payment thereof; and I hereby agree to pay from time to time all necessary costs arising in the prosecution of said claim for taking testimony, and to execute such powers of attorney as may be necessary or convenient for the successful prosecution and collection of said claim."

They prosecuted the claim before the Court of Claims of the United States, which on the 17th day of January, 1910, allowed it, in the sum of \$2,945. Congress made an appropriation for the payment of this and other allowed claims by act of March 4, 1915 (No. 289, Statutes 3d Session, 63d Congress, part 1, p. 962), section 4 of which provides:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a

misdeemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$1,000.00."

The officers in the Treasury Department, in the payment of said claim, delivered to said attorneys a warrant for their fee payable out of said appropriation for only the sum of \$589, being 20 per cent. of the amount of the claim collected in accordance with the act. They thereupon duly presented this claim for \$392.68 to the administrator of the estate of said claimant, which was disallowed by the probate court and on appeal by the circuit court, because of the provisions of the act of Congress, making the appropriation in payment of the claim limiting the attorneys' fee to 20 per cent. of the amount collected.

Jno. W. Blackwood and John W. Newman, both of Little Rock, for appellants. Gustave Jones, of Newport, for appellees.

KIRBY, J. (after stating the facts as above). It is contended by appellant that said section 4 of the act appropriating money in payment of the claim of Laura J. Dills is unconstitutional and in conflict with the Fifth Amendment of the Constitution of the United States, and that it deprives appellants of their property without due process of law. It is not denied that the parties had the right to make the contract entered into, nor that the claim was collected from the government out of the appropriation of money made by Congress for payment thereof. Contracts for the payment of fees to attorneys contingent upon the collection of claims against the United States have been upheld. *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; *Nutt v. Knut*, 200 U. S. 12, 26 Sup. Ct. 216, 50 L. Ed. 348.

It will not be contended that if this contract had been made for the collection of a claim against the government for which an appropriation had already been made limiting the attorney's fee to the payment of not more than 20 per cent. of the amount recovered and making it unlawful to charge more than said amount that no action could have been maintained for the collection of more than said per cent. as provided by the terms of the act of Congress making the appropriation for the payment of the claim. Appellants contend, however, that their right to the compensation provided in the contract for service performed was complete upon the allowance of the claim by the Court of Claims and vested in them a right to the recovery from their client an amount equal to one-third of the amount allowed on the claim. The phrase, "the amount which may be allowed on said claim," in connection with the per cent. agreed to be paid as compensation, refers necessarily to the amount collected and realized from the government in payment of the claim, and not the mere order of the Court of Claims ascertaining the amount due the claimant and liquidating it by allowance.

The government was no more indebted to the claimant for the property taken or destroyed during the War, after the amount of it was determined and the allowance made by the Court of Claims and no more obligated to its payment than it was before. This was but a recognition of the justness of the claim that existed not because it was allowed by said court, but because the claimant's property had been taken by the government under such circumstances as required it to make compensation therefor.

Neither was such allowance or judgment of the Court of Claims a satisfaction or payment of the claim, but only a determination by the tribunal authorized by the government to make it of the amount the government recognized would compensate the claimant for the loss. Its payment could no more be compelled after than before such allowance. The parties to the contract knew and recognized this in making it, and authorized the attorneys to prosecute the claim before any and all tribunals, courts, and departments of the government before the Congress of the United States or before any officer, commission, convention, or tribunal, authorized to take cognizance of the claim and authorized the officers of the government to deliver to the attorneys the check, draft, certificate, or other medium of payment that was issued in settlement of the claim, giving a lien thereon in favor of the attorneys for said fee until its payment. In other words, it is manifest from the contract that the parties realized that the claim could only be paid by an appropriation voluntarily made by the government and necessarily contracted with reference to such appropriation and the terms thereof. This appropriation was in effect conditioned upon the limitation of 20 per cent. only of it to the payment of any attorney's fees contracted for by the claimant and binding upon the parties thereto, and certainly upon the attorneys who accepted the 20 per cent. prescribed by the appropriation act and were paid same by the officers of the government in the payment of the claim out of the appropriation made therefor. The attorneys nor the claimant had anything from which payment of the claim could be realized, regardless of the justice thereof, nor under the terms of the contract was any debt created for the attorney's services, regardless of their value, until the appropriation of the money was made by the act of Congress. If such appropriation had never been made, nothing could have been realized by the client nor any debt created by the contract for the payment of any attorneys' fee.

In *Ball v. Halsell*, 161 U. S. 72, 16 Sup. Ct. 554, 40 L. Ed. 622, a case where the attorney was to be paid out of the amount of the claim recovered from the government, the court said:

"Although he prosecuted the claim before the Department of the Interior, and that depart-

ment recommended payment of a certain sum upon the claim, yet before that sum had been paid, or Congress had made any appropriation for its payment, and, therefore, before he had either recovered or received any money from the United States, or was entitled to any compensation by the terms of the contract now sued on, Congress passed the act of March 3, 1891 [25 Stat. 504, c. 1126]"

—and held the attorney bound by the limitation of the fee prescribed by the appropriation act.

We are aware that in *Moyers v. Fahey*, 43 Wash. Law Rep. 691, the court decided a like question differently to the conclusion reached herein, but we do not regard the opinion as supported by sound reason or authority, and do not follow it.

The judgment is affirmed.

THORSEN et al. v. POE et al. (No. 269.)
(Supreme Court of Arkansas. March 20, 1916.)

1. CONTRIBUTION — 4 — RIGHT — STATUTES.

Where several parties are equally liable for the same debt or bound to the discharge of an obligation, and one is compelled to pay the whole of it, he may have contribution against the others to obtain payment from their respective shares; which right is also recognized by Kirby's Dig. § 7926.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.]

2. JUDGMENT — 847 — ASSIGNMENT — RIGHTS OF ASSIGNEE.

The assignee of a judgment takes it subject to all the equities and defenses existing between the parties thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1548-1555; Dec. Dig. § 847.]

3. JUDGMENT — 848 — INJUNCTION — SET-OFF OF JUDGMENT.

Judgment was obtained against an insurance company and the plaintiff as indorser of a draft given in payment of a loss. A cosurety with plaintiff on the company's bond authorizing it to do business paid the judgment, taking an assignment thereof, and reassigned to defendants, and plaintiff recovered judgment against such cosurety for contribution. *Held*, that plaintiff, as against the last assignee of the judgment, was entitled to restrain its collection, thereby in effect enforcing his own judgment of contribution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1548-1563; Dec. Dig. § 848.]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit for injunction by A. B. Poe and others against Louis Thorsen and others. Decree for plaintiffs, and defendants appeal. Affirmed.

This appeal comes from a judgment of the chancery court, enjoining appellants, assignees of a certain judgment of the American Insurance Company against McGehee Liquor Company, and their attorneys, from the collection thereof, from A. B. Poe, one of the parties against whom the judgment was rendered. A. B. Poe, W. B. Calhoun, and others, became sureties upon the bond of said insurance company, required by the statute, au-

thorizing it to do business in the state. The McGehee Liquor Company sustained a loss under a policy issued it by said company, which was adjusted, and a draft on the home office in another state indorsed by A. B. Poe and Jno. B. Driver was given for payment of the loss. The insurance company became insolvent and went into the hands of a receiver before the draft was paid. The said liquor company brought suit against the insurance company, the sureties on its bond, and the indorsers on the draft for the amount of its loss, and recovered judgment against all of them, from which an appeal was taken and a supersedeas bond executed with A. B. Poe and A. J. Graham as sureties. Upon the hearing in the Supreme Court, the judgment against the sureties on the bond of the insurance company was reversed, and the cause dismissed as to them, and the judgment against the insurance company and Poe and Driver as indorsers on the draft given in payment by the adjuster was affirmed and judgment entered, also against A. B. Poe and Graham as sureties on the supersedeas bond. *American Ins. Co. v. McGehee Liquor Co.*, 93 Ark. 62, 124 S. W. 252, 20 Ann. Cas. 855.

The matter next appeared in this court upon a motion or petition of said Poe and Graham, asking this court to quash an execution issued by its clerk on the ground that the judgment had been satisfied. It was alleged that, after the affirmance of the judgment, an execution was issued thereon, and same was satisfied, and the judgment paid either by the insurance company or one of the sureties on the bond later alleged to be W. B. Calhoun; that the judgment was assigned to him by the plaintiff, and in turn to the German Investment Company. It was further alleged that one of the attorneys for the judgment creditor caused the execution notwithstanding it had been paid returned unsatisfied, and then procured an assignment of the judgment from the liquor company for the purpose of defrauding the petitioner and preventing him from enforcing his right of contribution against the sureties for amounts that he had paid out for the insurance company on other judgments. The response denied that the judgment had been satisfied and the other allegations of the petition, except as to the assignment of the judgment, and contained the statement that after the case had been appealed to the Supreme Court, and before the reversal of the judgment as to the sureties on the bond, an execution had been issued from the Pulaski circuit court to the sheriff of Mississippi county against W. B. Calhoun, one of the sureties on the insurance company's bond and against whom judgment had been rendered, and that he, to prevent the sale of his property, satisfied said execution, and the judgment was assigned to him, as appears from the record of same up-

on the margin thereof. This court held it would not be proper to strike out the assignment of the judgment unless it was shown that judgment had been satisfied, and that, although there was an allegation in the petition that such was the fact, this allegation was denied, and the records show an assignment of the judgment by the plaintiff. The court recognized having power over its own process and the propriety of quashing an execution erroneously issued thereon upon proof of payment of the judgment, and declined to go further, because it would be an exercise of original jurisdiction to attempt to adjust the equities between the sureties on the bond of the defendant insurance company, if any existed, and saying:

"The admission that Calhoun satisfied the execution issued from the Pulaski circuit court and caused the judgment to be assigned to him, and later to the German Investment Company, raises a question of fact which relates only to the alleged equities between petitioners and Calhoun and those who claim under him, since the judgment of this court was not rendered against Calhoun. The effect of the admission is merely that Calhoun purchased an assignment of the judgment, and the question whether he had a right to do so is one for investigation in a court of original jurisdiction."

—and denied the motion without prejudice to the rights of the petitioners to proceed in a court of competent jurisdiction for the relief to which they were entitled. It was shown on that motion that the petitioners had already instituted this action in the Pulaski chancery court, which was since determined in their favor, the court rendering a judgment against W. B. Calhoun, one of the sureties on the original bond of the insurance company in favor of A. B. Poe for \$1,500 as contribution for amounts expended by said Poe, as cosurety on said bond, more than his share, and enjoining the collection of said original judgment by the assignees thereof and their attorneys, and this appeal comes from said judgment.

J. P. Kerby and R. L. Floyd, both of Little Rock, for appellants. Mehaffy, Reid & Mehaffy and Lawrence B. Burrow, all of Little Rock, for appellees.

KIRBY, J. (after stating the facts as above). Appellants contend that no equities arose from the judgment of the liquor company as between A. B. Poe and W. B. Calhoun, which can be enforced against the assignees of Calhoun, who was not a party thereto; this court having reversed the judgment of the lower court after the assignment thereof to Calhoun and dismissed the action as to him. It is not denied, however, that Poe and Calhoun were sureties on the bond required by law of the insurance company, and as such liable, of course, to the payment

of its obligations. The chancellor found in this action for contribution that surety Poe paid obligations of said principal insurance company in discharge of the liability as surety on said bond, in sufficient amounts to entitle him to recover as contribution from his cosurety, Calhoun, the sum of \$1,500, from which judgment no appeal was taken by said Calhoun.

[1] It is a familiar principle that where several parties are equally liable for the same debt, or bound to the discharge of an obligation, and one is compelled to pay or satisfy the whole of it, he may have contribution against the others to obtain payment from their respective shares. 6 R. C. L. 1036, 1037; 1 Brandt, Suretyship, § 279. Our statute also recognizes this right. Kirby's Digest, § 7926; Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; Salinger v. Black, 68 Ark. 449, 60 S. W. 229.

[2] The assignee takes the judgment subject to all the equities and defenses existing between the parties thereto. 2 Freeman, Judgments, 427; 23 Cyc. 1424; Am. Ins. Co. v. McGehee Liquor Co., 118 Ark. 488, 169 S. W. 251.

[3] The first assignee of the judgment, W. B. Calhoun, was a cosurety on the insurance company's bond with A. B. Poe, appellee, and equally liable with him to the discharge of all obligations of the insurance company, for which the sureties were bound under the terms of said bond. He was liable to contribution to his said cosurety Poe on the whole amount paid out by Poe as surety beyond the amount of his share of the indebtedness or obligations of said insurance company, which has been determined herein to be \$1,500 with cost, an amount in excess of said assigned judgment attempted to be enforced against said Poe. There is no question but that Poe, in a suit or any other proceeding for the collection by Calhoun of said judgment claimed to have been assigned to him, could have claimed as a defense the amount due from said surety Calhoun to Poe as contribution for the amount of the debts and obligations of the insurance company discharged by Poe more than his share thereof; himself and Poe being the solvent sureties.

Having the right to contribution of said amount from W. B. Calhoun, who was in fact a party when he paid the consideration and became the first assignee of the judgment, he can enforce the collection of the amount thereof as against the judgment in the hands of the present assignee; the assignment not cutting off any equities nor defenses that existed as between said Calhoun and appellee Poe.

The decree is affirmed.

SMITH et al. v. BERKAU. (No. 272.)

(Supreme Court of Arkansas. March 20, 1916.)

1. VENDOR AND PURCHASER ⇨93—CONTRACT—ESSENCE—TIME.

Equity will not relieve against the vendee who has made default where time is of the essence of the contract, in the absence of waiver of the forfeiture.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. ⇨93.]

2. VENDOR AND PURCHASER ⇨93—CONTRACT—CONDITIONS PRECEDENT.

Equity will not relieve against the performance of an act which a contract for the sale of land has made a condition precedent.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. ⇨93.]

3. VENDOR AND PURCHASER ⇨78 — CONTRACTS—FORFEITURE.

A contract for the sale of land on installments providing that if the purchase money is not paid at the time and in the manner specified, upon the fourth default all notes remaining unpaid shall become due, the obligation resting on the seller shall be void and the money already paid be forfeited to the seller, gives the purchaser a present right to receive a deed on payment, and is insufficient to make time of the essence of the contract, since where a contract does not plainly and unambiguously provide for forfeiture, the court will not so construe it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121-125; Dec. Dig. ⇨78.]

4. PAYMENT ⇨73(1) — EVIDENCE — SUFFICIENCY.

Evidence held insufficient to support a judgment allowing the vendee of certain lands credit in certain sums for amounts alleged to have been paid.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 220, 224, 235, 237, 238; Dec. Dig. ⇨73(1).]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action by Peyton Smith, administrator, and others against Theo. H. A. Berkau. From a judgment for defendant in part, plaintiffs appeal. Reversed and remanded, with directions.

Manning, Emerson & Morris, of Little Rock, for appellants. Bradshaw, Rhoton & Helm, of Little Rock, for appellee.

SMITH, J. Appellant is the administrator of the estate of his mother, who in her lifetime entered into an agreement to sell the property involved in this suit to appellee. A cash payment of \$200 was made, and a contract entered into providing that the remainder should be paid at the rate of \$30 per month. These payments—100 in number—were each evidenced by a note. The first note was payable August 15, 1910, and one note was to be paid on the 15th of each month thereafter, and all of the notes bore interest at 7 per cent. until paid. The con-

tract for the sale of the land contained the following stipulation:

"But if the purchase money for said lands is not paid at the time and in the manner herein specified, upon the fourth default made in said payments all of said notes remaining unpaid shall at once become due and payable, and the obligation resting on the party of the first part shall become null and void, and the money theretofore paid on account of said purchase shall remain with and be the property of the party of the first part, and shall be considered as so much rent paid by said party of the second part for the use of said property from the date of this instrument to the date of such default in payment. * * * And the said party of the second part hereby accepts the conditions of this obligation, and in the event of the failure to make payments as herein provided, waives all right and claim to said real estate, and to the money theretofore paid on account thereof."

Suit was brought by appellant to recover possession of the land, it being alleged that appellee had defaulted in the payment of ten consecutive notes, and had thereby forfeited all rights under his contract of purchase.

Appellee denied that he had failed or refused to make payments required under the contract, and alleged he had made payments amounting to \$2,824, and that credit had not been given him for these payments.

Appellee assumed the burden of proof and introduced a statement of the account, showing various payments. Of all the credits so claimed only ten are in dispute. The court disallowed seven of these items and allowed three of them as follows: July 5, 1910, cash \$150; July 1, 1911, cash \$192; March 8, 1912, \$67.

The court found that appellee was six months in arrears in his payments at the time the suit was instituted, but refused to declare the contract forfeited, and the administrator has appealed.

It is first insisted that time is of the essence of this contract, and that the court erred in refusing to hold that appellee's rights thereunder had been forfeited. It is also insisted that the contract makes the payment of the notes a condition precedent before any rights can be acquired under the contract.

[1-3] It is settled that equity will not relieve a vendee who has made default where time has been made of the essence of the contract and the forfeiture has not been waived. Nor will it relieve against the performance of some act which the contract has made a condition precedent. Neither principle, however, controls here. This is a contract for the sale of land on a credit of 100 months with the proviso set out above. The contract gives appellee a present right as a purchaser, and upon payment of the purchase money he becomes entitled to a deed, just as any other purchaser would be who had bought land on credit.

Appellant relies on the case of Thomas v. Johnston, 78 Ark. 578, 95 S. W. 468. But that was a contract which created the rela-

tion of landlord and tenant, and which was not to be changed into the relation of vendor and vendee until certain payments were made. Here the relation was never anything but that of vendor and vendee, and we think the proviso set out above does not so make time of the essence of the contract that appellee's rights thereunder became forfeited. The payments were made at irregular times and without reference to the maturity of the notes or the amount due at the time of the payments, and as the contract does not plainly and unambiguously provide for the forfeiture, we will not hold that it should be so construed. *Chapman & Dewey Land Co. v. Wilson*, 91 Ark. 30, 120 S. W. 391; *Atkins v. Rison*, 25 Ark. 138; *Butler v. Colson*, 99 Ark. 340, 138 S. W. 467; *Kampman v. Kampman*, 98 Ark. 328, 135 S. W. 905; *Singer Mfg. Co. v. Brewer*, 78 Ark. 202, 93 S. W. 755.

[4] The evidence in regard to the three payments allowed is conflicting and unsatisfactory, but the evidence in appellee's behalf concerning these three items is very similar to his proof on the other seven. According to appellee he is as much entitled to the seven which were disallowed as he is to the three which were allowed, except that purported receipts for each of these three items were offered in evidence. Appellee testified that he made all ten of the payments, yet the court allowed him only three. The signatures to the three receipts were submitted to experts, who, by consent, were allowed to express their opinion, but who were not cross-examined. Two of these experts pronounced the signatures of S. J. Smith, who was his mother's agent in the collection of this money, and who was shown to have collected other moneys, to be genuine, while the third expert pronounced the signature a forgery. In addition to this expert who pronounced the signature a forgery was the evidence of the wife of S. J. Smith and of his brother with whom he had been associated in business for a great many years and who likewise pronounced the signature a forgery. There is also evidence touching the time and place and circumstances under which certain alleged payments were made which tends to discredit appellee's evidence. In regard to the alleged cash payment of July 5, 1910, and which is one of the items covered by the disputed receipts, the wife of Smith testifies that appellee made a cash payment of only \$50, and the balance was paid in two installments of \$75 each. Checks given by appellee corroborate Mrs. Smith's evidence concerning these payments. One was made on July 16th, one day after the papers were drawn up, and the second check was drawn on the 6th of August, nine days before the first note became due. The evidence is equally as uncertain in regard to the other credits claimed; and when we con-

sider that the burden of proof of showing these payments rests upon appellee, and that this controversy did not arise until after both Mrs. Smith and her son S. J. Smith were dead, we have concluded that the proof does not sustain the finding that the payments were in fact made, and the decree of the chancellor will be modified by disallowing these credits.

The decree will therefore be reversed, and the cause remanded, with directions to modify the decree to conform to this opinion.

CRABTREE v. STATE. (No. 264.)

(Supreme Court of Arkansas. March 20, 1916.)

1. STATUTES \S 194—CONSTRUCTION—EJUSDEM GENERIS.

The maxim of ejusdem generis is applied to effectuate the legislative intent, but never allowed to defeat it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 272; *Dec. Dig.* \S 194.]

2. GAME \S 7—OFFENSES—STATUTE—"WILD FOWL."

In Kirby's Dig. \S 3618, prohibiting the sale of certain animals or wild turkeys, grouse, or quail or any other kind of game, wild fowl, or birds, with certain exceptions, the word "game" includes animals, fowls, and birds that are fit and commonly hunted for use for food, and "wild fowl" means any large eatable bird of a wild nature, so that the statute prohibits the sale of wild ducks.

[Ed. Note.—For other cases, see *Game*, Cent. Dig. \S 6, 7; *Dec. Dig.* \S 7.

For other definitions, see *Words and Phrases*, First and Second Series, *Game*.]

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

James Crabtree was convicted of selling wild ducks, and he appeals. Affirmed.

J. M. Carter, of Texarkana, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

WOOD, J. Section 3618 of Kirby's Digest (as amended by Acts 1905, No. 42) provides:

"It shall be unlawful for any person, corporation, or company, to purchase, or have in possession for barter, exchange or sale, or to expose for barter, exchange or sale, or to sell, any buck, doe, fawn, or any part thereof, or any wild turkey, pinnated grouse, commonly called prairie chicken, or any quail, sometimes called Virginia partridge, or any other kind of game, wild fowl, or birds, whatsoever, within this state, except bear, rabbits, squirrels, raccoons, and opossum."

[1] Appellant was convicted of selling wild ducks under the above section, and he contended that the statute does not prohibit the sale of wild ducks, invoking the maxim of ejusdem generis. But that maxim, while applied to effectuate the legislative intent, is never allowed to defeat it. *Foster v. Blount*, 18 Ala. 687; *State v. Broderick*, 7 Mo. App. 19, 20.

[2] "It has never been supposed," says the Supreme Court of Illinois, "that the rule re-

quired the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind * * * enumerated. * * * On the contrary, it must yield to another equally salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force." *Misch v. Russell*, 136 Ill. 22, 25, 26 N. E. 528, 529 (12 L. R. A. 125).

The general words, "or any other kind of game, wild fowl, or birds, whatsoever," following the particular kinds enumerated, were manifestly intended by the Legislature to include animals, fowls, and birds of a wild nature that are fit and commonly hunted for use and food in addition to and different from those specified. *Law Dictionary; English Stand. Dict.; Worcester's Dict., verbum, "game."* The term "wild fowl" means any large eatable bird of a wild nature.

In *Jonesboro, L. C. & B. R. Co. v. Adams*, 174 S. W. 527-530, we said, "The lawmakers contributed to the preservation of wild ducks" by enacting a general statute, citing section 3618, Kirby's Digest.

While the exact question here presented was not before us in that case, the language above used was a correct interpretation of the statute.

The judgment is therefore affirmed.

HIMES et al. v. SHARP. (No. 258.)

(Supreme Court of Arkansas. March 20, 1916.)

1. EXECUTORS AND ADMINISTRATORS — ACCOUNTS — EXCEPTIONS — STATUTE.

Under Kirby's Dig. § 140, providing that any heir may file exceptions to an administrator's account at the term to which the account may be continued, and that, if exceptions are not filed within that time, the account shall be confirmed, and not afterwards subject to investigation, etc., a party filing exceptions to an account does not have to repeat them at each term to which the case may be continued and until final confirmation, and, where executors could not appeal from an order dismissing such exception until final judgment was rendered confirming or rejecting the account, the court's order continuing the consideration of the account current for reinstatement necessarily carried over the consideration of the exceptions when such account at a subsequent term came up for consideration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2157, 2165; Dec. Dig. § 504(1).]

2. EXECUTORS AND ADMINISTRATORS — SETTLEMENT OF ACCOUNT — APPEAL.

Where a judgment rendered on December 16, 1914, confirming the account current of an administratrix, as against exceptions by the heirs, recited that the attorney for the heirs excepted to the approval of such account and prayed an appeal to the circuit court, which was granted, the fact that the motion and affidavit for appeal and the order granting the appeal preceded the record entry of the final order and judgment on the account made on the same day was immaterial, and such record entries, consid-

ered together, showed a sufficient compliance with the law to perfect the exceptors' appeal and entitle them to be heard in the circuit court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2241, 2246, 2247; Dec. Dig. § 510(6).]

3. EXECUTORS AND ADMINISTRATORS — EXCEPTIONS TO ACCOUNT — APPEAL — AMENDMENT OF EXCEPTIONS.

In such case, the appeal being perfected in the circuit court, the appellants, having filed their exceptions in the probate court as required within the time provided by the statute, could renew such exceptions or amend the exceptions already filed in the circuit court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2235; Dec. Dig. § 510(1).]

4. COURTS — PROBATE COURTS — APPEAL — BOND FOR COSTS — STATUTE.

Under Kirby's Dig. § 1348, as amended by Acts 1909, p. 956, relating to appeals to the circuit court from final orders and judgments of the probate court, and sections 1349, 1350, relating to bonds, a bond is not required as a prerequisite to an appeal, except in cases where the appellant desires a supersedeas.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 486; Dec. Dig. § 202(5).]

Kirby, J., dissenting.

Appeal from Circuit Court, Sharp County; J. B. Baker, Judge.

Exceptions by Arminta Himes and others to the account of Margaret Norris Sharp, administratrix of the estate of James Norris, deceased. From a judgment of the circuit court dismissing the exceptors' appeal from an order approving the account, the exceptors appeal. Reversed, and cause remanded, with directions to reinstate the appeal.

At the December term, 1912, of the probate court for the Southern district of Sharp county, appellee, as administratrix of the estate of James Norris, deceased, filed for annual settlement her account current No. 1, and same was continued until the next term. At the December term, 1913, of the probate court, appellants, heirs of James Norris, deceased, filed exceptions to the account and the cause was continued to the next term, "with leave granted administratrix to restate said account current."

On September 18, 1914, the court considered the exceptions, and entered judgment sustaining certain exceptions, dismissing others, and ordered the administratrix "to restate said account current accordingly and file same so restated on or before the first day of the next term of this court."

On the 16th day of December, 1914, at the December term of the Sharp county probate court, Thos. L. Herrn, attorney for the heirs, presented an affidavit and prayer for appeal from the order and judgment of the probate court "made on the 18th day of September, 1914, in refusing and disallowing their exceptions to account current No. 1" in the matter of the estate of James Norris, deceased, Margaret Norris, administratrix.

The record then recites that on the 16th

day of December, 1914, appellants "asked and obtained leave of the court to file an affidavit for an appeal," which was by the court granted, the appeal allowed, and the clerk directed to make and certify transcript to the circuit court. Then follows account current No. 1 for annual settlement restated by order of the probate court made "on the 18th of September, 1914." The account current is set forth showing a balance due the estate according to the account as restated the sum of \$1,620.72. Then follows this recital:

"In the Matter of Account Current No. 1. Restated by Margaret Norris, Administratrix of Estate of James Norris, Deceased.

"Now on this day is presented to the court the amended account current numbered 1, filed by Margaret Norris, administratrix of the estate of James Norris, deceased, filed before the first day of the present term of this court, in accordance with a former order hereof, and the same being examined by T. I. Herrn, attorney for the heirs of deceased, and no exceptions being filed to said account current, or any item thereof, by any person or persons, the same is carefully examined by the court and found correct, is in all things approved, confirmed, and admitted to record, said account current showing a balance due said estate by said administratrix the sum of sixteen hundred and twenty dollars and seventy-two cents, and the attorney for the heirs at the time excepted to the approval of said account current, and prayed an appeal to the circuit court of the Southern district of Sharp county, which is granted."

In the circuit court the appellee moved to dismiss the appeal for the following reasons: (1) Because there were no exceptions filed in the probate court to the amended account current, and that no appeal was ever taken or prayed from the order of the probate court approving said account current No. 1 as amended; (2) and because the appellants have filed no bond for costs as required by law.

The court found as follows: That the record shows that there were no exceptions nor objections to the amended, restated account current No. 1 in the probate court, and no affidavit nor prayer for appeal from its confirmation either in term time nor in vacation—and further finds that the said plaintiffs have filed no bond for the costs as required by Act No. 327 of the Acts of the Legislature of the State of Arkansas 1909. The court then rendered judgment dismissing the appeal, and for costs against appellants, which judgment they now seek to reverse.

Appellants, pro se. David L. King, of Wilford, for appellee.

WOOD, J. (after stating the facts as above). [1] The court erred in dismissing the appeal. The statute provides:

"Any person interested as heir, legatee or creditor may file exceptions to such account, or any item thereof, on or before the second day of the term of said court to which such account may be continued; and, if exceptions are not filed within the time specified, such account shall be examined and confirmed as hereinbefore provided, and such account when confirmed shall never thereafter be subject to investigation, unless in a court of chancery," etc. Kirby's Digest, § 140.

When exceptions are once filed under this statute, unless they have afterwards been withdrawn by the party making them, it is the duty of the court to consider them as continuing so long as the account current is before the court for confirmation. A party filing exceptions under the statute to the account of the administrator does not have to repeat such exceptions at each term of the court to which the cause may be continued, and until final confirmation the same exceptions to the account as a whole or to any item thereof do not have to be made more than once.

The order of the probate court sustaining certain exceptions and dismissing others at the term of the court previous to the term at which the account was finally passed on and confirmed was not a final judgment so far as these exceptions were concerned. The order of the court continuing the consideration of the account current for restatement necessarily carried over the consideration of the exceptions that had been made to it when such account, at a subsequent term, came up for consideration and confirmation or rejection.

It is manifest that a party filing an exception could not appeal from the order of the court dismissing such exception until the final judgment was rendered confirming or rejecting the account current. The court therefore erred in finding that there were no exceptions to the restated account current in the probate court.

[2] The court also erred in finding that there was no affidavit nor prayer for appeal from the judgment of the probate court confirming the account current. It appears that this judgment was rendered on the 16th day of December, 1914, and it is recited in the judgment rendered on that day that "the attorney for the heirs at the time excepted to the approval of said account current, and prayed an appeal to the circuit court of the Southern district of Sharp county, which is granted." It also appears that on the same day Thomas I. Herrn, attorney for the heirs, filed a motion and an affidavit praying for an appeal "from the order and judgment of this court made on the 18th of September, 1914, in refusing and disallowing their exceptions to account current No. 1." And the affidavit stated that they "verily believe they are aggrieved by said order and judgment." True, this motion and affidavit and the order granting the appeal preceded on the record the entry of the final order and judgment on the account, but that could make no difference. The orders were made on the same day, and it would be highly technical and putting form before substance to say that these record entries, when considered together, were not a sufficient compliance with the law to perfect appellants' appeal, and to entitle them to have the same heard in the circuit court.

[3] The appeal being perfected in the cir-

cuit court, the appellants, having filed their exceptions in the probate court as required within the time provided by the statute, could renew these exceptions or amend the exceptions already filed in the circuit court.

[4] The court found that no bond for costs was filed as required by Act No. 327 of the Acts of the Legislature of the State of Arkansas of 1909. Under section 1348 of Kirby's Digest, as amended by Act No. 327, supra, and sections 1349 and 1350 of Kirby's Digest, a bond is not required as a prerequisite to an appeal except in cases where the appellant desires a supersedeas.

The judgment is therefore reversed, and the cause remanded, with directions to reinstate the appeal.

KIRBY, J., dissents.

BREYSACHER v. STATE. (No. 262.)

(Supreme Court of Arkansas. March 20, 1916.)

1. GRAND JURY \S 10—SUMMONS FOR SPECIAL GRAND JURY—ENTRY ON RECORD—STATUTE—"MINUTES."

Under the statute providing that if any offense be committed or discovered after the grand jury shall have been discharged, the court may, in its discretion, by an order to be entered in the minutes, direct the sheriff to summons a special grand jury, the entry of the order to summons upon the record of the court, instead of the judge's docket, was a substantial compliance with the statute; "minutes" being used in the sense of record of the court in the statute.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. \S 27; Dec. Dig. \S 10.]

For other definitions, see Words and Phrases, First and Second Series, Minutes.]

2. GRAND JURY \S 10 — SUMMONS FOR SPECIAL GRAND JURY—PROPRIETY.

An order directed to the sheriff, commanding him to "forthwith summons from the body of electors of this district 16 good and lawful men to serve as members of this special grand jury," to investigate an offense committed or discovered after discharge of the grand jury, being designated as a "scire facias" instead of a "venire facias," was a mere clerical mispision not affecting an indictment.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. \S 27; Dec. Dig. \S 10.]

3. GRAND JURY \S 10 — SUMMONS FOR SPECIAL GRAND JURY—DIRECTION TO CLERK TO ISSUE.

Where an order of court for a special grand jury was directed to the clerk, instead of the sheriff, but the order itself was by him issued to the sheriff, the proceedings were not improper, and the indictment found by the body was valid.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. \S 27; Dec. Dig. \S 10.]

4. HOMICIDE \S 156(1)—EVIDENCE—MALICE.

In a prosecution for murder, testimony calculated to cause the jury to believe that defendant, upon slight or no provocation, was undertaking to run down and rebuke or chastise those whom he fancied had wronged him by agreeing to pay the fine of one who was to give him a licking, and that in so doing he was manifesting a wicked and abandoned disposition, and that it was such malice which caused him to

assault and slay decedent, there being no evidence to show that decedent was one of the parties whom defendant was seeking, was improperly admitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 286, 287; Dec. Dig. \S 156(1).]

5. DEPOSITIONS \S 73—CERTIFICATE OF OFFICER—STATUTE.

Under Kirby's Dig. \S 8185, providing that the certificate of the officer shall state the time and place of taking the deposition, that the witness was duly sworn before he gave his testimony, and that his testimony was written, read to, and subscribed by him in the presence of the officer, and also state by whom it is written, and which of the parties, in person, or by agent or attorney, was present at the examination of the witness, the certificate of an officer who took offered depositions, reading: "State of Illinois, County of Alexander. John T. Brown, Cairo, Ill., being first duly sworn, deposes and says that he is the commissioner before whom W. H. Wood was taken in the case of The State of Arkansas, Plaintiff, v. J. A. Breysacher"—was insufficient, and the court's action in excluding the depositions proper.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. \S 165; Dec. Dig. \S 73.]

Kirby, J., dissenting.

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

J. A. Breysacher was convicted of murder in the second degree, and he appeals. Judgment reversed, and cause remanded for new trial, unless the Attorney General elects to have defendant sentenced for voluntary manslaughter.

At a regular term of the circuit court of Mississippi county, the prosecuting attorney petitioned the court for an order impaneling a special grand jury to inquire into the killing of one Johnny Bryeans, which occurred after the regular grand jury had adjourned. The court granted the petition and issued an order, which is designated as a scire facias, to the sheriff of Mississippi county, commanding him forthwith to summons from the body of the electors "16 good and lawful men to serve as members of the grand jury." The clerk entered the order upon the circuit court record and issued an order directed to the sheriff, commanding him to summons "from the body of the Chickasawba district of Mississippi county 16 good and lawful men," etc., to act as special grand jurors. The jury was duly impaneled, and returned an indictment against the appellant, charging him, in correct form, with the crime of murder in the first degree in the killing of one Johnny Bryeans. The appellant was convicted of murder in the second degree, and his punishment fixed by the sentence and judgment of the court at 21 years in the state penitentiary, from which he duly prosecutes this appeal.

C. A. Cunningham and Gravette & Rodgers, all of Blytheville, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). [1-3] Appellant contends that the court erred in overruling his motion to quash the indictment because the order calling for a special grand jury was not entered on the minutes of the court and was directed to the clerk instead of the sheriff, and because it was designated a *scire facias* instead of a *venire facias*. There is nothing in any of these objections. The statute provides:

"If any offense be committed or discovered during the sitting of any court after the grand jury attending such court shall have been discharged, such court may, in its discretion, by an order to be entered in the minutes, direct the sheriff to summon a special grand jury." Kirby's Dig. § 2219.

The entering of the order upon the record of the court, instead of on the judge's docket, was a substantial compliance with the statute. It was the purpose of the lawmakers simply to have the order entered upon the official record of the court. That is the meaning of the word "minutes," as used in the statute.

Designating the order as a "*scire facias*" instead of a "*venire facias*" was a mere clerical misprision. The order itself was directed to the sheriff, and commanded him to "forthwith summons from the body of electors of this district 16 good and lawful men to serve as members of this special grand jury," which showed that it was a *venire facias*. It was wholly immaterial what the order was called, since the purpose of the order was clearly stated therein, and was understood by the officer and complied with. The clerk was directed to issue the order, but the order itself was by him issued to the sheriff. The proceedings were in all things regular, and the court did not err in overruling the motion to quash the indictment. See *Dawson v. State*, 180 S. W. 701.

The appellant was one of the bosses in the employ of the Chicago Mill & Lumber Company. Bryeans was permitted to haul wood from the mill and supply the mill employes and its officers and such other persons as he cared to. When there was a surplus of wood at the mill, it was sold to anybody who wanted it. It was a rule of the company not to allow any one to bother the men who were employed at the mill, or to talk to them while they were at work. Bryeans, it appears from the testimony, had been violating this rule, and appellant had remonstrated with him about it, and on the day of the killing appellant approached him again, as he stated, to protest against his further interference with the employes at the mill, and that it was during this conversation that the killing occurred. Appellant relates the occurrence as follows:

"As I came out I met Mr. Schatz at the door, and asked him to go to the boiler room with me. On the way over I saw Johnny Bryeans, and told Mr. Schatz I wanted to speak to him. It was the first opportunity I had had. I walked up to him as he was pulling the back off of

his wagon under the kindling shed, and said: 'Johnny, I want you not to bother that negro any more about bringing wood out. Come to Mr. Davidson or me, and we will see that you get it.' He replied, 'I have not been bothering any of the men.' I said: 'You will have to keep your driver out of here, and the other evening you were bothering the men, and it is against the rule. I do not want it done.' He said he had not been bothering the men. Mr. Schatz stepped between us, and said there was no need for trouble. I thought at the time that Bryeans was going after his knife, but did not think there would be any trouble. I told him every time he came into the shop he stopped and talked to Skinny Morgan, and he called me a God damned liar, and I called him another one, and he put his hand in his pocket, got his knife, and ran at me from a distance of about 5 or 6 feet. I backed away, but got my foot tangled in some trash and kindling, saw that I could not get away from him, pulled my pistol, and shot him. I could tell by the look in his eyes that he was going to cut me. I had no intention of killing him. If I could bring him back by serving a term in the penitentiary I would gladly do so."

This testimony of appellant as to what took place at the time of the fatal encounter was substantially corroborated by witness Schatz, who was in company with appellant at the time he approached Bryeans, and also witness Stinnett, who was near by and observing them.

On behalf of the state a witness testified as follows:

"I was something like 45 or 50 feet away. Mr. Bryeans was facing Mr. Breysacher, and Breysacher's back was to me; Mr. Schatz was leaning against the back of wagon. I saw Mr. Breysacher step back about one step and fire. Mr. Bryeans did not fall for about a minute, and I thought he had missed him. At the time the shot was fired, Mr. Bryeans was standing facing towards Mr. Breysacher with his hands at his sides. He stood in that position until he weakened down."

Witness went to where Bryeans was lying, and saw no weapon. They were 5 or 6 feet apart when the shot was fired. Witness was in a position to see Bryeans and could have seen same if he had had a knife in his hand. However, he was not expecting any trouble, and did not remember having seen any knife. Witness stated that he himself was very much excited, and did not know whether he saw any movements or not; did not pretend to say Mr. Bryeans did not have a knife; he might have had one, but witness did not see it.

One other witness testified that he was about 16 feet from Bryeans when the dispute between him and appellant arose. He could not hear what was said. Immediately after they stepped back from the wagon Bryeans started towards Breysacher. As he started Breysacher reached back, but witness did not see him put his hand in his pocket and bring it out. He had a gun. Bryeans turned around, sank to his knees, and fell over. Witness could see his hands, and he did not have any knife. Witness never saw Breysacher's pistol; just saw the motion of his arm. Witness had his eyes on Bryeans at the time, and was looking at him at the

time to see if he put a knife in his pocket, and he didn't do it. His hands were down at his sides, and he never moved them.

Another witness testified that he saw Bryeans advance toward Breysacher a couple of steps; could not say that he was doing anything at the time he was shot. He stepped back and dropped his hands to his sides; never put his hands in his pockets. Witness did not see any knife.

Other witnesses on behalf of the state, whose attention was called to the occurrence by the pistol shot, testified substantially to the effect that the participants seemed to be standing perfectly still; that Bryeans' hands were hanging by his sides. They did not see him put his hands in his pocket from the time he was shot until he sank down. They could have seen the knife if he had had one in his hands. One witness testified:

"At the crack of the pistol I looked up and saw Mr. Gus (Breysacher) standing with it (the pistol) in his hand. Mr. Bryeans was standing 10 feet away, with both of his hands by his side. I could see his hands distinctly; he did not have anything in them."

Another witness testified substantially to the same effect.

The above testimony presents the circumstances of the fatal rencounter from the viewpoints of the appellant and the state.

A witness by the name of Potts testified that prior to the 3d of April he had been employed by Bryeans, and before that day Bryeans had discharged him, and told witness at the time that he did so because Gus Breysacher said that witness was bossing the negroes too much. The evening before the killing witness was with several boys in the barber shop, and they agreed among themselves that if witness would whip Breysacher they would pay witness' fine. Some of the boys were employes at the mill. Over the objection of appellant, witness was permitted to testify that he stopped Breysacher while he was on his way to dinner and asked him why he told the damn lie on witness; that Breysacher replied:

"If you think I told a damn lie on you, get Johnny Byreans and bring him up, and I will convince you that I did not."

Another witness testified that about 12:30 o'clock on the day of the killing he had a conversation with Breysacher, and, over the objection of appellant, witness was permitted to state that Breysacher said to witness: "When you get money to donate on anybody else's fine donate some on mine." Witness told Breysacher that he had agreed to pay a dollar on Potts' fine, and Breysacher said that he had not done anything to the boys. Witness jokingly said that he would pay a dollar towards paying Potts' fine if he would whip Breysacher. Breysacher replied that he was glad that witness did not have any more than that to do with it, and left witness laughing and in a good humor. That was 30 or 40 minutes before the killing.

Another witness was permitted, over the objection of appellant, to state that about five minutes before the killing he had a conversation with Breysacher, in which Breysacher had reproached him for offering a dollar on Potts' fine if Potts would give Breysacher a whipping; that Breysacher said to witness that it was none of witness' business who told him (Breysacher) about it; that Breysacher struck witness and said something to witness that he did not remember. Witness found that he was mad and tried to get loose from him. He got loose and went in the mill, and Breysacher caught him again. Witness only regarded what the Potts boy said as a joke, and did not apologize because Breysacher did not give him time. Breysacher said to witness that there were seven more that he was going to see.

Now it was not shown that Bryeans was one of those in the barber shop who offered to pay Potts' fine if he should whip Breysacher, and there is no testimony whatever to connect Bryeans with that conversation; nothing to show that the appellant harbored any ill will towards Bryeans growing out of the occurrence in the barber shop. There was nothing to show that Breysacher had reference to Bryeans when he stated to Albert Burns that there were seven more he was going to see in regard to the proposition to pay Potts' fine. There was nothing to show that there was any ill feeling on the part of Breysacher towards Bryeans before the fatal rencounter. Breysacher testified that he and Bryeans were good friends; that they had had no difficulty whatever; that there was no ill feeling existing between them; and that he had not connected John Bryeans with the conversation in the barber shop and had no intention of mentioning the barber shop occurrence to him at the time he approached him about disturbing the men in the box factory. So the occurrence in the barber shop, which so aroused the temper of the appellant as to cause him to violently attack one of the parties and to declare that he was going to see the others for the same purpose, had no connection whatever with the matter between Bryeans and appellant out of which the difficulty grew and which resulted in the death of Bryeans.

[4] Now the effect of the testimony of witnesses Potts, Burns, and Owens was to show that Breysacher was in an ill humor, and was harboring ill will towards those who had participated in the occurrence at the barber shop when Potts proposed to whip Breysacher, and the others present agreed to pay his fine if he would do so; that he was so embittered against them that he was, on the day of the killing and just a short time before, engaged in looking them up and calling them to account for what they had said and the part they had taken in the proposal by Potts to give him (appellant) a whipping; that he had gone to the extent of making a violent

attack upon one of them, and had declared that there were seven more that he expected to see. The testimony was calculated to cause the jury to believe that the appellant, upon apparently a very slight provocation, or no provocation whatever, was undertaking to run down and rebuke or chastise those whom he fancied had done him a wrong, and that in so doing he was manifesting a wicked and abandoned disposition, and that it was this malice and bad temper which caused him to assault and slay Bryeans. In *Deal v. State*, 82 Ark. 58, 100 S. W. 75, a witness was permitted to testify that a few hours before the killing the defendant had threatened to shoot his gun until it melted if they didn't quit running over him. His threat was not directed to any particular individual, and the deceased was not mentioned. In commenting upon this testimony we said:

"It tended to show a * * * malevolent spirit, a wicked and abandoned disposition; that appellant was in a frame of mind fatally bent on mischief which culminated in the killing of Bronson. But the testimony was clearly incompetent, because the threat 'to shoot his gun till it melted,' made several hours before the tragedy, was not directed against Bronson, the man who was killed, 'but against another fellow.' The proof showed that there was no ill will between appellant and Bronson before the killing. On the contrary, they were shown to be on friendly terms."

We held in that case that the admission of such testimony was error, citing cases. The principle announced in that case rules this.

[5] The court excluded offered depositions of certain witnesses taken at Cairo, Ill., to establish the reputation of appellant's witness Schatz for truth and morality. The certificate of the officer taking the offered depositions was as follows:

"State of Illinois, County of Alexander. John T. Brown, Cairo, Ill., being first duly sworn, deposes and says that he is the commissioner before whom W. H. Wood was taken in the case of *The State of Arkansas, Plaintiff, v. J. A. Breysacher, Defendant*. He also further states that he has no connection, either directly or indirectly, with the said Breysacher.

"[Signed] John T. Brown, Commissioner."

Our statute provides:

"The certificate of the officer shall state the time and place of taking the deposition; that the witness was duly sworn before he gave his testimony, and that his testimony was written, read to and subscribed by him in the presence of the officer; and also state by whom it was written, and which of the parties, in person, or by agent or attorney, was present at the examination of the witness." Kirby's Digest, § 3185.

The depositions had no caption showing the style of the case in which they were to be used. The certificate of the officer did not comply with our statute, and therefore the court did not err in excluding the depositions in the form in which they were offered.

The court erred in admitting the incompetent testimony above indicated, and the judgment will be reversed. But it does not follow that the appellant is entitled to a new trial. The only effect of the incompetent tes-

timony was to show malice on the part of the appellant, and the prejudicial effect of this testimony, therefore, will be eliminated if the verdict is reduced from murder in the second degree to manslaughter. For the jury did not accept the testimony on behalf of the appellant tending to show that he was justified in taking the life of his fellow man. On the contrary, their verdict shows that they believed the testimony of the witnesses for the state on this issue, and with the incompetent testimony tending to show malice eliminated, it is manifest the jury would not have returned a verdict for a lower offense than that of voluntary manslaughter.

The judgment will therefore be reversed, and the cause remanded for a new trial, unless the Attorney General, within 15 days, shall elect to have appellant sentenced to imprisonment in the penitentiary for voluntary manslaughter.

KIRBY, J., dissents.

ALLEN-WEST COMMISSION CO. v. HARSHAW et al. (No. 257.)

(Supreme Court of Arkansas. March 20, 1910.)

1. DOWER §91 — INCUMBRANCE — CONVEYANCE.

Defendant, owning an undivided seven-twelfths of land, incumbered by the unassigned dower interest of her mother which, when assigned, would have been a life estate in an undivided two-twelfths, who conveyed an undivided five-twelfths by deed with full covenants of warranty, held the remaining interest, sufficient to satisfy the dower incumbrance, subject to such incumbrance, so that it created no incumbrance upon the interest conveyed, the grantee of which had the right to require the dower interest to be taken out of the interest reserved, under the equitable rule that the court will as between the parties to the equities treat the subject-matter as if the equity had been worked out and as impressed with the character which it would have then borne.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 832; Dec. Dig. §91.]

2. COVENANTS §96(2) — WARRANTY — BREACH.

Under such conveyance, there was no breach of the warranty, as long as there were other lands of the grantor on which the dower interest could take effect.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 112; Dec. Dig. §96(2).]

3. PARTITION §87 — REIMBURSEMENT FOR DOWER — LACHES.

Plaintiff, who had been in possession of land, paying over to a widow having an unassigned dower interest of two-twelfths her part of the rent, was not guilty of laches in failing to assert its claim for reimbursement where such right did not exist until the lands were sold to it by defendant, whose remaining land was subject to the dower incumbrance.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 253; Dec. Dig. §87.]

Appeal from Lonoke Chancery Court; Jno. E. Martineau, Chancellor.

Action for partition by the Allen-West Commission Company against Mrs. M. L.

Harshaw and others. Decree for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Moore, Smith, Moore & Trieber, of Little Rock, and Geo. M. Chapline, of Lonoke, for appellant. Trimble & Williams, of Lonoke, and Blackwood & Newman, of Little Rock, for appellees.

McCULLOCH, C. J. The facts of this case, about which there is no dispute, are as follows:

Daniel Harshaw and his son, L. D. Harshaw, owned, as equal tenants in common, a tract of land in Lonoke county, Ark., consisting of 480 acres. L. D. Harshaw died intestate prior to the year 1883 (the precise date of his death not being stated in the record of this case), leaving surviving his widow, Mrs. M. L. Harshaw, and two children, Mary Z. Patrick and Robert M. Harshaw, and the last-named child subsequently died intestate and without issue, leaving as his sole heir at law his sister, the said Mary Z. Patrick. Daniel Harshaw died intestate in the year 1883, leaving surviving as his heirs at law his granddaughter, the said Mary Z. Patrick, and a son, John R. Harshaw, and four daughters. It is thus seen that Mrs. Patrick inherited an undivided one-half of the land from her father, L. D. Harshaw, subject to the dower interest of her mother, Mrs. M. L. Harshaw, and also inherited an undivided one-twelfth interest in the land from her grandfather, Daniel Harshaw, which gave her an undivided seven-twelfths, subject to the dower interest of her mother in two-twelfths. The dower interest of Mrs. M. L. Harshaw under the statutes of this state amounted to a life estate in one-third of her husband's interest, which, when assigned, would have given her a life estate in an undivided two-twelfths. John R. Harshaw subsequently purchased an undivided five-sixths from Mrs. Patrick, and the latter conveyed to him by deed dated April 9, 1898, containing full covenants of warranty. This gave John R. Harshaw an undivided six-twelfths interest in the land, and he subsequently purchased the interests of three of his sisters and received deeds of conveyance, thus giving him title to an undivided nine-twelfths.

John R. Harshaw subsequently mortgaged his interest to appellant, Allen-West Commission Company, and the mortgage was duly foreclosed and appellant acquired title under said foreclosure by deed dated September 23, 1907. Mary Z. Patrick died intestate in the year 1901, leaving surviving her four children, who are the appellees. Appellant took possession of the lands after its purchase at the foreclosure sale, and through its agents has collected the rents and disbursed the same, paying to Mrs. M. L. Harshaw, the widow of L. D. Harshaw, two-twelfths thereof as her interest in the dower lands, and also paying to Mrs. E. S. Davis, the daughter

of Daniel Harshaw who had not conveyed away her one-twelfth interest, an amount equal to her interest in rent of the lands, and retaining the balance of the rents of the undivided nine-twelfths.

Appellant instituted this action in the chancery court of Lonoke county for a partition of said lands, or sale thereof in the event partition could not be made, and the widow, Mrs. M. L. Harshaw, and the children of Mary Z. Patrick, and Mrs. E. S. Davis were made defendants. The dower of Mrs. Harshaw has never been assigned and it was agreed between all the parties to this suit that the value of her dower interest was the sum of \$600, which should be paid to her out of the proceeds of the sale of the land in lieu of the assignment of her dower in kind. The lands were sold under decree of the court by a commissioner, and in dividing the proceeds the chancery court decided that the \$600 paid to the widow, Mrs. Harshaw, should be deducted equally from each of the one-twelfth interests which descended from L. D. Harshaw, which constituted a deduction of \$500 of the amount from appellant's distributive share of the proceeds and one-twelfth from the share of the Patrick children. The court also decided that the Patrick children were entitled to one-twelfth of the rents collected by appellant during previous years and paid over to the widow, and entered a decree deducting the amount of the rents from appellant's distributive share in the proceeds of the sale. That was done over objections of appellant. An appeal has been prosecuted to this court, and the only controversy now relates to the one between appellant and the Patrick children concerning the distribution of the funds.

[1] Mary Z. Patrick owned an undivided seven-twelfths of the land, which was incumbered by the unassigned dower interest of her mother, which when assigned would have been a life estate in an undivided two-twelfths. Mrs. Patrick conveyed an undivided five-twelfths to John R. Harshaw and executed a deed with full covenants of warranty. The dower interest of the widow constituted an incumbrance on the title. *Hewitt v. Cox*, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873; *Seldon v. Dudley E. Jones Co.*, 74 Ark. 348, 85 S. W. 778; *Vaughan v. Butterfield*, 85 Ark. 289, 107 S. W. 993, 122 Am. St. Rep. 31. If the dower interest operated as an incumbrance upon the interest conveyed to John R. Harshaw, an eviction thereunder would have constituted a breach of the warranty; but we are of the opinion that it did not constitute an incumbrance upon the part so conveyed for the reason that sufficient interest remained in the grantor to satisfy the dower incumbrance. In other words, the dower is held to be an incumbrance on the remaining interest for the reason that the owner of the title under the conveyance to John R. Harshaw has the right to require the dower interest to be taken out of the in-

terest reserved. This results from the plain principles of equity that:

"The court will, as between the parties to the equities, treat the subject-matter as if the equity had been worked out and as impressed with the character which it would have then borne." 11 Am. & Eng. Ency. of Law, 181.

To state it in another form, Mrs. Patrick in conveying with covenants of warranty five-twelfths interest, and reserving two-twelfths, is presumed to have intended to convey free from the dower and to leave the dower incumbrance fastened upon the interest which she continued to hold. This is the equitable view which Mrs. Patrick and her privies can be required to observe.

The case of *Rice v. Rice*, 147 Iowa, 1, 125 N. W. 826, 34 L. R. A. (N. S.) 917, which is cited on the brief of appellant, is directly in point. There the grantor conveyed certain lands by warranty deed free from all liens and incumbrances. After his death a controversy arose between the grantees under the deeds and the devisees under the will of the grantor as to how the dower should be assigned, whether the grantees under the deed should take their lands free of dower or whether the dower should be assigned in each tract. The court held that the grantees took free of dower and that they had a right to compel the widow to take her dower out of the other lands. In disposing of the matter the court said:

"We see no way, however, to avoid giving effect to these conveyances strictly in accord with their terms. They were warranty deeds with full covenants. So far as the estate itself and the beneficiaries of the will are concerned, these deeds carried to the grantees the full and complete title to the tracts therein described. Only the widow can ignore them. And she is in no position to do so if her 'one-third in value' can be set apart without prejudice to her in the remaining real estate owned by the decedent at the time of his death. The devisees of the will can stand in no better position than the testator himself occupied after making such conveyances. If the warranty deeds were complete and binding as to him, they are clearly so as to his devisees. It is argued that the remedy of the grantees would be an action for damages for breach of covenants, and that they could recover therein only nominal damages, because the deeds were executed as a gift of the land. But the grantees are not bound to resort to an action for damages. We see no ground for holding that they may not maintain their possession and ownership under their deeds and in accordance with the terms thereof, subject only to the contingency that the widow might resort to the conveyed lands if necessary to the protection of her rights."

The only distinction sought to be made between the case just cited and the present one is that in the former the widow's dower right was inchoate at the time of the execution of the conveyance, and in the present case the widow's right was consummated by the death of her husband, lacking only an assignment to perfect her right in particular portions of the lands. The distinction is not, we think, a controlling one, and we are

of the opinion that the principle announced in the *Iowa Case*, supra, is correct and is applicable here. This disposes of both of the objectionable features of the decree in deducting the widow's dower interest from appellant's share and also decreasing payment by appellant of rent for previous years to appellees. The whole of the dower interest should have been deducted from the two shares of appellees, the Patrick children, and inasmuch as it is shown that appellant had paid the rents over on those two interests to the widow, appellant is not liable to the Patrick children for it.

[2] It is insisted that the only remedy of appellant was an action for the breach of warranty, and that the statute of limitation began to run from the date of the execution of the deed. What we have said disposes of that contention, for, as before stated, there was no breach of the warranty as long as there were other lands on which the dower interest could take effect.

[3] It is also contended that appellant was barred by laches in not asserting at an earlier date its claim for reimbursement for the dower. There is no laches in failing to assert a right which did not exist until the lands were sold. Appellant has been in possession of the lands, paying over to the widow her part of the rents, and in no view of the case can it be said that appellant has slept upon its rights.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree distributing the proceeds of sale in accordance with this opinion.

DETROIT FIRE & MARINE INS. CO. v. STEWART et al. (No. 252.)

(Supreme Court of Arkansas. March 20, 1916.)

1. GARNISHMENT ⇨235(1)—JUDGMENT—RES JUDICATA—IDENTITY OF ISSUES.

Judgment in garnishment of D. as debtor of S. individually, is not res judicata in an action by S. as trustee, against D., the issues being different.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 423-425; Dec. Dig. ⇨235(1).]

2. GARNISHMENT ⇨81(1)—PLACE OF PROCEEDING—DEBT MERGED IN JUDGMENT.

Debt merged in a judgment in one state is not subject to garnishment in another state.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 146; Dec. Dig. ⇨81(1).]

3. JUSTICES OF THE PEACE ⇨162(1)—APPEAL—SUPERSEDEAS.

Appeal from a judgment of a justice, with superseadeas, does not extinguish, but merely suspends operation of, the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 600, 603; Dec. Dig. ⇨162(1).]

Appeal from Circuit Court, Miller County: G. R. Haynie, Judge.

Action by Z. C. Stewart, trustee, and others, against the Detroit Fire & Marine In-

insurance Company. From a judgment for plaintiffs, on appeal from a justice, defendant appeals. Affirmed.

Glass, Estea, King & Burford and Jas. D. Head, all of Texarkana, for appellant.

McCULLOCH, C. J. This is an action instituted on an insurance policy issued by defendant, Detroit Fire & Marine Insurance Company, to recover the amount of damage to the insured property, a dwelling house situated in the state of Texas. The property was owned by Mrs. Kate Mitchell and was insured in her name. Damage was sustained by fire in the sum of \$97.43, and after the damage occurred Mrs. Mitchell made a written assignment of the claim to Z. C. Stewart, as trustee for herself and her daughter, Alfrey Mitchell. Stewart, as such trustee, instituted this action against the insurance company before a justice of the peace of Miller county, Ark., and recovered judgment for the amount of the claim, which was undisputed. The defendant took an appeal to the circuit court and superseded the judgment by the execution of a bond pursuant to the terms of the statute. Cravens & Cage, a copartnership, had previously obtained a judgment against Z. C. Stewart individually in an action for debt before a justice of the peace in Harris county, Tex., and while this suit was pending below Cravens & Cage sued out a writ of garnishment on the said judgment and caused the same to be served upon the defendant insurance company. The garnishee answered, and upon its motion Stewart and Mrs. Mitchell and Alfrey Mitchell were made parties and summoned by publication of a warning order, no personal service, however, being made on said parties, nor is there any evidence that they received any information of the pendency of said garnishment proceeding.

The Texas court rendered a judgment against the garnishee, directing the payment over to Cravens & Cage, the plaintiffs in that suit, of the amount due under the policy, and the defendant has pleaded the judgment in the garnishment proceedings as a bar to recovery in the present action. They pleaded the Texas judgment in this action below, but the trial court refused to sustain the plea and rendered judgment in favor of the plaintiff Z. C. Stewart, in his representative capacity as trustee under the aforesaid assignment to him. The defendant has prosecuted an appeal to this court.

[1] It is contended on behalf of the defendant that in Texas a justice of the peace exercises jurisdiction as a superior court, and that the judgment in the garnishment proceedings is an adjudication of the right of the plaintiff to recover in the present action. Treating the Texas court as a superior court, with complete jurisdiction over the subject-matter of the garnishment proceedings, we are of the opinion that the record in this

case does not show enough to bar the plaintiff from recovering, and that the judgment of the circuit court of Miller county was correct. The garnishment against the defendant operated upon an indebtedness to Z. C. Stewart individually. The writ and the subsequent judgment thereon merely substituted the plaintiffs in that action in the place of Stewart, the defendant in that action, and the only issue in that proceeding concerned the alleged indebtedness of the insurance company to Stewart. It did not involve an issue as to indebtedness of the garnishee to a third person, and Stewart in his representative capacity must be treated as a third person.

"It is a self-evident proposition," says Mr. Shinn, in his work on Attachment and Garnishment, vol. 2, § 727, "that no judgment is res adjudicata as to matters which have not been adjudicated. The rights of no person are res adjudicata, unless such person has been a party to the proceedings legally determined by the court. * * * If the indebtedness was not to the principal defendant, judgment against the garnishee will not bind his actual creditors. They may thereafter bring suit against him, or their creditors may bring garnishment against the garnishee."

It is true that Stewart and Mrs. Mitchell and Alfrey Mitchell were made parties to the garnishment proceedings and were summoned by publication of a warning order, but they were not bound to take notice of the fact that an indebtedness of the garnishee to Stewart, as trustee, was involved in the controversy, nor indeed was it involved under a writ which commanded the garnishee to answer as to his indebtedness to Stewart individually. The issue in the two proceedings being different, the judgment of the Texas court against Stewart individually does not bar his right to recover in the present action when suing in his representative capacity as trustee of an express trust.

[2, 3] There is still another reason why the circuit court was correct in holding that the garnishee was not discharged from liability in this action. It is the universal rule of the courts that a judgment debtor is not subject to garnishment in the courts of a state other than the one wherein the judgment against him is rendered. *Wabash Rd. Co. v. Tourville*, 179 U. S. 322, 21 Sup. Ct. 118, 45 L. Ed. 210. It does not appear that the defendant, when summoned as garnishee, pleaded the Arkansas judgment as it was the bounden duty of the garnishee to do. The judgment of the Arkansas justice of the peace had been appealed from and the judgment superseded, but the supersedeas operated, not as an extinguishment of the judgment, but merely as a suspension of its enforcement, and the debt covered by the judgment was beyond the reach of a writ of garnishment issued in a foreign jurisdiction.

The original debt had become merged in the judgment of the Arkansas justice of the peace, and it was no longer subject to garnishment in another state. *Tourville v. Wabash Rd. Co.*, 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 660; *Id.*, 179 U. S. 322, 21 Sup. Ct. 113, 45 L. Ed. 210. Nor does it appear in this action that the garnishee ever answered, showing that the indebtedness was to Stewart in his representative capacity as trustee of an express trust and not to him individually. It was the duty of the garnishee to make full disclosure of the facts, and in the absence of such a disclosure it cannot plead the judgment in the garnishment proceedings as a defense to the suit of a third person.

"The garnishee is under obligation to show in his answer not only that the fund has been assigned or is exempt, but must disclose all the facts relative to the interest of strangers to the suit, whether the same be existing liens, equities under special contract, or any other interest whatever; after which such claimants may interplead as parties and have their rights adjudicated." 2 Shinn on Attachment and Garnishment, § 719.

See, also, Rood on Garnishment, § 217.

The defendant has not shown that it pleaded the facts in the garnishment proceeding, or even that it gave the interested parties actual notice of the pendency of the proceedings. Therefore it is not entitled to plead the Texas judgment, for that reason if for no other.

Affirmed.

KOONCE et al. v. FORDYCE LUMBER CO. (No. 271.)

(Supreme Court of Arkansas. March 20, 1916.)

1. LOGS AND LOGGING §2—CONVEYANCE OF TIMBER LAND—EFFECT.

The conveyance of timber land without reservation or exception of the timber carries the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. §2.]

2. LOGS AND LOGGING §2—CONVEYANCE OF TIMBER—REMEDIES OF PURCHASER—SUBSEQUENT CONVEYANCE—FRAUD.

An owner of timber land who had conveyed the timber thereon to a lumber company by a warranty deed granting 20 years for its removal and who subsequently conveyed the land without any reservation or exception of the timber so as to defeat the prior conveyance of the timber, the deed of which was not on record, by vesting title in a bona fide purchaser without notice, was liable to the grantee of the timber for the loss, although they did not intend such result.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. §2.]

3. LOGS AND LOGGING §3(8)—CONVEYANCE OF TIMBER — REMEDIES OF PURCHASER — BREACH OF WARRANTY.

In such case the subsequent conveyance of the timber under which the grantee of the timber was deprived of its right to timber by bona

fide purchasers was a breach of the warranty entitling the grantee of the timber to damages.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. §3(8).]

4. LOGS AND LOGGING §3(15)—CONVEYANCE OF TIMBER—FRAUD—PARTIES.

Where tenant in common of an undivided half of timber land conveyed the timber by warranty deed with 20 years for its removal, and one of such tenants in common conveyed his interest to his cotenant, who by deed, without reservation or exception of the timber, conveyed to one whose grantees were held to be innocent purchasers and entitled to the timber, both tenants in common were properly joined as parties defendant in a suit by the grantee of the timber to recover the value of timber taken from the land.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. §3(15).]

Appeal from Circuit Court, Dallas County; Turner Butler, Judge.

Suit by the Fordyce Lumber Company against E. L. Koonce and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Appellee brought suit to recover the value of timber taken from certain lands in Dallas county.

The lumber company purchased the timber on the lands in question in 1908 from appellants, and the same was conveyed to them by a warranty deed granting 20 years' time in which to remove the timber. On July 11, 1913, appellant Koonce conveyed his one-half undivided interest in the lands to appellant McKee by deed without reserving or excepting the timber therefrom. On February 13, 1914, McKee conveyed to R. S. Treadway and W. J. Key without any exception or reservation of the timber, and the deed was recorded on the 28th of February. This deed contained some lands on which the right of the lumber company to cut timber had expired, and a lien was retained thereon to secure the unpaid purchase money, and subsequently, on March 23, 1914, McKee and wife executed a quitclaim deed to said grantees releasing the vendor's lien. On March 19, 1914, Treadway and Key conveyed all the standing timber on the lands to Cox and Richardson, who, in the suit of the lumber company against them, were held to be innocent purchasers thereof, and entitled to the timber, after which decree appellee company instituted this suit. Its deed to the timber was not recorded until April 13, 1914.

Appellants first demurred to the complaint for misjoinder of parties, and, upon the demurrer being overruled, answered, admitting the making of the conveyances of the timber and lands at the time alleged, and stated that the deed from Koonce to McKee of the one-half interest in the land was not intended to and did not convey the timber, which both parties knew belonged to the lumber company and was only intended to convey the lands, that therefore no reservation or exception of the timber was made therein:

that upon the making of the deed to Treadway and Key, it was understood between the parties that the timber upon the lands was not conveyed, although no exception or reservation was contained in the deed; that said grantees knew that the lumber company was the owner of the timber.

They denied any liability to the lumber company for the loss of the timber, and alleged that if any damage or loss was suffered, it was on account of the failure of the company to record its deed to the timber, which they supposed had been recorded. The timber conveyed to the lumber company by appellants' deed and lost to them by their subsequent conveyances of the land without reservation or exception of the timber as set out was shown to be worth the sum of \$3,500. Koonce and McKee testified denying any intention to wrong the lumber company or deprive it of the timber sold to it by the later conveyances of the land, each testifying that they notified the grantees down to and including Treadway and Key that the timber belonged to the lumber company and did not pass with the conveyance of the land. They also stated that they had no information that the timber deed was not of record, and in fact supposed it had been recorded before making such conveyances.

The court refused to give any of appellants' requested instructions, and denied the motion to require appellee to elect which defendant it would proceed against, the liability being claimed to be several, and not joint. It thereupon directed the jury to return a verdict for the lumber company, and from the judgment thereon, this appeal is prosecuted.

Wynne & Harrison, of Fordyce, and Daggett & Daggett, of Marianna, for appellants. S. F. Morton, of Fordyce, and Gaughan & Sifford, of Camden, for appellee.

KIRBY, J. (after stating the facts as above). Attorneys for appellants concede that one who conveys a tract of land and thereafter executes a second conveyance with the intent to defeat the first or with knowledge that such conveyance will be used for that purpose, commits an actionable wrong against the first grantee, holding an unrecorded deed, but insist that the instant case is entirely different from such cases. If appellee had recorded its deed to the timber, the condition existing now could never have arisen, since the last grantees who were held to be innocent purchasers of the timber would have had constructive notice of appellee's title from the record, their timber deed being in the chain of title. *Gaines v. Summers*, 50 Ark. 327, 7 S. W. 301.

Our statutes provide (sections 1698-95, Kirby's Digest) that if a person shall be a party to any conveyance or assignment of any real estate or interest therein with intent to defraud any prior or subsequent pur-

chaser, or if any person shall bona fide sell any tract or parcel of land and shall make any written deed of conveyance or other instrument of writing, assuring the title of such land to the purchaser thereof, and shall afterwards sell and convey such tract of land to any subsequent purchaser, whether the subsequent purchaser have knowledge of the previous sale or not, such person shall be deemed guilty of a misdemeanor.

Appellants contend that said section 1694, relative to the sale of the lands, does not apply to the facts of this case, since they had the right to sell the lands and it was not their intention to convey the timber which they did not sell. Their testimony also shows that they had no intention in fact or rather did not make the conveyance of the land to the last grantees for the purpose of defrauding the lumber company of the timber already conveyed to it, as they supposed its deed was of record and would protect its interest.

[1-3] However this may be, it is unquestionably true that the conveyance of the land conveyed the timber standing thereon, and that this fact was well known to appellants in making the deeds thereto. They also knew that their conveyances of the land contained no reservation or exception of the timber thereon from the grant, and were chargeable, of course, with knowledge that the conveyances of the land without such reservation or exception of the timber carried the timber and would have effect to defeat their prior conveyance of the timber to the lumber company if the timber conveyance was not of record and the lands were granted to a bona fide purchaser without notice of it. Their affirmative action in making such conveyances without proper exceptions and reservations to protect their grantee of the timber whose deed might not have been and was not recorded, had the same effect to defeat its right and defraud the grantee of the timber as though they had intended the result effected, and for which they must be held answerable. They were owners as tenants in common, each of an undivided half of the lands upon which the timber stood, and conveyed the timber thereon to the lumber company by a warranty deed granting 20 years' time for its removal, and their warranty was broken, and their grantee, appellee, deprived of the timber by a bona fide purchaser through their subsequent conveyances of the lands within said time without reservation or exception of the timber, for the loss of which they became liable. Whether the action be regarded arising out of contract or sounding in tort, the effect is the same, since the damage would not have resulted but for their subsequent conveyances of the land without reservation or exception of the timber, and although it is true that both appellants knew that they had already conveyed the timber to the lum-

ber company, and neither in fact intended to defeat that conveyance, or deprive said company of the timber by his conveyance to the other of his undivided half of the land, still but for his said conveyance as made, the other would not have been able to convey the lands and wrongfully deprive their grantee of the timber.

[4] In other words, the act of Koonce in making the conveyance of his undivided half of the land to this cotenant, McKee, contributed to the result attained by the conveyance of the lands without reservation or exception of the timber, thereby causing the damage to appellee in the loss of its timber. There was therefore no misjoinder of parties as contended by appellants.

The Supreme Court of Nebraska has reached the same conclusion as to liability in a case of like kind, in a well-considered opinion. *Hilligas v. Kuns*, 86 Neb. 68, 124 N. W. 925, 26 L. R. A. (N. S.) 284, 20 Ann. Cas. 1124.

The testimony being undisputed as to the value of the timber, the court committed no error in directing the verdict. The judgment is affirmed.

BEATY v. SWIFT et al. (No. 290.)

(Supreme Court of Arkansas. March 27, 1916.)

1. DEEDS \S 211(1) — VALIDITY — MENTAL CAPACITY — SUFFICIENCY OF EVIDENCE.

Evidence in a cause in equity held to show that when defendant executed a deed to her life estate in land, under which plaintiff claimed, she was possessed of sufficient mental capacity to make a valid deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 637-640, 642, 647; Dec. Dig. \S 211(1).]

2. DEEDS \S 68(1½) — VALIDITY — "MENTAL INCAPACITY."

To invalidate a deed on the ground of the grantor's mental incapacity, it must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent his understanding of the nature and consequences of his act.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 151; Dec. Dig. \S 68(1½).]

For other definitions, see Words and Phrases, Second Series, Mental Incapacity.]

Appeal from Washington Chancery Court; T. H. Humphreys, Chancellor.

Action of unlawful detainer by W. A. Beaty against Ann Swift and others. Cause transferred to equity and decree for defendants canceling the conveyance under which plaintiff claimed, and plaintiff appeals. Reversed and remanded, with directions.

R. J. Wilson and McDonald & Grabel, all of Fayetteville, for appellant. J. W. Walker, of Fayetteville, for appellees.

SMITH, J. The court below found that appellee Ann Swift was given a life estate under the will of her father in the land in controversy, and that at the time she executed a deed to the land to one A. S. King, under

whom appellant Beaty claims title by deed, the said Ann Swift was not possessed of sufficient mental capacity to know and appreciate her act, or to make a binding deed, and that her attempted conveyance of the land was void. The deed so declared void was dated September 14, 1891. As a result of this finding various collateral questions are presented in the briefs, but the correctness of the above finding presents what we regard as the controlling question in the case.

After Beaty's purchase of the land he improved it, and as a result of these improvements, and the building of a railroad near the land, and the general enhancement of values, the land became much more valuable than it was at the time appellee sold it. Appellant was in possession of the land by a tenant, who commenced moving from the place; but, before all of his effects had been removed, appellee and her husband moved in and took possession of the premises and retained possession until appellant brought an action of unlawful detainer to dispossess them. The cause was transferred to equity, where a guardian was appointed to defend for appellee, and a decree was rendered canceling appellee's conveyance of the land for the reason stated.

[1] A large number of witnesses—42, in fact—testified in appellee's behalf. Much of this evidence is clearly incompetent. For instance, the postmaster at Fayetteville testified that he taught school in the '80's near the home of William Rinehart, who was appellee's father, and that he always understood that Rinehart had a child who was mentally unbalanced, but that all he knew of her mental condition was what he had heard. Other witnesses who are nonexperts appear to have stated their opinions without detailing the evidence upon which such opinions were based. Only three persons testified who attempted to qualify as experts, and the usual difference of opinion was found among them. Two of the three testified that appellee did not have sufficient mental capacity to convey land, while the third was of the contrary opinion.

A number of nonexperts, however, testified, both pro and con, and gave such detailed statements of the facts and circumstances arising out of their observation of, and association with, appellee as gave them the right to express an opinion, based upon such observation and association concerning appellee's sanity. It appears from the evidence of some of the witnesses that appellee and her husband possessed about the same degree of intelligence. Of course, the husband's sanity was not directly involved in this inquiry, yet the witnesses discussed it more or less, and it is certain that both appellee and her husband possessed very little intelligence and were wholly uneducated. Evidence offered in appellee's behalf unquestionably tends to show that she did not pos-

ness sufficient mentality to execute a valid deed, and this evidence, considered alone, would, no doubt, sustain the finding of the chancellor. But the question is, and we concede it is a close one, whether the chancellor's finding is contrary to the preponderance of the evidence.

It was shown that at the time the deed was made appellee's husband shot a man, and, rather than stand trial upon this charge, ran away. He went first to Texas, and later to Tennessee, where he lived for 2 years, and, learning of the death of the man whom he had shot, he returned to his former home. Appellee left this state about 2 months after her husband ran away, and joined him in Texas, and has lived with him continuously since.

Appellee's brother testified that after Swift shot the man, the land in question was sold to raise money to pay the expenses of Swift's fight. That his sister knew her husband was in trouble, but he could not say how much she knew about it, but he supposed, if it was explained to her, she would have understood. That his sister received \$250 in money, and gave him \$150 of it to take to her husband, and she retained the other \$100. Other heirs who had an interest in the land joined in the conveyance, and the total consideration was \$1,000.

Appellee had a life estate under the will of her father in a fourth interest, and she received the same price for this life estate as did the heirs who owned the fee. This brother was asked, "Do you think she has sufficient mental capacity to intelligently dispose of any estate and protect her rights?" and he answered, "I do not think she ever had any ability. In some things she has judgment, and in other things she is a blank." A neighbor of many years standing testified, "I think she is pretty weak-minded; always thought that; it is my judgment she never was bright; she might know good from evil." Another testified, "I do not think Ann would be very competent; some things she might know; some she might not." Another brother of appellee testified that his sister knew no more of right or wrong than a child 4 or 5 years old, and that she had never developed mentally. He admitted, however, that in the settlement of his father's estate it became necessary for his sister to execute a deed to him, and this she did, and he thought she knew what she was doing when that deed was executed. Another sister testified that appellee never went to school and could not learn at home, but that she had read in the first reader. That her sister wanted the money to enable her husband to get out of the country, and that she sold her interest in the land for the same price which her sister received. Indeed, the proof appears to greatly preponderate that a fair price was received for the land. Another neighbor testified that appellee did not know right from wrong, and could not deal at arm's length in business

transactions with men and women; and several other witnesses employed similar language in expressing their opinion of appellee's mentality. It was shown that she possessed a great fondness for pets, particularly cats and dogs, and that she kept a good many of these about her, and talked to them in a childish way, and some of these witnesses who so testified stated that her mentality appeared to be that of a child anywhere from 4 to 12 years old. She was shown also to have had a fondness for dolls and to have had dolls to play with until she was 30 years old. She was about 60 years old at the time of the trial. Notwithstanding a good many witnesses testified appellee did not know right from wrong, these same witnesses admitted that she did right rather than wrong. That her conduct was decorous and her life simple and blameless, and no scandal had attached to her name. One witness did answer affirmatively the question, "Is she morally depraved?" but he did so after having stated that he did not understand the question and without having had it explained to him. This witness admitted that he could not himself read or write, and it is very probable that he did not understand the significance of his answer. At any rate, no other witness so testified. Upon the contrary, it was shown that she attended church regularly, and witnesses stated they had heard her testify in church coherently and that she appeared to enjoy the consolations of religion. Unquestionably she and her husband were very poor and were ignorant, and it is shown that they had none of the luxuries, and not many of the comforts, of life in their home. Witnesses described the home as one of squalor, filth, and misery. Yet for a number of years appellee and her husband kept house, during all of which time she performed all the usual and necessary domestic duties. She raised chickens and eggs and geese, and other fowls, and carried them to market, and sold them and exchanged them for things needed about her home. Witnesses in appellant's behalf testified that appellee would talk about and understand the affairs of the neighborhood, that she would borrow things and bring them back, and that she raised fine hogs for the market. One witness asked her how she raised such fine hogs, and she answered, "Us takes care of 'em." This appears to be characteristic language in which she expressed herself. Other witnesses testified that she talked intelligently and coherently, and while these witnesses conceded that she was of a low order of mentality, they thought she had intelligence enough to know what she was doing and what she wanted to do. Appellee's family physician, who had practiced his profession in the vicinity in which she lived for 34 years, testified that he had had numerous conversations with her, and that while she presented a case of arrested mental development, she was not an imbecile, nor

an idiot, but had sufficient intelligence to understand things ordinarily, to look after her own interests, and to sell her interest in land or deed it away and understand the nature of the transaction, and that he thought she was mentally competent to sign a deed and to know the nature of a transaction of that kind. He expressed the opinion that if she had had the assistance in her youth which science now affords such persons, that she might have made an intelligent woman.

Two doctors testified as experts in appellee's behalf, and the testimony of these physicians is practically identical. Neither had ever seen appellee until they were called upon to examine her, which they did together and in the presence of her husband. They expressed the opinion that neither appellee nor her husband appeared rational or to comprehend the simple transactions of life. They tested her reflexes, her ability to discriminate dates, the denomination of currency, and her visual capacity. They found that she could not count money, and after making various tests, which were regarded as appropriate to enable them to form the opinion which they expressed, they stated their opinion to be that they did not regard her as capable of transacting any kind of business. This examination covered a period of from 30 to 40 minutes, or possibly an hour, as one of the doctors said, and they also expressed the opinion that neither appellee nor her husband was simulating a lack of intelligence. They expressed the opinion that appellee would be unable to remember incidents that had happened several years back, and that they did not think she had mentality to recollect or recount incidents that had occurred 15 or 16 years previously. Upon their cross-examination, however, the questions asked and answers given by appellee when her deposition was taken were read to these doctors, and they stated that those answers were more connected and coherent than anything which they had been able to obtain, and they also expressed the opinion that the answers given indicated intelligence and continuity of thought, and that the answers indicated an understanding of the matters testified about and were fairly intelligent, except the phraseology employed in expressing them; but that this, however, was common in the case of illiterate persons like appellee and could not be regarded as a special mark of weakness of mind. And after the remainder of the questions and answers had been read the doctors testified that the answers indicated a fair degree of intelligence, and that if they had been without any personal knowledge of the party interrogated, they would be of the opinion that the answers showed something near an average degree of intelligence, and that those answers lead them to believe that the witness had more capacity and intelligence and understanding of the subjects about which she was questioned than

their examination of her would have led them to believe.

But possibly the more important of this evidence is that of appellee herself. She was examined and cross-examined at length, and was recalled for further examination and cross-examination. Notwithstanding the great length of time which had elapsed since the execution of her deed, she appeared to remember the circumstances under which it was executed, although other witnesses to the transaction contradicted her statement that the deed which she signed was destroyed, and that another deed was prepared but was not signed by her. She had never traveled on a train, but yet she followed her husband to Texas, and although she got lost there this appears to have resulted from the failure of the brakeman to advise her of the proper place to change cars. She named the various places in Texas where she stopped, and through which she passed, and the length of time she remained in each, and where and when she finally joined her husband. She went with him to Tennessee and detailed with fair intelligence their principal business transactions in that state. She described a piece of land which he purchased there, and the terms of his contract for its purchase, and the source from which he derived the funds to pay for the place. She remembered accurately and stated correctly the principal provisions of her father's will and knew the property which had been given to her and the conditions which had been imposed, and seemed to understand the nature and extent of her interests in that estate. She appears to have discussed frequently with her neighbors the sale of this land and to have advised with some, and to have been advised by others about her chances of recovering it long before this suit was brought. She told one person that she did bring this suit because she was afraid she might not recover the land, but she and her husband appeared to have bided their time and seized the first opportunity of taking possession of the land, thereby making themselves defendants in a suit to determine its title. Upon her cross-examination, appellee showed her ability to count money, to spell her given name, and to give a rational answer to all questions that were asked about herself, her family, and her property.

[2] In the case of *McEvoy v. Tucker*, 115 Ark. 430, 171 S. W. 888, we had occasion to consider the sufficiency of proof to establish the lack of mental capacity to invalidate a conveyance of real estate. In that case we quoted the rule applicable to such questions as stated by Mr. Justice Riddick in the case of *Seawell v. Dirst*, 70 Ark. 166, 66 S. W. 1058, as follows:

"It follows, therefore, that the proof which is designed to invalidate a man's deed or contract on the ground of insanity must show inability to exercise a reasonable judgment in regard to the matter involved in the conveyance. * * * To have that effect (i. e., to invalidate the deed),

the insanity must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act."

In applying that test to the facts in this case, as we understand them to be, we have reached a conclusion contrary to the one announced in the case of *McEvoy v. Tucker*. We think that appellee was not a person of average intelligence, but this is not required. The ignorant and illiterate person may acquire property and may convey it, provided he knows what he is doing and understands and appreciates the transaction in which he is engaging, and we think appellee had this knowledge, and we are constrained to believe that she realized that her husband's trouble put her to a choice between her land and her husband, and she chose to sell her land to save him. And having made this election with intelligence enough to know that she had done so, she cannot now recover her land, and the decree of the chancellor will be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

BALMAT v. CITY OF ARGENTA et al.
(No. 276.)

(Supreme Court of Arkansas. March 27, 1916.)

1. DEDICATION §19(2)—ALLEYWAY—IMPLICATION.

Where parties platted land into city lots with intersecting streets and alleys indicated on the plat, which was duly acknowledged and filed for record, having attached the statement, in relation to the alleys, that they should remain open highways for the use of the owners of or residents upon the blocks through which they run, but that the alley in any block might be closed at any time by all the owners of lots in the block executing, acknowledging, and placing on record in the recorder's office of the county a written instrument setting forth the closure, there was no dedication, expressly or by implication, of the alleys to the public, the reservation of the use of the alleys and right of closure to the owners or residents negating any implication of intent to irrevocably dedicate the alleys to public use; while the general rule is that in both express and implied common-law dedications there must be an appropriation of land by the owner to public use by some express manifestation of his purpose or by some act or course of conduct from which the law will imply the intent.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 38-41; Dec. Dig. §19(2).]

2. MUNICIPAL CORPORATIONS §648—ALLEYS—PRESCRIPTIVE RIGHT OF PUBLIC.

Where the owners of lands, platting them, reserve to the owners or residents of the blocks the right to use and close alleys, so that there is no dedication, the public may acquire the right to use by prescription; the alleys being open to use by the public.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1421, 1422; Dec. Dig. §648.]

3. DEDICATION §19(1)—MAKING AND RECORDING PLAT—INCLOSURE.

A dedication of streets or alleys across a tract of land is not established merely by proof

of making and recording a plat showing such ways, where the lands remained inclosed by the original owner.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 37; Dec. Dig. §19(1).]

4. INJUNCTION §130—RESTRAINING BREAKING OF INCLOSURE—IMMATERIAL QUESTION.

In an action by the owner of lands to enjoin officers of a city from breaking his inclosure and tearing down his fences to open an alleged alley, the question whether plaintiff was wrongfully withholding the strip of ground from the other owners of land in the block for use as an alley was not involved where none of such owners complained.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 288-300; Dec. Dig. §130.]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by Frank Balmat against the City of Argenta and others. From a decree for defendants, plaintiff appeals. Decree reversed, and cause remanded, with directions to enter a decree for plaintiff.

Bratton & Bratton, of Little Rock, for appellant. Fred McDonald, of Argenta, for appellees.

MCCULLOCH, C. J. This is an action instituted by appellant in the chancery court of Pulaski county to restrain the officers of the city of Argenta from breaking appellant's inclosure and tearing down his fences for the purpose of opening an alley. The officers of the city attempt to justify their invasion of the premises under a claim of dedication to the public by appellant's grantor. James H. Barton (who was appellant's immediate grantor) and James L. Davis formerly owned the property, and in the year 1887 platted it into city lots with intersecting streets and alleys indicated on the plat. The plat was duly acknowledged and filed for record, and attached thereto were field notes and the following statement, signed by the dedicators:

"Know all men by these presents that whereas, we, James H. Barton and James L. Davis, are the owners of the land described in the foregoing notes; and, whereas, we have caused the said land to be laid off into lots and blocks, streets and alleys as shown on the plat preceding said notes: Now, therefore, we hereby declare that the said land so laid off shall hereafter be known as Davis' addition to the town of Argenta, and the streets shall remain open highways forever, and the alleys shall remain open highways for the use of the owners of or residents upon the blocks through which they run, but the alley in any block may be closed at any time by all owners of lots in any such block duly executing, acknowledging, and placing on record in the recorder's office of Pulaski county a valid instrument of writing setting forth such closure."

Appellant subsequently purchased two lots from Barton, and the same were inclosed by a fence which included the portion indicated on the map as an alley running through the block, and that fence has been maintained by plaintiff to the present time, or at least until it was broken and the premises entered by the officers of the city.

The question in the case is whether or not there has ever been a dedication of the land in controversy to public use. The language of the writing is peculiar. It contains an express dedication of the streets indicated on the plat, but as to the alleys it provides that:

They "shall remain open highways for the use of the owners of or residents upon the blocks through which they run, but the alley in any block may be closed at any time by all owners of lots in any such block duly executing, acknowledging, and placing on record in the recorder's office of Pulaski county a valid instrument of writing setting forth such closure."

At the time of the alleged dedication we had in this state no statutory method of voluntary dedication of lands to public use as streets, alleys, and other public places, but the General Assembly of 1901 enacted a statute requiring persons and corporations to file plats of land situated in any city or town with the recorder of deeds. Kirby's Digest, §§ 5523, 5524.

There are two classes of common-law dedications, "express dedications and implied dedications," says Mr. Elliott in his work on Roads and Streets, vol. 1, § 133. "In both express and implied common-law dedications," continues the author, "it is necessary that there should be an appropriation of land by the owner to public use—in the one case by some express manifestation of his purpose to devote the land to the public use; in the other by some act or course of conduct from which the law will imply such an intent." The same author in another section of his work (section 138) says:

"It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent."

There have been many decisions of this court on the subject, and the rule expressed by Mr. Elliott is the one that we have steadily adhered to. Among other things, we have decided that:

"An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable." *Davies v. Epstein*, 77 Ark. 221, 92 S. W. 19.

But that:

"Merely laying out grounds, or merely platting and surveying them, without actually throwing them open to [the public] use or actually selling lots with reference to the plat, will not,

as a general rule, show a dedication." *Holly Grove v. Smith*, 63 Ark. 5, 37 S. W. 956.

[1] Now, it cannot be said that there was any express dedication in this instance, for there is nowhere found in the instrument executed by Barton and Davis a dedication of alleys to the public; so, if there has been one at all, it must arise by implication, either from what was declared in that instrument or by the conduct of the parties. It will be seen that, while there was an express dedication of the streets for public use, the use of the alleys indicated on the plat is reserved to the owners of or residents upon the block through which the alleys run, and there is an express reservation to such owners of the right to close the alleys at any time. In the face of the express declaration that the alleys are to remain open for the use of the owners or residents, and may at any time be closed by the joint action of such owners, it cannot be said that there was an implied intention to irrevocably dedicate the alleys to public use.

[2, 3] Notwithstanding that reservation, the public might acquire the right of use by prescription, but such is not the case in the present instance; for it appears that the alley now sought to be opened has never been opened, but, on the contrary, has been occupied by appellant and included within his inclosure. The case falls, we think, within the principle announced by this court in the case of *Holly Grove v. Smith*, supra, where it was held that a dedication of streets and alleys across a tract of land is not established merely by proof of making and recording the plat, where the lands remained inclosed by the original owner.

[4] The question whether the appellant is wrongfully withholding the strip of ground from the other owners of land in the block for use as an alley is not involved in this controversy, inasmuch as none of those owners is complaining. When they do complain, the question will arise whether or not they are barred by the statute of limitation; there being only private rights involved. At any rate, the public has no concern in the rights of private owners, as there has never been any prescriptive right acquired by the public, and, as we have already seen, there has been no dedication. We conclude, therefore, that the city had no right to open the alley and to forcibly break and enter appellant's inclosure, and that he was entitled to an injunction restraining the officers from so doing.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree in favor of the appellant.

HARPER v. YOUNG. (No. 289.)

(Supreme Court of Arkansas. March 27, 1916.)

LANDLORD AND TENANT \S 199½ — LIENS — USES OF PREMISES—RENT.

Under a lease of a building providing that it should be used as a saloon, but that it might be used for any other legal purpose, with the written consent of the lessor, and further providing that during the term the lessee would purchase all the beer used in the saloon or sold therefrom from the lessor, and that his failure or refusal to do so should forfeit all his rights and entitle the lessor to enter, an order of the court under the provisions of a statute prohibiting the operation of saloons did not relieve the lessee from liability for rent; as the lease only required the lessee to buy beer from the lessor so long as he operated a saloon in the building and was not for the sole purpose of conducting a saloon, and as the lessee could have made other uses of the building by permission of the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 761; Dec. Dig. \S 199½.]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by J. Ross Young, administratrix of D. J. Young, against Win Harper. Verdict for plaintiff, and defendant appeals. Affirmed.

In this case appellee, as administratrix of the estate of D. J. Young, sued appellant for the sum of \$1,000 for rent of a certain building in the city of Ft. Smith under a lease executed by the said Young to appellant on November 15, 1910. The lease provides:

"That said premises shall be used for the purpose of a saloon and dramshop, provided that they may be used for any other legal purpose with the written consent of the said lessor."

Written in the body of this lease was the further agreement:

"Lessee further agrees that during the term of this lease he will purchase all of the beer that he uses in said saloon or sells therefrom both bottled and keg beer from the said lessor, and from no one else, and failure or refusal to so purchase said beer from said lessor as aforesaid shall forfeit all of lessee's rights under this lease, and same shall at once become void at option of said lessor and be of no further force and effect, and lessor may without process of law or notice enter into said premises and eject lessee."

It was conceded that the rent for the four months beginning September 1, 1914, and ending January 1, 1915, was not paid by appellant, and it was also conceded that the operation of saloons in Ft. Smith was prohibited by order of the court under the provisions of the Going Act, and that said order became effective August 1, 1914. Appellant paid the rent for the month of August, but shortly after the first of the month vacated the premises, and so notified the lessor, and mailed him the keys to the premises, but the letter containing the keys was returned unopened.

Young was not engaged in the real estate business, and was not the owner of the building, but had rented it from the owner and had subrented it to appellant, who had used it only for the purpose of running a saloon. Young was the local agent of a brewery, and

was interested in having a tenant who would buy the beer sold by him. A conversation occurred between appellant and deceased after the city had gone dry, in which appellant asked about the lease, and Young said that so far as he was concerned the lease would be all right, whereupon appellant said, "What about Mr. Wyatt [the owner of the building]?" and there was some evidence about a statement by Young that he would not charge rent unless Wyatt charged him; but no attempt was made to show that anything was said about using the building for any other purpose.

At the conclusion of the evidence the court directed the jury to return a verdict for appellee for the sum sued for, and this appeal has been duly prosecuted from that judgment.

Thos. B. Pryor and Wm. Rhea, both of Ft. Smith, for appellant. Ben Cravens and Jno. H. Vaughan, both of Ft. Smith, for appellees.

SMITH, J. (after stating the facts as above). It is insisted on the part of the appellant that we have here a contract similar to the one which we construed in the case of *Kahn v. Wilhelm*, 177 S. W. 403, and that this case is controlled by the rule there announced. But we do not agree with counsel in this contention. The contracts are not similar. In the case of *Kahn v. Wilhelm*, we said of the lease there construed that the parties to it had agreed and covenanted that the property should be used as a hotel and saloon, and for no other purpose whatever, and that in construing the lease we had no right to strike out one of the terms there employed. It was there argued that the building could be used for a hotel, even though no saloon was kept there, and that the property had other usable value. But in answer to this argument it was said that the lease was not a general one, but a special one for the purpose of operating a hotel and saloon, and we construed that instrument as leasing the building for a single purpose; that purpose being the operation of a hotel and saloon.

The lease now under consideration does not provide, as did the lease in the *Kahn v. Wilhelm* Case, that the building should be used for certain purposes only. In fact, it appears to have been contemplated that some other use of the building might be desired, in which event such permission could be obtained by the written consent of the lessor, the lessee paying any increased rate of insurance caused by the change of business. It is true the parties to the lease in the *Kahn v. Wilhelm* Case might have agreed to some other use of the premises, but the contract contemplated no such agreement, and the agreement, if made, would have been a new one outside of the original contract. Here the contract contemplated the possibility of

a change in the use of the premises, and provides a manner in which that change may be accomplished. The provision in the lease requiring appellant to purchase beer from his lessor was inserted for the purpose of requiring appellant to buy beer from his lessor, so long as he operated a saloon in the building, and it has no other effect.

Appellant proceeded on the theory that his lease was for one purpose only, and acted upon that theory in returning the keys without attempting to use the building for other purposes or asking if that could be done. His liability depends upon the correctness of his interpretation of the contract, for he stood upon that interpretation in returning the keys without attempting to use the building for some other purpose, or inquiring if he could do so. We think he should have made some other use of the building, or should have asked if this might be done, and, if this permission had been refused, he would, of course, have been absolved from any obligation to pay the rent. But, not having done so, we must hold that the court properly directed a verdict against him for the rent due under his contract.

It is true this contract required appellant to obtain the written consent of the lessor before engaging in any other business except the operation of a saloon, but the insertion of this provision shows that the parties contemplated that such a request might be made and the terms upon which it would be granted. While this permission might not have been granted, it cannot be assumed that it would certainly have been refused, and we conclude, from the insertion of the provision that the parties contemplated the probability of this request being made, and had not contracted for a single use of the building as was done in the case of *Kahn v. Wilhelm*, *supra*.

The judgment is therefore affirmed.

McCABE v. LEE. (No. 270.)

(Supreme Court of Arkansas. March 20, 1916.)

1. CHATTEL MORTGAGES §144—PRIORITY—EXECUTION.

An officer in possession of property upon a levy under an execution acquired a lien on the property superior to the lien acquired under a chattel mortgage recorded subsequently to the issuance and levy of the execution.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 241; Dec. Dig. § 144.]

2. EXECUTION §116—RENEWAL—EFFECT OF LIEN.

Under Kirby's Dig. §§ 4642-4644, providing that an execution returned not satisfied shall be renewed for 12 months by indorsement thereon, a lien acquired by an officer under a levy of execution was continued by a renewal of the execution from the time of the levy until the disposition thereof.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 266-271; Dec. Dig. § 116.]

Appeal from Circuit Court, Clay County; W. J. Driver, Judge.

Action by John McCabe against S. O. Lee. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellee, the constable of Gleghorn township, Clay county, levied an execution, issued upon the 22d day of October, 1914, upon a judgment in the justice court obtained by J. P. Pugsly against Charles Harper, upon a cow, the property of Harper, which he took into possession and advertised for sale on the 7th day of November, 1914.

John McCabe brought replevin against appellee on that day, claiming the right to the possession of the cow under a chattel mortgage executed by said Harper to him on the 18th day of March, 1914, which was filed for record on the 3d day of November, 1914. On the 16th of November, after the service of the writ of possession in the replevin suit, the appellee, S. O. Lee, by order of the plaintiff in execution, returned the execution with the indorsement "Not satisfied" for renewal, and it was renewed by the justice in accordance with the statute.

Appellee executed a retaining bond and upon the trial of the replevin suit, judgment was rendered in McCabe's favor against him, from which he appealed to the circuit court, where upon trial the court found the value of the cow and declared the lien of the constable under the execution superior to the mortgage lien, same having been fixed prior to the filing of the mortgage and rendered judgment against appellant, from which he brings this appeal.

O. T. Bloodworth, of Corning, for appellant. Appellee, pro se.

KIRBY, J. (after stating the facts as above). [1, 2] The execution constituted a lien upon the property of the judgment debtor, which continued as long as the writ remained in force, and the general rule is:

"In the absence of express statutory enactment, an execution has no legal effect as such after its return day, and on the return of an execution nulla bona its lien expires; yet the title vested in an officer by virtue of his levy remains until divested by subsequent proceedings, and he may proceed to advertise and sell the property by virtue of his title acquired by levy after the return day of the writ." 17 Cyc. 1072; 2 Freeman on Executions, 202.

The property had been levied on and taken into possession of the officer under the authority of the execution, before appellant acquired a lien under his mortgage which had not been recorded until afterward, and the officer could have proceeded with the sale of the property even after the return day of the writ, but he returned it before the day under the direction of the judgment creditor unsatisfied, and caused it to be renewed by proper indorsement thereon, under the authority of sections 4642-4644, Kirby's Digest. By the terms of the statute such indorsement

of renewal continues the execution in full force in all respects for 12 months after the indorsement made. The execution constituted a lien from the time of its issuance and levy, and by the levy of it the officer acquired a special interest in the property of the judgment debtor levied upon, which he could protect by suit, and the execution, being renewed in accordance with the statute during its life or before it became functus officio, continued the lien and the right of the officer to the property seized under it from the time of its levy until the disposition thereof, according to law, and his right was superior to any right that could be acquired by appellant under his mortgage, which was not recorded until after the issuance and levy of the execution.

The judgment is affirmed.

BROOKFIELD v. BLOCK et al. (No. 281.)

(Supreme Court of Arkansas. March 27, 1916.)

1. DEDICATION \S 31, 65—STREETS—POWER TO REVOKE.

Where plaintiff conveyed part of a platted section of land to M. in 1883, and in 1890 executed a dedication deed to the city by the terms of which all streets and alleys laid off on the plat were to revert to the grantor when no longer used, she could not recover a strip of land laid off as an alley in both deeds, since where owners of land laid out as a town or an addition to a city or town platted into blocks and lots intersected by streets and alleys and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, no formal acceptance by the city or town is necessary, and such dedication is irrevocable.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. \S 64, 65, 103; Dec. Dig. \S 31, 65.]

2. EJECTMENT \S 9(3)—RIGHT TO ACTION—NECESSITY OF TITLE BY PLAINTIFF.

A plaintiff in ejectment must recover on the strength of his own title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 18, 20-24, 27; Dec. Dig. \S 9(3).]

Appeal from Circuit Court, Cross County; W. J. Driver, Judge.

Action by Nannie E. Brookfield against R. Block and others. Judgment for the defendants, and plaintiff appeals. Affirmed.

J. C. Brookfield, of Wynne, for appellant. Block & Kirsch, of Paragould, for appellees.

HART, J. Nannie E. Brookfield instituted this action in the circuit court against R. Block to recover possession of a strip of land 24 feet wide by 96 feet long in the west half of block 5 in the town of Wynne in Cross county, Ark.

On the 24th day of May, 1883, Joshua Brookfield and Nannie E. Brookfield, his wife, conveyed by warranty deed to B. B. Merriman "the west half of block No. 5 in accordance with the plat of the town of Wynne in said county now on file in the office of the recorder of said county of Cross."

On the 28th day of March, 1890, plaintiff filed for record a dedication deed as follows:

"Know all men by these presents that I, Elizabeth Brookfield, for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, do hereby grant, sell and quitclaim unto the inhabitants of the town of Wynne in the county of Cross and state of Arkansas, all the streets and alleys as designated and platted on this map for the use of the public as highways, and when said streets and alleys cease to be so used, then the same to revert and belong to me."

The property in question was formerly an alley in the west half of block No. 5 in Brookfield's addition to the town of Wynne. It has since been inclosed and occupied by various persons. The alley is not now used by the public, but it is claimed by the defendant Block. The court directed a verdict in favor of the defendant, and from a judgment dismissing her complaint, the plaintiff has appealed.

The plaintiff formerly owned the acreage property of which the piece of property in question was a part. It is the contention of counsel for the plaintiff that the property in controversy reverted to her under the provisions of her dedication deed when the alley ceased to be used by the public. It may be stated here that none of the maps or plats of the town of Wynne referred to in the briefs are copied in the transcript.

[1] It is well settled by the decisions of this court that where owners of land laid out a town or an addition to a city or town upon it, platting it into blocks and lots, intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, and that such dedication is irrevocable. Stuttgart v. John, 85 Ark. 520, 109 S. W. 541, and cases cited; Simon v. Perberton, 112 Ark. 202, 165 S. W. 297, and cases cited.

It will be noted that the deed from Mrs. Brookfield and husband to B. B. Merriman conveys "the west half of block No. 5 in accordance with the plat of the town of Wynne now on file in the office of the recorder of said county of Cross." The plat referred to in the deed is not in the transcript. So we cannot know whether or not there were any alleys laid off on the plat. If there was no alley laid off on the plat, then the property in controversy being a part of the west half of block 5 passed by the deed from Mrs. Brookfield to Merriman. If by the plat referred to in the deed from Mrs. Brookfield to Merriman, the alleys were laid off, they were dedicated to the public by the sale of the lots in the block and the dedication became irrevocable. Under the authorities referred to above where lots have been sold with reference to a plat, no formal acceptance by the city or town is necessary, as by that act the dedication becomes irrevocable.

[2] The dedication deed upon which Mrs. Brookfield relies for title was not executed

until 1890; several years after the deed from her to Merriman was executed. She could not by that deed reserve to herself any interest in the alleys which had been already dedicated to the public. As we have seen, the plat referred to in the deed from Mrs. Brookfield to Merriman is not in the record, and the title to the lot in question either passed to Merriman by that deed or, if it was laid off as an alley on the plat referred to in that deed, was irrevocably dedicated to the use of the public when the lots in the block were sold. In either event the title to the property in question was divested out of Mrs. Brookfield when she executed the deed to Merriman, and it is well settled in this state that a plaintiff in ejectment must recover on the strength of his own title.

It follows that the court was correct in directing a verdict in favor of the defendant, and the judgment will be affirmed.

LOUISVILLE, N. O. & T. R. CO. et al. v.
JACKSON. (No. 220.)

(Supreme Court of Arkansas. March 6, 1916.
Rehearing Denied April 3, 1916.)

1. WATERS AND WATER COURSES \S 126(3) —
SURFACE WATERS—RAILROAD EMBANKMENT
—QUESTION FOR JURY.

On evidence in an action for damages from the raising of a railroad embankment which changed the flow of water and caused it to accumulate on plaintiff's property, *held*, that whether the accumulation was caused by the raising of the embankment was a question for the jury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 141, 142; Dec. Dig. \S 126(3).]

2. WATERS AND WATER COURSES \S 116 —
SURFACE WATERS.

Surface water is a common enemy which any landowner may defend against with such measures as he may deem expedient without laying himself liable to any other owner upon whose land the water is caused to flow.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 127; Dec. Dig. \S 116.]

3. EMINENT DOMAIN \S 2(1)—**SURFACE WATERS—EMBANKMENT—LIABILITY.**

Defendant railroad, whose occupancy of a public highway for its tracks was entirely permissive, was liable for any damage to adjacent owners caused by its embankment, regardless of whether the water so diverted was surface water or was flowing through a natural drainway, and regardless of negligence in its construction, under the constitutional guaranty that private property shall not be taken or damaged for public use without due compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-8; Dec. Dig. \S 2(1).]

4. TRIAL \S 252(9)—**INSTRUCTIONS—APPLICABILITY TO EVIDENCE — SURFACE WATERS — ACTION FOR DAMAGES.**

In an action for damages to real property from an embankment by defendant railroad changing the flow of water and causing it to accumulate on plaintiff's property, where there was no evidence that the injury was caused by a failure of the city to maintain and repair the street, an instruction that the railroad had no

control over the street adjoining plaintiff's premises, except that actually occupied by its roadbed, and that any damage from surface water from the failure of the city to use reasonable care in the maintenance of the street did not make it liable, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. \S 252(9).]

5. WATERS AND WATER COURSES \S 118 —
SURFACE WATERS—LIABILITY FOR DAMAGES.

In such case, the railroad, having no control over any other part of the street except that occupied by its tracks, was not excused from liability for damages from surface water consequent upon the raising of an embankment because the city failed to afford additional facilities for carrying off the surface water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 128-130; Dec. Dig. \S 118.]

6. DAMAGES \S 62(3)—**MITIGATION—DUTY TO REDUCE.**

In such case, the owner was required to do whatever was reasonably necessary to protect his property from injury and could not permit the injury and then claim full damages, when he might have prevented it or lessened its effect by a reasonable expenditure.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 124-127; Dec. Dig. \S 62(3).]

7. WATERS AND WATER COURSES \S 126(3)—
SURFACE WATERS—ACTIONS FOR DAMAGES—INSTRUCTIONS.

In an action by an owner for damages to his property from surface water from defendant railroad's change in its roadbed, where defendant's evidence showed that the flow of water was not sufficient to overflow the gutters and that if it rose above the curbing and under plaintiff's storehouse it was due to the fact that the gutters were not cleaned, the refusal of its instruction, that it had no duty to clean the gutters in front of plaintiff's property, and that if the damage was caused by the failure of the city or any other person to keep them cleaned it was not liable, was error.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 141, 142; Dec. Dig. \S 126(3).]

8. WATERS AND WATER COURSES \S 118 —
SURFACE WATERS—LIABILITY.

In such case, defendant would not be liable if the gutters as they existed at the time its embankment was raised were sufficient to take care of the water, because they were subsequently allowed to fill up so that they could not take care of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 128-130; Dec. Dig. \S 118.]

9. WATERS AND WATER COURSES \S 123 —
SURFACE WATERS—ACTION FOR DAMAGES—PARTIES.

In such case, the plaintiff, if not the owner of the property mentioned in his complaint at the time the alleged permanent injury from its acts of negligence were committed by defendant railroad, could not recover.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 187, 138; Dec. Dig. \S 123.]

10. WATERS AND WATER COURSES \S 123 —
SURFACE WATERS—ACTION FOR DAMAGES—PARTIES.

In such case, if the injury occurred during the lifetime of plaintiff's devisee, the right of action did not descend to plaintiff as the devisee.

but survived to the devisor's personal representatives.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 137, 188; Dec. Dig. ¶ 123.]

11. TENANCY IN COMMON ¶ 55(1)—RECOVERY OF PREMISES.

In case of a tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 140; Dec. Dig. ¶ 55(1).]

12. TENANCY IN COMMON ¶ 55(1)—INJURY TO FREEHOLD—ACTION FOR DAMAGES.

A suit to recover the entire amount of damages for permanent injury to the freehold cannot be instituted by one of the tenants in common not in exclusive occupancy; and, where the land was partitioned in its damaged condition, the other tenants retained their right of action already accrued.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 140; Dec. Dig. ¶ 55(1).]

Appeal from Circuit Court, Phillips County; W. R. Satterfield, Special Judge.

Action by J. M. Jackson against the Louisville, New Orleans & Texas Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Fink & Dinning, of Helena, for appellants. P. R. Andrews and J. G. Burke, both of Helena, and Moore, Smith, Moore & Trieber, of Little Rock, for appellee.

McCULLOCH, C. J. The plaintiff, J. M. Jackson, instituted this action in the circuit court of Phillips county against the two defendant railway corporations to recover damages alleged to have been sustained to his real property in the city of Helena on account of the raising of an embankment which changed the flow of the water and caused it to flow to and accumulate on plaintiff's said property. One of the defendant companies is an Arkansas corporation, which holds the franchise, and the other is a foreign corporation operating the railroad along the line. No question is raised in the suit about misjoinder of the defendants or as to which one of the defendants is liable for the alleged injury, if there is any liability at all.

The real property alleged to have been injured consists of two lots on which there are three storehouses fronting east on Natchez street, at the southwest corner of Natchez and Missouri streets. Natchez street runs north and south and is 60 feet wide, the railroad operated by the defendants running along the east side of that street. The center of the track is 10 feet west of the east line of the street. Originally the track was about on a level with the grade of the street, and, according to the testimony adduced by the plaintiff, there was a ditch running along the west side of the track at the end of the ties which carried a considerable quantity of water down the track to the next street on the south, Arkansas street, where it was tak-

en care of without injury to adjacent property. In the year 1913, the defendants were compelled, on account of the raising of the track of another intersecting railroad, to raise this track about 2 or 2½ feet, and in doing so the embankment was sloped off from the west side of the track to about the center or crown of the street. The ditch just spoken of was, according to the testimony of the plaintiff, completely obliterated by the raising of the dump, and no other means were provided for taking care of the additional water which was thrown over into the gutter on the west side of the street.

The theory of the plaintiff is that the additional water thrown over into the gutter overtaxed its capacity and could not be taken care of, and that when it rained the surplus water rose about the curb and ran under the plaintiff's storehouses. It is contradicted that the flow of the water was from east to west, that the water came from the levee east of Natchez street and flowed over the railroad track, and that when the ditch was filled up there was nothing to prevent it from flowing onto the gutter, and on the west side of Natchez street. The plaintiff alleged in his complaint that he was the owner of the property, and the answer of the defendants contains a denial of that allegation. It is also denied in the answer that there was any ditch along the edge of the railroad track, and denied that the raising of the embankment caused any additional flow of water. Plaintiff alleged that permanent injury to the property was inflicted by the raising of the embankment and the digging of the ditch, which depreciated the value of the property, and the jury awarded damages for such permanent injury in the sum of \$2,500. Defendants have appealed.

[1] It is earnestly insisted that the testimony fails to make out a case of liability against the defendants; but, after careful consideration of the evidence, we conclude that, if the testimony be accepted in its light most favorable to the plaintiff's cause of action, there is enough to submit to the jury on the issue as to whether or not the injury was caused by the act of the defendants in raising the embankment and filling the ditch. There is a sharp conflict in the testimony as to whether or not there was any ditch there at all, but that conflict must be treated as settled in plaintiff's favor by the verdict of the jury. There is also a sharp conflict in the testimony as to whether or not the surface water rose above the curb and flowed onto plaintiff's property, there being testimony adduced by the defendants which tends to show that there was not sufficient water from the heaviest rains to rise above the curb; but that issue, too, must be treated as settled by the verdict.

[2] The argument is made, also, that it was surface waters that flowed over towards

plaintiff's adjacent property, and also that the ditch was not a natural drainway, and that for those reasons the defendants are not liable. It is asserted that the defendant railroad companies had the same right as any other property owner to defend against surface water, and that upon that theory there could be no liability. The defendants invoke the doctrine announced by this and many other courts that surface water is a common enemy which any landowner may defend against with such measures as he may deem expedient, without laying himself liable to any other owner upon which the water is caused to flow. *Levy v. Nash*, 87 Ark. 41, 112 S. W. 173, 20 L. R. A. (N. S.) 155; *McCoy v. Board of Directors of Plum Bayou Levee Dist.*, 95 Ark. 345, 129 S. W. 1097, 29 L. R. A. (N. S.) 396.

[3] That doctrine, though well established, has no application to the act of the railroad companies in raising their embankment to the injury of adjacent property owners, for the simple reason that such an act is not for the purpose of defending against surface waters. The occupancy of the railroad companies of the public highway was entirely permissive, and they could only do so by paying to the adjacent landowners any damage caused by such occupancy. They therefore became liable for any damage caused by a change in the condition of the highway brought about by such occupancy, regardless of the question whether or not the water thus diverted was surface water or was flowing through a natural drainway. If the change in the condition of the highway from the occupancy by the railroads caused the injury, then the companies are liable, whether there was any negligence in the construction of the embankment or not, for the Constitution of the state gives a guaranty that private property shall not be taken or damaged for public use without due compensation. The same principle applies where there has been a former appropriation of part of the public highway and afterwards there is a change made which causes additional damage. *Railway v. Greer*, 77 Ark. 387, 96 S. W. 129. So, under the law, the defendants are liable for any injury done to plaintiff's property by raising the embankment in the public streets. The question whether or not the accumulation of water under the storehouses was caused by the raising of the embankment was one of fact for the determination of the jury.

[4] The following instruction, requested by defendants, was refused:

"(5) The court instructs the jury that the defendant railroad company has no control over any part of the street adjoining the premises mentioned in the complaint, except that portion actually occupied by its roadbed, and that any damages resulting from any defect in the drainage of surface water on or along said street caused by the failure of the officers of the city of Helena to use reasonable care in the maintenance and repair of the said street are not

chargeable to this defendant, and this defendant is not liable for any part thereof."

We do not think that the court erred in refusing to give the instruction, for the reason that there is no evidence in the record to the effect that the injury was caused by a failure on the part of the city authorities to maintain and repair the street.

[5] It is true, as recited in the instruction, that the railroad companies had no control over any other part of the street except that part occupied by their track, but that condition does not exonerate the companies from liability for injury caused by their acts in changing the condition. If the act of the companies in raising the embankment caused the injury, the companies are not excused because the city authorities failed to take additional steps to remedy the defect and afford additional facilities for carrying off the water. The abutting property owners had no control over the street, and cannot be made to suffer from an injury caused by an act of the railroad companies because the city authorities failed to exercise proper care to avert the injury.

[6] Of course, the property owner is required to do whatever is reasonably necessary to protect his property from injury, and cannot permit the injury to occur and then claim full damages when he might have prevented it or lessened its effect by a reasonable expenditure. That question, however, is not raised on the present appeal, and we need not discuss it further, for it is sufficient to say that the rule announced in the instruction just referred to is not correct.

[7, 8] Instruction No. 6, which was requested by defendants and refused by the court, reads as follows:

"(6) The court instructs the jury that this defendant railroad company has no authority or right and it is no part of its duty to clean off or keep in good condition the gutter in front of this plaintiff's property, and if you find that the damages alleged in the complaint were caused by the failure on the part of the city of Helena, or any other person, to keep the gutter adjoining the plaintiff's premises clean, then you will find for the defendant."

We think that instruction should have been given. The testimony introduced by defendants tended to show that the flow of water was not sufficient to overflow the gutter, and that if the water rose above the curbing and flowed under the storehouses of plaintiff it was caused solely by the fact that the gutters were allowed to fill up with trash and were not cleaned out. The defendants were entitled to have that issue submitted to the jury, because if the gutters, as they existed at the time the embankment was raised, were sufficient to take care of the water, the defendants would not be rendered liable by the fact that they were subsequently allowed to fill up so as to incapacitate them from taking care of the water. There was an issue on that subject which should have been submitted to the jury, and we think that the court erred in refusing to do so.

[9] The defendants in their answer denied the plaintiff's ownership of the property in question, and they undertook to raise that question by requested instructions which the court refused. The testimony is undisputed on the question of ownership, but there is a conflict as to the time the embankment was raised so as to inflict a permanent injury to the property. The property was originally owned by plaintiff's grandfather, Mr. John P. Moore, who died in September, 1913, leaving his last will and testament whereby he devised the property in question to the plaintiff and seven other persons. The property was held by the devisees as tenants in common, plaintiff being the owner of an undivided eighth, until there was a partition of the lands of the estate in September, 1914, when this particular property fell to plaintiff in the division.

The testimony introduced by the plaintiff tends to show that the embankment was raised so as to cause the injury in October, 1913, which was after the death of Mr. Moore, the deviser. Defendant's testimony tends to show that the embankment was raised during Mr. Moore's lifetime. It was admitted that certain work was done as late as October, 1913, but that this merely applied to raising one of the crossings, and that the work of raising the embankment along the street was done some time prior to Mr. Moore's death. The state of the testimony is that there is a conflict whether the embankment which caused the injury was constructed before the death of Mr. Moore, but it is undisputed that it was completed before the plaintiff became the sole owner of the property.

Defendants asked an instruction as to ownership in the following words:

"(2) The court instructs the jury that, if it finds from the testimony in this case that the plaintiff was not the owner of the property mentioned in the complaint at the time the alleged acts of negligence were committed by the defendant, then you will find for the defendant."

This instruction was correct in any view of the case, and the court erred in refusing to give it. There is no controversy about the injury being a permanent one, if there was any injury caused by the defendants at all. In fact, the plaintiff brought his suit upon the theory that the injury was a permanent one, and made no attempt to establish any other kind of injury. There was no effort to prove that there had been loss of rents or any other temporary injury by reason of the construction of the embankment. The measure of damages sought to be established, and which the court submitted to the jury, was the permanent depreciation of the value of the property by reason of the additional water which flowed from the street.

[10] Now, if that injury occurred during the lifetime of Mr. Moore, the deviser, the right of action therefor did not descend to his heirs or devisees, but survived to his personal representatives, the executor or ad-

ministratoꝛ. The law on that subject is very well settled. In *Railway v. Greer*, supra, we said:

"The cause of action accrues when the damage is done, and accrues to the one who is the owner of the land at the time of the construction which causes the injury or damage."

To the same effect, see *Brown v. Arkansas Central Ry. Co.*, 72 Ark. 456, 81 S. W. 613; *Illinois Cent. Ry. Co. v. Allen*, 39 Ill. 205; *Railway v. Morgan*, 72 Ill. 155; *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *McFadden v. Johnson*, 72 Pa. 336, 13 Am. Rep. 681.

In *Moore v. City of Boston*, 62 Mass. (8 Cush.) 274, it is expressly decided that a right of action of a landowner against the city for property taken for public use survives to his executor or administrator, and not to the heirs.

Defendants attempted to raise the further question of the right of the plaintiff to recover for the whole damage, even though the injury occurred after the death of Mr. Moore and while plaintiff and the other devisees held the property as tenants in common.

Instruction No. 4, which reads as follows, was refused:

"(4) The court instructs the jury that, if it finds from the testimony that the plaintiff was the owner of the property mentioned in the complaint at the time of the commission of the said acts of negligence jointly with other owners as tenants in common, then you will find for the plaintiff only such pro rata part of the damages sustained by the property through the negligent acts of the defendant as his interest in the property bears to the whole interest in the property."

[11] There is some conflict in the authorities as to the right of a tenant in common to sue for the recovery of the whole premises or injury thereto. We are of the opinion that, according to the more recent authorities, the better rule is to hold that in case of tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property. While that point was not expressly decided in the case of *Cottonwood Lumber Co. v. Walker*, 106 Ark. 102, 152 S. W. 1005, 45 L. R. A. (N. S.) 429, such is necessarily the effect of the decision. The weight of authority as it now stands is, we think, in favor of that rule. 38 *Cyclopedia of Law*, 116-118; *Bledge v. Transfer Co.*, 56 Mo. App. 133; *Anderson v. Thunder Bay River Boom Co.*, 57 Mich. 216, 23 N. W. 776; *Wadleigh v. Marathon County Bank*, 58 Wis. 546, 17 N. W. 314; *Reed v. Chicago & Milwaukee R. Co.*, 71 Wis. 399, 37 N. W. 225.

[12] For a much stronger reason, a suit to recover damages for permanent injury to the land cannot be instituted by one of the tenants in common. Here the injury was to the freehold, and plaintiff was not the sole owner, nor was he in exclusive occupancy of the premises, and there is no principle of law which ought to permit him to sue for the en-

ture amount to be recovered by all the tenants in common. The case of *Birmingham Ry., Light & Power Co. v. Oden*, 146 Ala. 495, 41 South. 129, is precisely in point. In that case five out of seven owners, as tenants in common of real estate abutting on a street, sued the railway company for damages resulting from the construction of an embankment, and the court held that the limit of their recovery was their several interests, which was five-sevenths of the total depreciation of value. According to that rule of law, the plaintiff is not entitled to recover more than his share of the total amount of damages inflicted, even if the injury was caused after the death of Mr. Moore. If it was caused prior to that time, then he is not entitled to recover at all, for the right of action was, as before stated, in the executor or administrator and not the devisees under the will. The defense was clearly raised in the answer, for the answer contained an express denial of the plaintiff's alleged ownership.

Counsel for plaintiff invoke the rule established by many decisions to the effect that the allotment in severalty of lands inherited in common does not change the nature of the estate from inheritance to purchase, and that the one to whom the allotment is made takes the whole by inheritance the same as if it had directly descended to him from the ancestor. *Martin v. Martin*, 98 Ark. 93, 135 S. W. 348; *Cottrell v. Griffiths*, 108 Tenn. 191, 65 S. W. 397, 57 L. R. A. 332, 91 Am. St. Rep. 748. The application of that principle cannot, however, serve as grounds for holding that the allotment of the land in severalty to one of the cotenants operates as an assignment of the right of action of the other tenants for an injury already suffered. The land is partitioned in its damaged condition, and the other tenants retain their right of action which has already accrued. In this respect lands held by inheritance do not differ from those otherwise held.

The judgment must be reversed for the errors indicated, and the cause will be remanded for a new trial.

SHUFFLIN v. STATE. (No. 249.)

(Supreme Court of Arkansas. March 13, 1916.
Rehearing Denied April 3, 1916.)

1. CRIMINAL LAW §781(5)—CONFESSIONS—JURY QUESTION.

In a prosecution for cattle theft, where accused while in jail made a confession giving the whereabouts of the stolen cattle, and they were found, the court, having admitted the confession, there being a contention that it was not voluntary, but was induced by intimidation and promise of favor, properly charged the jury that they might consider it for whatever they deemed it worth, provided the state has satisfied them that the confession was free and voluntary, and that there were no intimidations made or inducements held out, but that, if accused was intimi-

dated or induced to make the confession, it could not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1867; Dec. Dig. §781(5).]

2. CRIMINAL LAW §519(4)—CONFESSIONS—ADMISSIBILITY.

That accused was a prisoner, and made a confession to officers who had him in custody, does not render his confession inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163, 1167; Dec. Dig. §519(4).]

3. CRIMINAL LAW §534(2)—CONFESSIONS—CORROBORATION.

Where accused, who was charged with cattle theft, made an extrajudicial confession, and the cattle were found in the place specified, there was sufficient corroboration to warrant conviction on the confession; Kirby's Dig. § 2385, declaring that a confession of accused unless made in open court will not warrant conviction unless accompanied by other proof that such offense was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1205, 1222-1224; Dec. Dig. §534(2).]

4. CRIMINAL LAW §537—EVIDENCE—CONFESSION.

Where pursuant to accused's statements contained in an extrajudicial confession the stolen cattle were found, evidence concerning accused's statements as to the location of the cattle is admissible, though the confession was not voluntary, and so was not admissible as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1206; Dec. Dig. §537.]

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Henry Shufflin was convicted of larceny of cattle, and he appeals. Affirmed.

J. M. Carter, of Texarkana, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted under an indictment charging him with the larceny of a cow and calf, the property of one Charlie Miller, and by this appeal questions chiefly the admissibility of his alleged confession, and the sufficiency of the evidence to sustain the conviction.

[1, 2] The confession was testified to by the sheriff, the jailer, the deputy prosecuting attorney, and a constable. These officers testified that the confession was entirely free and voluntary, and so, no doubt, they regarded it; yet the circumstances detailed by them are such that the record presents a close question as to its admissibility. It is admitted that appellant was frequently questioned in jail about his connection with this and other larcenies of which he and one John Orr were accused, and that appellant at first denied any knowledge of or complicity in these crimes, or any of them; and it was admitted by these officers that they did finally tell appellant that it would be better if he "came clean with the truth" and told what he knew; and it is not denied that the deputy prosecuting attorney stated that he would make a

recommendation to his principal of clemency if appellant told all he knew. But it was also testified by these officers that appellant had previously told of his own connection with the crime here charged, and that, among other things, he had told where the cow and calf could be found, and that the constable went to the place named and found the animals there. It was the theory of these officers that there was an organized band of cattle thieves, and the officers were attempting to induce appellant and the said Orr to divulge all they knew about the operations of the alleged gang of thieves, and their guilt of other crimes than the one charged, of which they were suspected. It appears, however, that these efforts were unavailing, and that no additional disclosures were made. At least the jury might have so found the fact to be, and the court submitted to the jury the question whether the confession was voluntary or not. This instruction was as follows:

"There has been some testimony which the court has permitted to go to the jury with reference to an alleged confession by this defendant of the stealing by him of the cow and calf as charged in this indictment. The court has permitted that testimony to go to the jury, as the court has already stated to the jury, and you may consider it in the trial of this case for whatever you think it is worth, provided the state has shown, and the burden is on the state to show, these confessions, if any were made by this defendant, were free and voluntary on his part; that is to say, that there were no intimidations made or inducements held out to him by those to whom he is alleged to have made the confession, in the way of promises of reward or immunity from the prosecution or punishment, and that there was no intimidation or threats of any kind made to him to induce him or compel him to make these confessions. If you find that there were any threats or intimidation used, or any promise made to him of immunity from prosecution, or reduction of punishment, and that these confessions, if any were made, were made by the defendant in view of these promises or these threats, as the case may be, then you cannot consider the testimony; otherwise you can consider it along for whatever you think it is worth, together with the other evidence in the case."

Appellant complains of the action of the court in submitting this question to the jury, and says the alleged confession should have been excluded from the jury upon the ground that it was not voluntarily made. We think the instruction was not an improper one, but that, on the contrary, it was entirely proper to give it. As a preliminary matter the court passed upon the admissibility of the confession, and the jury was permitted to hear the evidence in regard to the circumstances under which the confession was made, and was

told to disregard it entirely if they found it was not voluntarily made. The mere fact alone that appellant was at the time a prisoner and made the statement to the officers who had him in custody does not render the confession inadmissible. *Greenwood v. State*, 107 Ark. 568, 156 S. W. 427. Of course, that was a circumstance which the jury might very properly have considered in determining whether the confession was voluntarily made or not, and one which was, no doubt, called to the attention of the jury by learned counsel. But the record presents this question of fact, and we think the instruction fairly and properly submitted that issue.

[3, 4] It is urged, however, that the instruction should have been so modified as to tell the jury not merely to disregard the confession, but to acquit the defendant if it was found that the confession was not voluntarily made. It is said that this is true because there is not sufficient evidence to sustain the conviction aside from the confession.

The evidence may be summarized as follows: Fowler, the constable, who was one of the witnesses to the confession, testified that appellant said the animals would be found in the possession of one Enoch Green, about 16 miles from Texarkana, and that they were found in Green's possession. The owner of the property identified the animals so found as being the ones described in the indictment, and that they disappeared about August 1st. Green testified that he swapped appellant a horse for the cow and the calf, which were delivered to him at his home by appellant about the 1st of August. We think this evidence sufficient corroboration of the confession. Section 2385 of Kirby's Digest; *Ivy v. State*, 109 Ark. 449, 160 S. W. 208.

Moreover, we are of the opinion that the material part of this confession and the evidence which was most damaging was admissible in any event. This is the evidence which related to the place where the stolen property would be found and the fact that it was found there. The rule as to such evidence is stated in the syllabus to the case of *Yates v. State*, 47 Ark. 172, 1 S. W. 65, as follows:

"The confession of a prisoner of the locality of stolen property, though induced by threats, is admissible when verified by finding the property where he locates it; and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but his confession that he stole it is not admissible."

Finding no prejudicial error, the judgment is affirmed.

**WISCONSIN & ARKANSAS LUMBER CO.
v. IRONS. (No. 286.)**

(Supreme Court of Arkansas. March 20, 1916.)

**1. MASTER AND SERVANT ⇨101, 102(8), 124
(1) — DUTY TO SERVANT — SAFE PLACE TO WORK.**

It is the master's duty to exercise ordinary care to provide his servant with a reasonably safe place in which to work, and to make reasonable inspection to see that the place of work and appliances are safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 235; Dec. Dig. ⇨101, 102(8), 124(1).]

2. MASTER AND SERVANT ⇨288(7) — INJURIES TO SERVANT — ASSUMPTION OF RISK — QUESTION FOR JURY.

A servant operating a rip saw in a sawmill did not, as a matter of law, assume the risk of injury through having a lumber buggy break through the floor, throwing him against the wheel and rupturing him, because there was a defective place in the floor, which let a wheel through; the only indication thereof being a crack 14 inches long which might have been covered with sawdust or have been supposed to be the result of the planks shrinking or not being laid close together.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1073; Dec. Dig. ⇨288(7).]

3. MASTER AND SERVANT ⇨276(3) — INJURIES TO SERVANT — SUFFICIENCY OF EVIDENCE.

In a sawmill employe's action for injuries, evidence held sufficient to warrant finding that the falling of the wheel of a lumber buggy through a defective spot in the floor caused plaintiff to be ruptured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ⇨276(3).]

4. DAMAGES ⇨182(4) — PERSONAL INJURIES — EXCESSIVE VERDICT.

In an action by a sawmill employe for an injury resulting in hernia, where plaintiff was an able-bodied young man at the time of the injury, and could earn his living only by manual labor, but thereafter could only do light work, and could not lift, and finally got so he could not work steadily, a verdict of \$1,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 375; Dec. Dig. ⇨182(4).]

5. MASTER AND SERVANT ⇨226(2) — INJURIES TO SERVANT — SAFE PLACE TO WORK — ASSUMPTION OF RISK.

While the servant assumes the risk ordinarily incident to his employment, he does not assume any arising from the employer's negligence in failing to discharge its duty toward him, unless the servant knows of such negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 602; Dec. Dig. ⇨226(2).]

6. TRIAL ⇨256(2) — INSTRUCTION — CORRECTION — DUTY OF COUNSEL.

It is the duty of counsel to ask for correction of an incorrect instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 629; Dec. Dig. ⇨256(2).]

7. MASTER AND SERVANT ⇨295(7) — INJURIES TO SERVANT — ASSUMPTION OF RISK — INSTRUCTION.

In a servant's action for injuries, an instruction that a servant assumes the risk arising from any negligence of the employer in failing to provide a safe place to work, if, "by the

exercise of ordinary care on his part, he could have known of said negligence," was erroneous as placing the duty of inspection upon the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1175; Dec. Dig. ⇨295(7).]

8. APPEAL AND ERROR ⇨215(1) — SPECIFIC OBJECTION TO INSTRUCTION — NECESSITY

In a servant's action for injuries, where the employer desired that an instruction on the nondelegable character of its duty to provide a reasonably safe place to work should contain the qualification of assumption of risk, charged on separately, the employer should have specifically objected to the instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309, 1310; Dec. Dig. ⇨215(1); Trial, Cent. Dig. § 633.]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Suit by Roy Irons against the Wisconsin & Arkansas Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. D. Wynne, of Fordyce, and H. T. Harrison, of Little Rock, for appellant. D. D. Glover and J. C. Ross, both of Malvern, for appellee.

HART, J. Appellee sued appellant to recover damages for injuries received by him while working for appellant at its sawmill. There was a trial before a jury which resulted in a verdict for appellee, and, from the judgment rendered, appellant prosecutes this appeal.

Roy Irons, the appellee, in his own behalf testified substantially as follows:

"I am 21 years old. At the time I was injured my regular work was running the cut-off saw at appellant's mill. On the morning I was injured the foreman directed me to help the man operating the rip saw. Lumber buggies were used to bring in the lumber to the rip saw. The buggies were loaded with lumber and pulled into the mill by mules. Then the man who operated the rip saw would take hold of the lumber buggy and pull it by hand. I would get by the side of the wheel and push the lumber buggy towards the rip saw. While I was engaged in pulling the buggy wheel, all of a sudden the opposite wheel went through the tram and threw me right over on top of the wheel. There was a sudden stop when the wheel went through the floor, and this threw me against the wheel. The injury ruptured me."

S. V. Grissom for the plaintiff testified:

"I was running the rip saw and plaintiff was off-bearing for me on the day he was injured. We were pulling a loaded lumber buggy up to position by the rip saw at the time appellee was injured. I was guiding the buggy and pulling it, and appellee was pushing at the wheel. There was a place sluffed off of the floor in the tram, and one of the wheels went through the floor when it reached the defective place. When the wheel fell through the floor appellee was jerked over on the wheel. I observed the plank after the buggy was taken out. The plank was rotten, and the rotten place was about 8 or 10 feet from the machine I was operating. Two or three days before that time, I noticed a crack in the floor at that place, and notified the foreman that it was dangerous and should be repaired. He promised to do so. The floor was not completely out at the place where the wheel

went through it, but sloped off and the plank showed itself to be defective if any one should observe it closely. The crack was something like 14 inches long. It was also shown that the joists on the floor were about 18 inches apart and running east and west. The planks were laid across the joists running north and south, and were laid in the same direction, with regard to the place of the injury as the rip-saw."

Will Carmichael, the mill foreman, testified as follows:

"Appellee was my brother-in-law and worked under me. I remember him telling me that he fell on the wheel and ruptured himself about the time he was injured. He did not stop work. He did not turn in any report that he was hurt, but worked on under me for something like a year. I don't remember whether Grissom came to me about the hole in the floor or not. It was my duty to look out for holes in the floor and repair them. Appellee regularly worked at the cut-off saw which was situated near to the rip-saw."

[1] It is well settled that it is the master's duty to exercise ordinary care to provide his servant with a reasonably safe place in which to work and to make reasonable inspection to see that the place of work and appliances are safe. This is conceded to be the law by counsel for appellant, and it is also conceded by them that there is sufficient testimony to warrant the jury in finding that the floor was defective, but they contend that the defective condition of the floor which appellee claims caused his injury was perfectly obvious, and that the court should have told the jury as a matter of law that appellee had assumed the risk as one of the ordinary incidents to the employment in which he was engaged at the time of his injury. In short, they contended that the defect in the floor which caused the injury to appellee was plainly to be seen and was one of the obvious risks of the business carried on by appellant. On the other hand, it is insisted by counsel for the appellee that the court was right in submitting the question to the jury. Many illustrative cases are cited by counsel on both sides to sustain their respective positions. We do not consider it necessary to review these cases, for the reason that they all contain well-settled principles of law, and we do not think the facts of any of the cases cited are sufficiently like the facts in the instant case to make them controlling. The law on the question is well settled, and the only difficulty is in the application of it to a given state of facts.

[2] When the testimony adduced by appellee is considered in the light most favorable to him, we do not think it can be said as a matter of law that he assumed the risk. It is true Grissom stated that there was a crack in the floor some 14 inches long, and that he had seen it two or three days before the injury occurred, but he also stated that the defective plank sloped off, and that only a crack was shown. He was asked if anybody could see the defect, and replied that he did not know whether anybody could see

it or not; that it was not entirely through the plank.

It is true the regular job of appellee was at a cut-off saw which was situated near there, but his duties did not cause him to walk over that portion of the tramway, so far as the record discloses. He had hauled several loads over the tramway on the day he was injured, and on that day and on other days had noticed that other portions of the tramway were defective, but said that he had not noticed any defect in the tram at the place where he was injured.

We do not think it can be said as a matter of law, under the circumstances, that the defect was an obvious one. The joists on the floor were laid east and west, and were about 18 inches apart. The planks were laid across the joists running north and south. According to Grissom's testimony, while the crack was something like 14 inches long, it was only a crack, and the defective condition of the plank did not show all the way through. It is a matter of common knowledge that more or less sawdust would fly around and would be lighting on the floor near the rip-saw. Any one walking along there and seeing the crack might have thought it was caused by the planks shrinking or not being laid close enough together, instead of being caused by rotten condition of the plank. At least these matters were legitimate inferences which might have been drawn by the jury.

[3] Again, it is insisted that the evidence did not warrant the jury in finding that the falling of the wheel through the floor caused appellee to be ruptured, but we believe the facts fully warrant the jury in so finding. It is true appellee continued to work, but it may be fairly inferred from his testimony that he did this because he did not realize the gravity of his injury. Two physicians testified for appellant, and stated that they did not believe from the testimony detailed by appellee that the rupture was caused by him falling on the wheel when it fell through the floor. On the other hand, a physician for appellee testified that the rupture could have been caused in that way, and from appellee's statement was likely caused that way. Immediately after the accident happened appellee complained of pain and exhibited his person to Grissom, who testified that it showed indications of injury. Appellee went to a physician after working hours on the day he was injured and stated that the physician told him he had been ruptured. As above stated, the testimony of appellee and his witnesses, we think, warrant a verdict in his favor.

[4] It is insisted by counsel for appellant that the verdict is excessive. Appellee recovered a verdict of \$1,500.

Two witnesses for appellant testified that hernia can be cured by a simple operation, and that there was but little danger in under-

going the operation; that most operations for hernia are successful. On the other hand, a physician who had examined appellee testified that he found a complete indirect inguinal hernia. He further testified that there is always an element of uncertainty in operations, and that there is some danger attached to an operation for hernia; that appellee was permanently injured, and would have to wear a truss for the balance of his life. Appellee was a young, able-bodied young man at the time he received his injury, and could only earn his living by manual labor. It is true he continued to work around appellant's mill after he was injured, but he says that he could only do light work, and was not capable of lifting, and finally got so that he could not work steadily. According to his testimony he has grown worse since he was injured, and cannot now work steadily. Therefore we do not think the verdict was excessive.

[5-7] The court instructed the jury, in effect, that it was the duty of appellant to exercise ordinary care in providing appellee with a safe place in which to work, and that, while appellee assumed the risk ordinarily incident to his employment, he did not assume any arising from any negligence of appellant in failing to discharge its duty toward him.

Counsel for appellant asked that the instruction should be modified by adding thereto: Unless the jury should find that appellee knew or by the exercise of ordinary care could have known of said negligence. It was the duty of counsel for appellant to ask for a correct modification of the instruction. The first part of the modification was correct, but the latter part was not the law. In other words, appellee would assume the risk of the defective condition in the floor if he knew of the defect, but it was wrong to add: "Or by the exercise of ordinary care on his part could have known of said negligence." The practical effect of such qualification would have been to tell the jury that appellee should have examined the floor for defects in it before he went to work. In *Chicago, Rock Island & Southern Ry. Co. v. Smith*, 107 Ark. 512, 156 S. W. 166, the court in regard to a precisely similar request said that the court did not err in refusing to modify the instruction. Again, in the case of *Mosley v. Mohawk Lumber Co.*, 183 S. W. 187, the court gave an instruction containing the modification now under consideration, and on appeal we held the instruction to be erroneous, saying that the fact that the servant could by the exer-

cise of ordinary care have discovered the defect and avoided the danger does not constitute an assumption of the risk where it arose by the reason of the negligence of the master, even though such servant may have been guilty of contributory negligence which would bar his recovery.

[8] At the appellee's request the court gave the following instruction:

"You are instructed that the duty that devolved upon the defendant to exercise ordinary care to provide the plaintiff a reasonably safe place to work was an absolute duty, and that the defendant could not delegate that duty to any of its employees so as to escape the responsibility of performing this duty, and if you find from the evidence that the defendant failed to perform this duty of exercising ordinary care to furnish and provide the plaintiff a reasonably safe place to work, and that this failure resulted in the injuries complained of herein, then the plaintiff is entitled to recover, and you will find for the plaintiff."

Counsel for appellant insists that the judgment should be reversed because this instruction ignored appellant's defense as assumption of risk. No specific objection was made to the instruction on the ground that it failed to include the claim of assumed risk. At the request of both appellant and appellee, the court gave other instructions on the question of assumed risk. It is conceded that the instruction deals correctly with the phase of the case therein presented. If appellant desired that this instruction should contain qualification of the claim of assumed risk, it should have made specific objection to the instruction in the trial court. *A. L. Clark Lumber Co. v. Johns*, 98 Ark. 211, 135 S. W. 892; *St. L., I. M. & S. Ry. Co. v. Carter*, 93 Ark. 589, 126 S. W. 99; *Arkansas Midland R. Co. v. Rambo*, 90 Ark. 108, 117 S. W. 784; *St. L. S. W. Ry. Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112.

Counsel for appellant to sustain their contention rely on the case of *Helena Hardwood Lumber Co. v. Maynard*, 99 Ark. 379, 138 S. W. 469. The court told the jury that the master was negligent in furnishing a defective log loader, and directed it to find for the plaintiff if the injury was due to the fact that it was defective, unless the decedent was guilty of contributory negligence. The court in that case said the instruction as drawn not only excluded the defense of assumed risk, but was in conflict with the instruction given on defendant's part relative to assumed risk, and on that account was erroneous and prejudicial.

It follows that the judgment will be affirmed.

HICKEY v. STATE (No. 282.)

(Supreme Court of Arkansas. March 27, 1916.)

1. INTOXICATING LIQUORS \S 146(2)—CRIMINAL OFFENSE—SOLICITING ORDERS IN PROHIBITION TERRITORY.

Under Kirby's Dig. \S 5133, making it unlawful for any person, etc., engaged in the sale of liquors where the same may be lawful to solicit orders, by agent or otherwise, for such liquors in any place where the sale thereof is prohibited by law, the gist of the offense is the soliciting of orders in prohibited territory, and the penalties of the statute are denounced against the licensed liquor dealer, whether in or out of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 160; Dec. Dig. \S 146(2).]

2. INTOXICATING LIQUORS \S 275 — ABATEMENT OF NUISANCES—SUFFICIENCY OF EVIDENCE.

In an action to enjoin defendant from using a building for the purpose of soliciting orders for the sale of intoxicating liquors, evidence held sufficient to support a finding that defendant had a place of business in Ft. Smith from which he solicited orders for a liquor house in Missouri, in which he was interested.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 411; Dec. Dig. \S 275.]

3. INTOXICATING LIQUORS \S 260 — ABATEMENT OF NUISANCES — STATUTORY PROVISIONS.

Kirby's Dig. \S 5133, makes it unlawful for any person engaged in the sale of liquors where such sales are lawful to solicit orders, by agent or otherwise, for such liquors in any place where such sales are prohibited by law. Acts 1915, p. 408, provides that the conducting, maintaining, carrying on, or engaging in the sale of intoxicating liquors, in violation of law, in any building within the state, and all appliances, fixtures, etc., used for such purpose, are thereby declared to be public nuisances and may be abated thereunder. Held, that a person having a place in Arkansas from which he solicited orders for a liquor house in Missouri was violating section 5133 and maintaining a public nuisance under the Act of 1915, and the circuit court had power to abate the nuisance by injunction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 399; Dec. Dig. \S 260.]

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by the prosecuting attorney in the name of the State against J. E. Hickey. From a judgment against the defendant, he appeals. Affirmed.

Holland & Holland, of Ft. Smith, for appellant. Wallace Davis, Atty. Gen., and Hamilton Moses, Asst. Atty. Gen., for the State.

HART, J. This action was instituted by the prosecuting attorney of the Twelfth judicial circuit against J. E. Hickey to enjoin him from using a certain building in the city of Ft. Smith for the purpose of soliciting orders for the sale of whisky. The prosecuting attorney proceeded under an act entitled "An act to define certain public nuisances and to provide for the abatement

thereof." See Acts of 1915, p. 408. The facts are as follows:

Prior to our act prohibiting the issuance of liquor licenses in the state of Arkansas approved February 6, 1915, the defendant, Hickey, was engaged in operating a saloon in Ft. Smith, Ark. After his saloon in Ft. Smith was closed, he formed a partnership for the sale of liquors at Monette, Mo., under the firm name of Monette Liquor Company. He opened an office in Ft. Smith, Ark., and stayed there for a part of the time for the purpose of sending orders to his liquor firm in Monette, Mo. The officers found an order blank in his office of the Monette Liquor Company at Monette, Mo., envelopes addressed to that firm, and also a circular letter with the letter head of that firm. The letter was signed Monette Liquor Company, Monette, Mo., by J. E. Hickey, and it informed his friends and customers that he had shipped his stock of liquors from Ft. Smith, Ark., to Monette, Mo., and had opened a liquor house with orders as a specialty. The letter after soliciting the patronage of his former customers said:

"I will be in Ft. Smith a portion of my time and any information you may desire I can tell you if you ring our former Ft. Smith phone No. 1168. Again thanking you and assuring you that any favors shown us will be certainly appreciated, we remain," etc.

One of the police officers of the city of Ft. Smith testified that Hickey told him that he was soliciting orders in the city of Ft. Smith to send to the Monette Liquor Company; that he was accepting orders in Ft. Smith, but was not taking any money. Another officer stated that he told him that the circular letter found in his place of business was sent out to prospective customers, together with a price list, which was also found in the Ft. Smith office occupied by Hickey. He was then asked this question: "Did he (referring to Hickey) say that was a part of his business?" The witnesses answered, "Yes."

The circuit judge rendered a judgment restraining Hickey from soliciting and transmitting orders for intoxicating liquors at his place of business in Ft. Smith, Ark. The defendant has appealed.

In the case of *Dalamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733, the court held that since the enactment of the Wilson Law, which expressly provided that intoxicating liquors coming into a state should be as completely under control of the state as though manufactured therein, the owner of intoxicating liquors in one state cannot, under the commerce clause of the Constitution, go himself or send his agent into another state and, in defiance of its laws, carry on the business of soliciting proposals for the purchase of such liquors. In that case it was contended that because under the Wilson Act (Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1913, \S

8738]), a resident of one state had the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, he had the right to go into a state and there carry on the business of soliciting from residents of that state orders for liquor to be consummated by acceptance of the proposals by the nonresident dealer. The court said that this contention ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. See, also, *State of Alabama ex rel. v. Dalaye*, 68 South. 993, L. R. A. 1915E, 640. Therefore, being unable to prohibit the shipment of intoxicating liquors into the state, the Legislature of several states have enacted laws prohibiting the soliciting of orders for liquors by agents of liquor dealers of other states and of the same state out of the limits of the prohibited territory.

[1] Our Legislature provided that it shall be unlawful for any person, firm, partnership or corporation engaged in the sale of alcohol or any spirituous, ardent, vinous, malt, or fermented liquors, where the same may be lawful, to solicit orders, either by agent or otherwise, for the sale of alcohol or any spirituous, ardent, vinous, malt, or fermented liquors in any place or places in this state where same is prohibited by law. Kirby's

Digest, § 5133. The gist of the offense is the soliciting of orders in prohibited territory, and the penalties of the statutes are denounced against the licensed liquor dealer whether in or out of the state.

[2] The testimony in this case shows that Hickey had a place of business in the city of Ft. Smith from which he solicited orders for a liquor house at Monette, Mo., in which he was interested as a partner. In the circular letter of his firm, which was signed by him, he told his former customers that he would be in Ft. Smith a part of the time and to call on him for information in regard to the purchase of liquors, at the same time giving his phone number. An officer of the city of Ft. Smith testified that Hickey had told him that he was soliciting orders to send to the Monette Liquor Company, and the circular letters stated that company was doing business at Monette, Mo. Another officer testified that he told him that his firm was sending out a circular letter, and he was asked by the court if that was a part of his business, and replied, "Yes." The court might have inferred from this that Hickey himself was sending out circular letters from his office at Ft. Smith, Ark.

[3] The testimony was sufficient to have established the fact that he was soliciting orders for the sale of whisky by his firm at Monette, Mo. This was contrary to section 5133 of Kirby's Digest. Therefore he was maintaining a public nuisance under Act 109 of the Acts of 1915, and under that act the circuit court was given the power to abate the nuisance by injunction. See Acts of 1915, p. 408.

The judgment will be affirmed.

ROE RICE & LAND CO. v. STROBHART.
(No. 280.)

(Supreme Court of Arkansas. March 27, 1916.)

1. APPEAL AND ERROR ¶1046(5)—TRIAL ¶29(2) — CONDUCT OF TRIAL — REMARKS OF COURT—COMMENTS ON EVIDENCE.

In an action to recover the possession of chattels claimed by defendant under an instrument purporting to be a contract of sale and signed by the treasurer of the plaintiff corporation, the evidence would have warranted findings that the treasurer had no authority to bind defendant, and that the contract was not within the apparent scope of his authority. In the course of the trial, the court at different times remarked that he didn't see that a corporation could put a man down there and buy and sell and take charge and then get out of it by claiming that the agent did it, that he would instruct the jury that the instrument was a regular contract, that they would accept the contract in preference to an imaginary theory, that defendant said he accepted the written instrument and "it was the terms" and "Did he (defendant) come down there to do what he did to make that agreement and buy that property." *Held*, that these remarks were contrary to Const. art. 7, § 23, providing that judges shall not charge juries with regard to matters of fact and were improper and highly prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. ¶1046(5); Trial, Cent. Dig. § 81; Dec. Dig. ¶29(2).]

2. CORPORATIONS ¶433(1) — AUTHORITY OF OFFICERS—QUESTIONS FOR JURY.

In an action to recover the possession of chattels claimed by defendant under an instrument purporting to be a contract of sale and signed by the treasurer of the plaintiff corporation, evidence *held* to make questions for the jury as to whether the treasurer had authority, express or implied, to bind the corporation by such instrument and whether it was within the apparent scope of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1706, 1738, 1744; Dec. Dig. ¶433(1).]

Appeal from Circuit Court, Monroe County; Thos. C. Trimble, Judge.

Action by the Roe Rice & Land Company against R. S. Strobbart. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Appellant brought this suit against the appellee to recover the possession of certain live stock, machinery, etc., described in the complaint, alleging that it was the owner of the same, and that the appellee wrongfully detained it under a false claim of ownership, with all the necessary allegations for a complaint in replevin. The value of the property was alleged to be \$1,652.25.

Appellee denied the allegations of the complaint, and set up that he owned the property under a written contract and bill of sale, which was made an exhibit and introduced in evidence, and which is as follows:

"January 16, 1914.

"I hereby agree to sell to Mr. R. S. Strobbart the stock, machinery and tools on our farm, located two miles south of Roe, Arkansas, for the sum of \$2,230.00, including everything on the place, except tools belonging to the plant

and the threshing machine and engine. The engine and threshing machine belong to the Roe Rice & Land Company. We reserve the right to use the center aisle of the machine shed for our threshing machine and engine. Mr. Strobbart agrees hereby to release Dr. C. A. Meredith of contract to deliver to him one team of mules which were contracted for in the sale of our farm, same sale was made in December, 1913; Mr. R. S. Strobbart agrees to accept this deal at the above-named figures, \$2,230, and pay at the close of this contract one-third of this amount which is \$743.33, and the balance in two payments of \$743.33 each; the first deferred payment to be made on January 1, 1915, the second deferred payment to be made on January 1, 1916, the two deferred payments to bear interest from date at the rate of 6 per cent. per annum, the deferred payments to be secured by his share of the rice crop each year. Mr. R. S. Strobbart agrees to lease our rice farm of 160 acres for the purpose of raising rice for the term of five years. He agrees to furnish one-half of the seed rice, one-half of the rice bags, and one-half of the machine bill at threshing the crop, at the rate of .04 per bushel and deliver our half of the crop on board the cars at Roe, Arkansas, when the proper time comes to sell the crop at any time after threshing is done.

"We, the Roe Rice & Land Company, agree to lease to Mr. R. S. Strobbart the 160 acres of land for the term of five years for the purpose of growing rice. We agree to furnish the pumping plant in running order and keep it so and furnish the water for the rice crop.

"We, the Roe Rice & Land Company, reserve the right to enter upon our land at any time we see fit to inspect same. We, the Roe Rice & Land Company, also reserve the right to sell this land at any time during the life of this lease and to sell this lease with the land. We also give R. S. Strobbart an option to buy this land at any time he wishes, but this option shall not stop us from offering this land for sale should we get an offer on this land at any time during the life of this lease. We agree to submit the offer to Mr. R. S. Strobbart for him to buy at the price offered or to give us the right to sell at the price offered; this sale to be made subject to the lease of R. S. Strobbart during the five years. We ask the right to use the fan mill to clean our rice and the use of the teams to haul balance of our rice (now in small house) to the cars when we make a sale of same; all machine canvass on the place belonging to the threshing machine.

"I give this bill of sale to Mr. R. S. Strobbart for the stock and machinery on the place, and Mr. R. S. Strobbart is to release all claim on the team of mules which was contracted for at the sale of our one-half of the farm, which sale was made in December, 1913.

"I do this in full authority in writing from Dr. C. A. Meredith as president of the Roe Rice & Land Company. The full amount of \$2,230; first payment to be made at the close of this contract, which is one-third, being \$743.33; balance, two deferred payments to be made as aforementioned in our contract; earnest money, cash \$5.00, receipt of which is hereby acknowledged. [Signed] Henry W. Halwe.

"Treasurer of the Roe Rice & Land Company. Witness: Herman Wilke.

"I accept this five-year lease from the Roe Rice & Land Company of Missouri of their 160 acres of rice farm land in Monroe county, Arkansas, as described in the above contract; also bill of sale of their stock and machinery.

"[Signed] R. S. Strobbart."

Appellant asked judgment for \$1,652.25, for the value of the property, and damages

in the sum of \$3,500 for the detention of his property.

The facts are substantially as follows:

Appellant was a foreign corporation, having its office in St. Louis, Mo. It owned 320 acres of land in Monroe county on which, for several years, it had been engaged in raising rice, and also owned the personal property in controversy in this suit. The stock of the appellant was owned by Dr. C. A. Meredith and H. W. Halwe, except one share which was owned by one Mueller. Meredith, the president, and Mueller, the secretary, resided in St. Louis, and Halwe, who was treasurer and manager of appellant, resided on the farm.

In December, 1913, appellee, Strobbart, bought 160 acres of the land of appellant, on which was situated the improvements. The negotiations were conducted on the part of the appellant through its president, Meredith. Meredith then made an effort to lease the other 160 acres to Strobbart, and also to sell him the live stock and farming implements on the place, with the exception of the threshing machine, and to this end wrote Strobbart a letter, in which, among other things, he says:

"So it would be impossible to rent you the farm unless some agreement could be made to take over the machinery and stock. * * * I am sure if any such arrangement is to be made as we are contemplating, it must be done at once. Therefore I would suggest you go down to-morrow night if Mrs. Strobbart is well enough for you to leave. I am willing to accept any arrangement you and Mr. Halwe may agree to. * * * I will write Halwe this evening that you may be down, leaving to-morrow night."

Strobbart, who lived in St. Louis, went to Roe, in Monroe county, and he and Halwe entered into the agreement under which the appellee claims title to the property. Strobbart paid the \$5 mentioned in the contract as earnest money.

Halwe testified, on behalf of the appellant, that he told the appellee at the time the agreement of January 16th was presented to the appellee that the statement covered what he (Halwe) was willing to do, but that he (Strobbart) would have to close the deal with the officers of the company at St. Louis; that as treasurer of the company his duties were confined to keeping the accounts and records of the company, receiving the earnings of the company and paying claims against the company when they had been approved by the board of directors; and that there had been no meeting of the company with reference to the sale of the personal property and lease of the land prior to Strobbart's visit to Roe. He also testified that he was general manager for the company in Arkansas, bought and sold personal property for the company, but never made a sale without first taking it up with the company.

The witness was then asked this question, "Didn't you make a deal for the stuff?" and answered, "I did not." He was then asked,

"You were helping them in buying it, were you not?" Whereupon the appellant objected, and the court remarked, "I don't see that any corporation can form a corporation and put a man down there and buy and sell and take charge of it and then get out of it by claiming that the agent did it." The appellant excepted to the remarks of the court.

Halwe further testified that he first signed the contract as an individual, and then, at Strobbart's request, added the word "Treasurer." And, also under Strobbart's dictation, he wrote the words, "I do this in full authority in writing from Dr. C. A. Meredith as president of the Roe Rice & Land Company." The witness then stated that he regarded the contract as a statement. The court at this juncture said, "I will instruct the jury that it is a regular contract," and the appellant duly excepted to the remarks of the court.

The appellant asked the witness if he had any authority from the board of directors of the Roe Rice & Land Company to execute that paper. But the court, over the objection of appellant, refused to permit the witness to answer the question.

It was shown on the part of the appellant that at a meeting of the directors of appellant on January 29, 1914, the offer made by Strobbart as contained in the instrument set out was rejected. The witness stated that the understanding between him and Strobbart was that he should take the agreement of January 16, 1914, to the appellant, and that upon the approval of Meredith and Mueller the papers would be made out; that Strobbart dictated all that portion in regard to the leasing, saying that that was the way Meredith wanted it; that Strobbart did not present to him the letter he had from Meredith, but stated to witness that Meredith was willing to accept any arrangement that Strobbart and Halwe might come to; that he never sold or attempted to sell, at any time, any of the personal property of the plaintiff company, and did not sell the products of the farm except upon authority from the directors; that the property involved included all of the personal property owned by plaintiff, except the threshing machine.

The appellee, in his own behalf, testified that after the contract was signed he took possession of the stock and machinery and began the cultivation of the rice; that Halwe was representing the appellant and was running the place for it down at Roe; that after the contract was signed, witness went back to St. Louis, and everything was turned over to witness and Dr. Meredith knew it; that he had the use of the stock, machinery, etc., until this suit was brought, since which time appellant had had possession of the stock. He stated that Meredith told him to come to Arkansas and make a contract with Halwe, and that it would be all right with

the company. Halwe and witness made the arrangements, and then witness went back to St. Louis and notified Dr. Meredith that he and Halwe had made the contract, and showed the same to Meredith, and Meredith stated that he would not sign that contract in five years. Witness made a tender of the money called for in the contract to Dr. Meredith and he refused to accept it. Witness went down to Roe to look over the machinery and see whether he would accept it. He went down there to see whether the property was like they said and to agree with Mr. Halwe on terms, if possible, and he did accept the stock and the price. It was understood that if Halwe fixed a price that was satisfactory to witness that it was a trade.

The appellant offered prayers for instructions, which it is unnecessary to set out at length, in which they ask to have the issues submitted to the jury as to whether or not the instrument under which appellee claims was the contract of the appellant and binding upon it as such, or whether or not it was understood by both parties as simply an offer made by Halwe individually which had to be submitted to and approved or ratified by the appellant before it would be binding upon it, and as to whether or not such was the understanding between Halwe and the appellee. The court refused these requests for instructions.

The above sufficiently sets forth the rulings of the court for the purposes of the opinion. The jury returned a verdict in favor of the appellee awarding him \$1,652.25 for the value of the stock and \$500 damages for loss of the use of the property while in appellant's possession. Appellant seeks by this appeal to reverse this judgment.

Manning, Emerson & Morris, of Little Rock, for appellant. C. F. Greenlee, of Brinkley, for appellee.

WOOD, J. (after stating the facts as above). [1] During the progress of the trial the court made remarks (in addition to those set out in the statement) while evidence was being adduced concerning the instrument under which appellee claims, as follows:

"The instrument was a regular contract."
"We will accept the contract in preference to an

imaginary theory." "Did he come down there to do what he did, to make that agreement to buy that property." "He [Strobbart] says he accepted that, the written instrument, and it was the terms."

These remarks were contrary to section 23, article 7, of the Constitution, and invaded the province of the jury. *Sharp v. State*, 51 Ark. 147-158, 10 S. W. 228, 14 Am. St. Rep. 27; *Bishop v. State*, 73 Ark. 568-573, 84 S. W. 707.

The controlling issue in the case was, whether or not the written instrument under which appellee claimed to be the owner of the property in controversy was the contract of appellant. Under all the evidence in the case this was an issue for the jury, which the court should have submitted without such comments. Necessarily the jury must have concluded that in the opinion of the court the instrument under which the appellee claimed was a contract binding on the appellant.

All these remarks were improper, highly prejudicial to appellant and constitute reversible error. They indicated the opinion of the trial judge on the issue of fact, which should have been submitted under appropriate instructions.

[2] The court by its ruling in the exclusion of certain evidence, and the remarks made when ruling thereon, and in the giving and refusing of prayers for instructions, proceeded with the trial under a misapprehension of the effect of the written instrument. There was evidence from which the jury might have found, on correct instructions, that Halwe, the agent of appellant, had no authority, express or implied, to bind appellant by the instrument which he executed and which is the basis of appellee's claim, and also there was testimony from which the jury might have found that the making of such a contract was not within the apparent scope of Halwe's authority.

It is unnecessary to set out and discuss specifically the rulings upon the prayers for instructions. The principles of law applicable to the facts of this record are familiar and have been repeatedly announced by this court.

The judgment for the errors indicated is reversed, and the cause is remanded for new trial.

SMITH v. RESERVE LOAN LIFE INS. CO.
et al. (No. 17642.)

(Supreme Court of Missouri, Division No. 1.
Feb. 29, 1916. Rehearing Denied
March 30, 1916.)

**1. TENDER ⇐15(3) — FAILURE TO PRODUCE
LEGAL TENDER—WAIVER.**

A tender will not be invalid because not falling within the description of money made legal tender by law, if the creditor, when offered representatives of money, does not base his refusal to accept upon that ground, as he will be estopped from subsequently urging an objection suppressed at the time of the offer, to the damage of one who, in reliance upon the implied waiver, failed to produce legal tender.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 41, 42, 45; Dec. Dig. ⇐15(3).]

**2. TENDER ⇐29—EVIDENCE—QUESTION FOR
JURY.**

In an action on a life insurance policy, evidence of the implied waiver by the defendant of the production of money in payment of a premium by not stating its reason for refusing to accept a draft presented by the telegraph company held sufficient to warrant submitting to the jury the issue as to the validity of the tender.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 100; Dec. Dig. ⇐29.]

3. TENDER ⇐28—EVIDENCE—ADMISSIBILITY.

In an action on a life insurance policy, evidence that a draft or order presented by the telegraph company to the defendant, in payment of a premium, would be cashed by local banks was admissible, as tending to show the commercial value of the paper, tendered in the plaintiff's behalf, as the representative of money.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 96-98; Dec. Dig. ⇐28.]

4. TENDER ⇐28—EVIDENCE—ADMISSIBILITY.

In an action on a life insurance policy, evidence that the telegraph company, drawer of a draft tendered to defendant in payment of premium, kept sufficient funds in a local bank to pay the draft, was admissible.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 96-98; Dec. Dig. ⇐28.]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Suit by Mabel L. Smith against the Reserve Loan Life Insurance Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Gullford A. Deltch, of Indianapolis, Ind., Ed. E. Yates, of Kansas City, and Perry S. Rader, of Jefferson City, for appellants. Edward L. Scarritt, of Kansas City, and Constantine J. Smyth, Ed. P. Smith, and W. A. Schall, all of Omaha, Neb., for respondent.

BOND, J. I. This is a suit on an insurance policy taken out by Frank H. Smith on November 11, 1909, in favor of his wife, Mabel L. Smith, the respondent herein, in the sum of \$10,000 in the Reserve Loan Life Insurance Company upon payment of the first annual premium thereon of \$732.

On the 11th day of November, 1910, when the second annual premium became due, the said Frank L. Smith was unable to pay the

same and applied to the defendant company for an extension of time, to wit, to the 11th of February, 1911, which extension was granted by said defendant company, in consideration of which the said Frank L. Smith paid to the defendant company the sum of \$108.93 in cash and sent the defendant company one of the coupons mentioned in said policy for \$36.60, and executed an extension premium note for \$595.40 payable on February 11, 1911, providing that if said note be not paid upon maturity that the policy shall be without notice null and void.

On Thursday, February 9, 1911, one Arthur A. Remillard, the brother-in-law of Mrs. Smith, acting for Mr. Smith, tried to pay the premium at the local office of the said company in Philadelphia. Finding the local agent was not authorized to receive money, he went to the office of the Postal Telegraph Company and turned over to them \$595.40 plus \$9 to pay the transfer charges and requested them to transmit the money to the defendant company. At the same time, Remillard telegraphed the defendant, to wit:

"Philadelphia, Pa., Feb. 9th, 1911. The Reserve Loan Life Insurance Co., 900 Odd Fellows Bldg.: I this day telegraph you five hundred and ninety-five dollars and forty cents in payment of note given by Frank H. Smith, for premium on policy No. 25684, issued to Frank H. Smith, and due Feb. 11th, this year. Return note and send receipt for premium to Frank H. Smith. Aldan, Delaware Co., Pa. Arthur A. Remillard."

And after sending the telegram, and within the hour, he wrote and took to the post office, stamped, and registered the following letter:

"Postal Telegraph-Cable Company, Night Lettergram. Philadelphia, Pa. Feb. 9-11. Reserve Loan Life Insurance Company, No. 900 Odd Fellows Bldg., Indianapolis, Ind.—Gentlemen: I sent you to-day by the Postal Telegraph Co. five hundred and ninety-five dollars and 40 cents (\$595.40) in payment of note given by Frank H. Smith for premium on policy No. 25684 said note maturing Dec. 11, 1911. I exacted a report from the Postal Company of delivery of the message I sent notifying you I forwarded the money and for what purpose. Kindly answer at once and return note and also send receipt for premium to Frank H. Smith, Aldan, Delaware Co., Pa., formerly 1532 Arch St. Hoping for a prompt reply, I am respy, Arthur A. Remillard, Aldan, Delaware Co., Pa."

The money sent by Remillard had an order of waiver of identification, in which case the telegraph company testified they would pay in money if so requested. The testimony shows that on the 9th and 10th of February, 1911, the telegraph company notified the defendant company of the arrival of the money to pay the premium, which might be obtained by calling at the office of the telegraph company. Upon the defendant failing to call at the office of said telegraph company, after being so notified, Mr. Knight, the cashier of said telegraph company, on the 11th of February, 1911, called personally at the office of the defendant and displayed a draft of

the Postal Telegraph Company drawn upon its treasurer in New York for the amount of the extension note, \$595.40. Knight presented this draft at the cashier's window. The space behind the window was occupied by Miss Dickson, who was authorized to receive collections. The conflicting testimony as to what was said and done on this occasion will be stated later. On the following Monday, February 13, 1911, Knight again went to the office of the defendant company where he saw Mr. Zulick, its vice president, and delivered the draft or order to him in the presence of Mr. Deltch and Mr. West (the appellant claims Miss Dickson was also present). Mr. Zulick refused to accept the postal order and testified that he demanded money. Knight testified that the draft or order was returned to him but no demand was made for money. Mr. Zulick testified that on Saturday, at 11:39 o'clock, he wired Frank H. Smith that he could not send the premium receipt unless the premium note be paid in cash before due, sending the wire over the Western Union. Mr. Smith was sick at the time the second annual premium fell due, of which the company was informed. Evidence was introduced by the defendant of the Indiana law governing legal holidays (February 13, 1911, was Lincoln's birthday), and claimed that under such law the note would not mature until Tuesday, February, 14, 1911. The case was tried at the May term, 1915, of the Jackson county circuit court at Kansas City. A verdict was found in favor of the plaintiff for \$9,874.83, upon which judgment was rendered. The defendant duly appealed.

II. The controlling question on this appeal is whether there was a sufficient tender of payment of the note for a part of the second premium payable on the policy in suit.

[1] Prior to the legal tender acts of 1862 (Act Cong. Feb. 25, 1862, c. 33, § 1, 12 Stat. 345; Act Cong. July 11, 1862, c. 142, § 1, 12 Stat. 532) making United States treasury notes a legal tender for all debts public or private not payable in a particular kind of coin or commodity, only gold or silver coin of the realm was a legal tender of payment of private debts. 30 Cyc. 1212. But before and after these congressional enactments a tender of bank notes, checks, or drafts, or orders for the payment of money (if not objected to for failure to produce legal tender money), would not be invalid because not falling within the description of money made legal tender by the Constitution of the United States and the federal statutes. *Williams v. Rorer*, 7 Mo. 556; *Shipp et al. v. Stacker et al.*, 8 Mo. 145; *Berthold v. Reyburn*, 37 Mo. loc. cit. 595; *Beckham v. Puckett*, 88 Mo. App. loc. cit. 639; *Thompson v. St. Charles County*, 227 Mo. loc. cit. 234, 126 S. W. 1044. The reasoning of these cases is that the creditor, when offered such representatives of legal tender money, if he is not will-

ing to accept them as such, should put his refusal on that ground so that the debtor may have the opportunity to secure the specific money which the law prescribes shall be accepted in payment of any debts expressly to be payable in dollars. Hence it is deemed only just that the holder of such an obligation upon tender of the payment thereof in bank notes, or such things as represent money in the marts of trade and commerce, shall state expressly the ground of his rejection in order that the creditor may comply with the technical law requiring a tender of a particular kind of money. The nonobservance of this duty necessarily misleads the debtor and may inflict a loss which would be avoided if the creditor had stated that he objected to the form and character of the tender. He should therefore be estopped from subsequently urging an objection which he suppressed at the time of the offer if his later insistence thereon would inflict a loss or damage upon a creditor who in reliance on his implied waiver failed to produce the kind of money made a legal tender by law. This thought has been accurately and pithily stated by Lamm, J., viz., "Who does not speak when he should may not when he would." *Thompson v. St. Charles County*, supra.

[2] In the case at bar, defendant had actual knowledge two days before the note given to it for part of the second premium on the policy matured, that the money for the full payment thereof had been telegraphed to Indianapolis where its home office was located, for the satisfaction of the note, and was requested by wire and letter sent from Philadelphia coincidentally with the transmission of the money to apply the same on said note and return receipt thereof. The defendant was also notified by the forwarder of the money (the Postal Telegraph Company) two days before the maturity of the note that it held the money order for the amount which would be due on the maturity of the note and was requested in said notice to apply for the same. Getting no reply to this written request, the forwarding company phoned the office of the defendant stating it held such order for it, and received a phone answer indicating that the matter would be taken up or information given about it. Failing to receive such information, the forwarder sent its cashier, on the morning of the 11th day of February, to the office of the defendant with a draft or order drawn upon the treasurer of the forwarding company for the full amount due on the note. This was displayed to the person at the cashier's window, who did not receive it, excusing herself on the ground that the cashier was not in and that she would refer the matter to a Mr. Woodbury. Her account of the matter is, to wit:

"It was only passing. I just referred him at once to Mr. Woodbury and went back to my desk. Mr. Woodbury came forward, and I went to the next counter and back to my desk."

The account of this transaction by C. F. Knight, the cashier of the transmitter of the money, was in substance that, after unavailing efforts for two days to get definite instructions from defendant as to the money held for it, and after repeated notices given, he called in person with a draft in the usual form payable to defendant, upon the New York treasurer and presented the same to the lady occupying the cashier's window, adding; to wit:

"I told her I was from the Postal Telegraph Company with a money order for the Reserve Loan Life Insurance Company for \$595.41 from Arthur A. Remillard, Philadelphia." That she walked away and then came back. "When she came back, she said that the cashier was not in, and that he would take it up and let us know," whereupon he (Knight) returned to his office.

It was shown that this lady had full authority to accept payment of premiums and give receipt therefor. This being the last day upon which the note could be paid according to its terms, Knight, however, appeared with the same draft on the Monday following and handed it to the vice president of the defendant company. As to what took place at that interview there is a sharp conflict of testimony. The testimony of the cashier of the Postal Telegraph Company is to the effect that the draft or order which he delivered to the vice president was handed back to him without any objection to the form of the tender and without any request that money should be produced instead. The testimony of the vice president, corroborated by others whom he called to witness the interview and a notation upon a memorandum, was to the effect that the vice president refused to accept the order and demanded the production of money. The evidence was undisputed that the vice president had received notice from the sender of the money two days before the maturity of the note by letter and wire and that he delayed his reply until the lapse of two days, when, only a few minutes before the maturity of the note, he wired the assured that the note must be paid in cash before he would send a receipt or return it. This belated reply was sent over the wire of another company than that which transmitted the money.

These and other facts adduced on the trial presented issues of fact which were submitted to the jury under appropriate instructions. Upon this conflicting evidence their verdict was in favor of the testimony relied upon by the plaintiff to show an implied waiver on the part of the defendant of the production of the money at the times when the draft or order was presented for payment of the note.

The testimony for the plaintiff leads to the conclusion that the verdict of the jury was supported by evidence affording a legitimate basis for the inference that the defendant intended at all times, after it was informed two days in advance of the maturity of the

note that the money to pay it had been transmitted by telegraph, to baffle the efforts which might be made to extinguish that obligation and thereby forfeit the policy, and thus avoid its liability for the death of the insured, whose ill health and impetuous condition, the record discloses, had been brought to the attention of the defendant.

The anxiety to pay this note is manifest from what was done by Mr. Remillard to that end. He appeared at the office in Philadelphia with the money in his possession, and was told that it could not be received there, but would have to be sent to the home office in Indianapolis. Without risking the delay of the mail and uncertainty of his individual check or draft reaching defendant in time, he at once deposited with the Postal Telegraph Company the entire amount which would be due on the note two days thereafter, with directions to wire it, waiving identification, to the order of defendant at Indianapolis and paid \$9 for that method of sending the money. This was immediately done, the defendant was promptly notified both by the telegraph company and by the sender as has been shown and with the result as has been shown.

In view of this testimony, there was substantial evidence to support the verdict of the jury; for upon the theory of the evidence relied upon by plaintiff the transaction was one to which the doctrine of implied waiver of the production of money under the authorities hereinbefore cited is strictly applicable.

We conclude therefore that there was no error on the part of the trial court in submitting the issue as to the validity of the tender of payment to the jury.

III. Error is claimed as to the instructions. A careful examination of these shows that they were submitted in accordance with the rules of law governing the validity of payment where there is an implied waiver of the production of the money itself.

[3, 4] Some complaint is made as to the evidence adduced tending to show that the draft or order presented by the Postal Company of Indianapolis to the defendant was bankable in the sense that the banks of Indianapolis would put it to the credit of a holder and permit him to check out the amount thereof. Plaintiff was entitled to make this proof in order to show the commercial value of the paper tendered on her behalf as the representative of money, and she was further entitled to show that the drawer of the order, the Postal Telegraph Company, kept sufficient funds deposited in a bank in Indianapolis to pay this draft or order.

It seems to us to be a matter of common knowledge that the transmission of money by telegraph through such companies as the Postal Telegraph and the Western Union Telegraph Company has become well established in modern business in the states of this

Union and amongst most civilized nations having dealings with the people of this country; and that such a draft or order considering its use in certain emergencies requiring the rapid transfer of cash, and the immense resources of the two companies who are engaged in affording that business facility to their customers, would be equally as satisfactory and trustworthy as the cashier's checks of banks or the checks of individuals, and that persons willing to accept these for money would not hesitate to receive the former, which has now become a recognized medium of quick exchange of money of such pecuniary value and security that it is accepted by banks on the same basis upon which they receive drafts or cashier's checks of other banks.

The judgment in this case is free from any reversible error, and is affirmed. All concur.

JOHN McMENAMY INVESTMENT & REAL ESTATE CO. v. STILLWELL CATERING CO. (No. 17861.)

(Supreme Court of Missouri, Division No. 1. Feb. 29, 1916. On Motion to Modify Judgment, March 30, 1916.)

1. APPEAL AND ERROR — 185(1) — COURTS — 37(1) — PRESENTING QUESTIONS IN LOWER COURT — JURISDICTION.

The question of jurisdiction of the trial court is open at any state of the case, and may be raised for the first time in the appellate court or considered by the court *sua sponte*, and Rev. St. 1909, § 2081, prohibiting exceptions on appeal not decided by the trial court, sections 1848 and 1851, authorizing amendment of process, and section 1850, requiring the court to disregard any error not affecting substantial rights, are not applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1168-1168, 1170-1177; Dec. Dig. — 185(1); Courts, Cent. Dig. §§ 147, 151; Dec. Dig. — 37(1).]

2. CORPORATIONS — 507(3) — PROCESS — CONSTRUCTIVE SERVICE — VALIDITY.

Under Rev. St. 1909, § 1770, authorizing an order notifying nonresidents of the commencement of a suit if the plaintiff shall allege in the petition or file an affidavit stating that part or all of the defendants are nonresidents of the state or a corporation of another state and cannot be served in this state in the manner prescribed, section 1777, providing how such an order against nonresident defendants shall be published, and section 1778, providing for service in any of the cases mentioned in section 1770 on any defendant residing or being without the state, and that such service shall be as effectual as service within the state, where the petition alleges that defendant is a corporation of the state of Missouri, and the affidavit of plaintiff states that it has no office in the state nor any officer in the state on whom service of process can be had, personal service on the president of the corporation in another state is ineffectual to give jurisdiction to the court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1979, 1995; Dec. Dig. — 507(3).]

3. PROCESS — 84 — CONSTRUCTIVE SERVICE — STATUTORY REQUIREMENTS.

Where constructive service is authorized, there must be a strict compliance with the statutory requirements.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 98; Dec. Dig. — 84.]

4. CORPORATIONS — 507(3) — PROCESS — CONSTRUCTIVE SERVICE.

Rev. St. 1909, § 1778, authorizing personal service out of the state on a defendant residing or being without the state, does not apply to a Missouri corporation, though it has no office nor officers within the state on whom process may be served.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1979, 1995; Dec. Dig. — 507(3).]

5. CORPORATIONS — 500 — PROCESS — STATUTES.

Rev. St. 1909, § 1766, in so far as it purports to authorize a personal judgment upon extraterritorial service of process, is void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1912, 1940, 1941; Dec. Dig. — 500.]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by the John McMenemy Investment & Real Estate Company against the Stillwell Catering Company. From a judgment (175 Mo. App. 668, 158 S. W. 427) affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

The dissenting opinion by Allen, J., in the Court of Appeals, which is followed by the Supreme Court, is as follows:

I am unable to concur in the opinion herein written by my Brother Reynolds for the reasons indicated below.

The action was instituted in the circuit court of the city of St. Louis August 30, 1910, against the appellant, Stillwell Catering Company, a corporation, and Charles H. Stillwell, to recover \$12,000 alleged to be due to the plaintiff for rent under a lease of certain premises in the city of St. Louis and the further sum of \$147.91 alleged to have been expended by plaintiff in making certain repairs on the premises, which it is averred the defendants, by the terms of the lease, were obligated to make. The petition alleges that the defendant corporation, the Stillwell Catering Company, "is and at all the times mentioned in the petition was a corporation organized and existing under the laws of the state of Missouri." The following affidavit was attached to the petition: "John McMenemy, being duly sworn, on his oath says that he is the president of John McMenemy Investment & Real Estate Company, the plaintiff herein, that said plaintiff has a just demand against the defendants, and that the amount which the affiant believes the plaintiff ought to recover after allowing all just credits and offsets is the sum of \$12,147.91, and that the defendant Charles H. Stillwell is a nonresident of the state of Missouri, and that the defendant Stillwell Catering Company is a corporation having no office in the state of Missouri nor any officer in the state of Missouri upon whom service of process can be had." Upon the filing of the petition and affidavit a writ of attachment and summons for both of the defendants was issued, directed to the sheriff of the city of St. Louis, returnable to the October term, 1910, of said court. At the return term thereof the sheriff made a not found return as to both defendants; his return showing that he had levied the writ of attachment upon the leasehold estate of the defendants in and to certain real estate described in the return. During the same term the

plaintiff sued out an alias writ of summons returnable to the February term, 1911, directed to the sheriff of the city of St. Louis. At the return term of the alias summons the plaintiff caused the same to be filed in court with the affidavit of a deputy sheriff of Los Angeles county, Cal., attached thereto, showing that said deputy sheriff had executed the same in the said county of Los Angeles, state of California, by delivering a true copy thereof, with a copy of the petition, to Charles H. Stillwell, president of the defendant Stillwell Catering Company, on the 19th day of December, 1910; the clerk of the court of which the affiant was an officer certifying to the official character of the affiant and to his authority to serve process within the last-mentioned county and state.

At the February term of said court, 1911, the defendant Stillwell Catering Company, appearing for the purposes of the motion only, filed a motion to quash the alias summons; the ground of said motion being as follows: "That it appears from the petition in this cause that this defendant is a corporation under the laws of the state of Missouri and that under the laws of the state of Missouri this defendant cannot be served with summons without the state of Missouri, but must be served within said state of Missouri." This motion was overruled by the court; the defendant saving its exceptions to the action of the court thereupon. Thereafter the cause was dismissed by plaintiff as to the defendant Charles H. Stillwell, and judgment by default was had against defendant Stillwell Catering Company sustaining the attachment and for \$5,948.63 against the interest of this defendant in the attached property. At the same term, and within four days after the rendition of this judgment the defendant corporation, again appearing specially, filed a motion to set aside the judgment for the following reasons: "(1) That the court was and is without jurisdiction to render judgment against the defendant in this cause, because this defendant has never been summoned in this cause; and (2) because this court erred in overruling the motion heretofore made by this defendant in this cause to quash the summons issued against this defendant and the return thereon." This motion was overruled, and the defendant Stillwell Catering Company duly perfected its appeal to this court.

[1] The majority opinion holds that the only ground urged for a reversal of the judgment of which we can take notice is the action of the trial court in overruling the motion to quash the alias summons and return. This is upon the ground that only those questions are to be considered in the appellate court which have been duly raised and presented in the trial court. This, in my judgment, has no application here, for the reason that the jurisdiction of the trial court to render any judgment in the cause is challenged, and the question of jurisdiction is one which may be raised in any stage of the proceeding. The jurisdiction of the lower court, attempted to be acquired by service outside of this state, was raised by appellant's motion to set aside the judgment, the grounds of said motion being set out above verbatim; but, regardless of this, the question of jurisdiction is open at any state of the case, and may be raised for the first time in the appellate court or considered by the court sua sponte.

[2] I am of the opinion that the trial court acquired no jurisdiction to render a judgment affecting the rights of the defendant corporation, for the reason that no service was had upon it in the state of Missouri, nor was there compliance with the statutes authorizing either service by publication or personal service beyond the limits of the state.

Section 1770, Rev. Stat. 1909, provides that in suits in partition, divorce, attachment, etc., "if the plaintiff or other person for him shall allege in his petition, or at the time of filing same, or at any time thereafter, shall file an affidavit

stating, that part or all of the defendants are nonresidents of the state, or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the nonresidents or absentees, notifying them of the commencement of the suit," etc. Section 1777 provides how such an order against nonresident, absent, or unknown defendants shall be published. Section 1778, Rev. Stat. 1909, provides in part as follows: "In any of the cases mentioned in section 1770, the plaintiff may cause a copy of the petition, with a copy of the summons, to be delivered to each defendant residing or being without this state, and at any place within the United States or their territories, twenty days before the commencement of the term at which such defendant or defendants are required to appear. * * * If the plaintiff, or his attorney of record, in any of the cases mentioned in section 1770, shall allege in his petition or at the time of filing same, or at any time thereafter shall make the affidavit required by said section, and shall file in said cause proof of service of process on any defendant or defendants, in conformity with the provisions of this section, it shall not be necessary for such plaintiff or plaintiffs to obtain the order provided in section 1770 or to procure the publication provided in section 1777. Service of process in conformity with this section shall be as effectual within the limits of this state as personal service within this state, and judgments rendered against defendants thus served shall have the same effect and force within the limits of this state as judgments rendered against defendants personally served with summons in this state." It will thus be seen that personal service beyond the limits of this state, in a suit of this character, is authorized by section 1778, supra, only when "the plaintiff, or his attorney of record, in any of the cases mentioned in section 1770, shall allege in his petition or at the time of filing the same, or at any time thereafter shall make the affidavit required by said section"; and that section (1770) provides that the plaintiff shall state in his petition, or in the affidavit filed "that part or all of the defendants are nonresidents of the state, or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them."

It seems clear that the plaintiff here did not comply with the aforesaid statutory provisions. Its petition avers that the appellant is a Missouri corporation. The affidavit appended to the petition states merely that the appellant "is a corporation having no office in the state of Missouri nor any officer in the state of Missouri upon whom service of process can be had."

[3] It is well settled that, where constructive service is authorized, there must be a strict compliance with the statutory requirements. It is scarcely necessary to cite cases in support of this proposition, but see *Kunzi v. Hickmann*, 243 Mo. loc. cit. 113, 147 S. W. 1002; *Priest v. Captain*, 238 Mo. 447, 139 S. W. 204; *Stanton v. Thompson*, 234 Mo. 7, 136 S. W. 696; *Hinkle v. Lovelace*, 204 Mo. loc. cit. 220, 102 S. W. 1015, 10 L. R. A. (N. S.) 730, 120 Am. St. Rep. 698, 11 Ann. Cas. 794; *Kelly v. Murdagh*, 184 Mo. 377, 83 S. W. 437; *Russell v. Grant*, 122 Mo. loc. cit. 179, 26 S. W. 958, 43 Am. St. Rep. 563; *Myers v. McRay*, 114 Mo. 377, 21 S. W. 730; *Hedrix v. Hedrix*, 103 Mo.

pp. 40, 77 S. W. 495. Personal service beyond the limits of the state provided for by section 1778 has the same effect as service by publication. See *Priest v. Captain*, supra; *Moss v. Fitch*, 212 Mo. 484, 111 S. W. 475, 126 Am. St. Rep. 568; *Hedrix v. Hedrix*, supra. It cannot be said that there was here even a substantial compliance with the provisions of the statute authorizing such service, much less that scrupulous accuracy in complying therewith which the law requires. In such cases, unless there is a strict compliance with the statute, a judgment rendered upon constructive service is void, and is open to attack even in a collateral proceeding. See *Kunzi v. Hickmann* and *Moss v. Fitch*, supra.

[4] In this connection it must be observed that section 1778 provides that in any of the cases mentioned in section 1770, the plaintiff may cause a copy of the petition, with a copy of the summons, to be delivered to each defendant "residing or being without this state," etc. A corporation of the state of Missouri necessarily cannot become a nonresident of this state. It does not follow its president when he goes beyond the limits of the state, but its domicile remains within the state of Missouri, which created it. Hence it seems clear that section 1778 does not authorize service upon a domestic corporation by serving its president or chief officer in another state.

Regardless of what were the questions raised and presented in the trial court, if the court was without jurisdiction to render the judgment appealed from, that judgment cannot stand. For this reason the statutes referred to in the majority opinion, viz., sections 2081, 1848, 1850, and 1851, Rev. Stat. 1909, are, in my judgment, without application.

[5] Respondent takes the position, however, that the service upon the president of the defendant corporation beyond the limits of this state is authorized by section 1766, Rev. Stat. 1909, which is as follows: "When any such summons shall be issued against any incorporated company, service on the president or other chief officer of such company, or, in his absence, leaving a copy thereof at any business office of said company with the person having charge thereof, shall be deemed a sufficient service; and if the corporation have no business office in the county where suit is brought, or if no person be found in charge thereof, and the president or chief officer cannot be found in such county, a summons shall be issued, directed to the sheriff of any county in this state, or any other state, where the president or chief officer of such company may reside or be found, or where any office or place of business may be kept of such company, and the service thereof shall be the same as above." This section applies to domestic corporations; service on foreign corporations being provided for by section 1760, Rev. Stat. 1909. Section 1766 was amended in 1903 (Laws 1903, p. 115), by adding the words "or any other state," which we have italicized above. By this amendment it was evidently intended to permit a judgment in personam to be rendered against a domestic corporation upon service beyond the limits of this state; but, in so far as it purports to authorize the rendition of a personal judgment upon extraterritorial service, it is utterly void. See *Moss v. Fitch*, supra; *Wilson v. Railroad*, 108 Mo. 588, 18 S. W. 26, 32 Am. St. Rep. 624. This portion of the section appears to have no reference to constructive service in attachment suits or other actions in rem, such as are mentioned in section 1770 and referred to in section 1778, and it seems quite clear that it could have no such application. In the face of the express provisions of the two sections just referred to, it would seem that it could not well be contended that in any of the cases mentioned in section 1770 such extraterritorial service may be had upon a corporation in the absence of an allegation in the peti-

tion, or an affidavit in conformity to section 1770, nor upon a domestic corporation, which cannot be a "defendant residing or being without this state," as required by section 1778. Such extraterritorial service is necessarily constructive service. *Priest v. Captain*, *Moss v. Fitch*, and *Hedrix v. Hedrix*, supra. So far as our courts are concerned, the person serving such writ is not recognized as an officer, but as a mere individual. See *Priest v. Captain*, supra, 236 Mo. loc. cit. 459, 139 S. W. 204. Being constructive service, it must be governed by the express provisions of section 1778, supra, authorizing service of this character. That section authorizes such service only upon a "defendant residing or being without this state," and then only when the plaintiff "shall allege in his petition or * * * shall make the affidavit required by" section 1770. It may be noted also that the plaintiff did not comply with section 1766; for the alias summons served in California was not directed to the sheriff of any county in that state, but to the sheriff of the city of St. Louis. If this section could be taken to authorize constructive service upon a corporation (which evidently it cannot), then rigid compliance with its terms would be necessary to confer jurisdiction.

It is said that here the defendant corporation had "no office in the state of Missouri nor any officer in the state of Missouri upon whom service of process could be had," and that under such circumstances service could be had upon the corporation only in the manner in which plaintiff attempted to reach it. But, however this may be, our duty is not to make the law but to apply it. Whether, under such circumstances, constructive service by publication may be had, upon the petition or affidavit stating that the defendant has concealed itself so that the ordinary process of law cannot be served upon it, or has absconded or absented itself from its usual place of abode in this state, in compliance with section 1770, supra, is a matter which we are not called upon to decide.

For the reasons given above, I think that the judgment of the lower court should be reversed; and, as I deem the decision rendered by my Associates herein to be contrary to the previous decision of the Supreme Court in *Priest v. Captain*, 236 Mo. 447, 139 S. W. 204, and to other decisions of that court, I ask that the case be certified to the Supreme Court for its determination.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for appellant. F. A. & L. A. Wind and F. X. Geraghty, all of St. Louis, for respondent.

GRAVES, P. J. This cause reached this court by a certification, under the Constitution, made by the St. Louis Court of Appeals. Two opinions were filed in that court. The majority opinion affirmed the judgment of the circuit court. The minority opinion held that the judgment should be reversed, and the writer of the minority opinion asked for the certification of the cause here on the ground that the majority opinion conflicted with *Priest v. Captain*, 236 Mo. 447, 139 S. W. 204, and other cases in this court. The case is fully reported in 175 Mo. App. 668, 158 S. W. 427. All sides of the question involved are thoroughly threshed out in these two opinions.

The question of the jurisdiction of the circuit court, and that is the vital question, is discussed from all angles in these two opinions. The dissenting opinion, in my judg-

ment, follows the views of this court upon the question involved. The record facts are so thoroughly stated and the case law so thoroughly discussed by Judge Allen in his dissenting opinion that we feel that it would be a useless expenditure of vital force to try to add to them.

For the reasons expressed by Judge Allen in his dissenting opinion in *Real Estate Co. v. Catering Co.*, 175 Mo. App. loc. cit. 679, 158 S. W. 427, et seq., the judgment of the circuit court is reversed. All concur.

On Motion to Modify Judgment.

GRAVES, P. J. We are asked to so modify our judgment in this case so that the cause may be remanded. It is suggested that perhaps proper service of process can be obtained. Our judgment was a simple reversal of the judgment nisi. Under the views we have expressed as to the law we do not know whether plaintiff can get a valid service of process or not, but we see no objection to a remanding of the cause to give the plaintiff such an opportunity. So, whilst adhering to all the views of the opinion, we will sustain the motion to modify our judgment, so that such judgment shall be to the effect that the judgment nisi is reversed, and the cause remanded to the circuit court to be proceeded with in accordance with the law as declared in our opinion.

Motion to modify judgment sustained, and judgment modified as herein indicated. All concur.

WILLIAMS et al. v. CITY OF HAYTI. (No. 17705.)

(Supreme Court of Missouri, Division No. 1
Feb. 29, 1916. Rehearing Denied March
30, 1916.)

1. JUDGMENT \Leftrightarrow 682(3) — CONCLUSIVENESS — RES JUDICATA — IDENTITY OF PARTIES — SUB- JECT-MATTER.

The judgment in a suit to quiet title by heirs of the grantor of land dedicated to the defendant city and its officers for courthouse purposes is res judicata in a later action by the purchasers at partition sale of the interest of such heirs, against the city, involving the same land, in which the sole issues were the character of the original dedication and subsequent loss or waiver of city's rights.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1205; Dec. Dig. \Leftrightarrow 682(3).]

2. QUIETING TITLE \Leftrightarrow 15 — ISSUES — DEFENSE — EQUITABLE RELIEF.

In suit to quiet title, equitable, as well as legal, defenses may be invoked.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. \Leftrightarrow 15.]

3. JUDGMENT \Leftrightarrow 645 — CONCLUSIVENESS — RES JUDICATA.

Judgment in a law action, involving the same parties and subject-matter, wherein equitable defenses might have been interposed, is res judicata against defendant on such equitable de-

fenses, whether they were pleaded and adjudicated in the first action or not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1158; Dec. Dig. \Leftrightarrow 645.]

4. JUDGMENT \Leftrightarrow 702 — CONCLUSIVENESS — RES JUDICATA.

An unappealed judgment in district court, wherein the predecessors of the present plaintiffs were defendants, the plaintiffs therein being property owners and citizens of the present defendant city, the issue being the title to certain land, is res judicata, and works estoppel by judgment against the city in the later action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1227; Dec. Dig. \Leftrightarrow 702.]

Appeal from Circuit Court, Pemiscot County; W. S. O. Walker, Judge.

Action by Ivey Williams and others against the City of Hayti, a municipal corporation, and others. Judgment for plaintiffs, and defendant city appeals. Affirmed.

Von Mayes, of Hayti, and Brewer & Riley, of New Madrid, for appellant. Sam J. Corbett and C. G. Shepard, both of Caruthersville, for respondents.

GRAVES, P. J. This case started as a legal action in ejectment, but ended on the equity side of the court per force of the nature of the answer. The petition is an ordinary petition in ejectment, in which the plaintiff seeks to recover the possession of block 29 in the town of Gayoso City, now Hayti, in Pemiscot county.

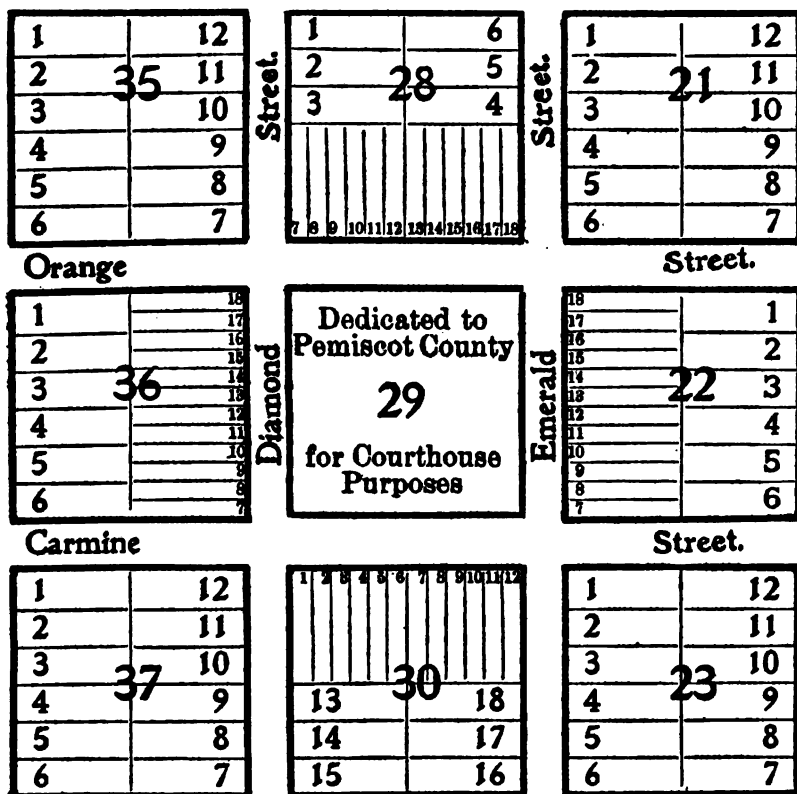
Of the named defendants the city of Hayti alone answers, thus: (1) By admitting its incorporation, but entering a general denial as to all other matters stated in the petition; (2) a common-law dedication by the former owner "to the public for a public square in the city of Hayti (formerly known as Gayoso City), this defendant, and general public purposes, or courthouse purposes should the county seat be located at said city and said land selected for a courthouse site"; (3) the ten-year statute of limitations; and (4) estoppel in pais. The reply is quite lengthy, but places in issue all new matter in the answer, and, in addition, contains a plea of res adjudicata as to the new matters pleaded in the answer. Judgment was entered for the plaintiffs, and from such judgment, the city of Hayti has appealed.

This block in the city of Hayti has been the subject of much litigation. In 1895 C. M. Hayes, his wife, Caroline Hayes, and his daughters, Mollie (Mary P.) Gwin and Nancy Williams, were the owners of a tract of farm land surrounding and including the present site of the town of Hayti. The county seat of Pemiscot county was then at Gayoso, a town several miles to the east. Louis Houck and J. E. Franklin were promoting a railroad from Kennet to Caruthersville, Mo. These promoters agreed with Hayes, his wife and daughters, that they would run this road through their land if they would lay out a town on said land and deed every

alternate lot to Houck and Franklin. The new town was platted as Gayoso City, and the alternate lots conveyed. The material portion of this plat is shown in the record, and we reproduce it here for the information it contains:

miles from the old county seat. In 1901 the county court of the county appointed Hon. C. B. Faris, now a member of this court, as a commissioner to deed the county's interest in this lot to the grantees in such plat or their heirs. This was done. In 1904 there

Portion of Plat of Gayoso City Showing Public Square and Property Adjacent Thereto:



The foregoing plat shows the use for which this block 29 was dedicated in legal and statutory form. At the foot of the plat is the following:

"We, the undersigned, hereby declare the above to be a true and correct plat of Gayoso City, and forever dedicate to the public the streets therein named. We also dedicate and give to Pemiscot county for courthouse purposes block 29, and for jail and calaboose purposes lot 5, block 43. We also dedicate for public school purposes block 34. Witness our hands and seals January 22, 1895.

"[Signed] Granville M. Hayes.

"Caroline Hayes.

"S. P. Williams.

"Mrs. Nancy Williams.

"F. M. Gwin.

"Mary P. Gwin."

Following this is the acknowledgment. In 1898 Caruthersville was selected as the permanent seat of government in Pemiscot county. Hopes had been entertained that Gayoso City might be selected, and this, no doubt, was in view when this statutory dedication was made. The new town was only three

seems to have been a condemnation suit by which it sought to condemn this lot for public purposes. This suit was against the grantors and heirs of the deceased grantors in the plat, named as owners. Judgment of condemnation is alleged to have been entered, but the money was never paid to the owners. In 1905 Mollie P. Gwin brought suit to quiet title to this block 29. The parties were Mollie P. Gwin, the heirs of G. M. Hayes, Caroline Hayes, and Nancy Williams, and the city of Hayti. This suit in the circuit court of Pemiscot county terminated in a decree by said court quieting the title to said block in Mollie P. Gwin and the heirs of G. M. Hayes, Caroline Hayes, and Nancy Williams, and further decreeing that the city of Hayti had no interest therein. This judgment was not appealed from, and stands in full force and effect. Following this decree vesting the title a partition suit was filed, the purpose of which was to partition the property between the heirs of the grantors in the plat,

who had been vested with the title. This suit went to judgment. Plaintiffs here are the purchasers at a partition sale under this judgment. While this partition was pending a suit entitled *J. W. Gaskins et al. v. Ivey Williams et al.* was filed in the circuit court. The plaintiffs in that case were owners of property around this block 29 in Hayti, and the defendants were the heirs of the grantors in the plat. The substance of this action can be gathered from the following excerpt therefrom:

"Plaintiffs further state that the original owners of the land on which the town of Gayoso City (now Hayti), Mo., is situated, laid off and recorded a plat thereof, and particularly set forth, marked, and designated thereon block No. 29 as a public square for the courthouse purposes; that the fee to said block No. 29, by virtue of said plat, was vested in the county of Pemiscot, state of Missouri, in trust for the free use of all the inhabitants of said county and town of Gayoso City, now Hayti, as a common or public ground, and for no other purpose whatever; that the same has been and still is used by the public for public purposes, and for no other purposes; that said lots all around on the face of the square were sold with the general understanding by the inhabitants of the county and the inhabitants of the town of Gayoso City, now Hayti, and upon the representation that block No. 29 was reserved, and was to be used for courthouse or public square purposes; that plaintiffs have property with valuable improvements erected thereon fronting said square or block No. 29, which they purchased and improved upon the faith and with the understanding that the square was public property, and ever would remain such; that the defendants are about to use said public square for other purposes than that of public use, thereby diverting the use of said property from the original intention of and the purposes specified by the donors in the act of dedication; the said defendants succeeded in having the county court of Pemiscot county on April 1, 1901, make an order purporting to release and relinquish unto said defendants all of said county's right, title, and interest in and to said block No. 29, making C. B. Faris its commissioner to execute the deed; that said Faris by an instrument of writing dated April 13, 1903, undertook to convey unto said defendants the county's right in and to said property, all of which was done without right or authority of law by said county court, and to the prejudice of these plaintiffs; that thereafter, and at the February term of the Pemiscot county circuit court, 1905, said defendants by their attorneys filed a petition in said court, claiming in said petition that they were the owners in fee simple and claimed title to block No. 29 in the city of Hayti, Mo.; that said defendants further filed in said circuit court at its — term, 1905, a suit in partition asking the court to appoint commissioners to divide block No. 29 in kind; the said commissioners were appointed by the court, viewed said property, and reported to the court that said block No. 29 was not divisible in kind; whereupon said defendants prayed the court for an order of sale to sell said property at public outcry; that the court ordered said block No. 29 sold as prayed; all of which is of record, and is recorded in the record books in Pemiscot county, Mo.; that the plaintiffs herein have never been made a party to any of the above-mentioned suits, and that their interest in and to said block No. 29 in said city of Hayti has never been determined by any court; that said block No. 29 is about to be sold in the way and manner as above set out, and to be used for other purposes than that for which it was dedicated, contrary to the intentions of the original donors; and that same will be a

serious obstruction to the beneficial use and enjoyment of these plaintiffs' property and to the great damage of these plaintiffs."

The prayer asked the court to decree that the Faris deed, supra, be held for naught, that the interests of the parties be determined, and that the defendants be held to have no interest in said block.

In this case an amended petition was filed upon which it went to trial. The substantive part of that petition reads:

"Plaintiffs further state that on the — day of —, 1895, G. M. Hayes and his wife, Caroline, J. P. Williams, Nancy Williams, F. M. Gwin, and Mary P. Gwin, being the owners of the lands hereinafter described, caused to be surveyed and laid off the town of Gayoso City, now Hayti, in Pemiscot county, Mo.; that they had a plat thereof made in which they particularly set forth marked and designated thereon streets, alleys, and a block known as block No. 29; that said plat was duly signed and acknowledged by the said G. M. Hayes and Caroline Hayes and others, and the same was duly filed on record in the office of the recorder of deeds for the county of Pemiscot, Mo., in Book —, page —; that the said G. M. Hayes, Caroline Hayes, and others by said plat conveyed and dedicated to the defendant Pemiscot county, Mo., said block No. 29 for courthouse purposes.

"Plaintiffs further charge and aver that on the — day of April, 1901, the county court of Pemiscot county, Mo., by its order duly entered of record, ordered that one C. B. Faris, of said county, convey by proper deed to the defendants herein said block No. 29, and that said order was made without any consideration passing from the said defendants to the county of Pemiscot, Mo.; that afterwards, to wit, on the 13th day of April, 1903, the said C. B. Faris, in pursuance of said order, executed and delivered to the defendants a deed purporting to convey to them the aforesaid property, which said deed was on the — day of —, 190—, duly rendered in Book —, at page —, of the Deed Records of said county of Pemiscot.

"Plaintiffs charge and aver that the said county court of said county had no authority to order said deed made, and that said conveyance and the order therefore is a violation of the trust created by said dedication, and that said order made by said court is void, and the said deed and order aforesaid constitute a cloud upon the title of Pemiscot county to the aforesaid described real estate.

"Wherefore plaintiffs pray that the court declare said order of the county court aforesaid and the said deed aforesaid to be void and of no effect, and that the title in and to said land be divested out of the defendants, and vested in Pemiscot county as trustee, and that the said court declare what said trust be, and for all such further relief as to this court may be proper."

Upon a trial of the cause judgment went for plaintiffs nisi, and the case was appealed to this court. This court reversed the judgment nisi, and directed the circuit court to enter a judgment vesting the title in the defendants. These several judgments are pleaded as *res adjudicata* in the case at bar. The present suit was filed after the determination of the case of *Gaskins et al. v. Williams et al.* by this court. With the view of the law which we entertain the foregoing sufficiently states the case.

I. This court has tried faithfully to finally determine the title to this block of ground.

In *Gaskins et al. v. Williams et al.*, 235 Mo. loc. cit. 570, 139 S. W. 120, 35 L. R. A. (N. S.) 603, Ferriss, J., construed the amended petition in that case (which we have outlined in our statement of this case), and in so doing said:

"If we should content ourselves with simply deciding whether or not the deed from the commissioner, upon the order of the county court, to the defendants, is a valid instrument, divesting all right, title, and interest out of the county, we would have no hesitancy in holding that the county court had no authority to order said deed, and that such deed is without force or effect. This block was not owned by the county in fee absolute, but was held in trust for a specific use. Therefore the statute and decisions referred to by the defendants authorizing such deed do not apply. If, however, we were simply to decide this question, it would leave the real question in dispute to be settled by further litigation. It is our desire to put an end to litigation whenever we may properly do so. We think the pleadings are broad enough to submit the substantial question as to the present ownership of this block of ground, and we shall proceed to consider such question." (The italics are ours.)

In concluding the opinion he said:

"The finding of the trial court that the order of the county court, and the deed made pursuant thereto, were null and void, was correct; but, if the judgment of that court as a whole should be affirmed, it would leave the matter, as we stated at the beginning of this opinion, still open for litigation. In order to establish now, finally, the right of ownership in said block 29, the judgment is reversed, and the cause remanded, with directions to the circuit court to enter a decree vesting the title to said block 29 in the defendants."

Thus it will be seen that a faithful effort has been made to fix this title. The judgment entered under our mandate in this case is the foundation of one of the pleas of *res judicata*, in the present case. We will discuss this plea later. But we desire to discuss the other plea of *res judicata* first, and that we do in the succeeding paragraph.

[1] II. After the judgment of condemnation had been entered, as set out in our statement, and after the heirs of the grantors in the plat (who were the defendants in the condemnation proceeding) had failed to get their money from the city for the block so condemned, these heirs of the grantors in the plat brought suit against the city of Hayti to quiet the title. Now, note the parties. The heirs of the grantors in the plat were the plaintiffs, and the city of Hayti was the defendant. The thing litigated was the title of this block. The judgment found the heirs to be the owner, and, further, that the city of Hayti had no interest whatever in such block. Now, note the parties to the present suit. The plaintiffs are the successors in title to the heirs of the grantors in the plat. They are the purchasers at the partition sale, wherein the said heirs were parties. The defendant in the case at bar is the city of Hayti. There were some individual defendants named (presumably the city officers), but they seem to have dropped out entirely, and

the city alone answered, and after adverse judgment appealed. The subject-matter of litigation, as shown by all the pleadings in the case at bar, is the title to this block 29 in said city of Hayti. The petition in ejectment and the general denial in the answer raised that issue. The matters pleaded further by the city in the equitable portion of its answer and the reply of the plaintiffs to the same raised the same issue. In the law the parties are the same, because these plaintiffs are successors in title to the plaintiffs in the suit to quiet title *supra*. The subject-matter is the same. The real issue presented is the same, and under all the authorities the judgment in this suit to quiet title in the circuit court (and unappealed from by the city of Hayti) is a former adjudication of the question involved in this case. It is *res judicata*. *Spratt v. Early*, 199 Mo. loc. cit. 501, 97 S. W. 925; *Donnell v. Wright*, 147 Mo. loc. cit. 647, 49 S. W. 874.

[2, 3] In suits to quiet title, equitable, as well as legal, defenses may be invoked. In the case at bar the city undertakes to say that this property was impressed with a public use. The same matter could have (if it was not) been invoked by the city of Hayti in the suit to quiet title. The record in this case does not show what the defense of the city was in the other case. But it is sufficient for us to say that the very matter in the answer here, in this regard, could have been pleaded there, and, whether pleaded or not, the estoppel by judgment is complete. *Spratt v. Early*, 199 Mo. loc. cit. 501, 97 S. W. 925; *Donnell v. Wright*, 147 Mo. loc. cit. 647, 49 S. W. 874; *City of St. Louis v. United Railways*, 263 Mo. 387, 174 S. W. 78.

There can be no question that this judgment in the circuit court, final and unappealed from as it is, and being between the same parties, and covering the same issues, is a bar to this present suit, and for this reason, if no other, the judgment *nisil* must be affirmed.

[4] III. It is not so clear whether or not, under strict technical law, the judgment which this court directed in the case of *Gaskins et al. v. Williams et al.*, 235 Mo. loc. cit. 575, 139 S. W. 117, 35 L. R. A. (N. S.) 603, is a bar. The defendants in that case are the predecessors in title of the plaintiffs in this case, and in law should be considered the same. The plaintiffs in that case were property owners in the city of Hayti and Pemiscot county. The city in the case at bar by its pleadings professes to speak for the public as well as itself. It invokes a public use as the title against the plaintiffs. The same thing was invoked in a way in the *Gaskins Case*. It was clearly invoked in the original petition, and Ferriss, J., understood the amended petition to be broad enough to try the very title to this block. *Gaskins et al. v. Williams et al.*, 235 Mo. loc. cit. 570, 139 S. W. 117, 35 L. R. A. (N. S.) 603. He did determine the very ques-

tion sought to be determined here, and which was determined in the suit to quiet title. The ruling in that case in the construction of the petition made the subject-matter in issue the same as here. The parties upon one side are the same as here. The only difference is that in the Gaskins Case members of the public were seeking to have the real title determined, whereas in this case the city of Hayti is seeking to do the same thing for the public. It is a close question, but we are of opinion that this judgment is likewise good as *res judicata*.

IV. There is another interesting question suggested by this record, but not discussed by counsel. There is no doubt that there was a statutory dedication of this block. That dedication was to "Pemiscot county for courthouse purposes." The dedication in the case at bar is a common-law dedication for the purpose thus stated in the petition:

"And represented to said persons at the time said block 29 was to be used by the public for a public square and for general public purposes, or for courthouse purposes should the county seat be located in said city, and said block selected for a courthouse site."

The plat was on file which completed the statutory dedication to the county. In *Gaskins v. Williams*, supra, we held that the statutory dedication was one "for courthouse purposes" solely, and further held that the trust imposed by the dedication was impossible of performance, and the fee reverted to the grantors. It will be noticed that the two purposes (the one for courthouse purposes and the other for general public purposes) are conflicting and antagonistic. The county was given the fee in one case, and, had it built a courthouse, would have had the right to control this block for that sole purpose. It would have had the right to say it shall not be used as a public square for other public purposes. The county, under our holding in *Gaskins v. Williams*, supra, held this right until in July, 1911, this court declared that trust to be at an end.

The question is: If it be shown that parties have made a valid statutory dedication of property for one purpose, can there be declared a common-law dedication for a separate and distinct purpose, and a purpose inconsistent with the statutory grant? We think not. We find no case in point, but it stands to reason that there could not be declared a common-law dedication of property for a different purpose which had been in due statutory form dedicated for a given specific purpose.

In the pleadings of the case at bar the common-law dedication is alleged to have begun very shortly after the statutory dedication. A further question is suggested. They plead that the grantors in the plat stated when the lots were sold that this block of ground would be a public square. This is the first

step tending to show the common-law dedication. At that very time the statutory dedication was a matter of public record, and all parties had to take notice thereof, as of a deed. In the face of this fact can they close their eyes to the record, and rely upon the statements? We leave the matter here.

Upon the whole the judgment nisi should be affirmed.

It is so ordered.

BOND, J., concurs in paragraphs I, II, and III and in result. BLAIR, J., concurs in paragraph II and in result. WOODSON, J., not sitting.

WELLS v. NATIONAL SURETY CO. et al. (No. 13828.)

(St. Louis Court of Appeals. Missouri. March 7, 1916.)

1. BANKS AND BANKING §51—EMPLOYMENT—CASHIER.

Rev. St. 1909, § 1112, declaring that the directors may appoint and remove any cashier or other officer or employé at pleasure, which is part of the charter of state banks, must be deemed to be incorporated in a contract for the employment of the cashier for the term of one year, and he is charged with notice thereof.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 82-89; Dec. Dig. § 51.]

2. MALICIOUS PROSECUTION §16, 32—ACTIONS—ESSENTIALS.

To make out a case for malicious prosecution, it must appear that the prosecution terminated without a conviction, that it was instituted maliciously and without probable cause, and, while malice may be inferred from want of probable cause, no recovery can be had where there was probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 19-22, 59, 67, 68; Dec. Dig. § 16, 32.

For other definitions, see *Words and Phrases*, First and Second Series, *Malicious Prosecution*.]

3. MALICIOUS PROSECUTION §24(3)—PROBABLE CAUSE.

Bank directors before the expiration of the year for which a cashier was engaged terminated his employment. On the last day of his service the cashier, who insisted the directors had no right to terminate the employment, removed from the bank funds sufficient to pay his salary for the remainder of the year, and deposited them in another institution, refusing to make restitution when it was demanded. Rev. St. 1909, § 1112, gives the directors of a bank authority to discharge any officer at pleasure, while section 4550 declares that, if any officer, agent, clerk, servant, or person employed shall embezzle or convert to his own use without the consent of his employer any money which shall come into his possession by virtue of his employment, he is guilty of embezzlement. Held, that the cashier was guilty of embezzlement under the statute regardless of his motives in taking the funds, and, so having been charged with embezzlement, he cannot recover in an action for malicious prosecution, those charging him having probable cause, though the prosecution was dismissed.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 51; Dec. Dig. § 24(3).

For other definitions, see *Words and Phrases*, First and Second Series, *Embezzlement*.]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by Charles P. Wells, Jr., against the National Surety Company, a corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

B. A. McKay, Everett Reeves, and C. G. Shepard, all of Caruthersville, for appellant. A. Sloan Oliver, of Caruthersville, Arthur L. Oliver, of St. Louis, and Von Mayes, of Hayti, for respondents.

NORTONI, J. This is a suit for damages on account of an alleged malicious prosecution. At the conclusion of the evidence the court peremptorily directed a verdict for defendant, and plaintiff prosecutes the appeal.

[1-3] It appears that plaintiff, Wells, was cashier of the Citizens' Bank of Hayti, and defendant National Surety Company, a corporation, the surety on his bond as cashier. Defendant Fred Morgan is the president of the Citizens' Bank of Hayti, while defendant Robert W. Inman is the claim adjuster of the National Surety Company. The records of the bank in evidence disclose that plaintiff, Wells, was elected cashier of the Citizens' Bank of Hayti in February, 1911, for the "ensuing year," at a salary of \$75 per month, whereupon his bond as such was made by defendant surety company. About three months subsequent thereto the board of directors of the bank by resolution requested plaintiff's resignation as cashier, and this he declined to submit. Thereupon the board of directors of the bank passed a resolution to the effect that his services as cashier of the bank should terminate on May 3, 1911. Plaintiff remained in charge of the bank and its funds until the evening of May 3d, but insisted all of the time that he was employed for one year, inasmuch as the record of the meeting of the board of directors made in February recited his employment for the ensuing year. Plaintiff offered to continue in the service of the bank for the term of one year from the date of his appointment in February, and insisted the board was without authority to discontinue his employment as it did, to take effect on May 3d. In this view plaintiff insisted that he was entitled to a year's salary, and on the close of business May 3d he took out of the funds of the bank \$600 to compensate the remainder of his year's salary at \$75 per month. Plaintiff deposited this money in another bank to his personal credit, and thus converted it to his own use. Thereafter the officers of the bank notified defendant surety company to the effect that plaintiff had converted \$600 of the bank's funds to his own use, and defendant Inman, claim adjuster for the surety company, immediately came upon the scene. Inman, together with defendant Morgan, president of the bank, and plaintiff, had a meeting, in which plaintiff was urged to surrender the amount of \$600 thus taken from the

funds of the bank and pay it over to the bank, but plaintiff declined to do this. The evidence tends to prove that thereupon defendant Inman, acting as the representative of the surety company, together with defendant Morgan, president of the bank, called upon the prosecuting attorney of Pemiscot county and laid the facts before him, and, moreover, that they induced the filing of an information against plaintiff, Wells, by the prosecuting attorney, charging him with the embezzlement of \$600 of the bank's funds. Plaintiff was taken into custody, entered into a recognizance for his appearance in court, and appeared at several terms of the court to which the case was continued at the instance of the prosecution. Finally the prosecution for embezzlement was dismissed by the state, and plaintiff then instituted this suit against defendant surety company, its agent, Inman, and Morgan, president of the bank, as for a malicious prosecution. Manifestly the court properly directed a verdict for defendant because it appears beyond peradventure that the prosecution was instituted on probable cause therefor. It is certain that the board of directors of the bank was authorized to discontinue plaintiff's services as cashier on May 3d as it did, and this is true notwithstanding the record of the board made in February to the effect that he was employed as cashier for the "ensuing year." Section 1112, R. S. 1909, which is parcel of the charter of the bank, provides: "The directors may appoint and remove any cashier or other officer or employé at pleasure." This is a declaration of sound public policy on the part of the state in respect of such offices of trust. Of this statute plaintiff is deemed in law to have had full knowledge at the time of his employment in February, and it is certain that it entered as a silent factor into the contract entered into between the bank and himself for his services as cashier. The board of directors were fully authorized to discontinue his employment as it did on May 3d, and plaintiff's salary was fully paid to that date. Therefore, when plaintiff seized upon the opportunity attending the last day of his employment in the bank to take from its funds \$600 as if to compensate himself for nine months' unearned salary without the knowledge or consent of the bank and converted this money to his own use, he became an embezzler of that amount in contemplation of law. It is essential to make out a case as for malicious prosecution: First, that the prosecution complained of has terminated without a conviction; and, second, that the prosecution was instituted maliciously; and, third, without probable cause. It is true the prosecution for embezzlement appears to have been terminated through dismissing the charge against plaintiff and it is true, too, that malice may be inferred from the want of probable cause; that is, from the facts and circumstances attending the

situation if it sufficiently appear that the prosecution is without probable cause. But, if probable cause for the prosecution appear, then no recovery may be had in any event in a civil action for damages on account of such prosecution so instituted on probable cause. The statute on embezzlement (section 4550, R. S. 1909) provides:

"If any officer, agent, clerk, servant or collector of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use, * * * without the assent of his master or employer, any money * * * which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished," etc.

Plaintiff in his testimony states the fact to be that he drew the \$600 out of the moneys of the bank in his charge and under his control as cashier, and that he did this without the consent or knowledge of any officer of the bank save himself; also that he did not ask permission of any one connected with the bank concerning it. Moreover, plaintiff testifies:

"I put it [the money] to my own use, deposited it there [in another bank], and converted this amount of money to my own use there at that time."

Obviously there is no question for the jury to consider under such testimony as this; for plaintiff confesses that he converted the funds according to the terms of the statute above quoted. It is true, under another clause of the same section of the statute, that pertaining to taking and making away with or secreting funds or property "with intent to embezzle," the question of intent is one for the jury. But under the clause of the statute first above quoted the Supreme Court has several times declared that the statute forecloses the matter of criminal intent when it appears that the agent or employé took the funds of the corporation and converted the same to his own use without the assent of his employer. So much appears from the express and pointed admissions in plaintiff's testimony, for he says in so many words that he took the \$600 without the knowledge or consent of his employer or without the knowledge of the officers of the bank, and with the intent to convert it to his own use, which he did at the time, and indeed persistently continued to hold it thereafter. In *State v. Silva*, 130 Mo. 440, 463, 464, 32 S. W. 1007, 1014, the Supreme Court considered the question in judgment here under the provisions of the statute first above referred to, and declared the law as above indicated. The court said:

"The only intent required to make the act of conversion of the corporation's funds felonious was the intent to convert said moneys to defendant's own use without the assent of his employer. It was clearly within the power of the Legislature to declare the unlawful appropriation of an employer's money by his agents and servants a crime. When the agent or servant takes his employer's money with the intent to convert it to his own use without the mas-

ter's knowledge, that moment he is guilty of the criminal intent denounced by the statute. The law will not enter upon the inquiry with him as to his further intention of returning the money at a later period or making good his shortage when called to account. * * * When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of the offense, and no one who violates a law which he is conclusively presumed to know can be heard to say he had no criminal intent in doing it."

This same subdivision of the statute under which defendant was informed against by the prosecuting attorney and charged with embezzlement was more recently expounded by the Supreme Court in the case of *State v. Lentz*, 184 Mo. 223, 237, 241, 83 S. W. 970, and the name view expressed concerning the intent essential to sustain a conviction under it. Indeed, the statute seems to be clear touching this, in that it denounces the act of an agent converting to his own use the money of his employer under his control without the assent of the employer. It appears conclusively from plaintiff's testimony that he converted \$600 belonging to the bank to his own use without the consent of the bank, and, as the law declares such to be an offense, it is obvious that the prosecution was instituted on probable cause therefor, and the court very properly directed a verdict for defendants.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

DUCKWORTH v. CITY OF SPRINGFIELD. (No. 1681.)

(Springfield Court of Appeals. Missouri.
March 11, 1916. Rehearing denied
April 15, 1916.)

1. DEDICATION \S 16(1)—MUNICIPAL CORPORATIONS \S 649—STREET—CREATION.

A public street becomes such by dedication by the owner, as by deed, plat, or an equivalent by process of condemnation, or by adverse user.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 15, 17, 19; *Dec. Dig.* \S 16(1); *Municipal Corporations*, Cent. Dig. §§ 1421, 1422; *Dec. Dig.* \S 648.]

2. LIMITATION OF ACTIONS \S 11(1) — RUNNING OF STATUTE AGAINST GOVERNMENT.

The statute of limitations does not run against the United States.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 85, 86; *Dec. Dig.* \S 11(1).]

3. MUNICIPAL CORPORATIONS \S 379—STREETS—CHANGING GRADE OF SIDEWALKS—LIABILITY—STATUTE.

Under Rev. St. 1909, § 9254, containing the charter powers as to streets of the city of Springfield, and giving it power to open, improve, and control streets, avenues, and alleys, where the city, under license, revocable at will, from the Secretary of War, regraded the sidewalks of an avenue within its limits which was owned by the federal government, running to a national cemetery, the city was not liable for

damages occasioned a property owner by such regrading, as its act was ultra vires, its charter powers being limited to public streets and avenues of the city, while, where a city makes improvements beyond its authority and goes outside of its corporate limits or on private property, or when there is no valid ordinance authorizing it, it is not liable for damages arising therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 917-919; Dec. Dig. § 379.]

1. MUNICIPAL CORPORATIONS § 647 — CONTROL OF STREETS—ACQUISITION.

By the extension of its corporate limits a city acquires control over all highways formerly controlled by a county thereby included within it, since the control over such highways passes by virtue of the state law from the one political subdivision of the state to the other, accordingly as the highway is in the one or the other.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1420; Dec. Dig. § 647.]

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Suit by J. T. Duckworth against the City of Springfield. From a judgment for plaintiff, defendant appeals. Reversed.

Fred A. Moon and Frank B. Williams, both of Springfield, for appellant. Mason & Page, of Springfield, for respondent.

STURGIS, J. This is a suit for damages caused to plaintiff's property by raising the grade of the street on which plaintiff's property abutted under city ordinances enacted for grading, paving, curbing, and sidewalk purposes and by thereafter causing a sidewalk to be constructed on such grade, whereby plaintiff's property is left some 3 feet below such grade. The defendant denies its liability on the ground that any action on its part in this respect, and whatever it did in this connection by passing ordinances, letting contracts, etc., was ultra vires. The basis of this contention by the city is that the street in question, known as the "National Boulevard," was not, at the time of said street being so improved, one of the streets of said city; that the city had no power or jurisdiction to cause such street to be improved, and any attempt to do so was utterly void. The history of this so-called street is that the United States acquired ownership of the National Cemetery some three miles south of Springfield, presumably under authority of section 4870, Revised Statutes of the United States (U. S. Comp. St. 1913, § 9962), relating to such cemeteries. Such ownership was conceded by the Legislature of this state (Laws 1877, p. 350, now section 1812, R. S. 1909) ceding to the United States full and entire control and jurisdiction over the land embraced therein. In 1884 the United States purchased from John S. Phelps a strip of land 80 feet wide, extending from the then corporate limits of Springfield to said National Cemetery. Said land was conveyed to the United States by warranty deed reciting therein that same is—

"for the purpose of a roadway from the city of Springfield, Missouri, to the National Cemetery in said Greene county, Missouri, or for building a roadway upon."

This strip of land became an entrance to such National Cemetery, and for many purposes a part and parcel thereof. The National government thereafter constructed a roadway thereon known as the "National Boulevard," and the same has been used as such ever since. At the trial the following agreement was made by the parties:

"It is admitted by the parties that the National Boulevard was at the time of the alleged change of grade a national way of the United States government extending from Cherry street in the city of Springfield, Mo., for a distance of about three miles, to the National Cemetery, which is a cemetery owned and controlled by the United States government and in which deceased soldiers, only, of said government are buried; that since the establishment of such roadway, the United States government has exercised exclusive control over the same, establishing the grade of the same, macadamizing the same, putting in culverts and waterways, setting out shade trees and caring for them, cutting the grass and weeds each year, and maintaining notices along the same forbidding fast driving and the burning of weeds on the same."

After this roadway was acquired, constructed, and graded by the United States, an addition to the city, including the lots in controversy, was platted abutting on this boulevard and the corporate limits of the city have been extended so as to include the same. In 1910 the roadway of this boulevard having already been brought to a grade by the United States, the lot owners and city became desirous of further improving the same by constructing sidewalks thereon. The following permit was thereupon obtained:

"The city of Springfield, Missouri, is hereby granted a license revocable at will by the Secretary of War to construct and maintain a sidewalk on and along the Springfield National Cemetery Boulevard within the city limits of Springfield, Missouri; this, pending legislation by Congress authorizing the conveyance of that portion of said boulevard to said city. This license is given subject to the following conditions: 1. That the work herein permitted to be done shall be subject to the supervision and approval of the officer of the United States in charge of the locality in question.

"Witness my hand this 3d day of June, 1910.
"Robert Thaw Oliver, Asst. Sec. of War."

Thereupon the city, treating this part of the boulevard as a city street, passed ordinances, the regularity of which is not questioned, causing a sidewalk to be constructed by a contractor in front of plaintiff's property, conforming to the grade of the roadway and at the cost of the property owners. The building of this sidewalk caused the alleged damage to plaintiff's property.

[1, 2] That the part of the National Boulevard thus caused to be improved by the construction of this sidewalk is not one of the streets of the city, though within its corporate limits, must follow, we think, from the facts stated. A public street becomes

such either by dedication by the owner (by deed or plat or something equivalent), by process of condemnation, or by adverse user. Here the land was deeded to the United States and continued its property. Though used by the public for travel thereon during the last 30 years, such use by the general public has been purely permissive and not adverse. Besides this the statute of limitations does not run against the United States. 25 Cyc. 1006; *United States v. Barnes* (C. C.) 31 Fed. 705. Neither the state nor city had ever assumed to exercise jurisdiction over this highway as such, or to take charge of, improve, or spend public money thereon. These powers had been exercised by the United States.

[3] The city of Springfield as a municipal corporation derives all its powers from the state of Missouri. It possesses such powers as its charter from the state gives it. *Leach v. Cargill*, 60 Mo. 316. Section 9254, R. S. 1909, contains its charter powers in this respect, and the powers there given to open, improve, and control the streets, avenues, and alleys are necessarily limited to public streets, avenues, and alleys of the city—those highways which, in the absence of such grant by the state to the city, would be controlled by the state. Unless the road or street is a public one, and such as the state or its governmental subdivision has acquired the right to control and improve, then it is not one of the streets of the city. The fact that a roadway over which the public has a permissive use, but which is being maintained and controlled by some one other than the city, and especially when so maintained and controlled by the supreme governmental authority, is within the corporate limits of the city does not make it a street of the city.

[4] The facts here present an entirely different situation than that of a public road in the country over which the state or its subdivision, the county, has control, and which by the extension of the corporate limits of some city comes within such city. In such case it is rightfully held that the control over such highway passes by virtue of the state law from one political subdivision of the state to the other accordingly as the highway is in the one or the other. *Kurtz v. Knapp*, 127 Mo. App. 608, 106 S. W. 537; *State v. Franklin*, 133 Mo. App. 486, 113 S. W. 652; section 10554, R. S. 1909. That this part of the National Boulevard was not a street of the city and subject to its jurisdiction and control in the matter of making improvements is shown by the fact that, before attempting to construct this sidewalk, the city sought and obtained permission from the United States, revocable at will, to construct and maintain a sidewalk thereon, and such permission was given subjecting the doing of any such work to the supervision of the United States.

Under the most favorable view of the case for plaintiff, the city is shown to have constructed this sidewalk on property owned by another and in legal contemplation other than one of the streets or avenues of the city. Where a city makes improvements beyond its authority because outside of its corporate limits or on private property or when there is no valid ordinance authorizing it, the city is not liable for damages arising therefrom. In *McQuarter v. St. Joseph*, 134 Mo. App. 640, 114 S. W. 1140, where the city had caused a change of grade in a street under a void ordinance, it was held that the city was not liable for damages to an abutting landowner since the void ordinance gave the contractor no authority to do the work. In *Maudlin v. City of Trenton*, 67 Mo. App. 452, where a city, by its officers, changed the grade of a street without any valid authority, the court held that the city was not liable for damages to an abutting landowner. In *Kurtz v. Knapp*, 127 Mo. App. 608, 611, 106 S. W. 537, the court assumed that if improvements were made on private property, a tax bill therefor would be void because of a lack of authority in the city to make any such improvements, and this court directly so held in *Springfield v. Baxter*, 180 Mo. App. 40, 165 S. W. 366. This court also held in *Bigelow v. Springfield*, 178 Mo. App. 463, 162 S. W. 750, that a city cannot be held for damages when it attempts to make improvements beyond the scope of its authority. To the same effect are *Rowland v. City of Galatin*, 75 Mo. 134, 42 Am. Rep. 395; *Becker v. La Crosse*, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829, 67 Am. St. Rep. 874; *Elliott on Roads and Streets* (3d Ed.) §§ 597-600.

The temporary permit, revocable at will, given by the United States, allowing the city to construct and maintain a sidewalk on this National Boulevard, instead of showing an intention of the landowner to dedicate or grant said land to the city for one of its public streets, evinces an intention to the contrary, in that the United States retained its jurisdiction and control over the same as a highway the same as if such permit had been granted to a private person.

It results that the judgment of the trial court is reversed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

STATE v. WILLIAMS. (No. 14250.)
(St. Louis Court of Appeals. Missouri. March 7, 1916.)

1. INDICTMENT AND INFORMATION \S 110(12) — REQUISITES OF ACCUSATION — FOLLOWING LANGUAGE OF STATUTE.

An information for violation of Rev. St. 1909, § 4713, prohibiting any one from unlawfully, willfully, maliciously, and contemptuously disquieting and disturbing an assembly of

people met for a lawful purpose, which information follows the language of the statute, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294; Dec. Dig. ¶110(12).]

2. INDICTMENT AND INFORMATION ¶125(19) —DUPLICITY.

An information charging that defendant did unlawfully, willfully, and maliciously and contemptuously disquiet and disturb an assembly of people met for a lawful purpose, to wit, for literary, social, and religious purposes, by making a noise, by rude and indecent behavior, and by profane discourse within a church, is not bad for duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 350; Dec. Dig. ¶125(19).]

3. DISTURBANCE OF PUBLIC ASSEMBLAGE ¶11—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of disquieting and disturbing an assembly met for literary, social, and religious purposes.

[Ed. Note.—For other cases, see Disturbance of Public Assemblage, Cent. Dig. § 39; Dec. Dig. ¶11.]

Appeal from Circuit Court, Madison County; Peter H. Huck, Judge.

"Not to be officially published."

Jack Williams was convicted of disturbing a public assembly, and appeals. Affirmed.

B. H. Boyer, of Farmington, for appellant.
E. D. Anthony, of Fredericktown, for the State.

ALLEN, J. This is a prosecution under section 4713, Revised Statutes 1909. Defendant was found guilty, and his punishment assessed at a fine of \$1, and he appeals.

The information charges that the defendant, "on the 16th day of November, 1912, at and in the county of Madison in the state of Missouri, did unlawfully, willfully, and maliciously and contemptuously disquiet and disturb an assembly of people then and there met for a lawful purpose, to wit, for literary, social, and religious purposes, at the Red Church in Mine La Motte in said Madison county and state of Missouri, said Red Church being set apart for literary, social, and religious purposes, by making a noise, by rude and indecent behavior, by profane discourse within said Red Church, against the peace and dignity of the state."

The evidence for the state went to show that the defendant and some companions created a disturbance in an assembly of persons met in the basement of the church building mentioned in the information, when and where a church entertainment was in progress, ultimately resulting in "breaking up" the meeting. The testimony is that the defendant "staggered" about the room, talking in a loud voice, and making much noise; that he created a disturbance at one of the dining tables by loud talking, by pouring soup over the table and in other ways, then proceeded to another table where he was guilty of conduct of a similar nature, and joined with

some others in such rude, boisterous, and disorderly conduct as to cause the meeting to break up in great confusion.

Defendant's testimony is very brief. He asserts that he used no profane or vulgar language and denied that he poured soup upon the table; but there is no denial on his part of other acts and conduct of a disorderly nature attributed to him by the state's witnesses. He called certain witnesses who testified that they saw nothing in his conduct to attract attention.

[1] It is urged here that the information is insufficient to charge an offense under the law, and that in any event it is bad for duplicity. The information follows closely the language of the statute, charging the offense of disturbing a meeting or assembly of people met together for a lawful purpose. It clearly includes every element necessary to charge the offense. See *State v. McDaniel*, 40 Mo. App. 356.

[2] Though defendant filed a motion to quash the information, it did not attack the information for duplicity, and the motion to quash is not preserved in the bill of exceptions, but appears only in the record proper. But in any event it is so obvious that the information does not charge more than one offense as to leave no room for argument. See *State v. McDaniel*, supra.

[3] The point made that the evidence is insufficient to sustain the conviction is clearly without merit. The testimony was ample from which the jury could find that the defendant did "disquiet" and "disturb" those assembled, by "making a noise," and by "rude or indecent behavior," within the place of assembly, in violation of section 4713, supra. In our judgment the evidence fully warrants the conviction, and, in fact, calls for a more substantial punishment than the nominal fine assessed.

The judgment is affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

Ex parte FISH. (No. 15158.)

(St. Louis Court of Appeals. Missouri. March 28, 1916.)

1. HABEAS CORPUS ¶22(2)—SCOPE OF WRIT—ILLEGAL COMMITMENT.

One held under a void process may be released on habeas corpus; therefore, where it was contended that a special judge who committed petitioner had no authority, that question may be determined on application for the writ.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 20; Dec. Dig. ¶22(2).]

2. JUDGES ¶14—ST. LOUIS COURT OF CRIMINAL CORRECTION—STATUTES.

Rev. St. 1909, §§ 3905, 5190, relating to the selection of special judges, apply to the appointment of special judges in the St. Louis court of criminal correction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 47; Dec. ¶14.]

3. COURTS ⇨117—RECORD—VERITY.

The record of a court imports absolute verity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 374; Dec. Dig. ⇨117.]

4. JUDGES ⇨16(1) — CHANGE OF — SPECIAL JUDGES.

Under Rev. St. 1909, §§ 3965, 5199, respectively providing that where the parties agree the court, when disqualified, may appoint a member of the bar as a special judge, and requiring, in case of a criminal prosecution, that such agreement between defendant and the prosecuting attorney be in writing and the regular judge approve the selection, a special judge appointed to sit in the St. Louis court of criminal correction on disqualification of the regular judge is not invested with jurisdiction, where the record showed that the parties were unable to agree on the selection.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 46, 53-56; Dec. Dig. ⇨16(1).]

5. COURTS ⇨114—ORDER NUNC PRO TUNC—SPECIAL JUDGE—APPOINTMENT.

A regular judge of the St. Louis court of criminal correction cannot, after the time for appealing has elapsed, alter nunc pro tunc an entry showing the appointment of a special judge, so as to show that the parties consented to his appointment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 368; Dec. Dig. ⇨114.]

6. JUDGES ⇨18—SPECIAL JUDGE—ENTRIES.

Where the record of the St. Louis court of criminal correction recited that the parties were unable to agree on the appointment of a member of the bar as a special judge, the regular judge having disqualified himself, and, on the other hand, that the appointment was made by oral agreement between counsel, the recitals are conflicting, and the appointment cannot be upheld.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 63; Dec. Dig. ⇨18.]

7. JUDGES ⇨6—DE FACTO OFFICERS—APPOINTMENT.

A member of the bar, improperly appointed as a special judge on disqualification of the regular judge, is not a de facto officer, and his acts will not be upheld as such.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 11, 12; Dec. Dig. ⇨6.]

"Not to be officially published."

Petition by William E. Fish for a writ of habeas corpus. Writ issued, and petitioner discharged.

Wm. E. Fish, of St. Louis, in pro. per. A. J. Fitzsimmons, of St. Louis, for respondent.

ALLEN, J. The petitioner herein, an attorney at law, sued out a writ of habeas corpus in this court, asserting that he was unlawfully restrained and deprived of his liberty by respondent, the sheriff of the city of St. Louis, to whose custody he had been committed to enforce the payment of a fine imposed upon him, as for contempt of court, by one sitting as special judge of the St. Louis court of criminal correction, division No. 2. The proceeding before us calls in question the validity of the appointment of the so-called special judge who issued the commitment in question. It appears that one Campbell and one Chrismer, police offi-

cers of the city of St. Louis, were arraigned in division No. 1 of the St. Louis court of criminal correction, charged with the offense of assault and battery; but the judge of that division of the court aforesaid disqualified himself, and the cases were sent on change of venue to division No. 2 of that court. The regular judge of division No. 2 likewise disqualified himself, and undertook to appoint an attorney at law as special judge, who proceeded to try these prosecutions. The proceedings had in the premises are shown by the following entry of December 29, 1915, in the record of the court of criminal correction, division No. 2, before us, viz.:

"Now, at this day, this cause coming on for trial, comes the prosecuting attorney and the defendants by their attorney. Thereupon Hon. Benj. F. Clark, judge of this court, disqualifies himself from the trial of this cause, and the parties hereto being unable to agree upon some attorney at law as special judge, the court doth appoint Wells Blodgett Priest as such special judge herein, and said Wells Blodgett Priest being duly qualified and sworn, the trial of this cause proceeded, and the defendants having seen and heard read the information herein, say they are not guilty in manner and form as therein charged, and the court having heard the evidence and being fully advised of and concerning the premises, doth find the defendants guilty of the said charge and assess their punishment at a fine of one hundred dollars each and thirty days each in the jail of the city of St. Louis, state of Missouri, together with the cost herein accrued."

Thereafter on January 15, 1916, the regular judge of said court undertook to amend, nunc pro tunc, the record of December 29, 1915, quoted above, changing that portion thereof with which we are immediately concerned so as to read as follows:

"Now, at this day, this cause coming on for trial, comes the prosecuting attorney and the defendants by their attorney. Thereupon Hon. Benj. F. Clark, judge of this court, disqualifies himself from the trial of this cause, and the parties hereto being unable to agree upon some attorney at law, as special judge herein, by oral agreement between William E. Fish, attorney for defendants, and Ray Weinbrenner, assistant prosecuting attorney, representing the state of Missouri, and Hon. Wells Blodgett Priest was selected as special judge to try said cause." etc.

The commitment before us recites that on January 29, 1916, in the St. Louis court of criminal correction, "before Wells Blodgett Priest, special judge in the case of State v. Campbell et al., Wm. E. Fish was guilty of disorderly, contemptuous, and insolent behavior, committed during the sitting of said court, in immediate view and presence of the court, and directly tending to interrupt its proceedings and to impair the respect due to its authority, in this, to wit:

"That during the progress of the hearing on the motion for a new trial of the cause wherein the state of Missouri is plaintiff and Jas. R. Campbell and Octa N. Chrismer are defendants, when the court ordered the sheriff to call the defendants in the said cause, William E. Fish, the respondent herein, while acting as attorney

for said defendants, arose and in a loud, defiant, and commanding manner, addressing said defendants Campbell and Chrimer, said, "I command you not to answer," then, turning towards and addressing the court, he, the said William E. Fish, said, "The defendants, on advice of their attorney, will refuse to answer any call or obey any order by Wells Blodgett Priest, sitting as special judge in this case," and that the court "did consider and adjudge that the said William E. Fish, for his criminal contempt as aforesaid, pay to the state of Missouri, for the use of the city of St. Louis, a fine of \$10, and that he be committed to the jail of the city of St. Louis, state of Missouri, until said fine is paid or he be otherwise discharged."

[1] This is the state of the record before us, under which is presented the question of the jurisdiction and authority of the so-called special judge to commit the petitioner for contempt. It cannot be doubted that one held under void process may be released on habeas corpus. It is well settled that "if the petitioner has been committed by one having no jurisdiction whatsoever, but who assumes to exercise the powers and authority of a court, the validity of the commitment may be determined on habeas corpus." See *Ex parte Snyder*, 64 Mo. loc. cit. 63; *Ex parte O'Brien*, 127 Mo. 477, 30 S. W. 158; *Ex parte Creasy*, 243 Mo. 879, 148 S. W. 914, 41 L. R. A. (N. S.) 478; In the Matter of Whicker, 187 Mo. App. 96, 173 S. W. 38.

[2-4] Our Supreme Court has held that sections 3965 and 5199, Rev. Stat. 1909, apply to the appointment of special judges in the St. Louis court of criminal correction. See *State v. Wilder*, 198 Mo. 166, 95 S. W. 910. Neither of these sections authorize the regular judge to appoint a member of the bar to try a case pending in the court, when the regular judge is disqualified, unless the parties agree thereupon; and under section 5199, *supra*, such agreement, between the defendant and the prosecuting attorney, must be in writing, and the regular judge must approve the selection. We can only know what took place in the court of criminal correction by and through the record of the proceedings therein which we have before us. Whether that record correctly or incorrectly states what occurred, we cannot go behind it. The record imports verity and is conclusive upon us in this proceeding.

[5, 6] The original entry of the proceedings had on December 29, 1915, recites that the parties were unable to agree upon an attorney to act as special judge. That record, taken alone, upon its face shows that the alleged appointment was void, and that the appointee was wholly without jurisdiction and authority to perform any of the functions of a judge of that court. One can become invested with jurisdiction to exercise the powers of a special judge only in the manner prescribed by law. *Ladd v. Forsee*, 163 Mo. 506, 63 S. W. 831; *Bank v. Graham*, 147 Mo. 250, 48 S. W. 910. The amendment of January 15, 1916, was an attempt to make

the record state such facts as would bring it within the law and validate the selection of a special judge. We need not pause to consider the question of the power of the regular judge, in any event, to make an entry of this character in a case in which he had disqualified himself.

For another reason, the attempted amendment was, we think, clearly beyond the power of the regular judge. The St. Louis court of criminal correction, though a court of record, is one of limited jurisdiction and statutory origin, not proceeding according to the course of the common law. It is endowed with jurisdiction in misdemeanor cases similar to that conferred on justices of the peace. *Ex parte O'Brien*, *supra*. And it must follow that its power to alter or amend the record entry of a judgment is similarly limited. See *State v. Grifflie*, 118 Mo. 188, 23 S. W. 878. Whatever control such a court (not one of general jurisdiction, and having no terms of court) may have over its own records, it may be safely asserted that it has no power to change its record entry of a judgment, after the time limited for entering the same, to show jurisdictional matters.

But, taking the amended record, we regard it likewise insufficient to show any jurisdiction or authority on the part of the so-called special judge to act as such. The amended record recites on the one hand that the parties were unable to agree, and on the other that the appointment was made by oral agreement between counsel. These recitals are conflicting and self-destructive, and constitute what is termed a *felo de se*. Such a record cannot be upheld as showing compliance with the law respecting the selection of a special judge.

[7] The argument that the attorney appointed by the regular judge became a *de facto* judge, whose acts cannot be here questioned, needs but passing notice. Our Supreme Court has held that one who, without warrant of law, is called as a special judge to preside over a court of record, is wholly without jurisdiction to exercise the powers of such court, and that his acts and judgment have no legal force or vitality. *Ladd v. Forsee*, *supra*; *Bank v. Graham*, *supra*.

It follows that the petitioner should be discharged from the custody of the sheriff; and it is accordingly so ordered.

REYNOLDS, P. J., and NORTONI, J.,
concur.

ANDERSON v. ST. LOUIS & S. F. R. CO.
(No. 13909.)

(St. Louis Court of Appeals. Missouri.
March 7, 1916. Rehearing Denied
March 28, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 286(30)—INJURIES TO SERVANT—QUESTION FOR JURY.

In a section hand's action for injuries while riding on a flat car which was derailed as the

result of a collision with cattle on the track, the locomotive engineer's negligence in not avoiding the collision held a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000, 1001; Dec. Dig. ☞286(30).]

2. MASTER AND SERVANT ☞289(32)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a section hand, engaged in throwing ties off a flat car as the train moved slowly, did not leave the car when he had unloaded it and climb over other cars laden with cross-ties covered with sleet and ice to take refuge in the caboose while the train proceeded three or four miles to a siding where it might let a passenger train in its rear pass, but remained on the flat car, and was injured when it was derailed, such section hand was not negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1124; Dec. Dig. ☞289(32).]

3. DAMAGES ☞132(7)—PERSONAL INJURIES—EXCESSIVE VERDICT.

In a section hand's action for injuries received when the flat car on which he rode was derailed, and he was precipitated down the railroad embankment, a number of railroad cross-ties and debris coming upon him, breaking off and crushing up both bones of his ankle, and bruising and skinning his hips and other portions of his body, so that he was confined in the hospital for several weeks, and was on crutches for more than three months, and used a cane for three months thereafter, being a young man twenty-eight years of age when injured, and suffering permanent injury and pain during the five years from the accident to trial of the cause, a verdict for \$7,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 378; Dec. Dig. ☞132(7).]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

"Not to be officially published."

Suit by Herman B. Anderson against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellant. K. C. Spence, of Bloomfield, and Wilson Cramer, of Jackson, for respondent.

NORTONI, J. This is a suit for damages accrued on account of personal injuries received through the negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

[1] Plaintiff, a section hand in the employ of defendant, was engaged on the day in question in unloading cross ties from a flat car in defendant's train. But at the immediate time of his injury he was standing on the flat car, when a derailment occurred as a result of a collision between the locomotive attached to the train with a number of cattle on the track. The train consisted of a locomotive and tender, six flat cars loaded with railroad cross-ties, and a caboose. The train moved slowly along some three or four miles an hour, and plaintiff and his companions

distributed the cross-ties by pushing them from the flat car along either side of the track. Four of the cars constituting the train were supplied with air brakes, while two of them were not. In making up the train defendant had so placed the cars as to render the air brakes thereon of no use for the purpose of checking up or slowing its speed. In other words, defendant had placed the two nonair cars next to the locomotive and the four cars equipped with air brakes in the rear, so there was no connection with the air brake appliances on the locomotive. This it appears rendered the train difficult to control. After plaintiff and his companion had pursued their work for a time the trainmen discovered defendant's passenger train approaching from the rear, and the work of unloading ties was suspended for the while until the work train on which plaintiff was riding could be run some 3 or 4 miles to the station of Taskee, where it was intended to take siding and permit the passenger train to pass. The work train, it is said, ran about 20 miles per hour, and while approaching a road crossing at which a bridge was immediately adjacent the locomotive collided with a number of cattle on the track, and occasioned a derailment of the flat car on which plaintiff was standing at the time, precipitating him forward down the embankment to his injury. The case proceeds in the view that defendant was negligent in making up its train through placing the cars equipped with air brakes in the rear and the nonair cars adjoining the locomotive so as to render the whole more or less unmanageable; also defendant is averred to have been negligent in operating its train 18 or 20 miles per hour in the circumstances stated at the place in question without providing means to control it. These two matters, it is said, conspired proximately to the injury of plaintiff. The evidence abundantly supports the averments of negligence relied upon in the petition, but it is argued that it does not appear the cattle came upon the track a sufficient length of time before the approach of the locomotive to enable the engineer to avert the collision, even though the train were well equipped with brakes. It is to be said that the point of collision was at the crossing of a public highway, where ordinary care cast the duty on the engineer to be on the lookout. It appears the railroad curved immediately adjacent to the crossing, but the inside of the curve was on the side of the engineer, who controlled the movements of the locomotive. The evidence is that the locomotive engineer had a clear view of the crossing for 485 feet before coming upon it, and that 33 head of cattle were about the crossing at the time. It is said some of the cattle were on the track, and some on either side. It is true the witness does not say in terms that the cattle were standing upon the track when the loco-

motive came into view 485 feet away, but he does say that he saw the cattle on the track and heard the train approaching and saw the collision shortly thereafter. Obviously this is sufficient to afford a reasonable inference that the cattle were on the track when the locomotive came into view 485 feet away. A locomotive engineer testified that at the rate of speed the train was then traveling it could have been stopped before colliding with the cattle on the track, averting the derailment, if it had been properly equipped with air. It is clear the evidence made a case for the jury.

[2] It is argued plaintiff should be declared negligent as a matter of law because he remained on the flat car during the time and did not take refuge in the caboose or locomotive after the work of throwing off the ties was suspended and while the train was proceeding some 3 or 4 miles to Taskee station. But manifestly this argument is without merit. It appears plaintiff remained on the flat car where he had been assigned to work, and to have taken refuge elsewhere it was necessary for him to climb over cars laden with cross-ties which were covered with sleet and ice. The question concerning plaintiff's contributory negligence, however, was said, on a former appeal of this identical case, to be one for the jury, as will appear by reference to *Anderson v. St. Louis & S. F. R. Co.*, 149 Mo. App. 266, 130 S. W. 82; *Id.*, 164 Mo. App. 357, 144 S. W. 1198.

[3] Plaintiff received his injury about seven years ago. The suit has been pending a long time. It is said to have been tried three times. On the first trial plaintiff recovered a verdict of \$5,000; on the second trial a verdict of \$1,750; and on the third and last trial a verdict of \$7,500. It is argued this verdict is excessive, but the trial court approved it, and we are indisposed to do otherwise. At the derailment of the car plaintiff was precipitated down the railroad embankment, and a number of railroad cross-ties and debris came upon him. Both bones of his ankle were broken off and crushed up—that is, fractured at the ankle joint—and his hips were bruised and skinned, as were also other portions of his body. He was confined in the hospital for several weeks, and hobbled around on crutches more than three months, and used a cane for three months thereafter. He was a young man twenty-eight years of age at the time of his injury, and the evidence is that his injury is permanent; that is, his ankle is more or less stiff and turns when he attempts to use it. He wears a cuff or collar about it. Plaintiff testified, too, that he suffered pain from his injury during all of the five years thereafter until the last trial of the case. On this evidence we do not regard the recovery as excessive. The other arguments put forward in the brief have been duly considered, but we

do not regard them of sufficient merit to warrant discussion in the opinion. The case appears to have been well and fairly tried.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STROTHER v. McFARLAND. (No. 14092.) (St. Louis Court of Appeals. Missouri. March 7, 1916.)

1. EVIDENCE \S 248(1)—ADMISSIONS—OWNER-SHIP OF PROPERTY.

In suit against a county collector of revenue for conversion of a wife's carriage, defendant's testimony that the carriage was never assessed, as the property of the wife, but that her husband included it in his assessment list and paid the taxes thereon, was inadmissible, as a husband cannot admit away by parol or deed his wife's separate property rights.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 953, 956, 959, 963, 964; Dec. Dig. \S 248(1).]

2. EVIDENCE \S 317(1)—HEARSAY.

In suit for conversion of a wife's carriage, defendant's testimony, that the husband stated he was sorry suit had been instituted, and that the wife's brother had procured it, the statements attributed to the husband not having been made in the presence of plaintiff wife, was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1174; Dec. Dig. \S 317(1).]

3. HUSBAND AND WIFE \S 10(1)—WIFE'S SEPARATE PROPERTY—HUSBAND'S ASSERTION OF OWNERSHIP.

The property of a wife in personality is not affected by her husband's assertion of ownership therein without her assent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 38, 46; Dec. Dig. \S 10(1).]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

"Not to be officially published."

Suit by Belle Strother against J. W. McFarland. From a judgment for defendant, plaintiff appeals. Judgment reversed, and cause remanded.

See, also, 166 Mo. App. 364, 148 S. W. 988.

C. G. Shepard and Everett Reeves, both of Caruthersville, for appellant. R. L. Ward, of Caruthersville, for respondent.

NORTONI, J. This is a suit in trover as for conversion. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

[1-3] Plaintiff, Belle Strother, is the wife of Jefferson D. Strother, and defendant was at the time the present controversy originated collector of the revenue in Pemiscot county. It appears that Jefferson D. Strother owed certain taxes and defendant collector levied upon and sold a carriage to liquidate the amount. Plaintiff asserts the carriage so levied upon and sold as the property of her husband belonged to her, and instituted this suit in conversion against defendant

strip of ground in controversy for the city's purposes. At this time plaintiff had, according to his testimony, from five to seven tons of coal upon the ground formerly occupied by the engine house, and this defendant removed. Litigation followed with which we are not here concerned; though it may be stated incidentally, that the record discloses that plaintiff was restrained from replacing the fence, and that defendant proceeded to and did build its city hall upon this strip at or near the northern line thereof.

[1] I. The action of the court in permitting plaintiff's counsel to make certain remarks in his opening statement, over the objections of defendant, and to which exceptions were duly saved, is assigned as error. Among other things, plaintiff's counsel in referring to the entire lot of land which plaintiff claimed, including the strip in controversy, said:

"Mr. Oliver, in my presence, told Mr. Underwood that he had examined the title to this property, and if he bought it he would get a good title. Mr. Underwood, relying on these statements, paid his money for this property."

[2, 3] We think that this assignment of error is well taken. The merits of the title cannot be inquired into in an action of this character. See section 7877, Rev. Stat. 1909; *Underwood v. Caruthersville*, 146 Mo. App. 288, 129 S. W. 1076 and cases cited. And evidence concerning the title is inadmissible unless it be in a case where evidence of this character is pertinent to the issue of plaintiff's possession. See *Moore v. Shoup*, 123 Mo. App. 409, 100 S. W. 53. And in any event the statement by counsel to the effect that he heard an attorney advise plaintiff as to the title, and that plaintiff relied upon this, was prejudicial. Later when plaintiff undertook, of his own initiative, to testify to this same thing, an objection was sustained and his testimony stricken out. But the statement of plaintiff's counsel quoted above, and others of much the same tenor and purport, were permitted to be made to the jury. Such statements we think were clearly prejudicial to the defendant.

II. Though upon the former appeal it was suggested in the opinion that the instructions should be few and couched in simple, plain language, the cause upon this last trial was submitted to the jury by sixteen instructions. Nine of them, according to the abstract before us, were given at plaintiff's request, and seven at the request of defendant.

[4] Several of plaintiff's instructions are complained of. The first told the jury that if they found that plaintiff "had such peaceable possession of the strip of land in question, as to use said land for a coalyard and to use said strip of land in connection with his lot adjoining the strip in dispute as a coalyard, and a place to do public weighing," and that defendant entered thereupon, removed plaintiff's coal, fence, etc., and against plaintiff's will took possession of the land, then to find for plaintiff. This told the jury,

in effect, that the mere fact that plaintiff made some use of this strip in connection with his business sufficed to show such possession in plaintiff as to entitle him to maintain the action. This was error.

[5] Another instruction for plaintiff is as follows:

"That the plaintiff was in good faith in erecting the fence spoken of by the witnesses, and which defendant is charged with having torn down at the time of the alleged forcible entry, and that plaintiff did not erect said fence solely for the purpose of securing some advantage in expected litigation between him and the defendant, then you should find the defendant guilty of forcible entry and detainer and that plaintiff is entitled to the possession of the land in question."

While it was said in the opinion in the former appeal that the good faith of plaintiff in erecting the fence was "the real issue in this case," an instruction such as that under discussion should not be given to the jury. It purports to cover the entire case and directs a verdict for plaintiff without requiring a finding of the essential elements necessary to a cause of action for forcible entry and detainer.

III. There are other questions pertaining to the instructions, but they need not be discussed. It is clear that the errors noted, if not others, are such as to necessitate the reversal of the judgment and the remanding of the cause for another trial. But the writer is of the opinion that plaintiff made no case for the jury, and that our order should be one of outright reversal.

The undisputed facts show that defendant had possession for some years of this entire strip of land in controversy. Indeed, the city's engine house was built upon and occupied for years a very considerable part of it. This engine house was connected with the city hall; that is, as plaintiff himself testified, "It was joined on the end of the corner room of the city hall." The two lots, belonging respectively to plaintiff and defendant, are rectangular in shape, as are the other lots in this block. The fact that the city's buildings covered the greater part of one end of this strip of land was notice to plaintiff, and to every one else, that the city's possession extended at least to the rear wall of the engine house. When plaintiff purchased his lot, he fenced it on three sides, but did not place a fence between his lot and that of defendant. It appears that he did place, on or about the line which he has asserted to be the true line, a "bulkhead," extending for a short distance only, and intended to support coal which he might store upon the premises. It was evidently a simple affair, made of planks to prevent the coal from rolling about. It did not extend across the entire lot to the engine house, and it does not appear that it was put up as and for a fence, in order to define a possession then claimed by plaintiff, but merely to support his coal. It fell down, and it is conceded that it had been removed

or had disappeared altogether prior to the time of the erection by plaintiff of the fence in March, 1907.

Respondent contends that plaintiff had been in possession of this strip of ground, exclusive of that occupied by the engine room, for a period of more than two years by reason of his use thereof in connection with his coalyard. But it does not appear that plaintiff's acts in this connection were of such character as to give him a possession which the law will recognize and protect under the circumstances. It was an open, notorious, and visible fact that defendant's buildings extended over and stood upon one end of this strip. Its occupancy of its lot was such originally as to carry with it the possession of the entire lot, including the strip in controversy. After plaintiff had acquired the lot in the rear of defendant's lot, he began, according to his testimony, to dump coal upon a part of that portion of the strip not occupied by the engine house. As plaintiff said, no one objected to this. He did not have coal stored upon his premises throughout the entire year. He dealt therein in a small way, and, as he testified, was constantly hauling coal in and out "during the winter and early fall."

Granting that plaintiff from time to time dumped coal upon some of this ground, and that he and those dealing with him drove over some of it from time to time, these acts do not appear to show such possession, under the circumstances, as to entitle plaintiff to maintain this action. In suits of this character, what acts will constitute possession is a matter for the courts. *De Graw v. Prior*, 60 Mo. 56. And the facts shown in evidence do not make it appear that plaintiff ever acquired open, equivocal, and well-defined possession of this land.

After acquiring his lot, plaintiff did not undertake to inclose this strip therewith by a fence, or otherwise definitely establish the line later claimed by him to be the true line. The so-called bulkhead (to which plaintiff sometimes refers in his testimony as a bulkhead fence) was, as said, not a fence at all. It did not extend entirely across the vacant portion of the lot, and was evidently not intended to mark the boundary of the possession claimed by plaintiff. Its purpose was merely to prevent plaintiff's coal from rolling about. And it later disappeared altogether, leaving nothing to definitely determine the boundary line. Any physical possession arising by virtue of it was abandoned. *Dyer v. Reitz*, 14 Mo. App. 45. And there is no testimony that at the time of defendant's alleged entry there was any coal on that part of the strip. There were, as said, a few tons of coal on the end of the strip which was formerly occupied, for the most part, by the engine house. This coal had been placed there after the removal of the building, and before the work of excavating began. And de-

fendant's witnesses testified that it was put there after plaintiff had erected the fence in March, 1907.

It seems that the only physical possession obtained by plaintiff, by virtue of his trespasses upon this land, that was of a definite and exclusive character, was that acquired by the erection of the fence in March, 1907. This was evidently the view taken in the opinion on the former appeal, for it is said:

"When plaintiff built the fence, that gave him the physical possession of the land, and, if the law will recognize and protect that possession, the defendant could not forcibly enter and oust him, but if it be true, as indicated by some of the testimony, that plaintiff erected the fence solely for the purpose of securing some advantage in expected litigation between him and defendant, then his pretended possession can avail him nothing and the law will leave him where it found him." *Underwood v. Caruthersville*, 146 Mo. App. loc. cit. 294, 295, 129 S. W. 1078.

Upon the facts of the record before us, this view appears to be eminently correct, and ought to be adhered to.

It is true, as learned counsel for respondent asserts, that it is not always essential in cases of this character that one claiming possession of land inclose the same by a fence. The extent of the occupation may otherwise sufficiently appear. But this is a controversy between the owners of two adjoining city lots, which, so far as this record shows, had never been separated by a fence prior to 1907. Under such circumstances, surely one's possession of a strip such as that in controversy must be manifested by something which definitely and unequivocally establishes the extent of the occupation. See *Keen v. Schweigler*, 70 Mo. App. loc. cit. 422, 423.

Let us consider then the physical possession acquired by plaintiff by virtue of the construction of this fence in March, 1907. In the course of the opinion, on the former appeal, it is said:

"Another well-settled principle of law is that possession taken primarily for the purpose of securing an advantage in threatened or expected litigation is not such a possession as the court will recognize, and it cannot be made the foundation of any sort of action as between that party and the one against whom the advantage was sought by the act of taking possession. *Dyer v. Reitz*, 14 Mo. App. 45; *Swayze v. Bride*, 34 Mo. App. 414; *Apperson v. Allen*, 42 Mo. App. 537; *Buck v. Endicott*, 103 Mo. App. 248, 77 S. W. 85; *Milem v. Freeman*, 136 Mo. App. 117, 117 S. W. 644." *Underwood v. Caruthersville*, 146 Mo. App. loc. cit. 294, 129 S. W. 1078.

Without attempting the unprofitable task of a comparison of the evidence contained in this record with that in the record on the former appeal, it may be said that the record before us shows beyond controversy that plaintiff erected this fence, which was built during the night or very early one morning, solely for the purpose of securing a supposed advantage in litigation; and that plaintiff should be held, as a matter of law, to have thereby acquired a mere pretended and "scrambling possession," in the enjoyment of which the law will not protect him.

All of defendant's evidence, definitely touching the matter (and many witnesses testified), goes to show that plaintiff erected this fence after the lines had been run and the stakes set upon this strip of ground for the foundation work for the new building. And there is much positive testimony that the work of excavation had actually been begun. Plaintiff, in testifying in his own behalf, denied that the lines had been run before he erected this fence, claiming that this work was begun some three days later. But plaintiff's own testimony shows that the old buildings had been removed, that there was building material on hand, and preparations under way for the construction of the new city hall. And it was an open, notorious fact that this work was about to begin, if indeed, as all the other testimony in the case shows, it was not already under way. Plaintiff admits that he employed a helper and erected this fence very early one morning when no one was about. The "scrambling possession" thus obtained by him is not such possession as the law will recognize and protect.

In *Dyer v. Reitz*, supra, a case of this precise character, this court, in an opinion by Lewis, P. J., said:

"Possession * * * means a real dominion, capable of devoting the property to some beneficial use, however small, by him who enjoys it. Procedure must be invoked in behalf of such dominion, as a substantial right, whose enjoyment is invaded, or withheld; and not for the mere purpose of securing a vantage ground for other litigation. The suitor who employs it for the latter purpose attempts a fraud upon the law. He would have the courts employed, not in administering justice between litigants, but in rewarding only the most skillful strategist. Such a case is exactly presented by the party who relies on what has been aptly called a 'scrambling possession.' It is a possession without any savor of the legitimate enjoyment of property rights, and neither sought nor secured on any such account; but which is only scrambled for, by one party or by both, because of some supposed advantage it may command in a pending struggle. The uniform course of adjudication, here and elsewhere, has always been to refuse recognition of such a mis-called possession as investing its claimant with any title to the protection offered in behalf of a peaceable occupancy, however acquired, which the holder intends and uses simply as an exercise of that dominion which insures an enjoyment of the ordinary and accustomed rights of property. *Keene v. Schnedler*, 9 Mo. App. 597. The argument here made for the plaintiffs seems to assume that the act of building a fence or inclosure creates ipso facto a peaceable possession in the builder, which he may ever thereafter maintain by the action of forcible entry and detainer. We know of no law to that effect. If the party commit a trespass, in order to build the fence, he will still be a trespasser, notwithstanding the fence. If the fence be only a feature of his strategy to gain advantages in litigation, it will not better his position. It sufficiently appears from the action of the circuit court, in giving and refusing instructions, that the learned judge, sitting as a jury, did not find from the evidence any disturbance by the defendants of an actual and peaceable possession held by the plaintiffs and entitled to legal protection. In our view of the testimony, he could not well have erred in finding that the hasty erection on the morning

of October 18, 1881, was a mere scrambling effort by the plaintiff to gain a certain status in prospective litigation, and was not in any sense a peaceable or bona fide acquisition or assertion of actual possession, sufficient to furnish a foundation for the present proceeding."

The doctrine thus asserted appears to be altogether sound and wholesome. One who obtains a peaceable possession of premises (i. e., a possession as the law will recognize) is entitled to maintain forcible entry and detainer, though he may in fact have no title to the land and no right of possession. But a peaceable possession which will enable one to maintain the action must not be one which a mere trespasser has obtained by a scrambling process, or through some secret artifice or design, whereby he has obtained physical occupation of the land for the sole purpose of gaining an advantageous status in litigation.

[6] REYNOLDS, P. J., and NORTON, J., concur in what is said as to the errors not occurring at the trial, but are of the opinion that the question of plaintiff's possession is not one to be disposed of as a matter of course.

The judgment is therefore reversed, and the cause remanded.

KINGMAN PLOW CO. v. JOYCE et al. (No. 13790.)

(St. Louis Court of Appeals. Missouri. March 28, 1916. Rehearing Denied March 28, 1916.)

1. SALES §450—"CONDITIONAL SALE."

The term "conditional sale" is commonly applied to a class of transactions where, by terms of the contract, the possession of goods is delivered to the buyer but the property in them is to remain in the seller till the payment of the price; the buyer being entitled to possession and use till default in payment.

[Ed. Note.—For other cases, see Sales, (C) Dig. § 1321; Dec. Dig. §450.]

For other definitions, see Words and Phrases, First and Second Series, Conditional Sale.

2. SALES §457—CONDITIONAL SALE—TURE OF CONTRACT.

An order for goods which the signer agrees to receive and settle for on terms and conditions specified, designating the price which is to be paid as the goods are sold, containing no words constituting an agreement on the one hand to sell and on the other to buy, but reserving in the seller and authorizing it to draw on its supply of goods ordered to fill orders in the buyer's vicinity, is not a conditional sale, but a bailment for sale.

[Ed. Note.—For other cases, see Sales, (C) Dig. § 1335; Dec. Dig. §457.]

3. SALES §457—CONDITIONAL SALE—TURE OF CONTRACT.

That an order for goods employs the word "purchaser" and contains a general provision that all goods are subject only to a certain warranty does not affect the construction of the contract as a conditional sale or bailment for sale.

[Ed. Note.—For other cases, see Sales, (C) Dig. § 1335; Dec. Dig. §457.]

4. SALES \Leftrightarrow 457—CONDITIONAL SALES—NATURE OF CONTRACT.

A provision, in an order for goods to be paid for as sold that if the signer should become insolvent, make an assignment, sustain loss by fire or other casualty, transfer property or close out business, all obligations provided for in the contract should become due and payable at once does not change the instrument into a conditional sale, but merely matures such obligations as are imposed in the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1335; Dec. Dig. \Leftrightarrow 457.]

5. SALES \Leftrightarrow 457—CONDITIONAL SALES—NATURE OF CONTRACT.

That a company ordering goods paid the freight and was authorized to fix its selling prices, retaining the difference between the agreed prices for which it was to account to plaintiff and its own selling prices as compensation and to cover expense, does not make the contract one of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1335; Dec. Dig. \Leftrightarrow 457.]

Appeal from Circuit Court, Scott County; James A. Finch, Judge.

Action by the Kingman Plow Company against James R. Joyce and others, trustees of the Farmers' Mercantile Company. From a judgment for defendants, plaintiff appeals. Affirmed.

Sturdevant & Sturdevant and Ohas. A. Powers, all of St. Louis, for appellant. R. L. Ward, of Caruthersville, for respondents.

ALLEN, J. This is an action to recover the sum of \$610, the alleged purchase price of certain personalty delivered by plaintiff to the Farmers' Mercantile Company. Plaintiff corporation conducts a wholesale business, and in 1910 the Farmers' Mercantile Company, a corporation (hereinafter referred to as the "Mercantile Company"), was engaged in conducting a retail store at Vanduser, Scott county, Mo. Under a written order executed by the Mercantile Company on September 3, 1910, plaintiff shipped to it 15 wagons and 5 "Clinton boxes." It appears that 3 of the wagons were afterwards returned to plaintiff, and that 2 were sold by the Mercantile Company and payment made to plaintiff therefor. In June, 1911, the store buildings of the Mercantile Company were destroyed by fire, whereby the 10 wagons remaining in that company's possession, and the 5 boxes were totally destroyed. Thereafter the defendants were appointed trustees of the Mercantile Company in a proceeding for the dissolution of that corporation; and plaintiff instituted this action against them as such trustees. At the close of plaintiff's case the court gave a peremptory instruction offered by defendant, in the nature of a demurrer to the evidence. Plaintiff thereupon took a nonsuit, and, upon the court's refusal to set the nonsuit aside, appealed.

The written order of September 3, 1910, signed by the Mercantile Company, is, for the most part, a printed form furnished by

plaintiff. It is addressed to plaintiff and proceeds as follows:

"Please ship the goods hereafter specified on or about 19 or as soon thereafter as possible, via from to Farmers' Mercantile company * * * the freight charges to be paid by the undersigned unless otherwise agreed and stipulated herein in writing, and the undersigned agrees to receive and settle for same upon these and other terms and conditions printed on back hereof which are hereby agreed to as being our contract.

No.	Description.	Price Each.
16	Clinton wagons complete with spring seats but no brakes	55.00
5	28' Clinton boxes.....	12.—

Upon the face of the order the following provisions were written, viz.:

"Payable. These wagons are to be paid for as sold."

"Kingman Plow Co. reserves the right to draw on these wagons to fill orders taken in south-east Mo."

The printed matter on the back of the order, referred to in the latter, contains certain provisions not applicable to this transaction, having to do with plowshares, shovels, etc. And certain other provisions are here wholly irrelevant. So much thereof as could possibly have any bearing upon the case before us is as follows:

"If requested, notes with highest legal rate of interest per annum from maturity, unless otherwise specified (including exchange and collection charges), will be given to you (plaintiff) on receipt of invoice and bill of lading in settlement of same, it being expressly understood that title to the goods shall not pass until said notes are paid in money. * * *

"The undersigned purchaser agrees to look to transportation companies for all losses or damages to goods in transit when receipted for in good order. * * *

"If the undersigned purchaser countermands this order, or any part thereof, or causes shipment to be held beyond present season, the undersigned purchaser agrees * * * to pay fifteen per cent. of the net amount of the goods herein ordered to you as agreed and liquidated damages.

"It is distinctly understood that all goods are sold subject to the following warranty and no other, viz.: That they are well made of good material, are durable if used with proper care and will do the work for which they are intended. * * *

"Should the undersigned become insolvent, make an assignment, remove to another place, execute a chattel mortgage, sustain loss by fire or other casualty, transfer property or close out business, or in case of death of any member of the firm or failure to carry out the conditions of this contract or if bankruptcy or attachment or other legal proceedings be begun against purchaser, all obligations provided for in this contract or arising therefrom, shall become due and payable at once, or at any time thereafter, at your option. * * *

"It is expressly agreed that the title to and ownership of all goods shipped under this contract shall remain vested in you, unless at your option it shall be expressly waived in writing and the goods are to be held at all times subject

to your order until paid for, if sales are made before payment, they shall be made only in the regular course of business and the proceeds of all such sales, whether cash, book accounts or notes, are to be held as your property in trust, until all obligations provided for in this contract or arising therefrom are fully paid in money or until full payment is made at the net prices herein specified but nothing in this clause shall release the undersigned purchaser from making payments as above stipulated. It is further agreed that notes taken by you are not accepted as payment or a novation of waiver of this contract; and shall not be construed as a waiver of your right to have the same recorded, or right to take possession of said goods on demand, but that the same shall be binding as between parties, their successors and assigns."

The rights of the parties depend upon the construction to be placed upon this instrument when taken as a whole. Plaintiff's action proceeds upon the theory that the contract thus entered into was one of sale, though the title to the goods was reserved by the seller until they were paid for, that the transaction was a "conditional sale," and that where goods are thus sold and delivered, the seller retaining the title as security for the payment of the purchase price, they are at the buyer's risk, and he is liable for the purchase price though they are destroyed by fire or other casualty while in his possession.

[1] The term, "conditional sale," is commonly applied to "a class of transactions where by the terms of the contract the possession of the goods is delivered to the buyer, but the property in them is to remain in the seller until the payment of the price," though, as pointed out by the writers generally, the term is inaccurate, and tends to confusion, since the transaction is not in reality a sale, but an agreement to sell. See 35 Cyc. 651, 652.

"It is the distinguishing feature of the so-called conditional sale that the title to or property in the goods remains in the seller until payment of the price; but the buyer is entitled to the possession and use of the goods until default in payment. The security retained by the seller is not a lien, but a reservation of title and the right to pursue the property in specie." 35 Cyc. 652, 653.

Learned counsel for plaintiff (appellant here) contend that the transaction here involved is a "conditional sale," within the aforesaid meaning of that term, and, proceeding upon this hypothesis, cite a number of authorities in support of the further contention that in a case of such character the seller may recover the agreed purchase price, though the goods, in the buyer's possession, may have been in the meantime destroyed without his fault. In *Tufts v. Wynne et al.*, 45 Mo. App. 42, cited by appellant, the suit was upon promissory notes given by the defendants in part payment of the purchase price of a soda fountain purchased from plaintiff. The contract of sale provided that the title was not to pass until the entire purchase price was paid. Defendants "took the apparatus into their possession and used it

in all respects as their own," and, while they were in their possession, it was destroyed by fire. It was held that the destruction of the property did not relieve defendants from the obligation to pay the balance of the purchase price evidenced by the notes sued upon. In this connection, see *Snyder v. Murdock*, 3 Mo. 175, and *Walker v. Owen*, 79 Mo. 569, referred to in *Tufts v. Wynne*, supra, each of which involved a contract for the sale of realty. In *Farmer v. Moore*, 73 Mo. App. 52, the contract under scrutiny was held by the court to be one of sale—

"with the right reserved in the vendors to retain the property if not paid for in one year, and to collect the value of the use of the property for the time it should remain in the possession of the defendants, or to collect the selling price with 8 per cent. interest."

It would serve no useful purpose to refer to the many other authorities cited and relied upon by appellant in this connection. For the purposes of this suit, it may be concluded, without deciding, that where the contract is one of sale, upon credit, and thereafter the goods are delivered to the buyer, the seller reserving in himself the title until the purchase price is paid, the destruction of the goods in the buyer's possession by fire or like casualty will not relieve him from his obligation to pay the purchase price. To this, it is said in 35 Cyc. at pages 670, 671.

"In some jurisdictions the rule prevails that on a conditional sale, since the title remains in the seller, the goods are at his risk, and, in the event of their destruction or injury without the buyer's fault, the seller must bear the loss, following in this regard the rule that prevails in sales generally. It is to be noted, however, that under a conditional sale the buyer is ordinarily vested with all the incidents of ownership except the title, and by the weight of authority the risk of loss is therefore to be borne by the buyer, and he is liable for the price, notwithstanding injury to or destruction of the goods (citing an array of authorities, among them *Tufts v. Wynne*, supra).

[2] But an examination of the written instrument upon which plaintiff here relies has convinced us that the contract here involved is not one of sale; that there was no sale of the property here in question, conditional or otherwise.

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and to pay the agreed price are essential elements of a contract of sale. * * * The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment." *Sanborn, C. J.*, in *Re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. 611.

The contract before us contains no word constituting, or purporting to constitute, an agreement on plaintiff's part to sell the goods, and none binding, or purporting to bind, the Mercantile Company to buy the goods and pay an agreed price therefor. Upon its face the instrument is an order, directed to plaintiff, to ship certain goods, which the Mercantile Company agrees to "receive and settle for," upon the terms and conditions

specified. Prices are designated, but no words are employed constituting an agreement on the one hand to sell and on the other to buy. The terms and conditions specified on the face of the order are that the wagons are "to be paid for as sold," and that plaintiff reserved the right to "draw on" them to fill orders in southeast Missouri.

[3] Turning to the printed matter on the back of the instrument, we find nothing to make the contract appear to be one of sale. The incidental employment of the word "purchaser" is, in itself, of little, if any, significance. And the general provision found in this printed "form" (evidently one designed for miscellaneous use by plaintiff) to the effect that all goods are sold subject only to a certain warranty, might well be applicable regardless of the precise nature of contract under consideration, and is not here a matter of consequence.

This printed matter contains a provision for notes to be given on request, but none were here requested or given, and there is nothing to indicate that this clause was intended to apply to this transaction.

It is expressly provided that the title to and ownership of all goods shipped under the contract shall remain vested in the plaintiff; that the goods are to be held at all times subject to plaintiff's order, until paid for; and that if sales are made before payment, the proceeds thereof are to be held in trust for plaintiff until all obligations of the other party, arising under the contract, are fulfilled. It appears that no obligation was placed upon the Mercantile Company to pay anything unless and until the goods were sold. Upon a sale or sales being made, that company was required to hold in trust the proceeds and "settle" with plaintiff. In the meantime the goods were held subject to plaintiff's order, unless the Mercantile Company should elect to pay for them before making sale thereof; and plaintiff could fill its orders from them, or require that any part or all thereof be restored to it. And it appears that plaintiff did, in fact, cause three of the wagons to be returned to it or delivered elsewhere upon its order. The Mercantile Company had, by virtue of the contract, no power to deal generally with the property as its own; and the only distinct obligation, as to payment, placed upon it, was to faithfully account to plaintiff, at designated prices, out of the proceeds of sales made in the course of its business. The contract is therefore lacking in the essential elements of an agreement of sale, and its provisions indicate clearly that the true intent and purpose thereof was to effectuate a bailment of the goods to the Mercantile Company for the purpose of enabling it to sell them in the course of its retail business. From the language employed it may be inferred that the Mercantile Company had the right, at

its option, to pay for the property and become vested with the title thereto, prior to sale thereof by it, though it was evidently contemplated that such right was one not likely to be exercised. It is clear that no obligation was imposed upon the Mercantile Company to thus pay for the goods. It did not agree to pay a purchase price, but did agree to account to plaintiff out of the proceeds of any sale or sales. If it had the right to acquire title at any time by paying the designated price of all or any portion of the goods, this right was nothing more than an option to purchase plaintiff's property then in its hands as bailee. It had not purchased, and was not bound to purchase, the property.

"A bailment, with an option on the part of the bailee to buy, is merely a bailment. If, however, the bailment is coupled with an agreement by which the bailee is bound to buy, the transaction will be deemed a conditional sale." 35 Cyc. 655, 656.

To the same effect is the opinion of this court in *Strauss Saddlery Co. v. Kingman & Co.*, 42 Mo. App. 208.

[4] Appellant lays some stress upon the following clause of the "contract" upon the back of the instrument under discussion:

"Should the undersigned become insolvent, make an assignment, * * * sustain loss by fire or other casualty, transfer property or close out business, * * * all obligations provided for in this contract or arising therefrom, shall become due and payable at once, or at any time thereafter, at your [plaintiff's] option. * * *

But this clause, we think, cannot have the effect which appellant seeks to give to it. Its evident purpose is merely to mature any obligation "provided for in this contract or arising therefrom." It creates no obligation whatsoever. And inasmuch as the contract places no obligation upon the Mercantile Company such as is here sought to be enforced, this clause cannot affect the question before us.

[5] Our conclusion is that this record discloses a "bailment for sale," and not a "conditional sale." See *Piano Company v. Williams*, 167 Mo. App. 515, 151 S. W. 211; *In re Columbus Buggy Company*, supra. The fact that the Mercantile Company paid the freight, and was authorized to fix its selling prices, retaining the difference between the agreed prices for which it was to account to plaintiff and its own selling prices, as its compensation and to cover expense, does not make the contract one of sale. *Piano Co. v. Williams*, supra.

It follows that plaintiff made no prima facie case for the recovery of the purchase price alleged to be due and payable to it, and that the trial court properly sustained the demurrer offered by defendants. The judgment is therefore affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

SCHARFF et al. v. KIRKWOOD LUMBER CO. et al. (No. 14187.)

(St. Louis Court of Appeals. Missouri. March 7, 1918.)

1. QUIETING TITLE — 7(4) — CLOUD ON TITLE — VOID INSTRUMENTS.

Since the judgment in a mechanic's lien action by the defendant against one who had no title or interest in the plaintiff's property established no lien against the property and a sale thereunder would contain no title, the sale could cast no cloud upon the plaintiff's title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 24, 27-32; Dec. Dig. — 7(4).]

2. QUIETING TITLE — 4 — RELIEF IN EQUITY — ADEQUATE REMEDY AT LAW.

Where the plaintiff is in possession of real estate and has thereto a title of record which, upon the record and unaided by extrinsic evidence, is superior to any title or interest that could be acquired by a purchaser at a sale under execution, he has a complete and adequate remedy at law against any claim that may be asserted by such purchaser, and equity will not interfere on the ground that a cloud would be cast upon the title by the sale.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 5-13; Dec. Dig. — 4.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

"Not to be officially published."

Action by Carrie Scharff and others against the Kirkwood Lumber Company and another. From a judgment for the defendants, the plaintiffs appeal. Affirmed.

Stonewall J. Walton and Oliver Senti, both of St. Louis, for appellants. Edwin W. Mills, of Clayton, Robt. W. Hall, of St. Louis, and George W. Wolff, of Clayton, for respondents.

ALLEN, J. This is a suit in equity whereby the plaintiffs seek to restrain the sale of certain buildings or structures under a judgment enforcing a mechanic's lien against the same. Plaintiffs are the devisees of one Jacob Bernheimer, who formerly held title to the land upon which the improvements in question were erected. The defendants are the Kirkwood Lumber Company, the corporation holding the judgment above mentioned, and the sheriff of the county of St. Louis. A demurrer was sustained to plaintiffs' second amended petition, and from a final judgment entered thereon plaintiffs appeal.

The petition alleges that plaintiffs are the owners in fee simple of certain described real estate, upon which are located a dancing pavilion and a frame "saloon or café building," constituting a part of the realty; that plaintiffs acquired title thereto as devisees under the will of Jacob Bernheimer, deceased, who, for many years prior to his demise on June 27, 1911, owned the property. It is averred that in a suit instituted in the circuit court of St. Louis county, on January 19, 1909, defendant Kirkwood Lumber Company obtained a judgment against one Ryan for material alleged to have been fur-

nished the latter for the construction of the structures above mentioned, and which established a mechanic's lien against these improvements, the judgment having been entered on November 13, 1911, but as of date February 17, 1911; and that thereafter, at the direction of defendant Kirkwood Lumber Company, an execution was issued upon this judgment to the defendant Grueninger, as sheriff, who, pursuant to the command of the writ, levied upon these improvements, advertised them for sale, and was proceeding to sell them at the time of the institution of this suit. It is further alleged that in the above-mentioned action which resulted in a judgment in favor of defendant Kirkwood Lumber Company, Ryan, the defendant therein, was sued as the lessee of Jacob Bernheimer, or of the "Meramec Highlands Company"; but it is averred that Ryan in fact did not then or at any time have any interest whatsoever in said real estate or the improvements thereupon, that Jacob Bernheimer was the sole owner thereof at the time of the institution of such action, but was never made a party defendant therein, Ryan being the sole defendant, and that since the death of Bernheimer these plaintiffs have ever been the sole owners in fee of the land and improvements. And it is averred that the judgment in favor of the Kirkwood Lumber Company is "illegal, void, and of no effect in so far as the same attempts to authorize a lien against said buildings belonging to plaintiffs, and that said execution issued pursuant to said alleged judgment is illegal, void, and of no effect in so far as it attempts to subject said premises or said buildings belonging to plaintiff to the payment of said alleged execution and judgment"; that defendant Kirkwood Lumber Company has no assets out of which to respond in damages to plaintiffs; that the sale of the improvements, if permitted to proceed, will cast a cloud upon plaintiffs' title to the real estate whereby plaintiffs will suffer irreparable loss and damage; and that plaintiffs are without adequate remedy at law. The prayer of the petition is that the defendants, their servants, employés, and agents, be perpetually restrained and enjoined from proceeding with the sale of the improvements mentioned, and for general relief.

[1] It is quite apparent that the demurrer to the petition was properly sustained, under the well-known rule of law in this state applicable to suits of this character. The petition alleges that Ryan, the sole defendant in the mechanic's lien action, had no interest whatsoever, as lessee or otherwise, in the property; and that in consequence thereof the judgment therein was and is utterly void in so far as it attempted to establish a lien against the improvements mentioned. If the allegations of the petition are true, the judgment established no lien whatsoever

against the property, and a sale of the buildings thereunder could convey no right, title, or interest therein to any one. And consequently, under our law, such sale could cast no cloud upon the title of plaintiffs.

[2] It has long been the law in this state that where a plaintiff is in possession of real estate and has thereto a title of record which, upon the record and unaided by extrinsic evidence, is superior to any title or interest that could be acquired by a purchaser at a sale under an execution, he has a complete and adequate remedy at law against any claim that may be asserted by such purchaser, and equity will not interfere on the ground that a cloud would be cast upon his title by such a sale. The wisdom of this rule, which is firmly imbedded in our jurisprudence, is not here open to question. It was applied in the recent case of *Turner v. Hunter*, 225 Mo. 71, 123 S. W. 1097, where the suit was one to cancel a sheriff's deed to land sold for taxes. It was averred that no judgment was rendered in the suit to enforce the state's lien for taxes, and it was consequently held that no cloud could be cast upon plaintiffs' title by a sheriff's deed predicated upon such proceeding. The opinion cites many of the earlier cases, which are authority here. And see further cases cited in *Mathias v. Arnold*, 191 Mo. App. 352, 178 S. W. 264, where—while recognizing the doctrine to which we have referred above—we held that a wife could restrain the sale of her separate real estate under a judgment against her husband.

Appellant places much reliance upon *Bonsor v. Madison County et al.*, 204 Mo. 84, 102 S. W. 494; but an examination of the opinion in that case will readily reveal that the facts involved were such as to take the case out of the rule under discussion.

It follows that the judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

COX v. HEAGY. (No. 13729.)

(St. Louis Court of Appeals. Missouri. March 7, 1916.)

1. BILLS AND NOTES § 238—ACCOMMODATION INDORSERS—LIABILITY.

One who indorses a promissory note merely for accommodation of the payee for use as collateral security and receives no consideration therefor is not liable to the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 565, 566; Dec. Dig. § 238.]

2. BILLS AND NOTES § 538(1)—LIABILITY—ACCOMMODATION INDORSERS—INSTRUCTIONS.

In an action against an indorser who claimed that he signed for accommodation of the payee only, it is error to instruct substantially that if either of the principals owed the payee anything, the payee might recover from the de-

fendant, though he was but an accommodation indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895-1898, 1902, 1906, 1907; Dec. Dig. § 538(1).]

3. BILLS AND NOTES § 238—LIABILITY—ACCOMMODATION INDORSERS.

Although an indorser for the accommodation of the payee may owe the payee some amount, he is not liable on the note which he indorses in the absence of specific agreement that his indorsement shall be a consideration for the other debt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 565, 566; Dec. Dig. § 238.]

4. BILLS AND NOTES § 238—LIABILITY—"ACCOMMODATION INDORSEMENT."

Under Rev. St. 1909, § 10000, defining an accommodation party as one who has signed the instrument as a maker, without receiving value therefor, and for the purpose of lending his name to some other person, an indorser for accommodation of the payee only, is not liable to the payee, although the principal owes the payee money on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 565, 566; Dec. Dig. § 238.]

For other definitions, see Words and Phrases, First and Second Series, Accommodation Indorser.]

5. BILLS AND NOTES § 238—LIABILITY—ACCOMMODATION INDORSERS.

In the absence of specific agreement, the fact that an indorser for accommodation of the payee owes money to the payee is insufficient to make him liable on the accommodation paper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 565, 566; Dec. Dig. § 238.]

6. BILLS AND NOTES § 238—LIABILITY—ACCOMMODATION INDORSERS—NOTICE.

If an accommodation indorser signed upon the representation and with the understanding that he was only an indorser for accommodation of the payee, it was immaterial whether the party securing his signature was authorized to make such representations by the payee; the question being whether the representations were made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 565, 566; Dec. Dig. § 238.]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

"Not to be officially published."

Action by J. F. Cox against L. W. Heagy. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Joseph A. Wright, of St. Louis, and George Munger, of Dexter, for appellant. J. L. Fort and J. M. Cook, both of Dexter, for respondent.

NORTONI, J. This is a suit on a promissory note. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant concedes he made the note which is payable to plaintiff, but asserts that it was without consideration as to him and for the accommodation of plaintiff only. The note was signed by one Hamblen and defendant jointly, and both were sued thereon, but the

cause was dismissed as to Hamblen and proceeded against defendant alone.

It appears plaintiff resided in the state of Colorado, Hamblen in Indianapolis, Ind., and defendant Heagy at Dexter, Mo. Hamblen and Heagy, who jointly executed the note, are brothers-in-law, while plaintiff was an old-time friend of Hamblen and an acquaintance of defendant, Heagy. The evidence on the part of plaintiff tends to prove that Hamblen and one Wysong jointly owed him \$1,500, for which sum they executed to plaintiff their promissory note January 14, 1907. Subsequently this note was taken up and a new one executed by Hamblen together with defendant, Heagy, about March, 1908, in the amount of \$1,640, which, it is said, included the principal sum of the former note and the accrued interest thereon. Wysong, who was jointly liable on the original \$1,500 note, did not sign the new note of \$1,640. Some time after the \$1,640 note had fallen due, plaintiff says he wrote to Hamblen in Indianapolis, requesting him to make a new note to cover the amount and interest. In a short time Hamblen sent plaintiff, who was then at his home in Colorado, the note in suit for \$1,875, which, it is said, included the principal sum of the former note and accrued interest thereon, and also \$78, which defendant, Heagy, owed plaintiff. (This \$1,875 note is the one in suit here.) On the part of defendant the evidence is that he signed the note in suit merely as an accommodation party—that is, for the accommodation of plaintiff, the payee—moreover, defendant says that he was not a party to any note payable to plaintiff prior to this one, and therefore, of course, not a joint maker with Hamblen of the \$1,640 above referred to. Both defendant and Hamblen testify that plaintiff desired to borrow some money in Colorado and wrote Hamblen, an old friend, requesting him to make this note as accommodation paper for plaintiff's use as collateral security at the bank in Colorado. Hamblen says he wrote his brother-in-law, defendant, Heagy, and requested that he join in making the note. Heagy at first declined to do this. Thereupon Hamblen wrote Heagy a second letter and inclosed plaintiff's letter to him, requesting that the note be executed merely as an accommodation to plaintiff to enable him to borrow some money in Colorado, depositing this accommodation note as security.

[1] Of course, if defendant signed the note with Hamblen merely as an accommodation to plaintiff, then plaintiff is not entitled to recover thereon against defendant.

But it seems the issue was much confused in its presentation to the jury in the instructions given on behalf of plaintiff. At the instance of plaintiff, the court gave his instruction No. 1 as follows:

"The court instructs the jury that an accommodation note is one made by one party to another party when the maker, or giver, of the note is not indebted to the party to whom the

note is given. If A. should give B. his note for \$100 for the purpose of enabling B. to get \$100 on the note from some other person than A. when A. did not owe B. anything, such a note would be an accommodation note. In such case, if B. should not sell the note, he, himself, could not collect it from A. If B. should sell the note to another and A. should have to pay it, then A. could collect from B. the amount he had to pay, and, in this case, if neither Hamblen nor Wysong owed plaintiff anything and the note in suit was given by Hamblen and defendant to enable plaintiff to get money on it, and for no other purpose, then and in that event the note is an accommodation note, and plaintiff cannot recover."

[2, 3] This instruction is erroneous in that it tells the jury in substance that if either Hamblen or Wysong owed plaintiff anything, then even though defendant signed the note as an accommodation to plaintiff, he might nevertheless recover against defendant. Obviously such is not the law. Then, too, Wysong was not a party to the note in suit in any event. Moreover, even though Hamblen who signed the note with defendant, Heagy, owed plaintiff something, the hypothesis contemplated in the instruction was not the character of the contract involved in so far as defendant, Heagy, is concerned, for according to the evidence on the part of the defense Heagy was an accommodation maker at most and is entitled to be treated as such. See *Weeks v. Russell*, 8 Wash. 440, 36 Pac. 265.

[4] Our statute (section 10000, R. S. 1909), in so far as relevant here, says:

"An accommodation party is one who has signed the instrument as a maker * * * without receiving value therefor, and for the purpose of lending his name to some other person."

According to the evidence of defendant, he was in no manner indebted to plaintiff, and even though Hamblen was so indebted, plaintiff was still an accommodation party if the evidence introduced on his part is to be believed and no liability is enforceable against him by plaintiff to whom he loaned his name as an accommodation.

[5] Plaintiff's second instruction is as follows:

"The court instructs the jury that the issue in this case is whether the note sued upon in this case is an accommodation note or not, and the court further instructs the jury that if the jury shall find from the evidence in this case that either Charles Hamblen or L. W. Heagy owed, or was indebted, to said J. F. Cox, at the time they, the said Hamblen and Heagy, signed said note, to wit, on the 25th day of May, 1909, in any sum whatever, then and in that event the court instructs the jury that said note was not an accommodation note and the verdict of the jury must be for the plaintiff."

This instruction is likewise erroneous for that it misdirects the jury as to the law concerning the liability of an accommodation party. Although the evidence of defendant, Heagy, with which this instruction purports to reckon is that he signed the note with Hamblen on receiving plaintiff's letter forwarded to him by Hamblen to the effect that he merely wanted the note as an accommodation to use as collateral security in a Colo-

rado bank, the instruction informs the jury that the note was not to be regarded as accommodation paper if it found either Hamblen or Heagy was indebted to plaintiff at the time. Manifestly such is an erroneous view, for though both Hamblen and Heagy owed plaintiff a valid and subsisting debt, such would not afford a consideration for the note in suit, unless it was so agreed or contemplated by the parties at the time. In other words, if defendant signed the note in suit as a mere accommodation to plaintiff, then it is not to be enforced against him otherwise, even though he owed plaintiff a debt on other grounds. To treat the matter otherwise is to disregard the accommodation contract entered into between defendant and plaintiff and substitute in lieu of it a direct promise to pay, founded upon another and distinct consideration; that is, a pre-existing debt owing by defendant to plaintiff or even one owing by Hamblen to plaintiff for which latter obligation it seems the instruction contemplates converting defendant into a surety, though he says he had in no wise undertaken such obligation.

[6] Plaintiff's third instruction is as follows:

"If the jury should find that Hamblen told Heagy that the note sued upon was only an accommodation note, and that Heagy signed the same in the bona fide belief that it was only an accommodation note, still the jury would not be justified in finding the issues for Heagy and against Cox, unless the jury should further find that Cox authorized Hamblen to make such statements and representations to Heagy."

Obviously this instruction is erroneous in that it informs the jury that though defendant, Heagy, signed the note bona fide as an accommodation party on the representation of

Hamblen that it was to be only an accommodation note for the use of plaintiff, nevertheless defendant was liable thereon to plaintiff, the party accommodated, unless the jury further find that plaintiff, Cox, authorized Hamblen to make such representations to defendant, Heagy. If Hamblen was acting for plaintiff, Cox, in procuring defendant's signature to the note as the evidence tends to prove, then it is not essential that Hamblen should have been expressly authorized to make the representations referred to, but rather the question is: Did he make such representations concerning the accommodation character of the paper at the time and was it on this defendant signed the note? However, it is to be said that the evidence shows there were two letters from Hamblen to Heagy about this matter, and neither of them is in evidence. Also in one of these letters it is said Hamblen inclosed plaintiff, Cox's letter saying that he only desired the note as an accommodation to use as collateral security in Colorado. If it be found that Hamblen was acting for plaintiff in procuring the signature of Heagy to the note in suit, then the rights of defendant, Heagy, are to be determined by reference to the apparent authority of Hamblen as disclosed in the two letters written by him to Heagy together with the letter from plaintiff, Cox, to Hamblen inclosed to Heagy, rather than by reference to some other authority given by plaintiff to Hamblen.

Other errors appear in plaintiff's instructions, but enough has been said to indicate the theory on which the case should be tried.

The judgment should be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

EL PASO & S. W. CO. v. LA LONDE.
(No. 9292.)

(Supreme Court of Texas. April 5, 1916.)

Action by Angela La Londe against the El Paso & Southwestern Company. A judgment for the plaintiff was affirmed by the Court of Civil Appeals (173 S. W. 890), and the defendant applies for writ of error. Application refused, and motion for rehearing overruled.

Hawkins & Franklin and W. M. Petcolas, all of El Paso, for applicant. Wallace & Gardner, of El Paso, opposed.

On Motion for Rehearing.

PER CURIAM. Motion for rehearing overruled.

HAWKINS, J. (concurring). The course of reasoning by which my conclusions herein have been reached is, in several respects, so different from that shown by the opinion of the Court of Civil Appeals in this cause (173 S. W. 890) that I feel in duty bound to state my individual views herein, although, with some exceptions, the rule in this court has been not to write in granting or in refusing applications for writs of error.

This action for damages for the killing of La Londe, on April 21, 1912, in New Mexico, by one of plaintiff in error's trains, was instituted in a Texas court by his widow as temporary administratrix and personal representative of the estate of the decedent.

Trial before a jury resulted in verdict and judgment in her favor for \$13,750, which judgment was affirmed by our Court of Civil Appeals for the Eighth Supreme Judicial District (Civ. App.) 173 S. W. 890. The railway company applied for a writ of error, which this court refused, and now prays for a rehearing.

It is contended by the railway company that the suit cannot be maintained by the Texas temporary administratrix in the absence of allegation and proof of orders of the probate court extending the period of administration. Under such circumstances such orders will be presumed. *Williams v. Bank*, 91 Tex. 651, 45 S. W. 690. Moreover, the record does not show that the right of the plaintiff to sue in that capacity was challenged by a sworn plea, as provided by R. S. of Texas 1911, art. 1906, subd. 2.

Complaint is made by the railway company of the refusal of the trial court to submit to the jury the provisions of the Constitution and statutes of New Mexico which were admitted in evidence before the court to enable the court to determine whether they or any of them govern or affect the rights of the parties, and to instruct the jury accordingly. In that refusal there was no error. *Andrews v. Hoxie*, 5 Tex. 171; *Willard v. Conduit*, 10 Tex. 213.

The temporary administratrix relies upon the act of February 21, 1891 (Laws 1891, c. 49), the act of February 17, 1893 (Laws 1893, c. 28), and section 16 of article 20 of the Constitution of New Mexico, in turn, while the railway company relies upon article 3213 of the Compilation of 1897, and section 4 of article 22 of said Constitution, all as shown below.

Their history, as I glean it, is as follows:

The original act of 1882 (chapter 61) dealt, in section 1, with damages for injuries resulting in death when caused by the wrongful acts of common carriers, their agents, servants, and employes, while engaged in operating locomotives, trains, stagecoaches and other public conveyances, and, in sections 2 and 3, with damages for such injuries when caused by wrongful acts of corporations and persons other than common carriers.

Said section 1 reads thus:

"Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any stagecoach or other public conveyance, while in the charge of the same as driver; and when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stagecoach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employe, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stagecoach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand (\$5,000.00) dollars, which may be sued and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not of a negligent defect or insufficiency."

Said section 1 was carried into the Compilation of 1884 as article 2308, and into the Compilation of 1897 as article 3213, and appears to be still in force, unless and except as repealed, amended, or rendered inoperative by said act of 1891, said act of 1893, and said section 16 of article 20 of the Constitution.

If article 3213 is applicable in this case, its unquestionable effects are: (a) Arbitrarily to fix, at \$5,000, the amount of the recovery, such fixed amount being in the nature of a penalty rather than in the nature of compensatory damages; and (b) to deny to defendant in error the right to maintain the suit in the capacity in which she sues herein.

Said sections 2 and 3 of said act of 1882

became sections 2309 and 2310 of the Compilation of 1884, and were amended by "An act to amend sections 2309 and 2310 of the Compiled Laws of New Mexico of 1884," approved February 21, 1891. Said act of 1891 authorizes, in general terms, recovery of damages for injuries resulting in death; it fixes no limit on the amount to be recovered; it requires that actions thereunder be in the names of personal representatives of the decedent; but that amendment, it seems, does not relate to common carriers, and does not repeal said article 3213. *Romero v. Railroad*, 11 N. M. 684, 72 Pac. 38, in which case the Supreme Court of the territory of New Mexico held said article 3213 applicable, although the injuries of the decedent, who was not an employé, were inflicted in June, 1902.

Said act of February 17, 1893, "an act for the protection and relief of railroad employés and for other purposes," provides:

"Every corporation operating a railway in this territory shall be liable in a sum sufficient to compensate such employé for all damages sustained by any employé of such corporation, the person injured or damaged being without fault on his or her part, occurring or sustained in consequence of any mismanagement, carelessness, neglect, default or wrongful act of any agent or employé of such corporation, while in the exercise of their several duties, when such mismanagement, carelessness, neglect, default or wrongful act of such employé or agent could have been avoided by such corporation through the exercise of reasonable care or diligence in the selection of competent employés, or agents, or by not overworking said employés or requiring or allowing them to work an unusual or unreasonable number of hours," etc.

It also provides:

"Whenever the death of an employé shall be caused under circumstances from which a cause of action would have accrued under the provisions of the two preceding sections, if death had not ensued, an action therefor shall be brought in the manner provided by section 2310 of the Compiled Laws of New Mexico, as amended by chapter XLIX of the Session Laws of 1891 of New Mexico, and any sum recovered therein shall be subject to all of the provisions of said section 2310 as so amended."

While said act of 1893 relates to common carriers, its operation is restricted to certain designated classes of cases, involving either want of care in the selection of employés or agents, or overworking them. Neither the pleading nor the evidence brings this case within its purview; consequently, at least for the purposes of this case, it neither controls nor affects said article 3213.

Said section 4 of article 22 of the Constitution is as follows:

"All laws of the territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with this Constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities and obligations, shall continue and remain unaffected by the change in the form of government."

Section 16 of article 20 of the Constitution, adopted in 1911, provides:

"Every person, receiver or corporation owning or operating a railroad within this state shall be liable in damages for injury to, or the death of, any person in its employ, resulting from the negligence, in whole or in part, of said owner or operator or of any of the officers, agents or employés thereof, or by reason of any defect or insufficiency, due to its negligence, in whole or in part, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

"An action for negligently causing the death of an employé as above provided shall be maintained by the executor or administratrix for the benefit of the employé's surviving widow or husband and children; or if none, then his parents; or if none, then the next of kin dependent upon said deceased. The amount recovered may be distributed as provided by law. Any contract or agreement made in advance of such injury with any employé waiving or limiting any right to recover such damages shall be void."

It seems that no statute has been enacted to put section 16 into effect, but its provisions, other than those relating to distribution of the amount to be recovered in death cases, appear to be self-operative, authorizing, whenever applicable, recovery of compensatory damages in any reasonable amount; actions in death cases thereunder to be by personal representatives of the decedent in behalf of the designated beneficiaries.

However, the expression "shall be liable in damages for injury to, or death of, any person in its employ," etc., greatly narrows the field of liability and was intended, I think, to restrict its legal effect to instances in which the injuries are received by such employé *in the course of his employment in the railroad service*. If it be assumed, for the sake of the argument, or if, upon due consideration of the history and legal effect of said article 3213, it should be held that said article was ever applicable to and controlled cases wherein the material facts were essentially like those of the case at bar, and if my foregoing views as to the self-operative effect of said section 16 are correct, then, inasmuch as section 16 is later than article 3213, it follows, logically, that if at the moment when La Londe received his injuries he was *in the employ* of the railway company within the meaning of section 16, its provisions, aside from those relating to distribution, are applicable, and either section 16 or the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) controls this case, and this court did not err in refusing the writ of error; but if La Londe was not then so "in its employ" it is just as clear that neither said section 16 nor said act of Congress has any application to the case at bar, and in that event, article 3213 should control this appeal, the judgment was for an amount in excess of that fixed by law, and the pending motion and also the application for a writ of error should be granted, unless this court should hold that the courts

of this state will not enforce the provisions of article 3213, because they are of a penal rather than of a merely compensatory nature, or because they are essentially different from provisions of our laws which would be applicable had La Londe's injuries been inflicted in Texas.

The charge given to the jury was, practically, to the effect, that if at the moment of his injuries La Londe was "waiting to be called," he was *in the employ* of the railway company within the meaning of said section 16, which was thus made to control this case, and that view was upheld by the Court of Civil Appeals, and has prevailed in this court. But is section 16 applicable? I think not, as La Londe's injuries were not received in the course of his employment, and were not fairly related to that employment. Whether he was or was not then so "in its employ," becomes, in reality, in this case, purely a question of law, in view of the evidence bearing thereon, because in that evidence there is no conflict whatever. It was to this effect: La Londe had been employed as a locomotive engineer by the railway company. He was paid on a mileage basis, and drew his pay monthly. That contract had not been terminated; but, at the time of his injuries, he was not engaged in the operation of a locomotive, and was not actively in the performance of any duty to his employer. He was "off duty," but was "subject to call." He had come in at 5 or 6 o'clock in the previous evening from his run of that day, his lawful hours of rest had expired, and he was "waiting to be called" whenever he might be needed to take out some train. While so waiting, and shortly after noon, which was about an hour and a half before the usual time for him to take a train out, he left his home and went to the post office, and thence to the railroad yard to see a friend who was engineer on an out-going train, to whom he desired to hand money to pay off a note in another town. As his friend walked around his engine La Londe walked and chatted with him, and, while so occupied, stepped back in front of an incoming train, which struck him, inflicting injuries from which he died. La Londe was there as a mere loiterer or bystander, and there is no evidence which even suggests that he was in the yards for any purpose which was in any wise related to the call for which he was waiting, or to any duty which he owed to the company by virtue of his said employment.

Under such circumstances, and in the absence of any decision of the courts of New Mexico construing said section 16, I cannot believe that La Londe was at that moment *in the employ* of the railway company within the meaning of said provision of the Constitution of New Mexico. The clause "injury to, or death of, any person in its employ" seems to me to have been intended to re-

strict the operation of section 16 to cases in which the injured party is not merely on the pay rolls of the company and engaged from time to time, during the general period of his employment, in some service for his employer, but in which, in addition, the injuries in question are related, directly, fairly, and reasonably, to such employment and service. Under any other theory of construction the provisions of section 16 become purely arbitrary. In this very case, as a matter of either natural justice or public policy, how can it be said that the railway company owed to La Londe, in that moment, and under those circumstances, any higher duty, than that its liability for injuries negligently inflicted upon him should be more certain, than if he were any other bystander who was not in no sense in its employ? That it was not the purpose of section 16 to impose such higher duty or more certain liability seems plain enough when it is considered by itself alone, and it is doubly plain, it seems to me, when section 16 is considered in the light of said previous legislation of New Mexico.

In support of my views as to the legal effect of the words "in its employ," as used in section 16, and without undertaking a thorough discussion of the subject, I emphasize the uncontroverted fact that, although La Londe was "subject to call," no duty to the railway company called or detained him upon its yards, or justified his presence there at the moment of his injuries, and, in that connection, cite *Railway v. Scott*, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; *Railway v. Welch*, 72 Tex. 298, 10 S. W. 532, 2 L. R. A. 839; *Railway v. Ryan*, 82 Tex. 565, 18 S. W. 219; *Railway v. Anderson*, 101 Tex. 402, 118 S. W. 127; *Freeman v. Brewster Co.*, 38 Tex. Civ. App. 396, 85 S. W. 116 (writ of error refused); *Railway v. Hendricks*, 49 Tex. Civ. App. 814, 108 S. W. 77 (writ of error refused). See, also, *Doyle v. Railway*, 162 Mass. 66, 37 N. E. 770, 25 R. A. 157, 44 Am. St. Rep. 335; *McNulty v. Railway*, 182 Pa. 479, 38 Atl. 524, 38 L. A. 376, 61 Am. St. Rep. 721.

In *Railway v. Scott*, this court, through Stayton, C. J., said:

"It is true that the employer is only liable to the servant when the latter is actually in his service, and that at times, during the period of an engagement, the employé may sustain to the employer no other relation than that of a stranger. It does not follow from this, however, that the employé is to be deemed in the employer's service only when he is actually engaged in labor. He is to be deemed in the master's service whenever present to perform his duty under a contract creating the relation of master and servant and subject to orders, although at given moment he may not be engaged in the actual performance of any labor. We are of the opinion that the evidence shows a state of facts which require the appellee, as the servant appellant, to be with the train at the time he was injured. The fact that he may not have been actually engaged in the performance of labor at the time he was injured, if he was with the train in discharge of a duty the engineer has power to impose upon him by virtue of his em-

ployment, and subject to further orders, would not for the time destroy the relation of master and servant, and make him a stranger to appellant."

In *Railway v. Welch*, and also in *Railway v. Ryan*, the decision rested upon two facts: (a) The injured employé was asleep in a car belonging to the company, provided by it for that purpose, upon its side track; and (b) he was liable at any moment to be called out on duty with his gang. In neither of those cases does the conclusion or finding that the injured man was a fellow servant (or employé) at the time of the injuries, rest, as in this case, solely upon the fact that he was then "subject to call." The reasoning which controlled all the cited cases supports my views herein, as to the meaning of section 16.

Under the act of Congress known as the Employers' Liability Act of 1908, relating to interstate commerce, the liability thereby created is expressly limited to "damages to any person suffering injury while he is employed by such carrier in such commerce." In chapter V of his work on "Liability of Railroads to Interstate Employés," Mr. Doherty says:

"The title of the Employers' Liability Act is 'An act relating to the liability of common carriers, or railroads, to their employés in certain cases.' From this title, as well as from the context of the act, it is apparent that the remedy provided is one which arises only when the employé is killed or injured from a cause which is incidental to or arising out of railroad employment. If any injury arises from a cause in no manner connected with or arising out of such employment, no recovery is possible under the act"—citing *Armitage v. Railway*, 4 Minton-Senhouse's Workmen's Compensation Cases, 5; *O'Brien v. Star Line Limited*, 1 Butterworth's Workmen's Compensation Cases, 177; *Jackson v. Railway*, 178 Fed. 432 (102 C. O. A. 159) which cites numerous cases.

The rule, as enunciated in the *O'Brien* Case, is to the effect that there must be "some causal relation between the employment and the accident." And the same author, in the same chapter, also says:

"Not every employé who is engaged in work auxiliary to interstate commerce is included in the act. The work of the employé, to bring him within the terms of the act, must be directly connected with and in aid of the traffic itself, or in maintenance of instrumentalities which are generally used in such interstate traffic"—citing *Miller v. Railway*, 2 Minton-Senhouse's Workmen's Compensation Cases, 51, *Railway v. Commissioners*, 6 Q. B. D. 586, and *Railway v. Tucker*, 35 App. D. C. 123, which discusses *Packett Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705, *Ewald v. Railway*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178, *Boldt v. Railway*, 18 N. Y. 432, and *Fletcher v. Railway*, 188 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411.

In *Railway v. Tucker* the court said:

"The better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespass-

ser nor a mere licensee. He is there because of his employment."

The rule under that statute is stated thus by Roberts, in section 14 of his recent treatise on "Injuries to Interstate Employés on Railroads":

"The carrier is not liable for every act of negligence causing injury to one employé by another. The negligent act causing injury or death must have been committed while the employé at fault was in the prosecution of the carrier's business. When the negligent act which causes an injury to or the death of an employé had no relation whatever to the employment the carrier is not liable for the employé at fault must have been, when committing the act, within the scope of his employment"—citing *Hobbs v. Railway*, 80 Wash. 678, 142 Pac. 20, L. R. A. 1915D, 503, 6 N. O. C. A. 84n, 90n; *Rief v. Railway*, 126 Minn. 430, 148 N. W. 309; *Railway v. West*, 38 Okl. 581, 184 Pac. 655; *Railway v. Wilson*, 161 Ky. 640, 171 S. W. 430; *Reeve v. Railway*, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C, 347; *Martin v. Railway*, 93 Kan. 681, 145 Pac. 849; *Moyse v. Railway*, 41 Mont. 272, 108 Pac. 1062. "And if an employé is injured or killed at a time and place and from a cause disconnected with his employment for the carrier, the carrier is not liable, for the statute requires the servant injured to have been at the time employed in interstate commerce"—citing *Padgett v. Railway* (S. C.) 83 S. E. 283; *Sanders v. Railway*, 97 S. C. 50, 81 S. E. 283, 6 N. C. C. A. 200n; *Ewald v. Railway*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Hurst v. Railway*, 49 Iowa, 76; *Dickinson v. Railway*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284.

That author's discussion of *Hobbs v. Railway* embraces the following:

"Decedent was killed while riding upon the pilot of an engine. He was a hostler's helper and his last work was placing sand in the engine. In doing this work the deceased was not required to ride on a pilot. No one knew why he stepped upon the pilot. The engine in moving collided with the footboard of another switch engine, which was not visible because of escaping steam, and this caused decedent's death. There was a rule of the railroad company forbidding employés to ride on engine pilots and the decedent in addition had been specifically told not to ride on pilots. The court, in denying that the railroad company was liable, said: 'The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servant a reasonably safe place in which to perform the work it requires of him, or while he has to be in those places which are incident to his work, and this duty is incident to all places where the employé must necessarily be in connection with his employment. But that duty is not incident to his place where a servant is not required to be nor expected to be in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all authorities and the federal act in no wise attempts to change it. Unless the evidence in this case shows that the deceased was upon the pilot of his engine in discharge of some duty required by the railroad company, then the railroad company owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted, and no authorities need be cited to sustain it.'"

If, at the moment in which his injuries were inflicted, La Londe was "in the employ" of the railway company within contemplation

of section 16, he was then, it would seem, undeniably, engaged in interstate commerce; the uncontradicted evidence being to the effect that any train which he might be called to take out would be an interstate train, just as were all that he had taken out in the course of his said employment, and therefore in that event, he was, at that moment, within the provisions of said Employers' Liability Act of 1908. But to hold that he was then so engaged in interstate commerce would be to extend the operation of that federal statute to individuals under circumstances far beyond the broad extent in which it has been construed and applied by the Supreme Court and by circuit courts of the United States. *Pedersen v. Railway*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, and cases cited. See, also, *Employers' Liability Cases*, 207 U. S. 497, 28 Sup. Ct. 141, 52 L. Ed. 297. To that I cannot agree.

The only logical escape from the conclusion that said act of Congress, alone (*Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661), controls this case lies in holding that, under the undisputed facts, and within the meaning of said federal statute, La Londe was not injured "while * * * employed" by, or while "in the employ" of, the railway company. The analogy between our own fellow servant statute and said Employers' Liability Act, on the one hand, and said section 16 on the other hand, is obvious. The argument by analogy might, with profit, be extended to embrace other statutes, did time and space permit.

To me it seems clear that neither said act of Congress nor said section 16 should be construed so broadly as to bring the case at bar within its legal effect. Then, if that be the correct view, is this case governed by article 3213? That statute was adopted, it seems, to preserve certain causes of action after the death of the party entitled thereto in the first instance, and not to abrogate the common-law rule that the servant assumes all ordinary risks of the service in which he is engaged, including risks arising from negligence of other servants of the same master in the same employment. Accordingly, it has been held that the words, "any person," as used in article 3213, do not include servants of the same master injured through negligence of a fellow servant while acting in the common employment. To that effect is *Railway v. Farrow*, 6 Colo. 498, which reviews the Missouri decisions construing a similar statute of that state, from which, it appears, the Colorado statute, in the same words as said article 3213, was taken. *Proctor v. Railway*, 64 Mo. 112. See, also, *Dale v. Railway*, 57 Kan. 601, 47 Pac. 521.

Consequently, it appears that even if this case should proceed upon the theory that La Londe was a fellow servant of the engineer

of the train which inflicted the injuries question, article 3213 would not be applicable anywhere, even though said section 16 should be held to be not self-executing. Said New Mexico statute not being operative, *proprio vigore*, in this state, there exists no principle of comity which requires or authorizes, by an interpretation or application thereof, which would render liability thereunder more extensive in this jurisdiction than in the courts of New Mexico. However, if La Londe was not such fellow servant, article 3213 would, it seems, have been applicable to the facts had this suit been in New Mexico.

But, even if article 3213 should be held to be applicable to cases like this in New Mexico courts, its provisions are not applicable and should not be enforced in the courts of Texas, because: (a) Its provisions are essentially different from those of our laws on the subject, the former being compensatory, the amount of liability, if any, under article 3213 being in a fixed amount but not so under our laws. *Vernon's Say Texas Civil Statutes*, art. 4694 et seq.; *Railway v. McCormick*, 71 Tex. 660, 9 S. W. 1 L. R. A. 804; *Dale v. Railway*, 57 Kan. 601, 47 Pac. 521, in which said article 3213 is considered. (b) Said article 3213 is a penal statute. *Railway v. McCormick*, *supra*; *Dale v. Railway*, *supra*; *Bank v. Price*, Md. 487, 3 Am. Rep. 204; *Derrickson v. Smith*, 27 N. J. Law, 166; *Halsey v. McLellan*, 12 Allen (Mass.) 438, 90 Am. Dec. 1; *Ogden v. Folliot*, 3 Term R. 733; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338, 7 Am. 1; 467; *State v. John*, 5 Ham. O. 217; *Lind v. Hill*, 66 Me. 212, 22 Am. Rep. 564; *Stoddard v. Conf. of Laws*, §§ 620, 621.

Upon the whole, each of said New Mexico statutes and section 16 of article 20 of the Constitution of that state being thus, in turn, eliminated from consideration, and no other provision of the Constitution or statutes of that state having been pleaded, the laws of Texas should control this transitory action, and, no reversible error thereunder being shown, I concur in the order of this court overruling the motion of plaintiff in error at a rehearing. I regret that press of other work has prevented me from giving this case more careful consideration and briefer more satisfactory treatment.

PIERCE et al. v. GIBSON et al. (No. 24)

(Supreme Court of Texas. April 5, 1916)

1. HOMESTEAD §56—POWER TO TRANSFER JOINDER OF WIFE.

A husband, acting in good faith, may choose and select the homestead, or abandon one selected and acquire a new one, independently of the wishes of the wife, so, after her insanity he may abandon the homestead.

[Ed. Note.—For other cases, see Homestead Cent. Dig. §§ 81, 82; Dec. Dig. §56.]

2. HUSBAND AND WIFE ⇐273(9)—COMMUNITY PROPERTY—INSANITY OF WIFE—CONVEYANCE BY HUSBAND—VALIDITY.

Vernon's Sayles' Ann. Civ. St. 1914, art. 3594, declares that where the wife dies or becomes insane, the husband shall have the exclusive management, control, and disposition of the community property in the same manner as during her lifetime and sanity, and it shall not be necessary that the wife join in conveyances thereof, subject, however, to the provisions of the chapter. The chapter of which the article is a part relates to the administration of community property, and its other articles provide that on death or insanity of the wife, the husband may give bond, and as survivor administer the community property. *Held*, that the husband, as surviving member of the marital partnership, may, to pay community debts, sell community property without giving any bond.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1020; Dec. Dig. ⇐273 (9).]

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by G. T. Gibson and others against P. P. Pierce and another. A judgment for defendant Pierce was reversed on error to the Court of Civil Appeals (146 S. W. 989), and defendant brings error. Reversed, and judgment of district court affirmed.

J. R. Stubblefield, of Eastland, for plaintiff in error. D. G. Hunt, of Eastland, and W. P. Sebastian, of Austin, for defendants in error.

YANTIS, J. This suit was instituted in the district court of Stephens county, Tex., by the defendants in error, who were plaintiffs below, against P. P. Pierce and R. Glasscock, to recover 730 acres of land situated partially in Palo Pinto county and partially in Stephens county, Tex. In the district court Glasscock filed a disclaimer, and the trial proceeded against Pierce. The case was submitted to the jury on special issues. The trial resulted in a judgment in the district court in favor of Pierce, who is plaintiff in error here, and against the plaintiffs in said suit in the district court. By them the case was appealed to the honorable Court of Civil Appeals for the Second District. The appeal was transferred to the honorable Court of Civil Appeals for the Eighth District, in which court the case was reversed and remanded as to Jane P. Pettit, wife of C. I. Pettit, the court holding that she was entitled to recover one-half of the land sued for. As to the other plaintiffs in the district court, and as to the remaining one-half interest in the land, the judgment of the district court was affirmed. A writ of error was granted by this court on the petition of P. P. Pierce, the plaintiff in error, on the ground of a conflict between the opinion by the Court of Civil Appeals for the Eighth District in this case and the opinion of the Court of Civil Appeals for the Fifth District in the case of Shields v. Aultman, Miller & Co., 20 Tex. Civ. App. 345, 50 S. W.

219, in which case a writ of error was denied by this court.

By the findings of the jury in answer to special issues the following facts were established: That C. I. Pettit was of sound mind when he executed the deed to Pierce and Glasscock in May, 1907, and at the time he executed the mortgage in February, 1907; that no part of the property in controversy constituted the homestead of C. I. Pettit at said time, or at the time he executed the mortgage thereon in February, 1907, to secure a loan of \$1,200; that C. I. Pettit acted in good faith at the time he executed the deed to Pierce and Glasscock in May, 1907, and at the time he executed the mortgage in February, 1907, and was not guilty of any fraudulent attempt to deprive his wife of the benefit of a homestead exemption in the property involved; that when C. I. Pettit abandoned his home in Stephens county, and acquired a new home in another county prior to May, 1907, he acted in good faith in so doing; that at the time Pierce and Glasscock purchased the property from C. I. Pettit in May, 1907, there was a valid and subsisting mortgage against such property in the amount of \$1,200; that at the time Pierce and Glasscock purchased the property from Pettit in May, 1907, there were no other liens against the property; that the consideration paid by Pierce and Glasscock to C. I. Pettit for the land in controversy was the reasonable cash market value of such land at the time and place it was sold; that Pierce and Glasscock acted in good faith towards C. I. Pettit when they bought the land in controversy, and did not practice any fraud upon him.

The evidence shows that when C. I. Pettit sold the property in controversy in May, 1907, he paid out of its proceeds the \$1,200 which he owed thereon, and which was a community debt.

The findings of fact by the Court of Civil Appeals is to the effect that the evidence was sufficient to sustain all the foregoing findings of fact by the jury, in answer to special issues.

[1] It is contended by the defendants in error that the husband of an insane wife cannot convey by his deed alone the homestead, unless the proof should show that the insanity of the wife was incurable. The findings of the jury in this case were to the effect that none of the property in question was the homestead of Pettit at the time he conveyed the property to Pierce and Glasscock. This finding of fact removes from the case the proposition of law contended for, and renders it unnecessary for us to consider the question of law as to the effect of a husband's deed of conveyance of the homestead while the wife is insane, since in this case there was no homestead at the time of sale. The property in question was the homestead

of C. I. Pettit and his wife, Jane, for many years. In January, 1901, the wife was adjudged insane, and was sent to a lunatic asylum, where she remained until during the trial of this case, when she appears to have been released, and to have attended the trial, though she did not testify as a witness, and there is no evidence showing either that she had or had not been restored to a sane condition. C. I. Pettit and his children continued to occupy the land as a homestead for about four years subsequent to the insanity of his wife. Having contracted tuberculosis, he moved to San Antonio, where he acquired another home, which he occupied for about one year. Later, in 1906, he acquired another home, and occupied it as such, in Guadalupe county, for about one year. He mortgaged the property in controversy in February, 1907, for \$1,200. On May 16, 1907, he conveyed it to P. P. Pierce and R. Glasscock for a cash consideration of \$4,357.50. Later Glasscock conveyed his interest in the land to Pierce. The homestead in Stephens county ceased to be such when it was abandoned by C. I. Pettit with the intention of making his home in south Texas, in the interest of his health. His abandonment of the homestead being in good faith, as found by the jury, it was his right and privilege in law to so abandon it and establish another home. The husband has a legal right, while acting in good faith, to abandon the homestead and acquire a new one without the consent of his wife. The fact that she was insane and unable to give her consent would not defeat this right on his part, since her consent to the abandonment of a homestead, and the acquiring of a new one, is not necessary. The fact that she became insane, and could not give her consent, would in no way alter the situation, or destroy his rights in this respect. *Shields v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S. W. 219.

[2] The honorable Court of Civil Appeals rested its holding in reversing the case as to one-half the property, on the proposition that C. I. Pettit's deed to Pierce and Glasscock, in so far as it attempted to convey the wife's one-half interest in said community property, was void, for the reason that he could not convey her one-half interest in the community property without qualifying, which he had not done, as survivor, and making a survivorship bond, under article 3594, ch. 29, tit. 52, Vernon's Sayles' Texas Civil Statutes, which is as follows:

"Where the wife dies or becomes insane, leaving a surviving husband and child, or children, the husband shall have the exclusive management, control and disposition of the community property in the same manner as during her lifetime, or sanity; and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment be taken to such conveyances, subject, however, to the provisions of this chapter."

We do not think this article of the statutes in any way abridged the right of the husband to sell the property for the purpose of liquidating community debts, though the other provisions in said chapter make provision for community administration and survivorship bond. It was all community property, and was charged with the payment of the community debts. It has been held by this court, in a long and unbroken line of decisions, that the husband upon the death of his wife may, without administration upon her estate, sell the community property to pay community debts. *Ashe v. Yungst*, 65 Tex. 631; *Sanger Bros. v. Heirs of Moody*, 60 Tex. 96; *Fagan v. McWhirter*, 71 Tex. 567, 9 S. W. 877; *Martin v. McAllister*, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585.

We hold that the rule should be the same where the wife is not dead but insane. It has never been doubted that, during the life of the wife, the husband could sell any community property except the homestead, for the purpose of liquidating community debts. They are a charge upon the partnership property of a husband and wife as much as are the debts of any other partnership a charge upon the partnership property. The survivor of the partnership is charged with the duty of paying the partnership debts, and it is his right to dispose of partnership property for such purpose. So it has been held unnecessary, when the wife dies leaving community property, and community debts, for the surviving husband to cause administration to be had, or to qualify as survivor by giving the bond provided for in article 3598, ch. 29, tit. 52, Vernon's Sayles' Civil Statutes, in order to dispose of the community property for the purpose of settling the community debts. We think that C. I. Pettit was not deprived of this right because of the insanity of his wife. It is true, as held by the Court of Civil Appeals in its opinion in this case, that when the case of *Shields v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S. W. 219, was decided, article 3594, Vernon's Sayles' Civil Statutes, did not contain any provision for a surviving husband, when the wife became insane, to qualify as a survivor under said chapter. At that time the chapter in question authorized community administration as it does now, but it only provided for instances where the wife had died, leaving a surviving husband and child. The change in the chapter was made by amendment in 1893 so as to allow the husband, when the wife became insane, to qualify by giving bond as a survivor on the same basis that said chapter had previously permitted survivorship administration in favor of the husband where the wife had died. But we think the rule is the same.

Prior to this amendment it had been held by this court in many cases that the statute authorizing survivorship administration in case of the death of the wife was not an abridgement of the right of the surviving

husband to sell community property for the purpose of paying community debts without making the bond and complying with the survivorship statute. This statute, authorizing survivorship administration in case of death of the wife, with the omission of the insanity clause, had existed since 1856, but notwithstanding its existence in full force, this court repeatedly construed it as not being restrictive of the rights of the survivor, but merely to be an enlargement of his privileges existing at the time of its passage; and it was held that it was not mandatory upon the survivor to qualify under chapter 29, tit. 52, Vernon's Sayles' Statutes, as survivor in order to authorize the survivor to sell community property with which to pay the community debts. In passing upon this question this court, speaking through Mr. Justice Ireland, in the case of *Dawson v. Holt*, 44 Tex. 178, said:

"It is contended that the latter clause of the law as quoted is to be construed literally and strictly, and that the authority of the husband to sell did not attach until after the probate court had 'recorded' the inventory and appraisal. It must be borne in mind that the surviving husband had the right to sell the community property to pay debts against the community, after the death of the wife, without the aid of this statute. *Jones v. Jones*, 15 Tex. 147. It was clearly not the intention of the Legislature to throw restrictions around the survivor in such cases, but to enlarge their powers."

Again this court, speaking through Mr. Justice Stayton, in the case of *Sanger Bros. v. Heirs of Moody*, 60 Tex. 98, says:

"It is claimed that, as community indebtedness was shown to exist at the time the land was sold by Louis Moody to Birge, the sale should be held valid. Under the repeated decisions of this court, it must be held as conclusively settled that the survivor of the marital relation, without administration upon the estate of the deceased member in any of the modes expressly provided by statute, has power as survivor to sell the community property for the purpose of paying debts which are a charge upon it, and by law such property is charged with the payment of debts contracted during the marriage. *Pasch. Dig. 4646*. It has been properly held that the act of 1856 did not withdraw such power from the survivor, but that the act was intended to enlarge the powers of the survivor. *Wenar v. Stenzel*, 48 Tex. 489; *Dawson v. Holt*, 44 Tex. 178; *Lumpkin v. Murrell*, 46 Tex. 58."

There are many other decisions to the same effect, and holding that the survivorship statute did not deprive the surviving husband of the power to sell community property and with the proceeds to discharge community debts. *Jones v. Jones*, 15 Tex. 147; *Dawson v. Holt*, 44 Tex. 174; *Lumpkin v. Murrell*, 46 Tex. 51.

We think the rule is the same since the amendment of the statute authorizing the husband, in case of his wife's insanity, to qualify as survivor. The statute as so amended must be held to be an enlargement of the rights of the survivor of an insane spouse, and not an abridgment thereof. Prior to this amendment it was the undoubt-

ed right of the husband of an insane wife to sell community property for the purpose of paying community debts, and we think he still has such right, and that he need not qualify under the survivorship statute in order to exercise it. The rule as to selling community property, with the proceeds of which to pay community debts, should be the same now, where the wife becomes insane, as it was prior to this amendment, in cases where the wife had died. We think the Court of Civil Appeals was in error in holding that *Petit's* deed was void because he had not qualified as survivor under chapter 28, tit. 52, Vernon's Sayles' Civil Statutes. We think the deed was valid, and conveyed all the land in controversy to *Pierce and Glasscock*.

We have examined the other questions presented by the defendants in error, and do not think any of them presents error.

It follows that the judgment of the Court of Civil Appeals should be reversed and the judgment of the district court should, in all things, be affirmed: and it is so ordered.

HOWARD v. STATE. (No. 3985.)

(Court of Criminal Appeals of Texas. March 22, 1916.)

1. CRIMINAL LAW §1144(6) — APPEAL — SCOPE OF REVIEW—PRESUMPTIONS—CHANGE OF VENUE.

In the absence of record showing to the contrary, it must be presumed that evidence introduced on application for change of venue, tending to show prejudice against the defendant, was wholly insufficient where the court overruled the motion, and the order cannot be reviewed by the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2740, 2757, 2901, 3021; Dec. Dig. §1144(6).]

2. CRIMINAL LAW §184(2) — CHANGE OF VENUE—AFFIDAVITS—SUFFICIENCY.

Where on hearing on the first application for change of venue the evidence disclosed that one of the two compurgators was wholly incredible under oath, it could not be said that overruling the second application for change on affidavits of the same persons was error, since Code Cr. Proc. 1911, art. 628, requires the application to be supported by the affidavit of the defendant and at least two credible persons.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251; Dec. Dig. §134(2).]

3. CRIMINAL LAW §137—CHANGE OF VENUE—HEARING—DENIAL.

While the court must have before it the evidence to show that a compurgator making affidavit for change of venue was wholly incredible, it is sufficient if that evidence was adduced on a former hearing for a change of venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. §137.]

4. CRIMINAL LAW §122—CHANGE OF VENUE—SECOND APPLICATION—PROPRIETY.

One seeking a change of venue should present, where possible, all of his grounds therefor in one application, although a second application cannot be denied where the evidence ad-

duced on the hearing of the first showed probable grounds for the second.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 254; Dec. Dig. ¶122.]

5. CRIMINAL LAW ¶622(1)—TRIAL—SEVERANCE—DUTY OF COURT.

Under Code Cr. Proc. 1911, art. 727, where two defendants accused of the same crime each filed motions that the other be first tried, it is the duty of the court to order the trial of one to precede the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380, 1382; Dec. Dig. ¶622(1).]

6. CRIMINAL LAW ¶364(6)—EVIDENCE—ADMISSIBILITY—RES GESTÆ.

A statement made by one accused of burglary while imprisoned more than a month after the offense charged is not a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 817; Dec. Dig. ¶364(6).]

7. CRIMINAL LAW ¶426—EVIDENCE—ADMISSIBILITY.

While the accused may show that another committed the offense charged, he cannot produce statements of a codefendant made to other persons showing that he was innocent, since Code Cr. Proc. 1911, art. 791, specifically declares that persons charged as principals cannot be introduced as witnesses one for another.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1011; Dec. Dig. ¶426.]

8. CRIMINAL LAW ¶721(3) — CONDUCT OF TRIAL—REMARKS OF ATTORNEYS—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.

A remark of the prosecuting attorney, in a prosecution for burglary, that the accused on his arrest failed to explain his possession of stolen goods, is not a comment on his failure to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. ¶721(3).]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Fletcher Howard was convicted of burglary, and he appeals. Affirmed.

McCutcheon & Church, of Dallas, for appellant. C. O. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the state penitentiary.

This is the second appeal of this case, the opinion on the former appeal being reported in 178 S. W. 508.

Appellant again contends that as the indictment was returned into the criminal district court No. 1 of Dallas county, the criminal district court No. 2 had no authority or jurisdiction to try the cause. The order transferring the cause is contained in the transcript, and, as this question was ruled on in the former opinion, we do not deem it necessary to discuss it again.

He again presents the motion to quash the indictment on the same grounds as those relied on in the former opinion. We have not changed our views of the law, and the court did not err in overruling the motion.

[1] When the case was called for trial, appellant requested time to prepare and file motion for change of venue. The court granted from 9 a. m. until 2 p. m. When the court convened in the afternoon, appellant presented an application for a change of venue on the ground:

"That there exists against him so great prejudice he cannot obtain a fair and impartial trial in Dallas county."

This application was contested by the state by sworn plea, and the court heard evidence on the application. After all the evidence was heard, the court overruled the application. The evidence heard on this application is not contained in the bill, nor the record. Therefore we must conclude that the evidence wholly failed to sustain the application. We cannot review the action of the court in the absence of the testimony heard.

[2] As soon as the court overruled the application for a change of venue, appellant's counsel stated he desired to present second application, on the ground:

"That there was a dangerous combination against him instigated by influential persons by reason of which he could not obtain a fair trial."

When this second application for a change of venue was presented, the court upon learning that it had been prepared at the same time as the first application, and signed by the same witnesses, and not presented at that time, but held out until the evidence on the first application had been heard and ruled on, refused to entertain the second application, alleging as reasons for refusing to do so:

"First, that after hearing the evidence on the first application he found that there did not exist in Dallas county such prejudice against the defendant as would prohibit him from obtaining a fair and impartial trial; second, that one of the compurgators, a negro by the name of Bert Morrow, was not a credible person and was totally unworthy of belief under oath."

If the evidence on hearing the first application for a change of venue had shown the court that one of the compurgators, Bert Morrow, who signed both applications, was not a credible person and wholly unworthy of belief, we cannot say he erred in not entertaining the second application. The statute requires (article 628) that the application must be supported by the affidavit of the defendant, and at least two credible persons, and it has been frequently held in this court that the application, which is supported by the affidavit of one credible person, is insufficient to present an issue for trial. O'Neal v. State, 14 Tex. App. 583; Macklin v. State, 53 Tex. Cr. R. 197, 109 W. 145; Gibson v. State, 53 Tex. Cr. R. 341, 110 S. W. 41.

In the O'Neal Case, *supra*, this court said: "There was no error in the action of the court in striking out and refusing to consider the defendant's application for a change of venue."

because the application did not conform to the requirements of the statute. It was supported by the affidavit of but one other person than the defendant, whereas the statute requires the supporting affidavits of 'at least two credible persons, residents of the county where the prosecution is instituted.' * * * Where the statute is not fully complied with in an application for a change of venue, the application is fatally defective, and the court is under no obligation to consider it. *Mitchell v. State*, 43 Tex. 512."

[3] Of course, the court without evidence and without a contest would not be authorized to hold that a witness was not a credible person, but in this case the court had heard evidence on the application presented under the first subdivision of article 628, and, having heard it and ruled on it, he would be authorized to hold, upon presenting the second application, the compurgators being the same, that they or either one of them were not credible persons, if the evidence on the first application had so shown.

[4] We do not wish to be understood as holding that a person cannot file a second application, if the evidence on the first application, based only on one ground of the statute, should disclose probable grounds for believing that grounds existed for filing an application under the second subdivision, or the appellant had learned such facts since filing the first application. The statute authorizes a change of venue upon either of the grounds. But we would say that the proper practice is to present both grounds in one application, if appellant is in possession of information at the time he files the first application that he has reason to believe that both grounds exist, and he should not, if in possession of the information, delay the orderly proceedings of the court by splitting the matter into two applications, one to be filed after the first has been heard and ruled on. However, this is a matter of procedure, and one should be denied no right the statute gives him, if he presents the matter properly to the court, and we only hold in this case that under the findings of the court on the evidence heard by him, which is not presented to us in the record before us, the court committed no error in refusing to hear the second application when it was signed but by one credible witness.

[5] Appellant and one Dave Johnson were both indicted, charged with burglarizing a railroad car. Appellant filed an application that Dave Johnson be tried first. Dave Johnson, through his attorney, also filed an application, asking that appellant be first tried. Article 727 of the Procedure provides for severance, and provides in the event the two defendants make such affidavits and cannot agree as to the order of trial, then the presiding judge shall direct the order in which they shall be tried. As both defendants filed affidavits asking that the other be first tried, it became the duty of the court to designate the one to be first tried.

[6, 7] Dave Johnson, appellant's codefendant, did not testify on this trial. By the bills on file it appears that he has made conflicting affidavits, in one affidavit stating facts which would tend to exonerate appellant and show he was not guilty of the offense charged. Appellant offered to introduce this affidavit in evidence, and prove by Noah Roark what Dave Johnson had told him while confined in jail. This was not res gestæ of the offense—the offense having been committed in November, 1914, while the affidavit made by Dave Johnson, which appellant called Mr. Roark to testify in regard to, was made about a month thereafter while Dave Johnson was in jail, charged jointly with appellant with having committed this burglary. While, since the rendition of the opinion in *Dubose v. State*, 10 Tex. App. 230, it is permissible for the person on trial to show that another committed the offense with which he is charged by legal and competent testimony, yet this does not give one the right to introduce illegal and inadmissible testimony which might tend to show that fact. Article 791 of the Procedure specifically declares that persons charged as principals, whether in the same or different indictments, cannot be introduced as witnesses for one another, and in passing on this statute Judge White, in *Long v. State*, 10 Tex. App. 197, holds:

"If he cannot testify in person, how can he state facts to others and thereby enable them to testify to matters wholly derived from him? To permit this would be to abrogate the law. * * * No fact stated by or derived from him can, so long as the disability remains, be detailed as testimony by another or used as evidence."

See, also, *Smith v. State*, 41 Tex. 354; *Blain v. State*, 24 Tex. App. 636, 7 S. W. 239; *Wyres v. State*, 74 Tex. Cr. R. 28, 166 S. W. 1150, and cases cited.

[8] In another bill of exceptions appellant contends the prosecuting officer in his argument made an indirect reference to appellant's failure to testify. The bill as approved by the court shows this clearly not to have been the case. Appellant's counsel referred to instances when persons charged with crime had made explanations. Counsel for the state merely stated, in replying, that appellant when arrested, charged with this offense, made no explanation of the fact that he was helping to move the stolen property when arrested. This would not be a reference to his failure to testify.

This disposes of all the questions presented in the brief on file. While there are other bills in the record, yet they relate to matters which were passed on in the former appeal of this case, and we see no necessity to pass on them again, but merely refer to that opinion, 178 S. W. 508.

The judgment is affirmed.

DAVIDSON, J., absent.

CARROLL v. STATE. (No. 3990.)

(Court of Criminal Appeals of Texas. March 15, 1916. Rehearing Denied April 5, 1916.)

1. CRIMINAL LAW — 1099(7) — APPEAL — STATEMENT OF FACTS—TIME FOR FILING.

A statement of facts in the county court must be filed within 20 days after the adjournment of court, and must be preceded by an order entered of record for that purpose, and hence a statement filed 26 days or more after adjournment would not be considered, notwithstanding an order entered of record allowing 30 days after adjournment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2876, 2878-2880; Dec. Dig. —1099(7).]

2. INDICTMENT AND INFORMATION — 110(3)—LANGUAGE OF STATUTE—SUFFICIENCY.

An indictment under the statute prohibiting the catching of fish, except by hook and line, etc., and nets under certain circumstances, the meshes of which shall be three inches or more, except as to a trammel net, in which they must be four inches, alleging those matters in the terms of the statute and showing that defendant caught fish in nets prohibited thereby, was sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294; Dec. Dig. —110(3).]

3. FISH — 8—PROTECTION—JURISDICTION OF STATE.

Under the statute prohibiting the catching of fish, except by hook and line, etc., and prohibiting certain nets, and in the absence of any such limitation in the statute or in any act of Congress, the jurisdiction of the state extended to the catching of fish in the Red river, the boundary line between Texas and Oklahoma.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16; Dec. Dig. —8.]

Appeal from Grayson County Court; Dayton B. Steed, Judge.

J. R. Carroll was convicted of catching fish in violation of the game law, and he appeals. Affirmed.

J. H. Randell, of Denison, for appellant.
C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of catching fish in violation of the game law; his punishment being assessed at a fine of \$25.

[1] There are no bills of exception or statement of facts contained in the record. There is what purports to be a statement of facts, but it was filed more than 20 days after the adjournment of court. Under quite a number of decisions in Texas a statement of facts in the county court must be filed within 20 days after the adjournment of court, and this must be preceded by an order entered of record for that purpose. There is an order entered in this record allowing 30 days, and the statement of facts was filed 26 or 27 days after court adjourned, but that document should have been filed before the expiration of the 20 days under an unbroken line of authorities. Therefore questions incidental to the statement of facts cannot be considered.

[2] Motion to quash as well as motion arrest of judgment were urged against the pleading. We are of opinion that the trial court did not err in overruling these matters. The statute under which appellant was indicted prohibits the catching of fish except by hook and line, trot line, etc., and nets under certain circumstances, but the meshes of the nets must be above a specified size, that is, three inches or above, unless it is a trammel net, in which instance it must be four inches. The information and complaint sufficiently allege these matters in the terms of the statute, and show that appellant caught fish in nets prohibited by statute.

[3] There is another question presented, to-wit: That, appellant having caught the fish in Red river, it was beyond the jurisdiction of Texas. We do not agree with appellant on this question. Red river is a boundary line between Texas and Oklahoma, and, whether it might be under the federal jurisdiction or not, to some matters, it still is within the jurisdiction of Texas as to a violation of the game laws. We are cited to no authority that would limit Texas to go beyond the edge of the water on the south bank of the river in enforcing its law. There is none in the Texas statute that we have been able to find that would justify that conclusion, nor has any been called to our attention in the annals of Congress. In some respects fresh-water streams which may be navigable can be considered as under the jurisdiction of Congress, but that does not apply to this statute. We think the jurisdiction of Texas fully reached and covered the territory in which this fishing occurred.

Finding no reversible error in the judgment, it is affirmed.

PETTIGREW v. STATE. (No. 4005.)

(Court of Criminal Appeals of Texas. March 29, 1916.)

1. CRIMINAL LAW — 1102 — STATEMENT OF FACTS—TIME OF FILING.

Where accused was convicted in county court at a term lasting more than 8 weeks, a statement of facts, which was not filed within 90 days after the motion for new trial was overruled and sentence pronounced, must be stricken, not being filed within time.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. —1102.]

2. CRIMINAL LAW — 1092(7) — APPEAL—BILLS OF EXCEPTION.

Where accused was convicted at a term of county court lasting more than 8 weeks, a bill of exception not filed within 90 days after overruling motion for new trial and sentence cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2850, 2852-2854; Dec. Dig. —1092(7).]

Appeal from District Court, Tarrant County; R. B. Young, Judge.

Charley Pettigrew was convicted of purchasing the occupation of selling intoxicating

nors in prohibition territory, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of pursuing the occupation of selling intoxicating liquors in prohibition territory.

[1] The term of court at which he was tried lasted more than eight weeks, the term covering a period of three months. The motion for a new trial was overruled November 19, 1915, and sentence pronounced on appellant that day. The statement of facts was not filed in the trial court until February 24, 1916, more than ninety days after the motion for a new trial was overruled and sentence pronounced, and therefore not filed within the time authorized by law. The motion of the Assistant Attorney General to strike it from the record is therefore sustained.

[2] The bills of exception were not filed until one day later, or February 25, 1916, and the motion to strike them from the record must also be sustained.

The contention is again made that the indictment is insufficient because it does not negative the exceptions contained in the statutes. This question was thoroughly discussed in *Slack v. State*, 61 Tex. Cr. R. 373, 136 S. W. 1073, Ann. Cas. 1913B, 112, and we do not deem it necessary to again review the authorities. There was no error in overruling the motion to quash the indictment.

While the bills of exception have been stricken out on the motion of the Assistant Attorney General, yet we have read each of them, and they, nor either of them, would present error had they been filed within the time fixed by law.

The judgment is affirmed.

MILLS v. STATE. (No. 4014.)

(Court of Criminal Appeals of Texas. March 29, 1916.)

RAPE \S 59(1)—INSTRUCTIONS — REASONABLE DOUBT.

On a charge of rape upon a girl under 15 years of age, where there was testimony that she was more than 15 years of age, though the court required the jury to believe beyond a reasonable doubt the necessary facts to find defendant guilty, and that the girl was under 15 years of age, the failure to charge conversely that, if the jury believed she was more than 15 years of age, or had a reasonable doubt of it, they should acquit was reversible error.

[Ed. Note.—For other cases, see Rape, Cent. Dig. \S 88; Dec. Dig. \S 59(1).]

Appeal from District Court, Kerr County; R. H. Burney, Judge.

Jake Mills was convicted of rape, and appeals. Reversed and remanded.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of rape. The indictment was in two counts—one that the act was committed by force, etc.; the other that the girl was under 15 years of age. The court submitted both counts for a finding. The jury convicted him under the count charging that the girl was under 15 years of age.

We will not discuss the testimony, except to say that it was in direct conflict, the girl testifying to the act, and the appellant as positively denying it. In addition, the appellant introduced much testimony in direct contradiction of the girl as to her testimony in other respects. Several questions are raised, but we deem it unnecessary to pass upon but one. Some or all of the others, doubtless, will not arise on another trial.

The court, in submitting the case to the jury for a finding on the count on which appellant was convicted, affirmatively required the jury to believe beyond a reasonable doubt the necessary facts from the evidence in order to find him guilty, and that the girl was under 15 years of age at the time. The appellant contested the age of the girl, and there was testimony tending to show that she was more than 15 years of age at the time of the act, if there was an act, of sexual intercourse. The appellant objected to this part of the court's charge, in effect, among other things, because it did not affirmatively submit in his behalf the converse of the court's charge; that is, it did not tell the jury that if they believed she was more than 15 years of age at the time, or if they had a reasonable doubt of it, to acquit him.

Under the circumstances of this case we believe that the court should have so charged in appellant's favor, and that his failure to do so presents reversible error, and for this error the judgment is reversed, and the cause remanded.

WELLS v. STATE. (No. 4008.)

(Court of Criminal Appeals of Texas. March 29, 1916.)

CRIMINAL LAW \S 1090(1) — STATEMENT OF FACTS AND BILL OF EXCEPTIONS—NECESSITY.

In the absence of statement of facts or bill of exceptions, no question is raised for review on appeal in a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2653, 2805-2807, 2825-2827, 3204; Dec. Dig. \S 1090(1).]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Robert Wells was convicted of robbery, and he appeals. Judgment affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction of robbery, without a state-

ment of facts or a bill of exceptions. In the absence of these, no question is raised which can be reviewed.

The judgment is affirmed.

CURRY v. STATE. (No. 4009.)

(Court of Criminal Appeals of Texas. March 29, 1916.)

CRIMINAL LAW \S 1090(16)—**APPEAL—NECESSITY OF STATEMENT OF FACTS AND BILL OF EXCEPTIONS.**

Questions raised in a motion for a new trial cannot be reviewed where the record contains no statement of facts or bills of exceptions. [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2822, 2948, 3204; Dec. Dig. \S 1090(16).]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

John Curry was convicted of manslaughter, and he appeals. Affirmed.

C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the state penitentiary.

No statement of facts accompanies the record; neither does it contain any bills of exception. Under such circumstances there is no question raised in the motion for a new trial we can review.

The judgment is affirmed.

BARNES v. STATE. (No. 4017.)

(Court of Criminal Appeals of Texas. March 22, 1916.)

INTOXICATING LIQUORS \S 205(2) — **INDICTMENT—CHARGE OF FELONY.**

An indictment for selling intoxicating liquors, merely charging that the local option law had been adopted prior to the presentment of the indictment, giving no date, and alleging a sale subsequent to the enactment of the felony statute of 1911 (Pen. Code 1911, art. 597), providing that, if the local option election was held prior to the passage of the act, an illegal sale of liquors shall be a misdemeanor, but that, if the election was held after the passage of the act, the offense shall be a felony, presented on its face a felony charge.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 225; Dec. Dig. \S 205(2).]

Appeal from Young County Court; W. P. Stinson, Judge.

Cleve Barnes was convicted of selling intoxicating liquors, and he appeals. Judgment reversed, and cause remanded.

See, also, 184 S. W. 510.

Brooks & Worsham, of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted under an indictment charging him with on or

about the 30th day of December, 1913, selling to Gran Glenn intoxicating liquors, and his punishment assessed at imprisonment in the county jail for 60 days and a fine of \$100.

Appellant moved to quash the indictment because the date was not alleged in the indictment when the local option election was held, on the ground that under the allegations contained in the indictment the county court had no jurisdiction of the offense. The indictment alleged the sale to have been made on December 30, 1913, and nowhere alleges when the election was held in Young county. By an act of the Legislature passed in 1911 (Pen. Code 1911, art. 597) it is provided that, if the election was held prior to the passage of that act, the offense would be a misdemeanor; if the election was held after the passage of that act, the offense would be a felony. We had this question before this court in Head v. State, 64 Tex. Cr. R. 112, 141 S. W. 536, Hamilton v. State, 65 Tex. Cr. R. 508, 145 S. W. 348, and other cases, in which it was held that an indictment merely alleging that the local option law had been adopted prior to the presentment of the indictment, giving no date and alleging a sale subsequent to the enactment of the felony statute, presented on its face a felony charge.

The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

BARNES v. STATE. (No. 4016.)

(Court of Criminal Appeals of Texas. March 22, 1916.)

Appeal from Young County Court; W. P. Stinson, Judge.

Cleve Barnes was convicted of selling intoxicating liquors, and he appeals. Judgment reversed, and cause remanded.

Brooks & Worsham, of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. This is a companion case to cause No. 4017, Cleve Barnes v. State, infra, this day decided. It is unnecessary to discuss the questions in this case.

On the authority of the opinion in the above-styled cause, this judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

DAVIS v. STATE. (No. 4027.)

(Court of Criminal Appeals of Texas. March 29, 1916.)

1. DISORDERLY HOUSE \S 16—**ADMISSIBILITY OF EVIDENCE—REPUTATION.**

In a prosecution for aiding the keeping of a house of prostitution, testimony of a witness that the house had had a reputation as such for a long time before and after defendant began working there is admissible, though the witness could not limit his knowledge as to the

reputation to the time after the defendant began working there.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 21-25; Dec. Dig. § 16.]

2. DISORDERLY HOUSE § 17 — SUFFICIENCY OF EVIDENCE.

In a prosecution for aiding in keeping a house of prostitution, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 26-29; Dec. Dig. § 17.]

Appeal from Wichita County Court; Harvey Harris, Judge.

E. C. Davis was convicted of aiding the keeping of a house of prostitution, and he appeals. Affirmed.

Ralph P. Mathis and W. Lindsay Bibb, both of Wichita Falls, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted under an information charging him with aiding, assisting, and abetting the keeping of a house of prostitution and a house where prostitutes were permitted to resort and reside.

[1] Appellant objected to Ed Carnes being permitted to testify that the house with which he was charged with aiding and abetting the keeping had the reputation of being a disorderly house at the time he was acting as night clerk of the Royal hotel, and had that reputation before appellant began working there. The objection was directed at that portion of the testimony in which he said:

"I could not limit my knowledge of the reputation of this house as just since the defendant began working. It has been disorderly for a long time."

As the testimony shows the reputation of the house was disorderly when appellant began working there, and so continued all the time he was connected with it, the bill presents no reversible error.

[2] The court did not err in refusing to give peremptory instructions to acquit, as we think the testimony would justify a conviction. The reputation of the house was shown to be a house where prostitutes resorted and resided. Harrold Buster testified that the reputation of the three women he saw at this hotel was bad; that they were common prostitutes; that he had seen at least one of them in the reservation at Lillian Hall's. Lewis Scott testified he was porter at the Royal Hotel, and that appellant told him, "if I found any one that wanted a woman up there, to send them to him." Ed Carnes testified that he secured a room at this hotel, and said to the porter, Lewis Scott, that he was going down to the reservation to see the girls, when the porter replied, "Boss, we have got any kind of girls you want at the hotel." The porter took him to his room, and in about 20 minutes a girl opened the door and came in.

The judgment is affirmed.

KROWER v. MARTIN. (No. 5676.)*

(Court of Civil Appeals of Texas. San Antonio. March 8, 1916. Rehearing Denied March 29, 1916.)

1. FRAUDULENT CONVEYANCES § 47 — BULK SALES LAW — "USUAL COURSE OF TRADE."

A sale by one formerly in the jewelry business who at the time of the sale had withdrawn therefrom, and who had mortgaged the goods sold and segregated them from his stock and trade, was not a sale in the "usual course of trade."

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 34; Dec. Dig. § 47.]

2. CHATTEL MORTGAGES § 186 — STOCKS IN TRADE — VALIDITY.

Vernon's Sayles' Ann. Civ. St. 1914, art. 3970, making void mortgages on stocks of goods exposed to daily sale where possession is retained by the mortgagor, does not apply where the goods mortgaged are segregated from the stock and possession delivered to the mortgagees, since a mortgage on such a stock was not void at common law.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 368; Dec. Dig. § 186.]

3. FRAUDULENT CONVEYANCES § 47 — BULK SALES LAW — WHEN APPLICABLE.

Where goods, having been segregated from the main stock, are mortgaged and possession delivered to the mortgagees, the Bulk Sales Law (Acts 31st Leg. c. 27; Vernon's Sayles' Ann. Civ. St. 1914, art. 3971), does not apply.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 34; Dec. Dig. § 47.]

4. FRAUDULENT CONVEYANCES § 47 — BULK SALES LAW — WHEN APPLICABLE.

The Bulk Sales Law does not apply to a sale of goods segregated from a stock in trade by the owner who was formerly a merchant, but who at the time of a sale was a farmer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 34; Dec. Dig. § 47.]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by Leonard Krower against S. J. Martin for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

Hertzberg, Barrett & Kercheville, of San Antonio, for appellant. Solon Stewart, of San Antonio, for appellee.

CARL, J. Appellant on December 4, 1915, made application for a writ of garnishment against appellee, which set forth, among other things, that on November 6, 1915, the plaintiff had filed suit against A. Levytansky for debt in the sum of \$2,500, and interest, which debt was evidenced by a note dated September 25, 1914, and in answer to the writ of garnishment served on him appellee denied that he owed Levytansky anything, or that he had any effects in his hands belonging to him, and prayed that he be discharged, with his attorney's fees, etc. Thereupon appellant applied to the court, on December 8, 1915, for an injunction, and, as a basis for such injunction, alleged that appellee had in his possession goods, wares, and merchandise that he had purchased from said Levytansky in bulk, especially a lot of jewelry and mon-

ey, that appellee purchased about \$11,000 worth of jewelry from Levytansky, which he still had, and that the "Bulk Sales Law" had not been complied with. It was alleged that Levytansky was a merchant and came within the provisions of the Bulk Sales Law, and did not give ten days' notice before making said sale. It was alleged that such sale was in fraud of Levytansky's creditors, and that Levytansky was insolvent, and it was also alleged that appellee was insolvent, and that appellant was without an adequate remedy at law. An injunction was prayed for restraining Martin from disposing of the merchandise, etc.

Appellee answered, admitting that he purchased a lot of jewelry from Levytansky about September 11, 1915, for which he paid Levytansky \$11,500, the fair market value of the same, but denied that he purchased same in bulk, or that the same was a bulk sale. It was denied that Levytansky was a merchant; that it was not necessary to give any notice of the sale, because he was not then a merchant. It was also denied that appellee was insolvent.

The court heard evidence and denied the injunction on the ground that the merchandise bought by appellee had been segregated from the stock of merchandise by Levytansky, and had been mortgaged to various banks and individuals by the said Levytansky; that thereafter, while the stock was in the possession of the banks and individuals, Levytansky negotiated the sale to Martin, and with the money received Levytansky acquired possession of the stock and delivered it to appellee. The court found that the mortgaging of said stock and delivering possession to the mortgagees caused it no longer to be a part of the original stock of merchandise, and did not come within the provisions of the Bulk Sales Law, and that therefore the title to said goods had passed to appellee. From the refusal of that injunction this appeal is prosecuted.

The agreed statement of facts shows that prior to March, 1915, A. Levytansky was a jewelry merchant in San Antonio, but in March, 1915, he closed his place of business and took the stock of goods which he had left and sold it to one T. L. Griffith, except certain parts of the stock, including diamonds which he had previously mortgaged or pledged to the Citizens' Bank & Trust Company, Dwight Potter, a party in New Orleans, Gus Kray, S. J. Martin, and others, to secure the payment of borrowed money; the amounts so borrowed aggregating about \$10,000. The possession of the goods mortgaged was delivered to these mortgagees at the times the various loans were obtained, and these goods never again became a part of the stock of goods from which they were taken and were never exposed to sale. They remained with the mortgagees until appellee received them. On September 11, 1915, Mar-

tin bought all of the jewelry so pledged from Levytansky, and paid him therefor the sum of \$11,500. Martin paid the wholesale price for this jewelry; the tags showing the retail price aggregated about \$45,000. Martin paid Levytansky in checks, and out of the money received Levytansky paid off the mortgages against the property, and the possession of the goods was delivered to Martin, who since has sold about 60 per cent. of it for \$8,500. These sales were made by Levytansky, and after Martin receives his \$11,500 back his agreement is that Levytansky is to have one-half of all over that sum for his services in selling the goods. Martin has never been in the jewelry business, and has no expert knowledge of diamonds, and is engaged in farming and real estate business.

[1] The sale by Levytansky to Martin was not in the usual course of trade, for at the time Levytansky was not engaged as a merchant in the jewelry business or any other kind of mercantile business, he having gone out of business in March, 1915, and Martin did not demand and receive a list of Levytansky's creditors, showing their addresses and the amounts due each, etc., as required by the Bulk Sales Law, and ten days' notice was not given them. All of his creditors did not share in the proceeds of this sale to Martin. Levytansky was financially insolvent at the time, and Martin was at the time one of his creditors, and at the time this suit was filed Levytansky was insolvent.

Levytansky's store was closed on Commerce street in 1914, and later he opened a store on Alamo Plaza for a few months, and after closing that he opened an office in the State Bank & Trust Company building, where he offered for sale the remaining portions of stock until March, 1915, when he finally sold or disposed of the remainder of the stock to others than Martin, and went to farming, and was not in the mercantile business when Martin bought. Between March and September, 1915, Levytansky made efforts to sell the jewelry which was up as collateral for these loans, but did not go into the jewelry business after March, 1915.

[2] Under article 3970, Vernon's Sayles' Civil Statutes, a mortgage on a stock of merchandise exposed to daily sale, and where the mortgagor retains possession, is deemed fraudulent and is made void. This dates back to Acts 1879, p. 60, and it has been held that this statute applies to a part of a stock as well as to the whole. *B. F. Avery Sons v. Waples*, 19 Tex. Civ. App. 672, 49 S. W. 153. A mortgage on the stock, however, was not void at common law, but was only made so by virtue of the statute which says that such sale shall be void where the mortgagor retains possession and the goods remain exposed to daily sale. So it would not apply to a case like this, where the goods were segregated and possession delivered to the mortgagees.

[3] These goods, having been segregated from the main stock and pledged to the several mortgagees, and the validity of those mortgages not being attacked or questioned, were not a part of a stock of merchandise at the time Martin acquired them. Levytansky's right to sever these goods and pledge them to secure his debts by delivering possession is not attacked, but it is contended that the Bulk Sales Law would apply. If he had the right to mortgage the goods, he had the right to make that mortgage valid and binding by delivering possession of the goods, which he did. If the mortgagees had foreclosed those mortgages, the purchasers would undoubtedly have obtained a good title. In order to prevent such a foreclosure the mortgagor sells the goods at wholesale price and pays off the mortgagees.

[4] Not only this, at the time Martin bought the goods Levytansky was not a merchant and had not been for several months. The Bulk Sales Law does not apply to this case, because it has reference to sales made out of a stock of merchandise exposed to sale. These goods were placed to secure debts, in such manner that it was not obnoxious to the statute as to void sales or mortgages, and then they ceased to be a part of the stock of merchandise, because they were segregated. And they never did resume their place as a part of a stock of merchandise exposed to sale. For this reason the Bulk Sales Law does not apply. Levytansky was not a merchant at all, but was a farmer at the time of the sale to Martin.

The judgment is affirmed.

POLK, County Judge, v. ROEBUCK et al.
(No. 79.)

(Court of Civil Appeals of Texas. Beaumont.
Feb. 18, 1916.)

1. COUNTIES ⇐98(1)—OFFICERS—LIABILITIES ON BONDS.

Under Sp. Laws 1903, c. 25, § 1, creating a special road law for San Augustine county, making the members of the commissioners' court ex officio road commissioners of their respective districts, requiring them to execute bonds as such road commissioners, and limiting the amount of compensation they should receive, a county commissioner and the sureties on his official bond as such are not liable for amounts coming into the hands of the commissioner for road purposes in excess of the amount permitted by law: no bond having been given by him as road commissioner.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141, 142; Dec. Dig. ⇐98(1).]

2. COUNTIES ⇐206(1)—COUNTY BOARD—CONCLUSIVENESS OF DECISIONS.

Under Rev. St. 1896, art. 1537, giving commissioners' courts authority to approve and settle all accounts against the county, the orders of the court are conclusive, unless appealed from, and are not subject to collateral attack if the court has jurisdiction, but, when the court ex-

ceeds its jurisdiction, the order is subject to collateral attack.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 822, 823, 826, 827; Dec. Dig. ⇐206(1).]

3. COUNTIES ⇐101(6)—OFFICERS—ACTIONS—PLEADING.

Though Rev. St. 1895, art. 1535, requires each member of the county commissioners' court to take oath that he will not directly or indirectly be interested in any contract with or claim against the county except for his fees of office, where a petition alleges that a commissioner collected sums to which he was not entitled, and set out the names of the persons to whom the warrants were issued, the number of warrants, the dates issued, the dates paid, and that they were for services rendered for the county, but failing to allege that the commissioner was interested in any of the claims, or that he had any assignment of any of them, or that he collected them for himself as owner, and not showing that he did not collect the claims for the real owners, it was insufficient to state a cause of action.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 157; Dec. Dig. ⇐101(6).]

4. COUNTIES ⇐101(6)—OFFICERS—LIABILITIES ON BOND.

A petition by a county against a county commissioner for amounts collected from the county to which he was not entitled for services rendered to the county did not show liability of sureties on his bond, even though he were personally liable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 157; Dec. Dig. ⇐101(6).]

5. COUNTIES ⇐101(6)—OFFICERS—LIABILITIES.

In a petition against a county commissioner for sums paid to him in excess of the amount allowed by law for road purposes and sums collected by him on warrants to various persons for services to the county, a paragraph alleging liability for money had and received is insufficient to show liability in the absence of a showing of liability in the paragraphs setting out the facts relating to amounts received by him.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 157; Dec. Dig. ⇐101(6).]

Appeal from District Court, Shelby County; A. E. Davis, Judge.

Action by H. K. Polk, County Judge, against M. C. Roebuck and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Minton, of Hemphill, and T. H. Downs, of San Augustine, for appellant. Davis & Ramsey, of San Augustine, for appellees.

BROOKE, J. H. K. Polk, county judge of San Augustine county, in his capacity as county judge, and acting for San Augustine county, filed this suit on the 8th day of December, 1913, against M. C. Roebuck, as principal, G. W. Townsend, A. Wall, F. C. Graham, T. J. Wall, and M. C. Flournoy, as sureties on the official bond of M. C. Roebuck as county commissioner of San Augustine county, for certain sums of money illegally collected from the county treasurer of San Augustine county by the said M. C. Roebuck while acting in the capacity of county commissioner of said county.

In his petition appellant alleged that on the 24th day of November, 1910, the defendant Roebuck, as principal, and the other defendants, as sureties, made, executed, and delivered to W. C. Ramsey, county judge of San Augustine county, Tex., and his successors in office, a certain official bond in the sum of \$3,000, which bond was in all respects in conformity with law and made to secure the faithful performance and discharge of all duties required of him by law as county commissioner for precinct No. 8. He further alleged that the original of said bond has been lost, and a certified copy of its record was attached to the petition. It was further alleged that the above bond was approved by the county judge in open commissioners' court on the 30th day of November, 1910, and was duly attested by the county clerk, and was filed by him on the same day. He further alleged that plaintiff was the duly elected and acting judge of San Augustine county and the successor in office of the said W. C. Ramsey, aforesaid.

Plaintiff further alleged that the defendant Roebuck qualified as county commissioner of said county on the 30th day of November, 1910, and served continuously as such officer until the ——— day of December, 1912.

In the eighth paragraph of his petition the plaintiff alleged that on the 8th day of February, 1911, the defendant Roebuck presented his account to the commissioners' court of said county for the sum of \$24 for "Reviewing roads," which was approved by the court and paid by the treasurer; that on the 14th day of February, 1912, the defendant Roebuck presented his account for \$30 to the commissioners' court of said county, which was approved and paid by the treasurer. Plaintiff alleges that the order of the court approving the two above-described accounts was without authority of law and void, and the payment of same illegal.

In the ninth paragraph of his petition plaintiff alleges that on the 29th day of July, 1911, the defendant Roebuck presented his account to the commissioners' court of said county for "roadwork during the preceding quarter" for \$6.95; that said account was approved and paid by the treasurer; that on the 29th day of July, 1911, the defendant Roebuck presented another account for "overseeing roadwork" during the preceding quarter for the sum of \$32, and on said last-named date said account was approved, and county warrant No. 318 was issued and paid by the treasurer; that said two payments made a payment of \$38.95 for work during one quarter, when under the law the defendant was entitled to not exceeding \$30 for services on the road during the quarter in which his account accrued, making therefor an amount collected by said defendant of \$8.95 in excess of the maximum amount allowed by law, and to the extent of this excess of \$8.95 the payment was illegal, without authority of law, and void; that on the 15th day of Novem-

ber, 1911, the defendant Roebuck presented his account to the commissioners' court for "overseeing roadwork" in the sum of \$44, which was allowed and paid by the treasurer, and which made the sum of \$14 in excess of the sum allowed by law, and to that extent was illegal, and therefore void.

In the tenth paragraph of his petition plaintiff alleged that on the 29th day of July, 1911, the defendant Roebuck presented his account to the commissioners' court of said county for the sum of \$8 for "receiving and letting bridges," which was allowed and paid; that during said quarter the defendant Roebuck had already presented his account for and collected the maximum amount of \$30 allowed him for the preceding quarter, and therefore the payment of this account of \$8 was illegal and void; that on the 17th day of August, 1911, the defendant Roebuck presented his account for "letting and receiving bridges" in the sum of \$4, which was allowed and paid by the treasurer; that on the 11th day of September, 1911, the defendant Roebuck presented his account for \$4 for "letting and receiving bridges," which was approved and paid; that on the 11th day of September, 1911, defendant Roebuck presented another account for \$12 for "receiving and letting bridges," which was allowed and paid; that on the 15th day of November, 1911, the defendant Roebuck presented an account to the commissioners' court for \$4 for "letting and receiving bridges," which was approved and paid—the above four items making a total of \$24 which was received by the defendant Roebuck in excess of the \$30 allowed him by law for services on the roads during the quarter covered by said accounts, the defendant having already received the maximum amount allowed him by law for such services, and that said payment of \$24 was therefore illegal and not warranted by law.

In the eleventh paragraph of his petition plaintiff alleged that a superintendent of roads and bridges for San Augustine county was duly appointed on the 15th day of April, 1912, and entered upon the duties of his office; that after such appointment no payments were allowed by law to be made to the commissioners of said county for any services on the public roads and bridges, except the sum of \$30 per year for reviewing the roads of his precinct; that on the 18th day of June, 1912, the defendant Roebuck presented his account to the commissioners' court of San Augustine county for \$8 for "letting and receiving bridges," which was approved by the court and paid by the treasurer; that on the 16th day of August, 1912, Roebuck presented his account to the commissioners' court for the sum of \$4 for "letting and receiving bridges," and said account was approved by the court and paid; that on the 30th of September, 1912, the defendant Roebuck presented his account for \$2, which was approved and paid; that on the 30th day of

September, 1912, the defendant Roebuck presented another account to said court for the sum of \$4 for "letting and receiving bridges," which was allowed and paid; that on the 15th of November, 1912, the defendant Roebuck presented his account for the sum of \$8 for "letting and receiving bridges," which was allowed and paid; that on the 30th day of November, 1912, the defendant Roebuck presented his account for \$8 for "letting and receiving bridges," which was approved and

paid; that said items in this paragraph make an aggregate of \$34 which was paid without authority of law, and was therefore void, and the orders approving same of no effect.

Plaintiff further alleged in paragraph 12 of his petition that at the dates set out below the defendant Roebuck collected the sums of money set out in the schedule below from the treasurer of San Augustine county, to which he was not entitled by law, and without authority of law, as follows:

For	War.	Date Issued	Date Paid	Check No.	Purpose.	Amt. Rec.
T. N. Spinks	29	12-16-10	12-16-10	806	Holding election	4.00
A. M. Henley	30	12-16-10	12-16-10	806	"	4.00
M. Luce	175	8-29-11	8-29-11	939	Pauper allowance	5.00
M. Luce	322	5-12-11	5-12-11	10	"	10.00
Jas. Debose	223	5-12-11	5-12-11	10	Att. M. Luce	15.00
Dorsey Harvey	313	7-29-11	7-29-11	227	Building bridge	87.00
Tom Beard et al.	314	7-29-11	7-29-11	227	Road work	187.00
Tom Beard et al.	325	7-31-11	7-31-11	235	"	245.50
Tom Beard et al.	391	8-17-11	8-17-11	307	"	271.00
W. T. Woods	391	8-17-11	8-17-11	307	Building bridge	36.00
M. Luce	392	8-17-11	8-17-11	307	Pauper allowance	10.00
J. L. Dubose	392	8-17-11	8-17-11	307	Att. M. Luce	15.00
B. F. Nugent	364	9-11-11	9-11-11	389	Holding election	4.00
A. M. Henley	465	9-11-11	9-11-11	389	"	2.00
Tom Beard et al.	474	9-11-11	9-11-11	389	Road work	809.90
A. M. Henley	475	9-11-11	9-11-11	389	Building bridge	92.50
Bob Baker	475	9-11-11	9-11-11	389	Fixing bridge	2.00
Hy. Hammond	475	9-11-11	9-11-11	389	Building bridge	36.80
Jasper Harvey	475	9-11-11	9-11-11	389	"	43.00
Dorsey Harvey	475	9-11-11	9-11-11	389	Lumber	13.20
G. H. Roebuck	475	9-11-11	9-11-11	389	Lumber	5.10
Tom Beard et al.	498	10- 3-11	10- 3-11	412	Road work	414.75
C. L. Luce	558	11-17-11	12-13-11	499	Pauper allowance	10.00
Joe Marshburn	559	11-17-11	12-13-11	499	"	10.00
Bob Baker	560	11-17-11	11-17-11	475	Team on road	6.00
M. Lewis	565	11-17-11	11-17-11	475	Work on plows	3.75
F. A. Willis	562	11-17-11	11-17-11	475	Building bridge	52.50
Tom Beard et al.	563	11-17-11	11-17-11	499	Road work	474.83
C. L. Luce	688	2-15-12	2-15-12	660	Pauper allowance	10.00
Joe Marshburn	689	2-15-12	2-15-12	660	"	10.00
Buster Henry	694	2-15-12	2-15-12	660	Repair bridges	15.00
Mitch Hollin	695	2-15-12	2-15-12	660	Building bridge	115.90
Susie Holloway	696	2-15-12	2-15-12	660	Pauper allowance	8.00
J. W. Parker	762	3-25-12	3-25-12	736	Repairing bridge	25.00
Dorsey Harvey	793	4- 9-12	4- 9-12	757	Building bridges	139.25
Steve Garrett	827	5-12-12	5-12-12	845	Pauper allowance	8.00
C. L. Luce	828	5-12-12	5-12-12	845	"	10.00
Susie Holloway	829	5-12-12	5-15-12	845	"	8.00
Joe Marshburn	850	5-15-12	5-15-12	845	"	10.00
Martha Bowie	881	5-15-12	5-15-12	845	"	6.00
Dorsey Harvey	901	6-18-12	6-18-12	970	Building bridge	80.00
Buster Henry	902	6-18-12	6-18-12	970	"	64.00
Henderson Smith	983	8-16-12	8-16-12	174	Repairing bridge	10.00
Joe Marshburn	984	8-16-12	8-16-12	174	Pauper allowance	10.00
C. L. Luce	985	8-16-12	8-16-12	174	"	10.00
Martha Bowie	986	8-16-12	8-16-12	174	"	6.00
W. H. Ware	57	9- 3-12	9-30-12	307	Building bridge	85.15
Wm. Ware	57	9-30-12	9-30-12	307	"	170.10
Clifford Harvey	140	11-15-12	11-15-12	434	"	74.12
Joe Marshburn	141	11-15-12	11-15-12	434	Pauper allowance	10.00
C. L. Luce	141	11-15-12	11-15-12	434	"	15.00
L. Taylor	143	11-15-12	11-15-12	434	Holding election	4.00
A. M. Henley	144	11-15-12	11-15-12	434	"	6.00
T. M. Spinks	145	11-15-12	11-15-12	434	"	4.00
J. J. Spinks	146	11-15-12	11-15-12	434	"	4.00
C. K. Caldwell	192	11-29-12	11-29-12	493	"	4.00
Aaron Norwood	204	11- 3-12	11-30-12	501	Repairing bridge	10.00
Sam Sheard	205	11- 3-12	11-30-12	501	Team on road	2.00
J. E. Sowell	206	11-30-12	11-30-12	501	Bridge lbr.	15.50
J. E. Soweoo	208	11-30-12	11-30-12	501	Building bridge	87.63
Total						\$3,300.38

Plaintiff says that the above payments are illegal and fraudulent, because they are made for services rendered for San Augustine county, and could not legally be made to the defendant M. C. Roebuck, because he was a county commissioner of said county, and by virtue of said office was also ex officio road commissioner of said county, and could not be interested either directly or indirectly in any contract with said county nor any claim against said county, and each of said above sums of money are now due and owing to said county by the said defendant M. C. Roebuck.

In the thirteenth paragraph of his petition plaintiff alleges that the defendant Roebuck has failed and refused to pay over to the defendant or the county treasurer of said county, or to any officer for the benefit of said county, the various sums of money referred to in paragraph 8, amounting to \$54, and the excess set out in paragraph 9 of \$8.98, also the excess sum set out in paragraph 9 of \$14, also the various sums set out in paragraph 10, amounting to \$32, the various sums set out in paragraph 11, amounting to \$34, and the various sums set out in paragraph 12, aggregating a total of \$3,300.38, making a total aggregate of \$3,443.33, and still refuses to pay over the same or any part thereof, though often requested to do so, to the damage of plaintiff and of San Augustine county, Tex., in the sum of \$3,443.33, which sum is due and owing to the plaintiff and to San Augustine county by the defendant M. C. Roebuck, whereby the terms and conditions of said bond are breached, and defendants, both principal and sureties, have become bound and liable, under the terms and conditions of said bond, to pay, and promised to pay, plaintiff the sum of \$3,443.33, but have wholly failed to do so, and this suit is brought to collect the principal debt of \$3,443.33, together with 6 per cent. interest thereon from the time that each of said sums was received by the said M. C. Roebuck, as aforesaid.

In the fourteenth paragraph plaintiff says that, if the said Roebuck and the sureties on his bond are not liable for the amount sued for upon the bond, then the said M. C. Roebuck, by reason of the facts set out above, became liable and bound, and promised to pay this plaintiff the sum of \$3,443.33, together with legal interest thereon at the rate of 6 per cent. per annum from the date of the receipt of the various funds for money had and received which belonged to San Augustine county, and which the defendant Roebuck has converted to his own use and benefit, and to which he was not entitled by law, and which he has refused and still refuses to pay.

Plaintiff further pleads an order of the commissioners' court authorizing the filing of this suit.

The defendant Roebuck filed his first

amended original answer herein on the 26th day of January, 1914, in which he pleads a general demurrer, several special exceptions, and special answers. The defendant sureties filed their amended original answer on the same day, and adopt the answer of the defendant Roebuck, and plead special exceptions and special denials. The cause came on to be heard on the 15th day of July, 1915, before the trial court, and the defendants urged their general demurrer, which was sustained by the court, to which action of the court in sustaining defendant's bill of exceptions to plaintiff's petition the plaintiff in open court excepted, and seasonably preserved and filed his bill of exception No. 1 to the action of the court in due time, and in open court gave notice of appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, at Beaumont, filed a transcript of the proceedings in this cause, and here now presents his cause for review before this court.

[1] Appellant by his first assignment of error challenges the action of the lower court in sustaining the general exception of defendants to the plaintiff's petition, and as his first proposition says that the facts set out in plaintiff's petition show a good cause of action against appellees, and that the cause should have been heard on its merits.

The Twenty-Eighth Legislature passed an act on the 26th day of March, 1903, which took effect 90 days after date, creating a special road law for San Augustine county, Tex. Section 1 is as follows:

"That the members of the commissioners' court of San Augustine county shall be ex officio road commissioners of their respective districts and under the direction of the commissioners' court shall have charge of all teams, camping outfits, tools and machinery belonging to the county and placed in their hands by said county, and it shall be their duty under such rules and regulations as the commissioners' court may prescribe to superintend the laying out of such roads, and the making or changing of roads, and the building of bridges. Each of said commissioners shall, before entering upon the duties of his office, in addition to his regular bond as commissioner, execute a bond of \$1,000, with two or more good and sufficient sureties, payable to the county judge of San Augustine county for the use and benefit of the road and bridge fund; conditioned that he shall well and faithfully perform all the duties required of him by law, or by the commissioners' court of San Augustine county, and that he will account for all money or property belonging to the county that may come into his possession: Provided, that with the consent of the commissioners' court, any one of said commissioners shall be allowed to appoint any competent person as deputy road commissioner, who shall be required to execute the same bond that is required by the commissioners in this section, and such deputy road commissioner shall be entitled to the same compensation that is here allowed county commissioners for the same service: Provided, that county commissioners shall not be allowed any commission when a deputy road commissioner has been appointed." Section 1, Special Laws of 1903, p. 150.

Section 14 of said act provides as follows:

"Each county commissioner when acting as road commissioner, shall be entitled to \$2.00 per

day for services actually performed: Provided, that he shall not receive more than \$80 per quarter. Said per diem shall be paid out of the road and bridge fund, when the account shall have been approved by the commissioners' court, and the court shall not approve said account unless the commissioner presenting it shall make oath that the account is just, due, and unpaid, and said account shall specify the number of days' work actually performed by him, and that it was necessary to be done under the circumstances, and if he worked only a part of the day, the number of hours worked shall be stated, and no commissioner shall be entitled to pay as road commissioner, either for himself or deputy, while he is performing the duties of county commissioner, nor shall he receive any additional pay than that provided by this section for inspection of his road, or other road service."

Section 16 of said act creates the office of county superintendent, and provides that the commissioners' court may at its first legal term after the law has taken effect appoint a county superintendent of public roads and bridges, etc., and the said section 16 further provides that, when a county superintendent shall be appointed, the county commissioners shall receive no compensation as road commissioners, except \$30 per quarter for inspecting the road once a year.

From sections 8 to 11, inclusive, of the petition it is charged that Roebuck received more compensation than he was allowed by law to receive, and suit is against him and the sureties on his official bond as county commissioner to recover said amount. The bond required of the county commissioner is required to be in the sum of \$3,000, to have two or more good and sufficient sureties, and the conditions of the bond are for the faithful performance of the duties of his office, and this is the only bond that is alleged to have been made. We do not understand that the sureties on this bond on which suit is brought would be liable for funds coming into the hands of Roebuck as road commissioner, and illegally retained by him as road commissioner. The special road law above referred to required a different and separate bond, conditioned that the road commissioner will account for all money and property belonging to the county that may come into his possession as road commissioner. It is not alleged in this petition that Roebuck at any time executed the bond as road commissioner and qualified as such road commissioner. And, indeed, there is no allegation in the petition to show if the said Roebuck did, in fact, collect amounts illegally from the county, whether the same were received as county commissioner or as road commissioner. He would be road commissioner by virtue of the fact of holding the office of county commissioner, but the law, as above stated, required that he qualify before entering upon such additional duties by giving the bond. We are left to infer that the intention was to charge him as receiving the amounts illegally as road commissioner.

For the reasons above stated, the petition, with reference to allegations, from sections

8 to 11, inclusive, is subject to a general demurrer, and does not state any cause of action whatever against the sureties on the said Roebuck's bond as county commissioner.

[2] It is argued by appellees that by article 1537, Revised Statutes 1895, commissioners' courts are given authority to approve and settle all accounts against the county, and direct their payment, and that this power of the court was invoked by appellee on his claim, and that the court, in the exercise of its authority, made the order allowing it, and we are cited to the case of Callaghan, County Judge, v. Sallaway, 5 Tex. Civ. App. 239, 23 S. W. 838, as holding that such an order made is conclusive unless appealed from, and cannot be collaterally attacked.

In the case of School Trustees et al. v. Farmer et al., 23 Tex. Civ. App. 39, 56 S. W. 555, Chief Justice Garrett uses the following language:

"But it is contended that the order of the commissioners' court fixing the amount at \$214.88 is an adjudication of the question is a judgment that cannot be collaterally attacked, and can only be set aside or revised by proper appellate proceeding. The district court has appellate jurisdiction over commissioners' court. Article 5, § 8 [Constitution]. But there has been no legislation making provision for the exercise of such jurisdiction except in the case of damages assessed for land taken for public roads. Rev. St. art. 6477. Its jurisdiction might, however, be invoked by certiorari.

"There is some conflict of authority as to the conclusiveness generally of the orders and judgments of the commissioners' courts. In matters involving discretion, of which the court has jurisdiction, they are held to be conclusive. City of Ft. Worth v. Davis, 57 Tex. 236; Callaghan v. Sallaway [5 Tex. Civ. App. 239], 23 S. W. 837; 7 Am. & Eng. Enc. of Law (2d Ed.) 1009, and authorities cited. By article 1537, subd. 8, Rev. St. of this state, the commissioners' court is given authority 'to credit, adjust, and settle all accounts against the county and direct their payment.' In this the court exercises a jurisdictional function, and, when it has exclusive jurisdiction, its judgment is conclusive, unless appealed from or reversed in the mode prescribed by law.

But, where the commissioners' court attempted to credit and allow accounts not legally chargeable against the county, it is an act in excess of jurisdiction, and is void. McKinney v. Robinson, 84 Tex. 496 [19 S. W. 609]. It has been held that a settlement of an account by a county board is not more sacred than a settlement between individuals," but Judge Taylor, in "Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12794, gives as the true rule the one that seems to have been adopted by the Supreme Court of this state in McKinney v. Robinson, supra. He says: 'Within the limits of their power, as conferred by statute, the action of the county court in determining the amount due a creditor of the county, in the absence of fraud, or, perhaps, mistake, binds the county; but the county court cannot bind the county by ordering a claim to be paid which is not made a county charge by statute or by allowing more than the statute distinctly limits, or by an allowance in the face of a statutory prohibition.' Since the law allowed the assessor a commission of only 1 per cent. of the taxes assessed by him upon the property in school district No. 26, the commissioners' court exceeded its authority in allowing him more; and in doing so it acted without jurisdiction of the matter, and its order making the allowance was void and subject to collateral attack. It is no defense in a suit

against the assessor by the trustees of the district for the amount paid him in excess of the commission fixed by the statute."

In the case of August-Busch Co. v. Caufield et al., 135 S. W. 244, the court, in a lengthy opinion, reviewed, among others, the case of Callaghan v. Sallaway and the Farmer Case, and said:

"In Voght v. Bexar County et al., 16 Tex. Civ. App. 567, 42 S. W. 127, * * * a writ of error was refused by the Supreme Court. In discussing the legal effect of judgments of the commissioners' court, it was said: 'All the provisions of the statute having been complied with, the judgment of the commissioners' court is not subject to collateral attack. The law has provided for appeal from the judgment of commissioners' courts; and appellant, if dissatisfied with the judgment, should have used the statutory means for setting it aside' "

—quoting Elliott on Roads and Streets, 259, as saying:

"In all cases where there is a permanent tribunal, having jurisdiction to approve or reject a report, to hear and determine controversies, there is a tribunal competent to render a judgment strong enough to resist collateral attack."

7 Am. & Eng. Enc. of Law (2d Ed.) p. 1003, is quoted as saying:

"A board of county commissioners, in the audit, adjustment, allowance, or disallowance of a claim against a county, exercises judicial functions and, having exclusive jurisdiction its judgment in the absence of fraud, is conclusive, both upon the board and the parties interested, unless appealed from or reversed in a mode prescribed by law"—citing numerous cases in support of the text.

In 11 Cyc. 404, it is said:

"Ordinarily the decision of a board in the exercise of jurisdictional discretion is conclusive, and will not be controlled or reversed, unless it is a clear abuse of such discretion, or unless there is evidence of collusion or fraud. Where the county commissioners of the county do public business according to the discretion provided for them, new commissioners are bound by their acts. Decisions, judgments, or orders of a county board, acting jurisdictionally in a proceeding in which they have jurisdiction, being conclusive, as the judgment of a court of record, cannot be collaterally attacked, and are only reversible upon appeal or other appropriate proceeding. Where, however, a board or court exceeds its jurisdiction and makes an order without authority, such order, being void, is subject to collateral attack."

The following cases are cited by Judge Garrett from other jurisdictions as supporting the doctrine that the judgments and orders of commissioners' courts are not subject to collateral attack: *Waugh v. Chauncey*, 13 Cal. 11; *Stingley v. Nichols*, 131 Ind. 214, 30 N. E. 34; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487; *Knox County v. Barnett*, 106 Ind. 599, 7 N. E. 205; *Brewer v. Boston Ry. Co.*, 113 Mass. 52; *Blanchard v. Blissell*, 11 Ohio St. 96; *Bartlett v. Eau Claire Co.*, 112 Wis. 237, 88 N. W. 61; *Bennett v. Hetherington*, 41 Iowa, 142; *Beaman v. Leake County*, 42 Miss. 237; and others.

It will be seen from the decisions that, if the court has jurisdiction, the orders of such court in such matters as complained of in this case are conclusive, unless appealed

from, and are not subject to collateral attack. But, when the court exceeds its jurisdiction, as under the allegations in the petition it did in the instant case, the order is void, and therefore subject to collateral attack.

[3] In section 12 of the petition appellant alleges that appellee Roebuck collected certain sums of money to which he was not entitled, and that the names of the persons to whom the warrants were issued, the number of the warrants, the dates issued, the dates paid, and the number of the treasury warrants are set out, and appellant says that the said payments were illegal, because the payments were made for services rendered for San Augustine county, and could not be legally made to the said Roebuck, because he was county commissioner, and that said Roebuck could not be interested, either directly or indirectly, in any contract of the county.

There is no allegation that the said Roebuck was interested in any of the claims which appear to have been made by various persons for holding elections, pauper allowances, lumber, building bridges, roadwork, etc., and the names of the parties by whom said services were performed are set out. There is no allegation that the said Roebuck had any assignment of any kind whatever to any of said claims. There is no allegation in the petition that the said Roebuck, as county commissioner, collected the claims for himself as owner or that they were assigned to him, and nothing to negative the idea that the said Roebuck was only collecting the claims for the real owners of the same.

It has been held under Revised Statutes 1895, art. 1535, requiring each member of the county commissioners' court to take oath that he will not directly or indirectly be interested in any contract with or claim against the county, except for his fees of office, and under article 1537, Revised Statutes, making it the duty of such court to provide and keep in repair the courthouse and jail, and audit and settle all accounts against the county, that a commissioner cannot take and enforce an assignment of the claim of a contractor against the county, to accrue on an unfinished contract to build a jail, and the court, in passing on said case, used the following language:

"However honest appellant may have been in his intentions the contract by virtue of which he claims that he is entitled to the money is in derogation of the statute, and contrary to the spirit, if not the letter, of his official oath. His pecuniary interest would have been directly opposed to the interest of the county in the event of a rejection of the work contracted for, and his private pecuniary interest might have induced him to act in violation of his duty as county commissioner. Contracts in their nature calculated to influence the action of public officers and the effect of which is to influence them one way or the other are against public policy and void. *Robinson v. Patterson*, 71 Mich. 149, 39 N. W. 24, and authorities cited; *Meguire v. Corwine*, 101 U. S. 103, 25 L. Ed. 899; *Rigby v. State*,

27 Tex. App. 55, 10 S. W. 760; Brown v. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206." Knippa v Stewart Iron Works, 66 S. W. 824.

[4] We do not see how the bondsmen of said Roebuck as county commissioner could be held liable under section 12 of the petition if the other proper allegations stating a cause of action had been made.

[5] Section 14 of the plaintiff's petition cannot stand by itself alone, in connection with the allegations contained in previous paragraphs of the petition; for, if the said previous paragraphs do not allege a cause of action, section 14 is not aided in this respect, and within itself it is not sufficient.

For the reasons above set out, we are of opinion that the action of the lower court in sustaining the demurrer to plaintiff's petition was correct.

The appellant's assignment is therefore overruled, and this case is in all things affirmed.

WESTERN UNION TELEGRAPH CO. v. BAILEY. (No. 1539).*

(Court of Civil Appeals of Texas. Texarkana. Jan. 27, 1916. On Rehearing, Feb. 24, 1916.)

1. EVIDENCE ⇨80(1)—PRESUMPTIONS—LAWS OF SISTER STATE.

Where the laws of a sister state are involved, they will, in the absence of evidence, be presumed to be the same as the laws of the forum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. ⇨80(1).]

2. TELEGRAPHS AND TELEPHONES ⇨27—DELAY IN TRANSMISSION OF MESSAGE—DAMAGES—MENTAL ANGUISH.

While the mental anguish doctrine prevails in Texas, such damages cannot be recovered in action for delay or nondelivery of a telegram originating in a state where such damages are not allowed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 80; Dec. Dig. ⇨27.]

3. COMMERCE ⇨59—INTERSTATE COMMERCE—BURDEN UPON.

In an action against a telegraph company for nondelivery of a death message originating in a sister state where damages for mental anguish could be recovered, the action of the court of the forum in allowing recovery for such damage, the negligence having occurred in the state of the forum, is not improper as placing the burden on interstate commerce contrary to Const. U. S. art. 1, § 8, subd. 3, giving Congress exclusive power over such commerce; for, while the contract of the telegraph company was one for interstate carriage, yet, Congress not having acted, actions for breach are governed by the state laws.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 87, 100; Dec. Dig. ⇨59.]

4. COMMERCE ⇨10—INTERSTATE COMMERCE—POWER OF CONGRESS.

Until Congress has acted and passed laws regulating the recovery for breach of a contract for the delivery of an interstate telegram, the state courts are warranted in following their own laws.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. ⇨10.]

5. TELEGRAPHS AND TELEPHONES ⇨54(6)—NONDELIVERY OF MESSAGES—STIPULATIONS.

A provision on the back of a telegraph blank, which embodied the contract, limiting the company's liability for failure to discharge its duty to a sum not exceeding \$50, is void.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 44, 46; Dec. Dig. ⇨54(6).]

6. APPEAL AND ERROR ⇨562—STATEMENT OF FACTS—NECESSITY.

In an action for nondelivery of a telegram, the company cannot on appeal question its liability on the ground of a stipulation limiting liability for an unrepeat message, where such provision did not appear in the statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495-2499; Dec. Dig. ⇨562.]

On Rehearing.

7. APPEAL AND ERROR ⇨1079—ASSIGNMENTS OF ERROR—SUFFICIENCY.

The excessiveness of an award of damages for nondelivery of a telegram cannot be considered on appeal, where the appellant's brief did not present that assignment in proper manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4262; Dec. Dig. ⇨1079.]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Action by T. C. Bailey against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. S. Todd, of Texarkana, for appellant. Mahaffey & Keeney, of Texarkana, for appellee.

HODGES, J. This appeal is from a judgment in favor of the appellee for damages resulting from the negligent failure to deliver a telegraphic message sent by R. L. Bailey from Bethel Springs, Tenn., to T. C. Bailey at New Boston, Tex., notifying the latter of the dangerous illness of his brother. The message reached New Boston promptly, but was never delivered, and the appellee did not learn of his brother's illness and death till some time after the burial.

This is the second time this case has been before this court. See Bailey v. Western Union Tel. Co., 171 S. W. 840. On the first trial, the court in his charge to the jury limited the amount which might in any way or event be awarded to the plaintiff to the sum of \$50. The plaintiff appealed from a judgment for that amount, and assigned as error the giving of the charge referred to. This court sustained the assignment and reversed and remanded the case, holding that the stipulation contained in the printed matter on the back of the telegram, which provided that \$50 should be the limit of liability, was void. The last trial proceeded according to the instructions given in that opinion, and a judgment was rendered in favor of the appellee for the sum of \$1,000, from which the telegraph company prosecutes this appeal. Inferentially, it appears to be conceded that,

If the correctness of the judgment appealed from in this case is to be tested by the laws and judicial policy of this state, there is no error insisted upon which will justify a reversal. In other words, if no federal question is involved, the judgment should be affirmed. In their brief, counsel for the appellant thus state the questions which are raised:

"First. This being an interstate message and constituting interstate commerce, is mental anguish a proper element of damages to be submitted to and determined by the jury?

"Second. Is the valuation clause of the contract, limiting recovery of damages to the sum of \$50, reasonable and valid, and is the un-repeated message clause, also limiting liability, reasonable and valid?

"Third. Is the free delivery limit clause, limiting liability on messages wherein the addressee was beyond the delivery limits of office, reasonable and valid?"

In view of the fact that since the former appeal some other courts of high repute have announced a ruling in conflict with what we there held, we have felt constrained to give the subject further careful consideration. We shall therefore endeavor to treat the questions raised as if this were their first presentation to this court.

The argument attacking our former ruling rests upon two propositions: First, that the judgment appealed from, being based upon damages resulting from mental anguish alone, imposes a burden on interstate commerce and violates the provisions of subdivision 3, § 8, of article 1 of the Constitution of the United States. Second, that telegraph companies engaged in interstate commerce have by an act of Congress been made subject to the provisions of the Interstate Commerce Law, which alone must be looked to in determining their liability for damages and the validity of their contracts designed to limit or qualify that liability. These propositions present two separate and distinct federal questions, depending upon two distinct federal provisions for their support. If the judgment in this instance violates the provisions of the commerce clause of the Constitution, it should be set aside, regardless of whether or not Congress has undertaken to regulate this class of commerce. On the other hand, if Congress has undertaken to regulate telegraph companies doing an interstate business, and has prescribed a rule for determining their liability for negligently failing to deliver messages intrusted to them for transmission from one state to another, that law is supreme and should control, without reference to the constitutional objection. But if it should appear that neither of these grounds for federal intervention is well taken, then the judgment of the court below should be affirmed.

We shall now take these questions up for discussion in the order stated above.

[1-3] First, does the judgment appealed from violate the commerce provision of the federal Constitution? As authority for an-

swering that question affirmatively, counsel for the appellant have referred to the case of *W. U. Tel. Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457. This case was considered, and an effort made to distinguish it from the case now under consideration on the former appeal. The message in that instance was sent from a point in South Carolina, addressed to Brown at Washington, D. C. It was forwarded to the latter place without delay, but through the negligence of the agents of the telegraph company in Washington was not delivered. It was a death message; and Mrs. Brown, claiming damages subsequently filed a suit in the court of common pleas in the state of South Carolina, where she recovered a judgment for damages, based upon mental anguish. That judgment, after being affirmed by the Supreme Court of South Carolina (92 S. C. 534, 75 S. E. 542), went before the Supreme Court of the United States and was there reversed for the reasons stated and quoted in our former opinion. It appears from the facts set out in the opinion that the suit was based upon a statute of South Carolina which provided that damages for mental anguish were recoverable in such cases. It also appears that under the rulings of the courts of the District of Columbia, over which the Supreme Court of the United States exercised appellate jurisdiction, mental anguish was not regarded as a proper element of damages in such suits. Justice Holmes, who rendered the opinion, held that the action was one of tort; that, the misconduct having occurred in the District of Columbia, the question of liability must be determined by the laws of that place. We deem it unnecessary to again quote at any length from that case, and shall merely refer to the extracts made in the opinion in this case on the former appeal. The decision in the *Brown Case* announces these three propositions: First, that the measure of damages for an act of negligence, when treated as a tort, is to be determined by the laws of the place where the tort is committed; second, that in the District of Columbia, where the common law, as construed by the Supreme Court of the United States, prevails, the mental anguish doctrine, as commonly understood in telegraph cases, will not be enforced; third, that the laws of a state prescribing a measure of damages for a tort cannot be given any extraterritorial effect.

The dissimilarity between the facts of that case and the one here under consideration may be thus pointed out: There the action was one sounding in tort; here the suit is for the breach of a contract. There the misconduct occurred in another jurisdiction; here it occurred in the state of the forum. There the trial court undertook to measure the damages to be recovered by its own laws, which were different from those of the district where the tort was committed; here the judgment may be sustained whether tested

by the laws of this state or by those of the state from which the message came—and this is true whether the negligence charged be treated as a tort or as the breach of a contract. There is no evidence in the record as to what were the laws of Tennessee, and we must therefore assume that they are the same as those of this state. We understand that in reviewing the decisions of a state court the federal Supreme Court will follow the same rule. *Liverpool & Gr. West. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788. It is evident, from previous decisions of the federal Supreme Court, that its holding in the *Brown Case* that the judgment of the South Carolina court was an unconstitutional interference with interstate commerce, did not rest upon the solitary fact that the measure of damages had been so extended as to permit a recovery for mental anguish, but upon the application of the South Carolina statute to an incident of interstate commerce occurring beyond the limits of that state. It was not the particular consequences of negligence which this statute prescribed that made it offensive, but the fact that it prescribed any rule of damages to be applied to conduct beyond the state borders. If we transpose the material facts and assume that the message had been sent from Washington to a point in South Carolina, and that the negligent delay had occurred in the latter state, or if we assume that negligence was in the transmission, occurring in the state of South Carolina, in either situation the language used by Justice Holmes would have no appropriate application. Under the assumed facts, the rule observed for estimating the damages in the South Carolina court would have been in accordance with that which was expressly approved. The language used by that court in *C. M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, is peculiarly applicable to the transposed and assumed state of facts. The court said:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be re-

garded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

This is almost a literal repetition of what was said in *Smith v. Ala.*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. In these cases, carriers of freight doing an interstate business were involved. But if a state may prescribe what shall be the consequences of their misconduct occurring within its limits, there is no reason why the same authority may not be exercised toward telegraph companies similarly engaged. The modification of the facts in the illustration made above does not eliminate the South Carolina statute or dispense with any of its provisions. It merely restricts the application of the statute to torts committed in that state. The case of *Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, is also in point. In that case David W. James sued the telegraph company in the state court of Georgia to recover the sum of \$100 as a penalty for the failure of the company to promptly deliver a telegraphic message addressed to him at his residence in Blakely, in the state of Georgia. The message was sent from Eufaula, in the state of Alabama. The only question before the court was whether the statute of the state of Georgia providing for the recovery of such a penalty was a valid exercise of the power of the state in relation to messages by telegraph sent from points outside to some point within the state of Georgia. The validity of that statute was upheld upon the ground that it was but a proper exercise of the police power of the state, in the absence of any opposing congressional legislation on that subject. If the statute of Georgia which prescribed a penalty for negligence in handling an interstate message in that state is not an unconstitutional interference with interstate commerce, why should the South Carolina statute be offensive so long as it is applied in the same manner? Surely it will not be contended that there is less authority for saying what shall be the measure of damages than for penalizing the company for a legal wrong. As in line with the cases discussed, we may refer to the following: *Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *I. C. Ry. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306; *Penn. Ry. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. We therefore conclude that the *Brown Case* is not authority for holding that a judgment for mental anguish is alone an unconstitutional interference with interstate commerce.

But it is argued that the courts of Texas treat negligence in handling telegraphic messages as the breach of a contract, and measure the damages that may be recovered by the laws of the state in which the message

originated. This is the settled rule in this state; and, while the mental anguish doctrine has long prevailed, our courts have refused to enforce it in any event when the message comes from a state whose laws do not permit such damages. *W. U. Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437, 80 S. W. 561; *Tel. Co. v. Young*, 133 S. W. 512, and cases there cited. We then have this question: Does the application of the *lex loci contractus* rule offend against the commerce provision of the federal Constitution? It has never been so held, unless that should be the logical inference from the language used in the *Brown Case*. Prior to the amendment of the interstate commerce law, providing a rule for determining the liability of interstate carriers in negligence cases, the federal Supreme Court had frequent occasion to review the decisions of the state courts in cases which involved the validity of stipulations designed to relieve the carrier from all or a portion of its common law liability. Different states had enacted varying laws on the subject. In some states those stipulations were valid, while in others they were invalid. But the Supreme Court, in every instance which has come under our observation, refused to interfere with the right of the state court to give effect to its own rules of construction and its own laws in testing the validity of such contracts. *Penn. Ry. Co. v. Hughes*, *supra*, was a suit to recover for a loss resulting from the negligence of a carrier in transporting a shipment of horses from Albany, N. Y., to a point in the state of Pennsylvania. The bill of lading contained stipulations which limited the liability of the carrier to an agreed value. Under the laws of the state of New York, where the contract was made, this provision was valid. But under those of Pennsylvania it was invalid. The courts of the latter state applied their own laws and refused to entertain a defense founded upon that part of the contract. The federal Supreme Court in reviewing the case, after referring to a contrary rule, approved by it in the case of *Hart v. Penn. Ry. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, said:

"The federal courts, in cases of which they have jurisdiction, will doubtless continue to follow the rule of the *Hart Case*; but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the federal Supreme Court where some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied."

In *Tel. Co. v. James*, *supra*, it was said:

"It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor."

Negligence may be both a tort and the breach of a contract. What particular rules

of law shall be applied in any given instance will depend largely upon the form of the action and the facts pleaded. In fixing the measure of the damages which the aggrieved party may recover as the consequences of the breach of a contract, the court merely endeavors to hold the aggressor to such liability as he assumed when he entered into the contract. So long as Congress has not prescribed a different standard for measuring the damages recoverable in such instances, or has not enacted a law which practically excludes the states from that field of commercial legislation, the state courts may exercise the same liberty in dealing with interstate telegraphic messages as they once did in respect to interstate shipments of freight. Hence we feel justified in holding that the judgment in this case is not an unconstitutional interference with interstate commerce.

[4] We then pass to the second proposition relied on; that is, that Congress has superseded the authority of the states in this class of cases so that the liability in this instance must be determined by the rule adopted in federal courts. As supporting that proposition, we are again referred to the *Brown Case* and to the following: *Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946; *Tel. Co. v. Johnson* (Ark.) 171 S. W. 859; *Tel. Co. v. Simpson* (Ark.) 174 S. W. 232; *Tel. Co. v. Holder* (Ark.) 174 S. W. 552; *Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91; and quite a number of others. The four Arkansas cases expressly refer to the *Brown Case* as authority for their ruling. In the Virginia case the facts may be differentiated from those before us, and it is not in point, although the language used by the court tends to support the appellant's contention. Under the view which we feel constrained to take of the *Brown Case*, it is not only no authority for sustaining the rule which appears to have controlled the decisions cited, but will even support a contrary ruling. No mention is made in the opinion there rendered of any action on the part of Congress which could in any event conflict with the statute of South Carolina. Two grounds are stated for reversing the judgment. The first mentioned is the failure of the trial court to estimate the damages by the laws of the District of Columbia, the place where the tort was committed. Manifestly, this had no reference whatever to any general law of Congress, but to the common-law rules of decision prevailing in the District of Columbia. The second ground is the unconstitutionality of the South Carolina statute as applied in that instance. The errors discussed would be fatal whether Congress had acted or not. But had there been in existence at that time a conflicting federal statute, it is inconceivable that the Supreme Court would have overlooked or failed to refer to so important an authority for reversing the judgment. This omission is too significant to be ignored, and can be accounted

for only upon the assumption that in the opinion of that court no such law existed. If the Brown Case furnishes no authority for the adverse decisions lately rendered, there is none. It is unnecessary to add more to what has been said on the former appeal in disposing of this issue.

There being no question which enables the federal Supreme Court to apply its own rules for determining the measure of damages, we feel it our duty to adhere to the established judicial policy of this state. In *Young v. Tel. Co.*, 168 N. C. 36, 84 S. E. 45, and *Hornthal v. Tel. Co.*, 166 N. C. 602, 82 S. E. 851, the Supreme Court of North Carolina took a view in harmony with what has been said. In *Am. Ex. Co. v. Po. Ca. Co.*, 97 Neb. 701, 151 N. W. 240, the Supreme Court of Nebraska considered a state of facts in all material respects similar to those before us, and sustained a judgment without making any reference to a federal question.

[5] Under the rule followed in both Texas and Tennessee, those stipulations in the contract before us which undertake to limit the liability of the telegraph company for failure to discharge its duty to a sum not exceeding \$50 are void. *Womack v. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Tel. Co. v. Odum*, 21 Tex. Civ. App. 537, 52 S. W. 632; *Tel. Co. v. Norris*, 25 Tex. Civ. App. 48, 60 S. W. 982; *P. Tel. Co. v. Sunset Const. Co.*, 102 Tex. 148, 114 S. W. 98; *Tel. Co. v. Hearne*, 77 Tex. 84, 13 S. W. 971; *Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Railway Co. v. Smith*, 123 Tenn. 678, 134 S. W. 866; *Leedy v. Tel. Co.*, 130 Tenn. 547, 172 S. W. 278; *Pepper v. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699. See, also, *Blackwell Milling & Elev. Co. v. Western Union Tel. Co.*, 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 857. To these may be added the cases cited on the former appeal.

[6] The appellant also relies upon a stipulation which seeks to limit liability for an unrepeatable message. No such provision is to be found in the statement of facts, and the assignment cannot be considered.

The final assignment of error, which raises the question of liability for failure to deliver a message beyond the free delivery limits, cannot be sustained. Aside from any other reason, both the pleadings and the facts show that no free delivery in this instance was contemplated, but, on the contrary, the agent of the appellant demanded and received full compensation for making a rural delivery of the message.

The judgment is affirmed.

On Rehearing.

In its motion for rehearing, appellant's counsel has called attention to the fact that the case of *W. U. Tel. Co. v. Brown*, cited above, arose before the act of Congress plac-

ing telegraph companies under the provisions of the Interstate Commerce Law was enacted. A reference to the original report of that case confirms that statement. However, we do not feel that this necessitates a different ruling upon the question as to whether or not that act of Congress was applicable to this case. What was said upon the former appeal we think sufficiently disposes of that particular question.

[7] Appellant also insists that we erred in failing to sustain its objection to the judgment because it was excessive. It is a sufficient answer to that contention to say that the appellant's brief does not present that particular assignment in a manner which entitled it to consideration.

The motion is overruled.

ZAVALA LAND & WATER CO. v. TOLBERT. (No. 7425).*

(Court of Civil Appeals of Texas. Dallas.
Feb. 19, 1916. Rehearing Denied
March 23, 1916.)

1. EVIDENCE \Leftarrow 461(1) — PAROL EVIDENCE — INTENT OF PARTIES.

In an action for damages for defendant's breach of contract, where it sold land which had to be irrigated, under a contract providing for the drilling of a well and guaranteeing water, evidence that at the time of signing defendant's principal agent explained that the well would produce sufficient water for irrigation is admissible; the expression in the contract being equivocal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2129; Dec. Dig. \Leftarrow 461(1).]

2. EVIDENCE \Leftarrow 450(8) — PAROL EVIDENCE — CONTRACT OF SALE.

In such case, the fact that the contract was first signed by another agent does not render inadmissible the declaration by the principal agent, where until he signed it the contract was not binding.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2073, 2074; Dec. Dig. \Leftarrow 450(8).]

3. APPEAL AND ERROR \Leftarrow 1051(1) — REVIEW — HARMLESS ERROR.

In such case, where there was abundant other evidence to establish that the expression "guaranteeing water" meant sufficient water for irrigation purposes, the erroneous admission of evidence of the declarations of such agent was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4165, 4166; Dec. Dig. \Leftarrow 1051(1).]

4. TRIAL \Leftarrow 352(5) — SPECIAL ISSUES — STATEMENT.

In an action for damages for misrepresentation in effecting a sale of land, where the written contract provided for the drilling of a well and contained a guaranty of water by the vendor, the submission in a single special issue as to what purpose and what extent water was guaranteed was not erroneous as including two separate questions, it being plaintiff's contention that sufficient water for irrigation purposes was guaranteed, for the questions if separated were so closely related that one could not be well determined without the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 841; Dec. Dig. \Leftarrow 352(5).]

5. APPEAL AND ERROR ⇐1001(1)—REVIEW—FINDING.

Where there is evidence in support of the verdict, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. ⇐1001(1).]

6. FRAUD ⇐58(4)—RELIANCE ON REPRESENTATIONS—EVIDENCE.

In an action for damages for misrepresentations in effecting a sale of land, evidence *held* to warrant a finding that the purchaser did not rely on his independent investigations but upon the representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 59; Dec. Dig. ⇐58(4).]

7. FRAUD ⇐13(2)—BELIEF IN MISREPRESENTATIONS.

That defendant's agent in effecting a sale of land honestly believed a well drilled would produce sufficient water to irrigate the land will not prevent plaintiff from recovering damages for the false representation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 4; Dec. Dig. ⇐13(2).]

8. VENDOR AND PURCHASER ⇐352 — CONTRACTS—JURY QUESTION.

Whether a vendor delivered a deed within a reasonable time, the contract fixing no time, is a question of fact for the jury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1059; Dec. Dig. ⇐352.]

9. FRAUD ⇐66—ACTION—EVIDENCE—SUFFICIENCY.

In an action for misrepresentations in effecting a sale of land, finding by the jury as to the actual value of the land *held* warranted under the evidence, though not in accordance with the exact estimates of the parties.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 75; Dec. Dig. ⇐66.]

10. APPEAL AND ERROR ⇐1083(9)—REVIEW—HARMLESS ERROR.

In an action for misrepresentations in effecting a sale of land which plaintiff later resold, where the damages allowed were less than those fixed by the jury and did not exceed the value of plaintiff's improvements and the difference between the contract price and the price at which plaintiff disposed of the land, defendant could not complain that the jury assessed the land at a value less than its actual value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4061; Dec. Dig. ⇐1033(9).]

Appeal from District Court, Hunt County; A. P. Dohoney, Judge.

Action by R. L. Tolbert against the Zavala Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dinsmore, McMahan & Dinsmore, of Greenville, for appellant. Thompson & Thompson, of Greenville, for appellee.

TALBOT, J. This is the second appeal in this case. See 165 S. W. 28. Appellant, about the year 1909, acquired about 100,000 acres of land in Zavala county, Tex., and had 50,000 acres of the same sectionized and surveyed and test wells bored at the corners of the sections for the purpose of ascertaining whether water could be found by sinking wells. Appellant also subdivided

each section and placed said lands on the market. On the 17th day of January, 1912, a contract was written and signed in behalf of the appellant by E. C. Hughes, one of its agents, and by the appellee, whereby the appellant bound itself to sell and convey to appellee, and appellee bound himself to receive and pay for 40 acres, a quarter of a quarter of a section of said land. After the said contract was written and before it was signed, the appellant's said agent wrote into said contract as a part thereof the following:

"It is agreed to bore on land above described 10%-in. casing, guaranteeing water, and draw on R. L. Tolbert for total cost of well when completed."

This contract was executed in triplicate, the appellee receiving one copy thereof, and the appellant's agent Hughes retaining the other copies. At the time the contract was thus signed and delivered, appellee drew and delivered to the said Hughes, as the cash or first payment to be made for the land agreed to be conveyed, his check on a bank in the city of Greenville, Tex., for the sum of \$866.66, and it was then agreed, verbally, that said contract was not to become a "completed contract," and the said check was not to be presented for payment and collected until said contract was further signed on behalf of the appellant by its agent W. H. Parish, who was then absent, when he returned to the said city of Greenville. In a few days after the signing of the contract by E. C. Hughes and the appellee, Tolbert, W. H. Parish returned to Greenville, and when first called upon to sign the contract he refused to do so, but later and on the 29th day of January, 1912, as agent of appellant, he signed it. His name was signed under the word "witness" printed in said contract, and in the opinion on the former appeal it is stated that the contract was "witnessed by W. H. Parish," and it so appeared from the record then before this court; but on the subsequent trial it was shown that Mr. Parish signed as appellant's agent, and not as a witness. At and prior to the time the contract was made, the defendant had printed and was circulating as advertising matter a pamphlet purporting to give picture views of its lands in Zavala county, and of farms on those lands, and of wells being pumped for irrigation purposes. These printed pamphlets stated, in substance, that the lands mentioned were irrigable by pumping water from wells; that tracts of land were being irrigated from wells; that sufficient water was being secured, and could be secured, from wells to irrigate the said lands. A copy of the pamphlet above mentioned came into plaintiff's hands before he signed the contract. This suit was filed March 23, 1912, and on October 5, 1914, after the former appeal, hereinbefore referred to, appellee filed his second amended petition on

which the last trial of the case was had. This amended petition alleges the ownership of the lands in Zavala county by the appellant, and that appellant was offering and selling the same as irrigable lands; the execution of the contract mentioned; that by the terms of said contract appellant agreed to sell and cause to be conveyed to appellee the 40 acres of land described therein, by a good and sufficient warranty deed in consideration of the sum of \$2,600, to be paid by appellee; that \$866.66 was to be paid in cash, and the remainder to be paid in three promissory notes at different dates; that appellant was to sink a well on said 40 acres of land of the dimensions stipulated in the contract and to draw on the appellee for the cost of the well; that the water clause written in the contract meant, and was intended to mean, that the well to be sunk should furnish water sufficient to irrigate the said 40 acres of land.

Said petition further alleges, in substance: That appellant agreed to furnish appellee an abstract of title showing good title in appellant to the said land, and a warranty deed thereto, within a reasonable time. That at the time of the execution of said contract appellee informed appellant's agents that he expected to go at once upon said land and begin work with the view of growing crops thereon during the year 1912; that he would move his family from Greenville, and that he and his minor son, with two teams, would begin work immediately upon said land, but to do this appellee must first have a deed to the land, with abstract of title; and that a well must be sunk thereon. That said agents assured appellee that said requirements would be faithfully met, but that appellant failed and refused to deliver to appellee a sufficient deed to said land until March 15, 1912, when it was too late to prepare said land and make a crop thereon. That appellant failed and refused to sink the well, provided for in the contract, upon said land until on or about May 15, 1912, and that the well then provided was not in accordance with the contract. That appellant's agents, Hughes and Parish, prior to and at the time of the making of the contract for the purchase of said land, stated to appellee that there was an abundance of water underlying said land, and that the same could be irrigated by sinking a well thereon and pumping the water. That said representations were false. That appellee knew nothing of the water supply underlying the said land outside the representations of appellant's said agents. That he only visited the locality once prior to the making of the said contract and spent less than two days there at that time. That the settlements were then all new and few in number. That appellee at the time went over a large section of country hurriedly in an automobile. That the land he afterwards bought was only pointed out to him as being for sale as he passed by

the same. It was then unimproved, had no well thereon. That appellee did not make, and at the time and under the circumstances could not have made, any investigation as to the water supply underlying said 40 acres of land, but he relied wholly upon the representations made to him by appellant's agents. That immediately upon receiving a proper deed and abstract of title to said 40 acres of land on March 15, 1912, appellee prepared to go upon the same, and so, within two days thereafter, he left Greenville for La Pryor, and arrived at the latter place on or about March 20, 1912. That appellant had not then begun the well contracted for, and did not begin the same until on or about May 10, 1912. That upon being notified of the completion of the said well appellee requested appellant to provide proper persons and suitable machinery to test same, but the latter persistently refused appellee's said request. That it thus became necessary for appellee to make such provision, and to make the said test. That upon a full and fair test made of the water supply as found in the said well, it proved to be wholly insufficient for purposes of irrigation. That the water found therein was not only insufficient to irrigate 40 acres of land, but was insufficient to irrigate even one acre. That appellant's agents knew at the time said contract was made that there was not sufficient water underlying said land for purposes of irrigation. That appellee, believing said false representations, was induced thereby to make said contract of purchase and agree to pay \$65 per acre for said land, when the same was not worth exceeding \$10 per acre, to make the cash payment of \$866.66, and to deliver to appellant his notes, and of all this appellant's agents were fully informed at the time. The petition further alleges that, under the terms of said contract, it was appellant's duty to supply machinery and to pump and test the said well after it was sunk, but that appellant failed and refused to so test said well, whereby the plaintiff was forced to buy machinery and to employ labor to test the said well; that appellant did not sink a well on said land until about the 15th of May, 1912; that the said land, without irrigation, is wholly unsuited for any kind of successful farming; that by reason of the delay by appellant in furnishing a deed of conveyance and in sinking a well the appellee was prevented from growing a crop on said land; and that he and one of his sons lost their time for eight months. It is alleged that appellee suffered losses as follows: In the value of land by reason of failure of water, \$2,200; loss of plaintiff's time eight months, \$1,000; loss of plaintiff's son's time for eight months, \$480; loss of time for two teams eight months, \$400; loss on machinery purchased to pump well, \$250; loss for labor paid for testing well, \$75—aggregating \$4,405.

On October 7, 1914, appellant filed its first

amended answer in reply to appellee's second amended petition, and averred, in substance, that appellee and appellant executed and mutually delivered the contract set out in appellee's petition, on January 17, 1912, and that appellee then made the cash payment mentioned; that the appellant performed all of its obligations under said contract; that it delivered the deed and an abstract showing title within a reasonable time; that the title to the said 40 acres of land was in a man named Lynn, who resided in the state of Arkansas; that it was found that some of the instruments constituting links in the chain of title had not been placed on record in Zavala county, and that certain releases of liens had not been executed and recorded; that appellant diligently prosecuted the work of securing said missing links in the chain of title, and having them recorded, and in furnishing complete abstract; that early in January, 1912, the appellant submitted to appellee an abstract of the chain of title, which appellee rejected; that in the month of February appellant submitted to appellee an amended abstract of chain of title, which appellee also rejected; that all statements and representations made by appellant's agents to appellee about the said 40 acres of land, the water under the said lands, and the crops grown thereon, were substantially true; that appellee did not rely upon any representations about said land made to him by appellant's agents, but pending the said negotiations plaintiff went to Zavala county and himself investigated the said lands before he would make contract to buy, and appellee did not make said contract until after he had investigated the said lands and returned to Greenville, Tex., and that appellee relied upon his own knowledge, information, and judgment; that the water clause in the said written contract did not mean to guarantee water sufficient for irrigation; that when the said contract was written appellee demanded of appellant's agent Hughes that he write in said contract a clause guaranteeing water sufficient for irrigation, but the said Hughes refused to do so, and appellee accepted and signed and delivered the said contract immediately after the appellant's agent had refused to write therein a clause guaranteeing water sufficient for irrigation; that appellant did cause to be sunk upon the said lands a well in full compliance with the condition of the said contract, in accordance with the stipulations; that the said well was sunk and finished, and was ready for use by appellee, on or about the 5th day of April, 1912; that appellant did not test the said well, and it was not bound under the contract to make a test of the said well; that appellee did not properly test the said well and did not pump the said well with sufficient machinery or for a sufficient length of time; that the appellant did not make any false or fraudulent representations to appellee; that the said 40 acres of land was well

worth the price paid by appellee therefor; that the well on the said land would, with proper pumping, furnish water amply sufficient to irrigate all, or the greater part, of the said 40 acres; that appellant was in no wise responsible to appellee for any loss on machinery purchased, or for loss of time of appellee and his son and teams. By way of cross-action, appellant alleged that it bored the well provided for in the contract for the purchase of the land in question at a total cost of \$635.05; that appellee had agreed to pay such cost and prayed judgment therefor.

The case was tried at the October term, 1914, with the aid of a jury. Upon motion of the appellee, the case was submitted to the jury upon special issues, in the form of questions which were answered by the jury. The appellant filed and presented to the court a motion for a judgment in its favor upon the findings of the jury, which was overruled. The court, upon the findings of the jury, entered judgment for appellee in the sum of \$1,990, and a judgment for the appellant on its cross-bill for the sum of \$200, with direction that the \$200 be set off against the said \$1,990 leaving a balance of \$1,790 in plaintiff's favor.

[1] The court permitted the appellee to testify, over the objection of the appellant, that W. H. Parish, after the contract for the sale of the land involved in this suit had been signed by E. C. Hughes as agent for appellant, and by the appellee, Tolbert, and mutually delivered on the 17th day of January, 1912, and after appellee had delivered to said agent his check for \$866.66, as part payment for the said land, and before the said W. H. Parish, as agent for appellant, had signed said contract, stated to appellee that there was an inexhaustible supply of water under said land, and that they would guarantee an inexhaustible supply for irrigation purposes. The admission of this testimony is complained of by appellant and made the basis of its first and second assignments of error. The propositions contended for are:

"(1) That the terms of the contract having been agreed upon, reduced to writing, signed, and delivered, statements made by W. H. Parish about the supply of water under the land could not have been an inducement to plaintiff to make the contract, and such statements were immaterial. (2) That statements by W. H. Parish about the quantity of water under the land, made after the terms of the contract had been agreed upon and reduced to writing, when there had been evidence introduced tending to show that by agreement the contract was not to be effective until W. H. Parish signed the same, admitted in evidence over the objection of the defendant, were probably considered by the jury upon the question of inducement to plaintiff, and worked an injury to the defendant."

We are inclined to the opinion that the evidence was admissible. It was alleged that the clause in the contract "guaranteeing water" was intended to mean, and did mean, a supply of water from the well to be sunk

on the land sufficient in quantity to irrigate the 40 acres of land purchased by appellee. This clause of the contract, as we said on the former appeal, was manifestly not "inserted therein without regard to the quantity or uses to which the water guaranteed was to be put, and in that respect it evidently does not unequivocally and fully express the intention of the parties. This being true, parol evidence was admissible to show the situation of the parties and the circumstances under which the contract in question was executed for the purpose of ascertaining the meaning of the language under consideration and properly construing said contract." The language, being equivocal, its meaning could only be ascertained "from a full history of the circumstances under which it was used, and for this purpose the court was authorized to receive evidence explaining the subject-matter, the surrounding circumstances, the relation of the parties, and the inducing cause which led up to the making of the agreement, and this is especially true under the acts of fraud in plaintiff's petition." *Zavala Land & Water Co. v. Tolbert*, 165 S. W. 28. The testimony objected to was, we think, admissible as tending to show the meaning of the language "guaranteeing water" as used in the contract entered into between appellant and appellee and an "inducing cause which led up to the making of the agreement."

[2] The testimony objected to was not inadmissible, we think, because the contract had been reduced to writing and signed by E. C. Hughes as agent for appellant, and by the appellee, Tolbert. It very clearly appears that, notwithstanding the contract was so signed, it was not completed and binding upon the parties until signed by appellant's agent Parish. In *Merrill v. Tehama Consol. Mill Co.*, 10 Nev. 125, the general rule is said to be that:

"Where parties enter into an agreement and the understanding is that it is to be reduced to writing, or, if it is already in a written form, that is to be signed before it is acted on or to take effect, it is not binding until so written or signed."

And in 7 Am. & Eng. Enc. of Law, 140, the rule is stated in the following language:

"Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon."

[3] Until the contract was signed by appellant's agent Parish, either party thereto was at liberty to withdraw from it, and the reiteration by Parish that there was an inexhaustible supply of water underlying the land, and in effect that appellant would guarantee that there was an inexhaustible supply of water underlying the land for the purposes of irrigation, just before he (Parish) signed the contract, was relevant to the issue raised as to the meaning of the clause "guaranteeing water" and the intention of the parties in inserting it in the contract. But if it should be conceded that the testimony was not, strictly speaking, admissible, still in view of the express finding of the jury that the representations made in reference to the extent of the water supply underlying the land were made before January 17, 1912, and the oft-repeated and practically undisputed declarations of appellant's agents prior to and at the time of the signing of the contract by E. C. Hughes and the appellee on said 12th day of January, 1912, to the effect that there was an inexhaustible supply of water underlying the land and amply sufficient for irrigation purposes, it is improbable the jury was influenced to the prejudice of appellant by the testimony under consideration.

[4] The court submitted the following issue to the jury:

"The contract between plaintiff and defendant for the purchase and sale of 40 acres of land in Zavala county, Tex., provides that 'water is guaranteed.' You will find from the evidence and state in answer hereto for what purpose and to what extent water was guaranteed; that is, you will determine from the evidence, and so state in your answer, what the intention of the parties was with reference to the quantity of water referred to in the contract and the use to which it was to be put."

Appellant contends that the court erred in the submission of this issue, in that it "embraces two distinct questions, and confuses matters of fact which are sharply contested and matters of fact which should be separately submitted to the jury; that the question submitted assumes that there was water guaranteed for a purpose, when the evidence raised a sharp issue as to whether water was guaranteed for use for any purpose; that said question assumes that the intention of each of the parties at the time the contract was executed was the same; and that it was the intention of each that the well was to furnish water which should be put to some use, when the said matter was an issue of fact for the jury." The manner and form of submitting the issue in question was not materially erroneous, if erroneous at all. We agree with the views expressed by counsel for appellee: First, that the purpose for which water was guaranteed in the contract, and the quantity of water so guaranteed, are matters so intimately related, and so nearly identical in meaning, that the division of the question as suggested would not have made the same more intelligible, but would have involved needless repetition. Second, that the clause in said contract guaranteeing water had some meaning, and expressed some purpose, were uncontroverted facts, and the court committed no error in so assuming. Third, the parties having agreed upon the terms of the contract, their intentions as to its legal significance are presumed in law to be in accord and to unite in one purpose; such purpose or intention it was the

province of the jury to determine from the contract itself interpreted by the surrounding circumstances; therefore, the question propounded by the court was not upon the weight of the evidence. The answer of the jury to the question is as follows: "Water for irrigation, sufficient to irrigate said lands." As said by counsel for appellee, this answer of the jury is definite and clear, it is consistent with other answers made by them in response to kindred questions, and there appears to be no reason or legal ground for the claim that the question objected to was not fully understood by the jury. The testimony discloses that appellee repeatedly stated to appellant's agents that he desired to purchase the land for trucking purposes, and that he would not buy the land unless there was water for producing this character of crops. He further testified that the purpose of sinking the well was fully discussed at the time the contract was drawn and signed, and that no other purpose was mentioned than that of irrigation. The dimension of the well—10½ inches in diameter—as set out in the contract, and as shown by the undisputed testimony, discloses a size of well used only for purposes of irrigation; for other purposes, wells from 4 to 8 inches in diameter were used, and these latter were usually propelled by windmills.

[5] The fourth assignment of error is, in substance, that the finding of the jury to the effect that the clause in the contract "guaranteeing water" was intended by appellant and its agents to mean a supply of water sufficient for the irrigation of the land purchased by appellee, is not only against the great weight of the evidence, but wholly without evidence to support it. Upon the former appeal of this case, we held that the appellee's allegations that said clause in the contract was intended by the parties to mean a supply of water from the well to be sunk on appellee's land sufficient to irrigate the same were not sustained by a preponderance of the evidence as it then appeared in the record, and gave that as one of the reasons why the case should be reversed. But upon a very careful review and consideration of the evidence now found in the record, although in many respects quite the same as it was on the former appeal, we have reached the conclusion that we would not be warranted in saying that the finding of the jury with respect to the meaning of said clause of the contract was wholly without evidence to support it. The rule in such case in this state is not to disturb the jury's finding. The assignment will therefore be overruled.

Nor do we think the finding of the jury, to the effect that the representations and statements made by appellant's agents about the quantity of water underlying the land sold to appellee were false, is without substantial evidence to support it.

[6] Appellant complains of the tenth ques-

tion submitted by the court to the jury. This question reads:

"If you have found that such representations were made, then did plaintiff rely upon such representations, and was he induced thereby to execute the contract and purchase said lands? Or did he rely upon his own judgment as to water supply and irrigation, after going over the land and looking at it and making an investigation for himself?"

The jury answered the question as follows: "He relied upon their agents' representations." The proposition asserted under this assignment is that:

"Under the undisputed evidence, it follows as a matter of law that plaintiff did not rely upon representations of defendant's agents, and this was not a question for the jury."

The evidence bearing upon the question presented is entirely too voluminous to be quoted in this opinion, and we shall not undertake to do so. We agreed with the contention made by the appellant on the former appeal of this case to the effect that the weight and preponderance of the evidence then before the court showed that the representations made by appellant's agents to the appellee in regard to the quantity of water that could be procured from a well on the land purchased by appellee were not relied upon by appellee and did not operate as the inducement of his purchase. But we are of opinion that the testimony now contained in the record touching the question, while largely the same as it was on the former appeal, is materially different therefrom in some important particulars and of such a character as called for the submission of the issue to the jury. Appellee swore positively that he relied upon the representations made to him by appellant's agents in reference to the supply of water to be obtained by sinking a well on the land conveyed to him; that, while he went upon the lands offered for sale by appellant before the execution of the contract made with appellant, the condition of the improvements found and his means of investigation were such that he could obtain no accurate and reliable information as to the extent of the water supply underlying the land. He says he was there only a day and a half; that he went down there on a holiday with a crowd, not to investigate the water supply any more than to look at the wells on the lands, but to look at the country generally; that just what he saw riding around in that way, and what appellant's agent told him, was all he knew about the water. He further said there was no well on the land he bought, which is an undisputed fact, and that the nearest well in its locality then was the Lundt well, and that there was a 40-acre tract between that well and the land sold him; that the Lundt well was not in operation at the time he saw it, but there was water in the reservoir; that the demonstration well was the only well he saw running to amount to anything;

that they started up two other little pumps and ran them a few minutes.

This and other testimony found in the record tends to show that there was practically no irrigation in progress at the time appellee saw the lands and before he made the contract to buy. The appellant, however, had sunk wells on the lands, other than the land bought by appellee, and was then engaged in advertising extensively the same for sale as being fully susceptible of irrigation from water obtainable from wells already sunk and to be sunk thereon. The representations made of the irrigability of the lands were not the mere expressions of opinion, but as demonstrated facts. The jury found that the appellee requested appellant's agent Hughes to write into the contract a guaranty of water sufficient for irrigation, and that Hughes refused to do so, but that the reason given by Hughes for his refusal to write such guaranty was that "he could not tell the machinery he would use." The jury further found that appellee provided suitable machinery and properly pumped and tested the well drilled by appellant on the 40 acres of land sold him, and that the failure of the well to furnish an adequate supply of water to irrigate said land was due to a lack of a sufficient supply of water underlying the same. These were specific findings, among others, made by the jury, and establish that the refusal to insert in the contract the requested provision of guaranty of water sufficient for irrigation was not an unqualified refusal to do so, and left, we now think, as an issuable fact the meaning and purpose of the language guaranteeing water written in the contract to be determined by the jury from a full history of the circumstances and facts under which it was so written. Testimony showing such facts and circumstances was clearly admissible, not, as we said on the former appeal of this case, for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the said words, "guaranteeing water." Appellant's agents were not only advertising for sale generally the lands owned by it by pamphlets and other printed matter, some of which fell into the hands of appellee, as unquestionably susceptible of irrigation from water obtainable by wells bored on the land, but practically at all times in negotiating the sale to appellee and at the very time the contract for said sale was made represented that there was an inexhaustible supply of water for irrigation underlying the land. Appellee, in substance, informed these agents before and at the time of the execution of the contract of purchase that he would not purchase the land at any price unless there was water underlying the same sufficient for irrigation and we do not feel, especially since two juries have found that such representations under the

evidence adduced were not true, and in effect that such representations were the "inducing cause which led up to the making of the contract of purchase by appellee, and that the parties intended by language of said contract guaranteeing water" a guaranty of water sufficient for irrigation, that we would be justified in reversing the judgment of the district court on the ground that it appears from the evidence, as a matter of law, that the appellee did not rely upon the representations made by appellant's agents in regard to the quantity of water that could be procured from a well on the land and did not operate as the inducement of his purchase; or that it so appears that the words, "guaranteeing water," were not intended by the parties to mean water enough for irrigation. If the clause in the contract, "guaranteeing water," was intended by the parties to mean water sufficient for irrigation, the refusal of appellant's agents to add thereto language that would show expressly that such was their intention would not preclude the assertion and proof thereof by appellee, or his right to avail himself of the benefits of such a stipulation. Indeed, if the parties intended said clause to mean water sufficient for irrigation, the legal effect of the words used is the same as a full expression of such intention would be.

[7] There was no error in refusing to submit the question requested by appellant, as to whether the appellant and its agents, at the time the contract involved in this suit was signed, believed and had good reason to believe that water sufficient for the purpose of irrigation could be obtained by sinking a well upon said land. If such question had been submitted and answered in the affirmative, appellee would not have been relieved thereby from liability for any element of damage sought to be recovered. If appellant falsely represented to appellee that there was water enough underlying the land for the purpose of irrigating the same, and said representations were relied upon by appellee, appellant would be liable, although at the time the representations were made appellant and its agent believed them to be true. This we believe to be the clearly established rule of this state. *Mitchell v. Zimmerman*, 4 Tex. 76, 51 Am. Dec. 717; *Boles v. Aldridge*, 153 S. W. 373; *Id.* (Sup.) 175 S. W. 1052.

[8] The tenth assignment of error is that the appellant's motion for a new trial ought to have been granted, "because the answer of the jury to the fifteenth question submitted by the court, to the effect that a deed and abstract were not furnished within a reasonable time under the circumstances, is without evidence to support the finding." There was no stipulation in the contract fixing the time of performance, and the rule is substantially as stated by appellant, namely, that in such case the law allows a reasonable time, and what is a reasonable time depends

upon the nature and character of the thing to be done, the circumstances of the particular case, and the difficulties surrounding and attending its accomplishment. Ordinarily, the question is one of fact for the determination of the jury, and was, we believe, in this instance. To detail all the evidence touching the question would extend this already long opinion to too great length, and we shall content ourselves, in disposing of the assignment of error presenting it, with the statement that the jury found that the appellant did not within a reasonable time after the contract for the purchase of the land in question became effective furnish the appellee a good and sufficient deed and abstract of title to said land, and that we are not prepared to say the evidence did not justify such finding.

[9, 10] The eleventh and last assignment of error is, in substance, that the answer of the jury to the twenty-first question propounded to them by the court, whereby the jury found that the reasonable cash market value of the land in controversy was \$40 an acre, is against the overwhelming weight of the evidence, and is not supported by any evidence. This contention is based upon the fact that the witnesses who testified as to the market value of the land varied widely as to such valuation and no witness testified that the land was worth \$40 per acre. The appellee testified that the market value of the land was about \$10 per acre. E. G. Dellinger testified that without water for irrigation it was worth about \$10. N. E. Peak, that its market value was \$20 or \$25. E. C. Hughes, that its value as it stood at the time of the trial was \$85 per acre. I. B. Hopper, that at a fair market value it ought to be worth \$80 or \$85 per acre. A. F. Scott, that the 40 acres ought to be sold at \$75 per acre, and B. F. Kite testified that he considered appellee's 40 acres of land worth \$100 per acre. It further appears without dispute or contradiction that the contract price per acre for the 40 acres of land sold to appellee was \$65 per acre, or \$2,600 for the total number of acres, and that during the trial of this case, and in the presence of the court and jury, and apparently as part of the proceedings in the trial, the appellee sold and conveyed said land to C. R. Rhea for \$50 per acre, aggregating \$2,000. The testimony standing thus as to the value of the land, it is argued, in effect, that the jury, in arriving at that verdict and measuring the damages claimed by appellee evidently disregarded the evidence, and disclose thereby that they were not fair and impartial. We are not prepared to say that such conclusion necessarily follows from the action of the jury. We are inclined to think, as contended by appellee's counsel, that when witnesses differ, as they often do, as to the value of property, their statements with reference thereto being the mere expression of opinion, the jury

may properly arrive at their verdict from a consideration of all the testimony and credibility of the witnesses, and are not required to adopt the opinion or testimony of any particular witness or number of witnesses, and their verdict should not be disturbed unless it appears that it is clearly wrong. But, however this may be, the appellant, we think, has no just cause to complain of the action of the jury in finding that the land involved herein was of the market value of \$40 per acre. As above stated, the contract price for said land was \$2,600, and the appellee sold and conveyed the same for \$2,000. The jury, in addition to the finding that the land was worth \$40 per acre, which for the total number of acres amounts to \$1,600, found that the value of the barn and fencing built by appellee on said land and which he was entitled to recover, as a part of his damages, was \$400. Just why these elements of appellee's damages were submitted as separate and distinct matters from his loss on the land proper does not appear, but that they entered into and were proper to be considered by the jury in arriving at the total amount of his loss on the land can hardly be questioned. That they were submitted separately, however, does not alter the fact that they formed a part of appellee's loss on the land, and, having been submitted as a separate issue, it is not improbable that the jury recognized their relation to the land itself and fixed the value of the land and of the barn and fence at the respective amounts they did to correspond with the amount appellee sold the land and said improvements for to C. R. Rhea; for it will be observed that the two values fixed by the jury amount to a valuation of the land and said improvements at \$50 per acre, or a total amount of \$2,000.

Again, the judgment of the court contains the following recitation:

"The jury having found, in response to the twenty-first question propounded to them, that the reasonable cash market value of the land is \$40 per acre, and it appearing to the court from undisputed evidence that the plaintiff received for said land by sale thereof made in the presence of the court, during and as a part of the proceedings herein, the sum of \$50 per acre, the court finds, and so holds, that the measure of plaintiff's damage, in so far as the loss upon the land itself is concerned, is the difference between the contract price, to wit, \$2,600, and the amount received by the plaintiff for the land by reason of said sale, to wit, \$2,000."

It is then adjudged that the appellee recover of appellant the several sums awarded him, including \$600 loss on land and the item of \$400, the value of the improvements placed on the land by appellee aggregating the sum of \$1,990. But, again, the court in that portion of the judgment quoted above correctly states the measure of appellee's damages with respect to his loss on the land, and as it appeared without dispute that he had contracted to pay \$2,600 for the land and sold it for \$2,000, the measure of appellee's damages in that regard became a question of

law and was not a question of fact to be submitted to the jury. The amount allowed appellee therefore as loss on land and included in the judgment rendered was proper regardless of the finding of the jury upon the issue. Such allowance resulted in the rendition of a judgment against appellant for \$200 less than would have been rendered had the finding of the jury for loss on the land been strictly adhered to; and it follows that it has not been harmed by the finding of the jury complained of, even if it should be conceded that such finding was not based on the evidence adduced with respect to the value of the land.

We recognize that some of the questions raised are close, and some of the conclusions announced have not been reached without difficulty. The case has been tried twice with similar findings by the jury, which findings in both instances have been approved by the trial judge. It is immaterial what the conclusions of this court might have been with regard to some of the questions involved, had they been submitted as original propositions. Our conclusion is that, if it be conceded that some of the findings of the jury on material issues were against the preponderance of the evidence, yet there was some substantial evidence upon which to base such findings. Believing that the verdict of the jury is not without evidence to support it and that none of appellant's assignments disclose reversible error, the judgment is affirmed.

Affirmed.

NUNEZ v. McELROY. (No. 408.)*

(Court of Civil Appeals of Texas. El Paso.
Feb. 24, 1916. Rehearing Denied
March 23, 1916.)

1. APPEAL AND ERROR \S 1185—JURISDICTION—FINALITY OF JUDGMENT IN LOWER COURT—SETTING ASIDE AFFIRMANCE.

If the trial court's judgment was not final, the Court of Civil Appeals did not acquire jurisdiction, and its judgment of affirmance is a nullity, and should be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4636-4641; Dec. Dig. \S 1185.]

2. APPEAL AND ERROR \S 1185—JURISDICTION—JUDGMENT IN LOWER COURT—SETTING ASIDE AFFIRMANCE.

Motion to set aside a judgment of affirmance, on the ground that the trial court's judgment was not final, and that therefore the appellate court never acquired jurisdiction, may be made at a subsequent term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4636-4641; Dec. Dig. \S 1185.]

3. APPEAL AND ERROR 79(2)—JURISDICTION—FINAL JUDGMENT—DISPOSITION OF PARTIES—IMPLICATION.

Even if plaintiff's amended petition, stating that he dismissed his suit as to all defendants except N., and complaining of N. only, did not ipso facto, operate as a discontinuance as to all defendants except N. without formal order, the plain and necessary implication from the order

then made—not specifically naming defendant R., but reciting that plaintiff says he will not prosecute his suit against named defendants, and dismisses his suit as to all defendants except N., and ordering the dismissal as to the named defendants, and that the cause stand for trial with N. as defendant, and from the judgment against N. after trial, reciting that plaintiff having therefore entered a dismissal of his cause against all the defendants except N., plaintiff and defendant N. announced ready for trial—is that the suit was discontinued as to all defendants except N., which is all that is necessary as regards there being a complete disposition of parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 485-487; Dec. Dig. \S 79(2).]

4. APPEAL AND ERROR \S 80(1)—JURISDICTION—FINAL JUDGMENT—DISPOSITION OF SUBJECT-MATTER—AMENDMENT OF PETITION.

Relative to the judgment disposing of the subject-matter, and so being final, for purpose of appeal, amendment of the petition reducing plaintiff's claim to five of the many acres claimed by the petition, of itself eliminated all the rest of the subject-matter of his claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-500, 503, 505-509; Dec. Dig. \S 80(1).]

5. APPEAL AND ERROR \S 80(1)—JURISDICTION—FINAL JUDGMENT—DISPOSITION OF CROSS-ACTION.

The cross-action of defendant for the land sued for by plaintiff is by necessary implication disposed of and adjudicated against him by the judgment for plaintiff therefore.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-500, 503, 505-509; Dec. Dig. \S 80(1).]

6. DISMISSAL AND NONSUIT \S 19(3)—DISMISSAL OF SUIT—EFFECT ON CROSS-ACTION.

Plaintiff's dismissal of his suit as to certain defendants did not affect any cross-action pleaded by them.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 36; Dec. Dig. \S 19(3).]

7. APPEAL AND ERROR \S 80(1)—JURISDICTION—FINAL JUDGMENT—DISPOSITION OF CROSS-ACTION.

Disposition of any cross-action pleaded by defendants as to whom he dismissed his suit is essential to finality of the decree or judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-500, 503, 505-509; Dec. Dig. \S 80(1).]

8. TRESPASS TO TRY TITLE \S 22—CROSS-ACTION—PLEADING—LIMITATIONS.

Answer of defendants in trespass to try title, though not containing some formal allegations appropriate to a cross-action therein, is, in the absence of special exceptions, sufficient to constitute a cross-action, and afford basis on which to predicate a right to affirmative relief, thereby asked, facts being alleged, the legal effect of which is to vest in such defendants title by limitations; a plea of limitations, as distinguished from one of not guilty, necessarily implying that title is vested in defendants, and so, under appropriate prayer, authorizing affirmative relief.

[Ed. Note.—For other cases, see Trespass to Try Title, Dec. Dig. \S 22.]

9. APPEAL AND ERROR \S 80(1)—JURISDICTION—FINAL JUDGMENT—DISPOSITION OF CROSS-ACTION.

There is an implied disposition, by discontinuance or dismissal, of the other defendants' cross-action, in the order that plaintiff's suit was dismissed as to them, "and that this cause

stand for trial with M. as plaintiff, and N. as defendant."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-500, 503, 505-509; Dec. Dig. § 80(1).]

10. APPEAL AND ERROR § 80(1) — JURISDICTION—FINAL JUDGMENT.

Whether dismissal of the cross-action of defendants, as to whom plaintiff dismissed his suit, was rightful, is immaterial, relatively to there having been a disposition of the issue, making the judgment final, and so giving the appellate court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-500, 503, 505-509; Dec. Dig. § 80(1).]

Appeal from District Court, El Paso County; M. Nagle, Judge.

On motion to vacate judgment of affirmance. Denied.

For former opinion, see 174 S. W. 829.

C. L. Vowell, Beall & Kemp, and J. E. Quaid, all of El Paso, for appellant. Davis & Goggin, Paul D. Thomas, and Burges & Burges, all of El Paso, for appellee.

HIGGINS, J. [1, 2] At a preceding term of this court, a final disposition of this appeal was made and judgment of affirmance entered. At this term, appellant filed a motion setting up that the judgment of the lower court was not final; therefore this court never acquired jurisdiction, and its order of affirmance was a nullity and should now be vacated and the appeal dismissed. If the judgment of the court below is subject to the objection urged against it, this court never acquired jurisdiction of the case. Its order of affirmance would be a nullity and it should now be vacated and the appeal dismissed. The fact that this motion is filed at a subsequent term is not an objection to such action. *Chambers v. Hodges*, 3 Tex. 517; *Burke v. Mathews*, 37 Tex. 73; *Burr v. Lewis*, 6 Tex. 76; *Munson v. Newson*, 9 Tex. 109; *Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312; *Milam Co. v. Robertson*, 47 Tex. 222.

Appellant's motion will therefore be considered upon its merits.

[3] It is objected to the judgment of the court below that it lacks finality, because it fails to dispose of all the parties to, issues, and subject-matter of, the litigation.

The suit was filed by McElroy against Nunez et al. to recover title to and possession of a number of surveys of land bordering on the Rio Grande river. On July 31, 1913, plaintiff filed an amended petition against the same defendants and Ignacio Rodriguez. On September 2, 1913, defendants filed a plea of not guilty. On January 7, 1914, defendants filed another answer, which reads:

"Now come defendants and deny each and every allegation in plaintiff's petition and demand strict proof of same.

"Defendants say they are not guilty of the wrongs and injuries complained of in plaintiff's petition.

"Defendants say that they have been in peaceable and adverse possession of land described in plaintiff's petition under title and color of title for more than three years next preceding June 1, 1913, and therefore say plaintiff's cause of action is barred by statute of limitation, and of this they pray judgment of the court.

"Defendants further say that they have had peaceable and adverse possession of said real estate described in plaintiff's petition, cultivating, using and enjoying the same for ten years next preceding June 1, 1913, and therefore plaintiff's cause of action is barred by the statute of limitation, and of this they pray judgment of the court.

"Defendants further say that they have been in peaceable and adverse possession of said real estate, cultivating, using, and enjoying the same and paying taxes thereon and claiming under a deed and deeds duly registered for more than five years next preceding June 1, 1913, and therefore plaintiff's cause of action is barred by statute of limitation, and of this they pray judgment of the court.

"Wherefore defendants pray for judgment over and against the plaintiff herein for all land between the old river as it ran at the time the respective surveys of respective numbers set up in plaintiff's petition and present Rio Grande river; same is not accretion to said numbers and because same is property in fee simple of defendants."

On January 8, 1914, plaintiff again amended, in such amendment stating that he dismissed as to all defendants except Nunez. This petition complained only of Nunez, and prayed judgment against him for the title and possession of the land therein described. The land described was five acres out of one of the surveys named in the preceding petitions. On the same date the court entered an order of dismissal as follows:

"Be it remembered that on this the 8th day of January, 1914, came the parties by their attorneys, and the plaintiff says that he will not further prosecute his suit against the defendants Melquerras Perea, Catrino Rivera, Felix Castillos, Patricio Rivera, Joaquin Ruiz, Alberto Chavez, Preciliano Apodaca, Bonifacio Sapulga, Victorio Espinosa, Jesus Rivera, Gregorio Rivera, Polito Sapulga, Julian Sanchez, Mauricio Apodaca, Frank Alderete, Robert Parson, and R. J. Owen, and dismisses, without prejudice, as to all of the defendants except the defendant Jesus Nunez, but will prosecute his suit as to defendant Jesus Nunez. It is therefore considered by the court that this suit be dismissed as to the said Melquerras Perea, Catrino Rivera, Felix Castillos, Patricio Rivera, Joaquin Ruiz, Alberto Chavez, Preciliano Apodaca, Bonifacio Sapulga, Victorio Espinosa, Jesus Rivera, Gregorio Rivera, Polito Sapulga, Julian Sanchez, Mauricio Apodaca, Frank Alderete, Robert Parson, and R. J. Owen, but as to the defendant, Jesus Nunez, be proceeded with and that the defendants, Melquerras Perea, Catrino Rivera, Felix Castillos, Patricio Rivera, Joaquin Ruiz, Alberto Chavez, Preciliano Apodaca, Bonifacio Sapulga, Victorio Espinosa, Jesus Rivera, Gregorio Rivera, Polito Sapulga, Julian Sanchez, Mauricio Apodaca, Frank Alderete, Robert Parson, and R. J. Owen, go hence without day, without prejudice to any cause of action which plaintiff may have against them or any of them, and that they and each of them have and recover of the plaintiff, John T. McElroy, their costs in this behalf expended, and that they have their executions, and that this cause stand for trial with the said John T. McElroy as plaintiff and Jesus Nunez as defendant."

In this order, it will be observed that Ignacio Rodriguez is not specifically named.

On January 12, 1914, Nunez filed what he designates his trial amendment in answer to the trial amendment of plaintiff, and in this amendment he pleaded not guilty; also, the five and ten years' statute of limitation which he pleaded in bar of the suit. This answer concluded with this prayer:

"Defendant says, by reason of the aforesaid statute of limitation, the facts pleaded in connection with defendant's prayer invoking the same, that he is the owner in fee simple of the property described in plaintiff's petition, is the owner of the title thereto, the same is by law vested in him, and he prays on final hearing that he have judgment over against the plaintiff for the lands described in plaintiff's petition and for the title thereto, and that he have judgment quieting his title forever as against any claim of this plaintiff."

To this last amendment plaintiff filed a supplemental petition containing matter in no wise pertinent to the questions here considered. It concluded with prayer for recovery of the premises described in his last amended original petition and that Nunez take nothing by his cross-action.

Upon trial of the cause, the court entered judgment in favor of McElroy against Nunez for the title and possession of the five acres of land described in McElroy's last amended original petition. This judgment begins with this recital:

"Be it remembered that on the 8th day of January, 1914, at a regular term of this court, came on regularly to be heard the above styled and numbered cause, and the plaintiff having theretofore entered a dismissal of his cause of action herein against all of the defendants herein, except as against the defendant Jesus Nunez, thereupon came the parties, the plaintiff, John T. McElroy, by his attorneys, and the defendant, Jesus Nunez, by his attorneys, and announced ready for trial."

The foregoing statement of the pleadings embraces all that is material to a consideration of the questions involved.

So far as the disposition of parties defendant is concerned, it is plainly apparent that the order of January 8, 1914, completely eliminated all of the parties from the suit of the plaintiff except Ignacio Rodriguez.

In the amendment of the plaintiff filed on January 8, 1914, he expressly stated that he dismissed his suit as to all defendants except Nunez, and this amended petition complained of Nunez only. It occurs to us that this formal admission perhaps ipso facto operated as a discontinuance of the suit as to all defendants except Nunez, and that formal order of dismissal by the court was unnecessary. But be this as it may, the recitals in the order of dismissal and in the final decree in substance and effect show that all defendants except Nunez were dismissed from the plaintiff's suit, and the failure to specifically name Rodriguez was accidental or clerical error. The plain and necessary implication to be deduced from the recitals is that the suit of the plaintiff was discontinued as to all defendants except Nunez,

and this is all that is necessary. Trammell v. Rosen, 106 Tex. 132, 157 S. W. 1161.

This view disposes of the question as to the complete disposition of parties.

[4] Taking up the question of subject-matter, it is contended first that no disposition has been made of the large acreage for which the plaintiff originally sued. As to this, we think that the plaintiff's amendment of January 8, 1914, of itself eliminated all of the subject-matter so far as his suit was concerned except five acres, by reducing his claim to the five acres therein described and sued for.

[5] As to the cross-action of Nunez for said five acres contained in his last trial amendment, this by necessary implication was disposed of and adjudicated against him by the final judgment, whereby recovery of the five acres was had by the plaintiff against him. Trammell v. Rosen, supra; Davies v. Thomson, 92 Tex. 391, 49 S. W. 215; Rackley v. Fowlkes, 89 Tex. 613, 36 S. W. 77.

[6-10] It is next contended that disposition was not made of the cross-action of the other defendants. It is, of course, true that a plaintiff by a dismissal of his suit cannot prejudice and does not affect a cross-action set up by the defendant. So, if a cross-action was pleaded by the codefendants of Nunez, the plaintiff's dismissal of his suit as to such defendants did not affect such cross-action, and disposition thereof is essential to the finality of the decree. So it is pertinent to inquire whether those defendants had pleaded a cross-action against the plaintiff. If there was such a cross-action pleaded, it is contained in the answer filed by all defendants on January 7, 1914, noted above. It is objected by appellee that this answer is insufficient to constitute a cross-action and affords no basis upon which to predicate a right to affirmative relief. In the absence of special exceptions, we think it sufficient. Facts are alleged, the legal effect of which was to vest title in such defendants by limitation, and they have an appropriate prayer for affirmative relief. It is true, affirmative relief cannot be granted under a plea of not guilty (Railway Co. v. Prather, 75 Tex. 55, 12 S. W. 909; Matthews v. Moses, 21 Tex. Civ. App. 494, 52 S. W. 113), but a plea of limitation is quite different from such a plea. A plea of not guilty does not necessarily imply that title is vested in the defendant; whereas, limitation does. The deduction necessarily drawn from the answer of the defendants was that they had title by limitation to the lands sued for by plaintiff. They aver a fee-simple title in them and by appropriate prayer asked judgment over against plaintiff for all the land between the old and present river. It may be that the answer does not contain some formal allegations appropriate to a cross-action in trespass to try title; but, as against a general demurrer, it is regarded as sufficient. Whether or not

there has been a disposition of this cross-action is a phase of the case which presents a question of no little difficulty. Undoubtedly, there has been no express disposition thereof. But under the cited cases, it is sufficient if it has been done by necessary implication. In the dismissal order of January 8, 1914, it is expressly ordered that the plaintiff's suit was dismissed as to them, that they go hence without day, recover their costs of plaintiff, *"and that this cause stand for trial with the said John T. McElroy as plaintiff, and Jesus Nunez as defendant."* The quoted and italicized portion of this order clearly implies that all issues involved in the case were thereby eliminated except those existing between McElroy and Nunez. In its practical effect, therefore, it constituted a discontinuance or dismissal of the cross-action of the codefendants of Nunez and thereby disposes of it. Whether or not it was rightfully done is not the question here considered. We are considering only whether a disposition has been made of the issue. If so, the judgment is final, and the correctness of the action of the court with respect thereto relates to the merits of the appeal.

For the reasons indicated, we are of opinion that complete disposition has been made of all parties, issues, and subject-matter of the litigation. The motion therefore will be overruled.

J. & G. LIPPMAN v. JEFFORDS-SCHOENMANN PRODUCE CO. (No. 7053.)

(Court of Civil Appeals of Texas. Galveston. Feb. 28, 1916. Rehearing Denied March 16, 1916.)

1. SALES — RETENTION OF TITLE — QUESTION FOR JURY.

The fact that the sellers of goods, shipping them, attached to the bill of lading a draft for the purchase price made to the order of the seller, does not, of itself, conclusively show an intention to withhold passing of title until the draft is paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1428; Dec. Dig. —479(8).]

2. SALES — RETENTION OF TITLE — QUESTION FOR JURY.

In a suit for the price of potatoes sold to a buyer in Texas and shipped from a point in Maine, where the sellers attached to the bill of lading a draft to the order of the buyers for the purchase price, and inspected the potatoes in transit at New York, billing them to their agents at Galveston, Tex., with instructions to forward to Houston to the shipper's order, the question whether the sellers intended to retain title until payment of the draft was for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1428; Dec. Dig. —479(8).]

3. SALES — PLACE OF DELIVERY — QUESTION FOR JURY.

In a suit for the price of Maine potatoes sold to a buyer in Texas, where the contract provided that each car should contain a certain amount at \$3 per bag, "delivered at Texas common points," while the sellers inspected the potatoes on transshipment at New York, and directed their transfer from steamer to car at Gal-

veston, Tex., the question where the potatoes were to be delivered to the buyers, at a common point or on delivery to the carrier, was for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248-250; Dec. Dig. —88.]

4. SALES — DELIVERY — REASONABLE TIME.

Where the sellers of potatoes contracted to deliver to the buyers at a Texas common point, the buyers were not liable for the price unless the potatoes were delivered or tendered at such a point within a reasonable time after the sellers received the order to ship.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 221; Dec. Dig. —81(5).]

Appeal from Harris County Court; Clark C. Wren, Judge.

Action by J. & G. Lippman, a corporation, against the Jeffords-Schoenmann Produce Company. From a judgment for defendants as to the cause of action set forth in plaintiff's petition, and for plaintiff as to defendants' cross-action, plaintiff appeals. Reversed and remanded.

Hunt, Myer & Teagle and Rodman S. Cosby, all of Houston, for appellant. Campbell, Sewall & Myer and John H. Freeman, all of Houston, for appellees.

LANE, J. On the 28th day of March, 1912, J. & G. Lippman, a corporation in the state of New York, and Jeffords-Schoenmann Produce Company, a firm composed of Claud D. Jeffords and Ludwig Schoenmann, of Houston, Tex., entered into a written contract containing the following:

"Parties of the first and second part respectively agree:

"J. & G. Lippman, of New York, first party, have sold to Jeffords-Schoenmann Produce Co., second party, of Houston, Tex., two cars of Maine grown seed potatoes, each car to contain 220 bags of 11 pecks each, at \$3.00 per bag, delivered at Texas common points. Shipment from Maine during the months of December, January, and February, buyers' option.

"Parties of the second part further agree to specifications and deposit of \$100.00 per car with J. & G. Lippman no later than September 1st. In default of specifications not being furnished by September 1st by parties of the second part, parties of the first part reserve the right to substitute such varieties as they may select. Shipments are to be made at time specified by buyers, unless delayed by providential causes.

"Terms: Sight draft with B/L attached.

"This contract is signed in duplicate and is not subject to countermand.

"[Signed] J. & G. Lippman, by Morris Westlosky, V. Pres.

"Buyers: Jeffords-Schoenmann Pro. & Bkge. Co., by C. D. Jeffords.

"Broker: T. H. Thompson & Co."

On September 1, 1912, the buyers sent to the sellers specifications and \$200 on the two cars of potatoes as per contract. On the 8th day of February, 1913, the sellers received a night telegraphic letter at their office in New York from the buyers instructing the sellers to ship the cars of potatoes in question.

The car of potatoes involved in this appeal

was loaded in car N. Y., N. H. & H. 86879, at Goodrich station, in the state of Maine, on 8th day of February, 1913, and were transported to Stockton Springs, Me., and there unloaded from said car into a Bull Line steamer and carried to New York, and then unloaded into the Morgan Line boat, which transported them to Galveston, Tex. The bill of lading upon which these potatoes were shipped to Galveston shows that they were consigned to J. & G. Lippman, "Notify Hawley & Letzerich." They were delivered to Hawley & Letzerich, forwarding agents of the sellers, at Galveston, about the 7th or 8th day of March, 1913, who, under the instructions of the sellers, had them forwarded, on or about the 9th or 10th of March, over the International & Great Northern Railway to Houston, Tex., consigned to the order of J. & G. Lippman, "Notify Jeffords-Schoenmann Produce Co." This bill of lading was sent to the Lumberman's National Bank at Houston with the following draft attached:

"\$560.00 less freight, with exchange.

"\$561.40. New York, Feb. 8th, 1913.

"On arrival of car pay to the order of ourselves five hundred and sixty dollars. Value received. Car N. Y., N. H. & H. 86870.

"By Morris Weslosky.
"To Jeffords-Schoenmann Produce Co., Houston, Texas.

"No. 2367. Accept paid freight bill in part payment of draft attached."

Said car of potatoes arrived at Houston about March 10, 1913. After notice the buyers refused to pay said draft or any part thereof, and also refused to accept said potatoes. The other car of potatoes mentioned in said contract was shipped on the 5th day of February, 1913, practically in the same manner as the one in question, and was accepted by buyers without complaint to sellers until this suit was brought.

The freight due upon said car of potatoes involved in this appeal was \$187.38, and, as the same was not paid, the railway company, to whom the freight was due, sold said potatoes for \$165, and applied the same to payment of the freight charges.

Appellant J. & G. Lippman brought this suit for \$395 against Jeffords-Schoenmann Produce Company, alleging that same was the balance of the agreed purchase price after deducting the \$165 received by the railway company for the potatoes. Plaintiff's suit was based on the theory that under the contract a delivery of the quantity and quality of potatoes agreed upon to the carrier at point of shipment was a delivery to defendants at that point, and that then said contract became executed, and the title of said potatoes passed to the defendants, and that the fact that the potatoes were shipped to shipper's order, with bill of lading attached, was not such act as showed that plaintiff retained the title to said potatoes after delivery to the carrier in Maine, but that such acts were for the purpose only

of retaining possession of said potatoes until the purchase price was paid, and did not have the effect to retain the title thereto in plaintiff; that plaintiff shipped out the quantity and quality of potatoes called for by the contract in good order promptly after receipt of notice from defendants, and thereby fully performed its part of the contract, and that they were not liable or responsible for any delay in delivery, or for any damage to said potatoes thereafter.

Defendants answered, admitting the execution of the contract of March 28, 1912, and say that they have fully complied with the terms of said contract. They deny that the potatoes shipped by plaintiff under said contract were of the kind and quality ordered by them, and further say that said potatoes so shipped were not such as were ordered by them, and that said potatoes were not shipped within the time called for by said contract, and were not delivered to defendants at Houston, Tex., within the time contemplated by said contract, and not until long after the date upon which they should have been delivered at Houston, and were delivered entirely too late for defendants to use them for seed potatoes. They admit that they refused to pay the draft attached to the bill of lading and receive said potatoes. They say that the car of potatoes never passed out of the possession of the plaintiff, and that the carrier was the agent of plaintiff, and not of defendants. They say that, when the potatoes arrived at Houston, they were scabby, decayed, and not the kind, grade, and quality as ordered by them. They say that from the 21st day of January, 1912, to the 31st day of said month they wrote plaintiff several letters, ordering it to ship said two cars of potatoes, but, as they heard nothing from plaintiff in reply to said letters, on the 7th day of February, 1913, they sent plaintiff a night telegraphic letter ordering it to ship said two cars of potatoes; that one of said cars reached Houston on the 27th day of February, and was received and paid for by them, although not such potatoes as they had ordered, and by reason of the inferior quality of said potatoes they were damaged in the sum of \$420, and in re-convention they pray judgment for said sum. They say that the car of potatoes involved in this suit did not arrive in Houston until the 11th day of March, 1913, and that they were refused the privilege of inspecting said potatoes unless they first paid the draft covering the purchase price thereof, and, as the first car received by them was in bad order, they refused to accept said second car without an inspection. They deny that they owe plaintiff anything, but aver that plaintiff owes them for damages on the car of potatoes received and accepted by them in the sum of \$420, and for the \$100 paid by them on the second car shipped by plaintiff which they refused to accept, a total of \$520, for which they prayed judgment.

Plaintiff by supplemental petition denies all the material defensive allegations of defendants' answer. It further says it never received any of the letters alleged to have been written by defendants ordering shipment of said potatoes, and that the only order to ship received by it was the said night telegraphic letter of February 7, 1913, and that it made prompt shipment after receipt of said night letter; that it did not contract to deliver said potatoes to defendants at Houston, Tex., in good condition, but that its delivery to the carrier in Maine was in law a delivery to defendants; that said two cars of potatoes were in good condition, sound, and merchantable at the time they were delivered to the carrier in Maine, and if they were not in such condition upon arrival in Houston, and if they did not arrive in Houston within a reasonable time, such delay and damage was chargeable to the negligence of the carriers in handling said potatoes, and that it is not responsible for such negligence, if any.

The testimony of the witnesses for plaintiff is to the effect that the car of potatoes involved in this appeal were of the quantity and quality called for by the contract, and that they were in good condition when delivered to the carrier in Maine, that they were inspected by J. Hartman, an employé of plaintiff, when being transferred from one steamer to the other about the latter part of February, 1913, at New York, and that they were then in good condition. This testimony stands undisputed. No inspection of these potatoes was made at Houston, as to quantity, quality, or condition, so far as shown by the evidence, and consequently their condition was not shown. Defendants made request to inspect said potatoes after they reached Houston, but permission to inspect was refused by the railway company, unless the draft attached to bill of lading was first paid. The freight on said potatoes was unpaid, and the railway company sold same for \$165, and applied the proceeds to payment on freight charges.

The questions at issue in the trial court may be said to have been: First, under the terms of the contract, was the delivery of the potatoes to the carriers in Maine a delivery to appellees, the buyers, or were they to be delivered to appellees in Houston? Second, if they were to be delivered at Houston, were they shipped promptly after receipt of notice to ship had been received by appellant and delivered to appellees in a reasonable time thereafter?

The court instructed the jury selected by the parties as follows:

"You are instructed to return a verdict against the plaintiff in this cause, and in favor of the defendants as to the cause of action set forth in plaintiff's petition, and to return a verdict against the defendants and in favor of the plaintiff as to the cross-action of the defendants."

A verdict was returned and judgment rendered in accordance with such instructions.

From such judgment, J. & G. Lippman have appealed.

[1, 2] While it is true that the fact that the sellers attached a draft for the purchase price of the potatoes to the bill of lading, which is made to the order of the sellers, under the most recent opinions of our courts does not of itself constitute and conclusively show an intention to withhold the passing of the title until the draft is paid (*Robinson v. H. & T. C. Ry. Co.*, 105 Tex. 188, 146 S. W. 537; *Orthwein v. Wichita Milling Co.*, 32 Tex. Civ. App. 600, 75 S. W. 364), we think such fact, together with other facts and circumstances proven, such as an inspection of the potatoes while in transit by the agent of the seller at New York, and the billing of the potatoes to Hawley & Letzerich, agents of the seller at Galveston, with instructions to forward to Houston to shipper's order, etc., should have been submitted to the jury, under proper instruction, for it to find and determine from all such facts and circumstances as to what the intention of the parties was at the time the contract in question was entered into.

[3] We do not think that by the language used in the contract it is made clear whether the potatoes were to be delivered to the buyers at Houston or whether they were to be delivered to the initial carrier in the state of Maine, as the agent of such buyer. The provisions in the contract that "each car to contain 220 bags of 11 pecks each, at \$3.00 per bag, delivered at Texas common points," is not entirely clear of ambiguity. It is not clear from this provision, when considered with the contract as a whole, that such provision was for the purpose of fixing the price only of the potatoes to the buyers at Houston, Texas, and that it was not inserted for the purpose of specifying the point of delivery by the sellers, and we therefore conclude that as, under the undisputed facts, the sellers, seemingly at least, assumed some kind of supervision and control over the potatoes, at several points while they were being transported from Maine to Texas, such as inspection at New York, directing their transfer from steamer to car at Galveston by the sellers' agent, etc., the court should have submitted to the jury the question as to where, under the contract, the potatoes were to be delivered by the sellers to the purchasers, and that the court erred in not so doing.

The contention of appellant, however, that the court should have instructed a verdict for it cannot be sustained. The fact that after the potatoes were delivered to the carrier in the state of Maine to be transported to Galveston, Tex., they were, while in transit, inspected at New York by the agent of the seller, that the seller through its forwarding agent at Galveston, surrendered the original bill of lading to the steamship company, which transported the potatoes to Galveston, and took charge of them and forwarded them

from Galveston to Houston, to seller's order, with draft attached to bill of lading, to say the least of it, is not entirely consistent with appellant's contention that the title to the potatoes passed to the buyers at the initial point of shipment in the state of Maine, and from that time were their property and subject to their risk. We think, therefore, the question as to where the potatoes were to be delivered under the terms of the contract should have been submitted to the jury under all the facts and circumstances proved.

[4] Upon another trial the jury should be instructed that, if they should find that under the contract plaintiff was to deliver the potatoes to defendants at a Texas common point, then they will further find whether the potatoes contracted for were delivered and tendered to defendants at such point within a reasonable time after plaintiff received the order to ship.

For the error hereinbefore pointed out, the judgment of the trial court is here reversed, and the cause remanded.

Reversed and remanded.

COLONIAL LAND & LOAN CO. v. JOPLIN. (No. 7256.)

(Court of Civil Appeals of Texas, Galveston.
March 9, 1916. Rehearing Denied
March 23, 1916.)

1. STIPULATIONS \S 18(1)—EFFECT.

Where the mortgagee of a nursery company secured a money judgment, with a foreclosure of its lien upon the land, providing that an order of sale would issue, in course of the nursery company's receivership, commanding the property to be sold on execution subject to approval of the court, and such mortgagee's assignee stipulated in court, as recited in the order of sale of the property, that the title to the nursery stock should not pass with the sale of the land, and acquiesced in the order of the court that the sale of the land should be made subject to the right of the receiver or his assignees to remove the stock, such assignee, after sale of the land to itself, could not enjoin the sale or removal of such stock.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41, 45, 47, 54; Dec. Dig. \S 18(1).]

2. INJUNCTION \S 7 — FORECLOSURE — ASSIGNEE OF JUDGMENT—REMEDY BY APPEAL.

Where the assignee of a foreclosure judgment against a nursery company in the hands of a receiver was not satisfied with the terms of the order of sale requiring the land and nursery stock to be sold separately and denying its right of lien upon the stock, its remedy was to appeal, and not to buy in the land and then seek to enjoin the receiver from selling or removing the stock.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 6, 34; Dec. Dig. \S 7.]

3. MORTGAGES \S 133 — EXTENT OF LIEN — NURSERY STOCK.

Whether nursery stock, prima facie a part of the realty, is subject to the lien of a mortgagee of the land depends upon the intention of the parties at the time the mortgage was executed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 260, 264, 265; Dec. Dig. \S 133.]

4. MORTGAGES \S 133 — EXTENT OF LIEN — NURSERY STOCK—INTENTION.

Where a nursery company mortgaged its land, if it was contemplated by the parties that the company should have the right each year to sell the nursery stock without accounting to the mortgagee for the proceeds, and such right was exercised by the company, it was the intention of the parties that the nursery stock was to be regarded as personalty not subject to the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 260, 264, 265; Dec. Dig. \S 133.]

5. MORTGAGES \S 133—PROPERTY COVERED—CROPS.

Crops grown upon land covered by a mortgage are personal property of the mortgagor, and not subject to the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 260, 264, 265; Dec. Dig. \S 133.]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Suit by the Colonial Land & Loan Company against Paul W. Joplin, receiver. From an order refusing an application for temporary injunction, plaintiff appeals. Affirmed.

Bryan & Bryan, of Houston, for appellant. Sam, Bradley & Fogle, of Houston, for appellee.

PLEASANTS, C. J. This appeal is from an order of the judge of the Eleventh judicial district, refusing an application for temporary injunction in a suit for injunction brought by appellant against the appellee. The facts upon which the injunction was sought are as follows: The property of the Alvin Japanese Nursery Company, a private corporation, was placed in the hands of a receiver in September, 1914, and its business as the owner and seller of nursery stock, consisting of fruit trees, ornamental trees, shrubs, vines, etc., and its business as the grower of an orange orchard was continued under the orders of the court by the receiver. On March 31, 1915, the Lumberman's National Bank of Houston, Tex., intervened in the case, and asked for a foreclosure of certain deeds of trust liens, the first of which had been given in 1909, and the second, which was but in effect an extension of time of the first indebtedness, was given in 1914, and both deeds of trust covered that portion of the land owned by the Nursery Company upon which it had and was growing its said nursery stock. On June 2, 1915, the court entered a judgment in favor of the bank for \$29,225.72, with 10 per cent. interest per annum thereon from date, together with a foreclosure of said liens upon the land, and providing that an order of sale would issue in due course of the receivership, commanding that said property be seized and sold under execution subject to the approval of the court. On July 5, 1915, the bank sold and assigned its said judgment to the appellant, Colonial Land & Loan Company, which company, on October 13, 1915, intervened in

the case, and on the 23d of October, 1915, filed a motion asking that the court order a sale of the property covered by its judgment lien, and the court thereupon appointed commissioners to sell all of the property of the nursery company at private sale and report the same to the court. The appellant, having been the only bidder at private sale, and its bid having been reported to the court, a hearing was had thereon, and on the 10th day of December, 1915, the court refused to confirm the bid, and ordered the land, exclusive of the nursery stock, sold at public sale by the commissioners on the first Tuesday in January, 1916, subject to the approval of the court. On December 13, 1915, the court filed its conclusions of fact and law with reference to the nursery stock, a copy of which findings is attached to the appellant's petition and injunction herein, and marked "Exhibit A," in which the court found that, from the facts, the nursery stock was not a part of the realty, but was personal property, and not subject to appellant's deeds of trust liens. Afterwards the land, exclusive of the nursery stock, was offered at public sale, on the first Tuesday in January, 1916, and the only bid made for the land, exclusive of the nursery stock, was that of the appellant, and afterwards, upon the hearing of the confirmation of this sale, at the suggestion of the court, the appellant made an additional bid or raise on its bid, and the court confirmed the sale and ordered a deed made to appellant for the land. After crediting appellant's judgment indebtedness with the amount bid for the land, there was a balance due appellant of something over \$10,000 on its judgment. At the sale of the land in January, in addition to its bid for the land, appellant bid the further sum of \$14,000 for the nursery stock, the amount of said bid to be credited with the balance due on appellant's judgment after crediting said judgment with the amount bid for the land. This bid of appellant for the nursery stock was not recommended for confirmation by the master in chancery, to whom the report of sales was referred, for the reason, as stated in his report, "that it was unnecessary for him to pass upon it, as it did not appear to be regular or in conformity with the court's order of sale"; but the master found that the value of the nursery stock was \$20,000. The court rejected appellant's bid for the nursery stock. The order of December 10th, before referred to, by which the court refused to confirm the first sale of all of the property and ordered the sale of the land and the nursery stock to be made separately, contains the following recitals:

"The Colonial Land & Loan Company, without waiving its claim that the said nursery stock is now subject to its lien, and that by reason thereof it has the right to follow the proceeds of the sale of such stock, having stipulated in open court that the status of such nursery stock (as to whether it is subject to such lien)

shall not be held to be affected by a sale of said land upon which said nursery stock is situated prior to a sale, or severance of such nursery stock—that is, that the nursery stock on the land at date of sale will not pass by sale of the land because of the fact that the stock was on the land at date of sale, in this connection—it is further ordered that the sale of the lands upon which the nursery stock is situated shall be made subject to the right of the receiver or his assigns to remove the nursery stock at any time prior to March 1, 1916."

To the action of the court in holding the nursery stock as being personal property and not subject to its mortgage lien, the Colonial Land & Loan Company excepts, and to all of which the Citizens' State Bank of Alvin, Tex., excepts. After the confirmation of the sale of the land and the refusal of the court to confirm appellant's bid for the nursery stock, it filed this suit for an injunction to restrain the receiver from selling or removing the nursery stock. In addition to the facts before set out, the petition alleges (and it is an admitted fact) that the nursery company is insolvent, and unless appellant subjects the nursery stock to the payment of the balance due upon its judgment, it will lose said balance.

[1] In his order refusing the application for injunction the trial judge states that the injunction was refused because he was of opinion that the nursery stock was not a part of the realty, and therefore not subject to appellant's lien, but that if it could be considered a part of the realty the injunction should be granted. We think it clear that the injunction was properly refused, regardless of the question of whether appellant has a lien on the nursery stock to secure the payment of the balance of its judgment. The agreement of appellant, recited in the order of sale, before set out, that the title to the nursery stock should not pass by the sale of the land, and its acquiescence in the order of the court "that the sale of the land upon which the nursery stock is situated shall be made subject to the right of the receiver or his assigns to remove the nursery stock at any time prior to March 1, 1916," is a complete answer to appellant's claim of a right to enjoin the sale or removal of the nursery stock.

[2] Appellant cannot claim that the title to the nursery stock passed to it by its purchase of the land under the terms of the order of sale before set out. The only right that it preserved to itself in said order was the right to assert the claim that the proceeds of the sale of the nursery stock should be subjected to its lien, and it cannot, in violation of the terms of the order under which it purchased the land, enjoin the sale and removal of the nursery stock. If appellant was not satisfied with the terms of the order of sale, which required the land and nursery stock to be sold separately and denied its claim of lien upon the nursery stock, it should have appealed therefrom. Having acquiesced in the order of sale, it is

bound by its terms, and the receiver cannot be enjoined from selling or removing the nursery stock.

[3] This conclusion will require the affirmation of the order of the trial judge, and this opinion could properly end here. In view, however, of the fact that when the nursery stock has been sold appellant is not precluded from asserting its claim of lien upon the proceeds of such sale, we deem it proper to say that, in our opinion, the question of whether the nursery stock on the land is subject to appellant's lien depends upon the intention of the parties at the time the trust deed was executed. The rule is stated by Jones in the Law on Mortgages of Real Property ([5th Ed.] vol. 1, page 35) as follows:

"Trees and shrubs planted in a nursery garden for the temporary purpose of cultivation and growth until they are fit for market, and then to be taken up and sold, pass by a mortgage of the land, so that neither the mortgagor nor his assigns or creditors can remove them as personal property. One claiming that trees and shrubs, whether growing naturally, or planted and cultivated for any purpose, are not part of the realty must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels. The mere fact that the trees and shrubs were the stock in trade of the mortgagor in his business as a nursery gardener is insufficient for this purpose. They are *prima facie* parcel of the land, unless specially excepted, and in the same way, unless specially excepted, pass to a mortgagee. Although planted by the mortgagor after the execution of the mortgage, they become a part of the realty and part of the mortgage security."

[4] If the evidence justifies the conclusion that at the time the mortgage was executed it was contemplated by the parties that the mortgagor should have the right each year to sell the nursery stock without accounting to the mortgagee for the proceeds of such sales, and that this right has been exercised by the mortgagor continuously since the execution of the mortgage, we think it should be held that it was the intention of the parties that the nursery stock placed or grown on the land was to be regarded as personal property, and not subject to the mortgage. *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

[5] It is a settled rule of decision in this state that crops grown upon land covered by a mortgage are personal property of the mortgagor, and not subject to the mortgage. *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

While under the general rule above quoted nursery stock is *prima facie* a part of the realty, when the circumstances in the particular case show it was the intention of the parties to the mortgage that it should be regarded as personal property, it is not any more subject to the mortgage on the land than would be a growing crop.

In accordance with the conclusions before expressed the judgment of the court below is affirmed.

Affirmed.

SLAUGHTER, County Treasurer, v. KNIGHT, County Com'r, et al. (No. 78.)

(Court of Civil Appeals of Texas. Beaumont. Feb. 17, 1916.)

1. COUNTIES \S 98(1)—OFFICERS—LIABILITY OF OFFICIAL BOND—STATUTE.

Under Sp. Acts 28th Leg. c. 25 (Special Road Law for San Augustine County) § 1, providing that the members of the commissioners' court of the county shall be *ex officio* road commissioners of their respective districts, and that one shall, before entering upon the duties of his office, in addition to his required bond as commissioner, execute a bond of \$1,000, with sureties, conditioned that he shall faithfully perform all duties required of him by law or the commissioners' court, etc., the sureties on the official bond of a county commissioner as such were not responsible for his illegal drawing or receiving money from the county as *ex officio* road commissioner.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141, 142; Dec. Dig. \S 98(1).]

2. COUNTIES \S 101(6)—OFFICERS—LIABILITY FOR DEFAULT—PLEADING AND PROOF.

In suit by the treasurer of San Augustine county, where the petition showing upon its face an action laid against a county commissioner and the sureties on his bond for the unlawful collection of moneys as such commissioner, does not warrant recovery against him individually for defaults committed by him as *ex officio* road commissioner under the special road law for the county (Sp. Acts 28th Leg. c. 25).

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 157; Dec. Dig. \S 101(6).]

3. COURTS \S 120—DISTRICT COURTS—JURISDICTIONAL AMOUNT.

The district court had no jurisdiction of the county treasurer's suit against a county commissioner to recover \$120 unlawfully collected from the county; the amount being below its jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. \S 120.]

4. COUNTIES \S 101(6)—LIABILITY OF OFFICER—ILLEGAL COLLECTION OF MONEY—PLEADING.

In suit by the treasurer of San Augustine county against a county commissioner and his sureties to recover moneys unlawfully collected, the allegation of the petition "that said account [of parties for road work] was approved and ordered paid by the county commissioners' court, and on the same date county warrant No. 477 was issued and delivered to said defendant in payment therefor, and that said warrant was paid on the same date by treasurer's check No. 390," was insufficient as failing to charge that the warrant was issued in favor of defendant commissioner, that he collected it, or that he had pecuniary interest in it.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 157; Dec. Dig. \S 101(6).]

5. COUNTIES \S 206(1)—CLAIMS—ALLOWANCE—CONCLUSIVENESS—VOID ORDER—STATUTE.

Under Const. art. 5, § 8, providing for appeals from commissioners' courts to district courts with such exceptions as may be provided by law, and in view of *Vernon's Sayles' Ann. Civ. St. art. 6366*, providing for an appeal to the district court from a judgment of the commissioners' court, assessing damages after tak-

ing land for public roads, the only provision for appeal from a judgment of the commissioners' court to the district court, where the commissioners' court of San Augustine county ordered and allowed to a county commissioner without legal authority amounts claimed by him in connection with roadwork, such judgment of the commissioners' court, in excess of its jurisdiction, allowing and ordering illegal warrants, was subject to collateral attack.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 326, 327; Dec. Dig. § 206(1).]

Appeal from District Court, San Augustine County; A. E. Davis, Judge.

Suit by G. W. Slaughter, Treasurer of San Augustine County, against W. K. Knight, County Commissioner of Precinct No. 1, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Minton, of Hemphill, and T. H. Downs, of San Augustine, for appellant. Davis & Ramsey, of San Augustine, for appellees.

MIDDLEBROOK, J. This is a suit, brought in the district court of San Augustine county, Tex., by the county treasurer, against W. K. Knight, county commissioner of precinct No. 1, said county, and the sureties on his official bond, as county commissioner of precinct No. 1 of said county, alleging unlawful collection and holding of money belonging to said county by said commissioner. The suit is brought under special road law for said county, enacted by the Twenty-Eighth Legislature.

The charges are: (1) That he collected \$30 at the end of each quarter, or \$120 for the year 1911, as county commissioner of said county for reviewing, etc., the public roads of said county, when under the special road law for said county, he could collect only \$80 for the entire year; (2) that he collected \$78 for work done on roads by Teel and Hanks, and that such collection was without warrant of law; (3) that he collected \$12 for letting and receiving bridges, and such collection was without warrant of law. Plaintiff also alleged presentation by said Knight of these different claims to the commissioners' court of said county, the approval of said claims by the commissioners' court, issuance of warrants by said court on the county treasurer, and payment of the same by the county treasurer of said county. The total amount charged to have been illegally collected is \$120. The petition alleges, also, the election of said Knight as commissioner of precinct No. 1 for said county, his qualification as such official, and the execution of the statutory bond by him for the sum of \$3,000 as such officer, with Sam Parker and John Thompson, Jr., sureties on the bond, and the approval of the bond by the commissioners' court, and pleaded the bond in *hac verba*. The bond is for the faithful performance of his duties as county commissioner.

Defendant Knight answered by general

and special exception and general denial. The exceptions are to the effect: (1) That defendant is charged with liability as a road commissioner under act of the Twenty-Eighth Legislature, but the petition fails to show that he qualified as such commissioner; (2) that under the special road law for San Augustine county, county commissioners are made *ex officio* road commissioners, and such commissioners are required to qualify and give bond in the sum of \$1,000 for faithful performance of duty and properly accounting for all moneys, tools, and property of the county coming into the possession of such *ex officio* road commissioner; (3) that the petition fails to show lack of authority of the commissioners' court to pay the sums of money charged to have been illegally received; (4) that the petition fails to show wherein or how the defendant is liable to the county for the money claimed; (5) that the petition showed voluntary payment by the commissioners' court of the money charged to have been illegally collected; (6) that the petition showed payment of the various sums by the commissioners' court, but failed to charge the receipt of such money as a part of the defendant's special duty, and that he violated, the conditions of his official bond to faithfully perform his duty as county commissioner, as required of him under the law.

Defendants Parker & Thompson adopted the answer of defendant Knight, so far as applicable, and urged further special exception to the effect that the petition charged them as sureties on said Knight's bond as county commissioner, etc., and as such sureties liable for said money, but that the Twenty-Eighth Legislature had made a special road law for San Augustine county, which was then in force, and said law created the office of road superintendent for said county, and, in the absence of appointment of such superintendent, making the county commissioner *ex officio* road commissioner of said county, and requiring them to give bond as such in the sum of \$1,000 for faithful performance of duty and properly accounting for all property of the county coming into the possession of such *ex officio* road commissioner; and that such bond was another different and additional bond to the bond as required under the law, in the sum of \$3,000 for a county commissioner, and that such bond as *ex officio* road commissioner was made payable to the county judge of San Augustine county for the benefit of the road and bridge fund of said county; and that the petition failed to show the qualification of said Knight as such *ex officio* road commissioner and his execution of bond as such commissioner; and that the petition sought to hold them liable for acts of the county commissioner, which could have been performed, under the law, only in his capacity of *ex officio* road commissioner.

The honorable trial court sustained the

exceptions to the petition, and the only assignment of error presented for our consideration is:

"The court erred in sustaining the general exceptions of the defendant to the plaintiff's petition."

But one proposition is presented under this assignment, which is as follows:

"The facts set out in plaintiff's petition show a good cause of action against appellees, and the cause should have been heard on its merits."

To support this proposition, appellant cites Special Laws of Texas, Twenty-Eighth Legislature, 1903, p. 149, §§ 14, 16.

"Sec. 14. Each county commissioner, when acting as road commissioner, shall be entitled to \$2.00 per day for services actually performed; provided, that he shall not receive more than \$30 per quarter. Said per diem shall be paid out of the road and bridge fund, when the account shall have been approved by the commissioners' court, and the court shall not approve said account unless the commissioner presenting it shall make oath that the account is just, due, and unpaid, and said account shall specify the number of days' work actually performed by him, and that it was necessary to be done under the circumstances, and if he worked only a part of a day, the number of hours worked shall be stated, and no commissioner shall be entitled to pay as road commissioner, either for himself or deputy, while he is performing the duties of county commissioner, nor shall he receive any additional pay than that provided by this section for inspection of his road, or other road service."

"Sec. 16. The office of county superintendent of public roads and bridges is hereby created, and the commissioners' court of San Augustine county may at its first regular term after this law shall have taken effect appoint a county superintendent of public roads and bridges, who shall hold his office until removed by said court, in which case there shall be another appointed to fill such vacancy. Such county superintendent of roads and bridges shall be a person of good character, executive ability, and versed in road working, and shall be a freeholder in the county of San Augustine. Such superintendent shall have charge of, shall direct the labor of county convicts when doing road duty, and all the hands placed under him, and may through the direction of the commissioners' court employ other hands to labor on the public roads, provided, that such hand or hands shall not cost at the rate of more than \$1.00 per day. * * * Such county superintendent of public roads and bridges, before entering upon the discharge of his duties, shall take the oath of office prescribed by law, and shall enter into a bond in the sum of \$2,000, with two or more good and sufficient sureties, to be approved by a commissioners' court, and * * * to be filed by the clerk of San Augustine county and his successors in office in trust for the road and bridge fund of San Augustine county, and to be conditioned for the faithful performance of all the duties of his office. * * * That when a county superintendent of public roads is appointed the county commissioners shall receive no compensation as road commissioners, except \$30 for inspecting the road once a year."

[1] It is to be noted that section 1 of the special road law for San Augustine county provides:

"That the members of the commissioners' court of San Augustine county shall be ex officio road commissioners of their respective districts and under the direction of the commissioners' court shall have charge of all teams. * * * Each of said commissioners shall before entering upon the duties of his office, in addition to his regular bond as commissioner, execute a

bond of \$1,000 with two or more good and sufficient sureties, payable to the county judge * * * for the use and benefit of the road and bridge fund; conditioned that he shall well and faithfully perform all the duties required of him by law, or by the commissioners' court * * * and that he will account for all money or property belonging to the county that may come into his possession; * * * that county commissioners shall not be allowed any commission when a deputy road commissioner has been appointed."

Under this law it is clear that the bondsmen of County Commissioner Knight, sued in this case, could not be responsible for any of his acts as ex officio road commissioner. It is also clear that the suit is one based upon allegations of illegal drawing or receiving money from San Augustine county as such road commissioner; for under this law if no road superintendent is appointed, the several county commissioners are made ex officio road commissioners, and are required to give another and different bond as such official, for another and different purpose, and with different conditions in said bond. This being true, it could not be argued that bondsmen for him as county commissioner could be held liable for any illegal act or drawing of money from the county by such county commissioner, when acting in matters in which the law succinctly makes him another and different officer, to wit, ex officio road commissioner.

[2] There is an alternative plea in this case, asking for judgment against County Commissioner W. K. Knight individually, if it should be found that he and his sureties are not jointly liable. We do not believe the pleadings in this case would warrant such finding, because the petition shows upon its face a different action pleaded from the one that would have to be proved; i. e., an action laid against a county commissioner, when the facts pleaded show that all the proof that could be introduced would be as to acts of another and different officer, under a different bond, for a different amount, and providing for different conditions under the special road law for San Augustine county.

[3] Again, if the bondsmen, Parker & Thompson, are not liable under the pleadings, as we have already determined, then it would necessarily follow that the district court was without jurisdiction to try the case and render any judgment against County Commissioner Knight, for in such case, the amount, \$120, is below the jurisdiction of the district court.

[4] In paragraph 9 of plaintiff's petition, he alleges that W. K. Knight presented his account to the commissioners' court for \$28 for work on roads with Teel & Hanks, and also \$40 for 20 days' work on roads with Teel & Hanks, and again \$10 for 5 days' work with Teel & Hanks, giving the date of the presentation of such claim, its allowance, the warrant number, and the payment of the warrant by the county treasurer. These

amounts, added to the amount alleged to have been drawn for three-quarters of the year 1911 by Commissioner Knight, illegally, in absence of the suit being upon the official bond of County Commissioner Knight, would not make a sufficient amount to give the district court jurisdiction; but if the amount was sufficient, after adding the vouchers in favor of Teel & Hanks to the amount which was audited to County Commissioner Knight himself, under the pleadings of this case, the general exception was well taken, because the pleadings nowhere charge that County Commissioner Knight had any interest in nor were the vouchers for Teel & Hanks assigned to him or that he was in any pecuniary way affected by such vouchers, or the money in payment of them. One cannot tell from reading the petition but that County Commissioner Knight drew the warrants of Teel & Hanks and cashed them, and delivered the money to Teel & Hanks, or that he employed Teel & Hanks to do the work, put in an account for them, drew the warrant, and delivered it to Teel & Hanks, or drew the warrant, cashed it, and delivered the money to Teel & Hanks. The exact verbiage of the allegation as to the cashing of said warrants is as follows:

"That said account was approved and ordered paid by the said court, and on the same date, county warrant No. 477 was issued and delivered to said defendant in payment thereof, and that said warrant was paid on the same date by treasurer's check No. 390."

The same allegation is made as to the different vouchers charged. Such allegation does not charge that the warrant was issued in favor of County Commissioner Knight. It does not charge that he collected the warrant, nor does it charge that he had any pecuniary interest in the warrant, and therefore fails to charge a cause of action against him; and we think there was no error by the honorable trial court in sustaining the exception; and appellant's assignment of error is therefore overruled.

[5] Appellees present a counter proposition to the effect that the several amounts charged to have been illegally collected by Commissioner Knight as shown by the petition, having been allowed and adjudicated by the commissioners' court, and the judgment of said court regularly entered, such judgment and action of the court is res adjudicata of the subject-matter, and is not subject to collateral attack. We do not agree with this assumption of the law, but, on the contrary, hold that if the several amounts allowed by the commissioners' court to the county commissioner were not provided for by law, and the commissioners' court acted without legal authority in auditing and allowing said amounts, in such event the court exceeded its authority and jurisdiction, and such judgment of the court, allowing and ordering such illegal warrants, is subject to collateral

attack. There is a variance in authorities on this subject; but we think this has been settled by our Supreme Court. Article 5, § 8, of the Constitution of Texas provides for appeals from commissioners' courts to district courts, "with such exceptions and under such regulations as may be provided by law." Article 6866, Vernon's Sayles' Civil Statutes, provides for appeal from a judgment of a commissioners' court, assessing damages for taking land for public roads, to the district court. This, so far as we have been able to find, is the only provision by the Legislature for appeal from a judgment or order of the commissioners' court to the district court. So, in the instant case, there is no appeal provided by law from the judgment of the commissioners' court, allowing the several amounts complained of to Commissioner Knight; and, such being the case, if they were illegal claims, they could not be legally allowed by the commissioners' court; and if they were not legally allowed, the commissioners' court's action was a nullity, and the order void, and therefore subject to collateral attack. *McKinney v. Robinson*, 84 Tex. 496, 19 S. W. 699.

The action of the trial court is affirmed.

PECK v. MURPHY & BOLANZ. (No. 7443.)

(Court of Civil Appeals of Texas. Dallas.
March 4, 1916.)

1. EXECUTION ~~§~~ 333—RETURN—STATUTE.

An execution when issued and placed in the hands of an officer is returnable under Vernon's Sayles' Ann. Civ. St. 1914, art. 3730, in 30, 60, or 90 days, if so directed by the plaintiff or his attorney, and if no return day is specified, is returnable on the first day of the next term of the court whence it is issued.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1002-1004; Dec. Dig. ~~§~~ 333.]

2. LIMITATION OF ACTIONS ~~§~~ 22(8)—LIABILITY FOR FAILURE TO LEVY AND RETURN EXECUTION.

An action by the assignee of a judgment under Rev. St. 1911, arts. 3776, 3777, to recover the amount thereof against the sheriff and the sureties on his official bond for refusal to levy and return such execution, accruing 90 days after the issuance of the execution, was barred by the five-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 109; Dec. Dig. ~~§~~ 22(8).]

3. LIMITATION OF ACTIONS ~~§~~ 111—SUSPENSION OF LIMITATION—INJUNCTION.

In such case the fact of a judgment enjoining the issuance and levying of an execution under the judgment assigned to plaintiff, entered after the issuance and return day of the execution, which did not restrain the assignee from proceeding against the sheriff for refusal to levy and return execution, and which only enjoined the levy of any execution then in the hands of the sheriff or the issuance and levy of any execution subsequent to the rendition thereof, did not interrupt the statute of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 521; Dec. Dig. ~~§~~ 111.]

4. LIMITATION OF ACTIONS \Leftrightarrow 192(3) — CONCEALMENT OF CAUSE OF ACTION — ALLEGATIONS.

In such case allegations of an injunction against the issuance and levy of any execution under the judgment against the property of the judgment debtor, procured to mislead plaintiff to believe that he had no cause of action against the sheriff for failure to execute and return the execution issued on the judgment, without allegation as to what diligence he had used to discover the alleged fraud, or that it could not have been discovered by the exercise of ordinary diligence in time to save a proceeding from being barred by the statute, were insufficient to show any suspension of the statute of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 701; Dec. Dig. \Leftrightarrow 192(3).]

5. LIMITATION OF ACTIONS \Leftrightarrow 100(11)—FRAUD—DISCOVERY—LACHES.

When the fraud relied upon to prevent the running of limitation is unknown to the injured party or is concealed, lapse of time will not be laches barring relief, unless such party has failed to use reasonable diligence to discover the fraud; and fraud prevents the running of the statute only until its discovery, or until by the exercise of reasonable care it might have been discovered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 490; Dec. Dig. \Leftrightarrow 100(11).]

6. LIMITATION OF ACTIONS \Leftrightarrow 111 — SUSPENSION—INJUNCTION.

In a statutory action by the assignee of a judgment against the former sheriff and his sureties to recover the amount of a judgment for his refusal to levy and return execution, the action of the sheriff and his sureties in obtaining a judgment, perpetually enjoining plaintiff from any proceedings against the sheriff, suspended the running of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 521; Dec. Dig. \Leftrightarrow 111.]

7. SHERIFFS AND CONSTABLES \Leftrightarrow 159—REFUSAL TO LEVY AND RETURN—ACTION AGAINST SHERIFF—PLEADING.

In such proceeding where plaintiff pleaded that the sheriff in a cross-action had obtained a perpetual injunction against any statutory proceeding on his official bond to recover the amount of the judgment, without alleging anything to relieve him of the legal effect of such injunction, the sheriff's general demurrer was properly sustained.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 372-382; Dec. Dig. \Leftrightarrow 159.]

8. APPEAL AND ERROR \Leftrightarrow 736—ASSIGNMENT OF ERROR—FORM.

An assignment of error in that the court erred in excusing the parties to go to try another case, and in dismissing without any opportunity to argue or to amend was not entitled to consideration because presenting two separate and unrelated questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8028, 8029; Dec. Dig. \Leftrightarrow 736.]

9. APPEAL AND ERROR \Leftrightarrow 742(1) — ASSIGNMENTS OF ERROR—FORM—RECORD.

Such assignment of error was not entitled to consideration where it did not include a brief statement in substance of the proceedings or a part thereof contained in the record sufficient to explain and support the contention made as required by rule 31 for Courts of Civil Appeals (142 S. W. xiii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. \Leftrightarrow 742(1).]

10. APPEAL AND ERROR \Leftrightarrow 236(2)—PRESENTATION OF QUESTIONS IN TRIAL COURT—REQUEST TO AMEND.

If plaintiff desired to amend his motion against a sheriff before the court sustained the defendant's demurrer thereto, he should have requested the court's permission to amend, and upon refusal should have reserved a bill of exception thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1385; Dec. Dig. \Leftrightarrow 236(2).]

11. APPEAL AND ERROR \Leftrightarrow 960(1)—SHERIFFS AND CONSTABLES \Leftrightarrow 159 — SUMMARY REMEDIES—DISCRETION OF TRIAL COURT—RULING ON DEMURRER.

The action of the trial court in sustaining a demurrer to appellant's motion against a sheriff and his sureties without hearing appellant's reply argument and in refusing to allow appellant to argue his exceptions to the special answer, was largely within its discretion, and would not be reviewed, where no abuse was shown by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3834; Dec. Dig. \Leftrightarrow 960(1); Sheriffs and Constables, Cent. Dig. §§ 372-382; Dec. Dig. \Leftrightarrow 159.]

12. APPEAL AND ERROR \Leftrightarrow 742(1) — ASSIGNMENT OF ERROR — STATEMENT — RULE OF COURT.

An assignment of error in that the trial court stopped appellant while he was reading his amended motion for a new trial and entered an order striking out and dismissing the motion, not supported by any statement required by rule 31 for Courts of Civil Appeals (142 S. W. xiii) was not entitled to consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. \Leftrightarrow 742(1).]

13. NEW TRIAL \Leftrightarrow 154 — STRIKING OUT — ATTACK ON JUDGE.

The trial court, while authorized to eliminate from a motion for a new trial, any irrelevant and scurrilous matter, was not authorized by reason of such matter to strike out the entire motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 312, 313; Dec. Dig. \Leftrightarrow 154.]

14. APPEAL AND ERROR \Leftrightarrow 1072 — HARMLESS ERROR—STRIKING OUT.

Error in striking out and refusing to consider appellant's motion for a new trial was harmless, where the case went off on demurrers to appellant's petition or motion, and no motion for a new trial in the district court was essential to appellant's right to have that court's action reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233½; Dec. Dig. \Leftrightarrow 1072.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by H. D. Peck against Murphy & Bolanz, in which Herman Kruegel, assignee of the judgment for plaintiff, moved for a recovery of the amount thereof against J. Roll Johnson, as former sheriff, and the sureties on his official bond. Motion dismissed, and Kruegel appeals. Affirmed.

Herman Kruegel, of Dallas, in pro. per. Jeff Word, of Dallas, for appellee.

TALBOT, J. On the 28th day of April, 1914, the appellant, Herman Kruegel, filed a motion in the district court of Dallas county, Tex., against J. Roll Johnson, as former sher-

iff of said county, and John H. Gaston, John A. Crowder, and C. H. Alexander, as sureties on the official bond of the said Johnson as such sheriff, to recover, under articles 3776 and 3777 of the Revised Statutes of 1911, \$1,135.80, the amount of judgment rendered in the above-entitled cause in favor of H. D. Peck, and against Murphy & Bolanz, a firm composed of J. P. Murphy and Charles F. Bolanz. On May 21, 1914, the appellant filed an amended motion on which the case went to trial. This amended motion alleges, in substance, so far as is material to state, that the said J. Roll Johnson was on November 4, 1902, duly elected sheriff of Dallas county, Tex.; that he duly qualified as such sheriff by taking the oath of office and executing bond as required by law in the sum of \$10,000, with the said John H. Gaston, John A. Crowder, and C. H. Alexander as sureties thereon; that on October 22, 1895, there was duly rendered in the Forty-Fourth district court of Dallas county in the said cause of H. D. Peck v. Murphy & Bolanz, a judgment against J. P. Murphy, Charles F. Bolanz, and said Murphy & Bolanz, for the sum of \$1,135.80, with costs and interest from said date; that no appeal had ever been taken from said judgment, that it had not been set aside or canceled, had never been paid or otherwise satisfied or released, and that H. D. Peck caused the first execution to be issued thereon in July, 1896; that in July, 1901, the said H. D. Peck for a valuable consideration assigned and transferred said judgment to the appellant herein, Herman Kruegel, and that said Kruegel is now and has been, ever since said assignment and transfer, the legal owner and holder of said judgment; that he caused said judgment to be abstracted and recorded in the Dallas county judgment record and had thereafter the second execution issued thereon and placed in the hands of the said J. Roll Johnson, one of the appellees herein, for levy upon and sale of property belonging to the judgment debtors; that said Johnson under an unlawful and corrupt conspiracy and collusion with the judgment debtors willfully and corruptly returned said second execution without making the levy thereon, marked, "no property found," when said debtors were solvent with sufficient property in sight subject to execution sale. The said motion further alleges that thereafter, on February 9, 1903, appellant, Kruegel, caused the third execution to be issued on said judgment and delivered the same to the said J. Roll Johnson, as sheriff of Dallas county, Tex., with instructions to levy the same upon a vacant lot, No. 3, block 4, Oakland Cemetery near Dallas, belonging to Chas. F. Bolanz, one of the judgment debtors, and subject to levy and execution sale; but that said Johnson, under and in furtherance of the aforesaid collusion and conspiracy, without legal cause and contrary to appellant's rights, with fraudulent and corrupt intent, willfully and

corruptly failed and refused to make a levy on said lot pointed out to him, or on any other property belonging to either of said judgment debtors, when he could have done so and made the money; that said Johnson under and in furtherance of the aforesaid collusion and conspiracy, without legal excuse or ground for not making the levy as aforesaid, and without legal right, failed to make return of said third execution to the clerk of the court that issued it. The prayer of the petition is, in substance, that the appellees be required to answer and show cause why they should not be ordered to pay to relator (appellant) the full amount of the said judgment with interest and costs, and that upon final hearing appellant, Kruegel, have judgment against said appellees for the amount of said judgment, interest, and costs. The appellees, on May 13, 1914, answered the motion of the said Kruegel by general and special demurrers and special answer. The general demurrer is in the usual form, asserting that appellant's motion showed no cause of action, and prayed judgment.

The first special demurrer is to the effect that appellant's motion or petition shows on its face that his cause of action, if any he ever had, is barred by the statutes of limitation.

In their answer on the facts they plead specially the statute of limitation in bar of appellant's right to recover; they deny that said judgment rendered against said Murphy & Bolanz, in favor of said Peck, was a valid subsisting judgment in force and effect in February, 1903, and allege that on September 8, 1898, said Murphy and said Bolanz filed their petition for adjudication in bankruptcy, in the United States District Court, and were adjudged bankrupts; that said Peck judgment was scheduled by them respectively as a liability against them, and that Peck proved up his said judgment against them in said court, and the same was allowed and established by said court, as a provable claim against them in favor of said Peck. That on June 8, 1899, said Murphy and said Bolanz were duly discharged of all their said debts by said court, and said Peck judgment was thereby discharged against them. They further aver, among other things we deem unnecessary to state, that on the 29th of December, 1903, said Bolanz and his wife and said Murphy filed in the Forty-Fourth district court of Dallas county, their petition against said Kruegel and said Peck, and against said Johnson, as sheriff of Dallas county, said cause being styled and numbered on the docket of said court, "Chas. F. Bolanz, et al. v. Herman Kruegel et al., No. 23151," in which suit said plaintiffs alleged, among other things, that in September, 1898, said J. P. Murphy and said Chas. F. Bolanz each, were on their own petition, adjudged bankrupt by the United States District Court at Dallas; and that

on June 8, 1899, they each received from said court their discharges in bankruptcy, discharging each of them from all debts and claims against them which existed on September 8, 1898. That in said bankruptcy proceedings, said judgment of said Peck was scheduled by them as part of their liabilities, and same was duly proved up by said Peck against them and allowed by the referee in bankruptcy, that the same was a provable claim against them in bankruptcy, etc.; and that they and each of them, and said firm of Murphy & Bolanz, had been released and discharged from all liability on said judgment thereby. That on November 23, 1904, said Forty-Fourth district court did render a judgment in said case, and among other matters did adjudge and decree that said J. P. Murphy and said Chas. F. Bolanz and said Murphy & Bolanz were discharged by their said bankruptcy from liability on said judgment of said Peck.

The appellant, Kruegel, by supplemental motion filed September 4, 1914, demurred generally and specially to appellee's answers, and in reply thereto admitted that J. P. Murphy and Chas. F. Bolanz each received a general discharge in bankruptcy from the federal court at Dallas, sitting in bankruptcy on or about the dates mentioned in appellees' answer, but denied that the firm of Murphy & Bolanz ever received any such discharge. He further denied that the discharge received by the said J. P. Murphy and Chas. F. Bolanz released them or either of them, or the firm of Murphy & Bolanz, from liability on the Peck judgment. He alleges that the discharge the said J. P. Murphy and Charles F. Bolanz received released them only from such debts and liabilities as are not specially excepted by law from the operation of a discharge in bankruptcy, and that the Peck judgment is such a debt as is specially excepted by law from such discharge; "that said judgment claim was feloniously and corruptly created by the bankrupts J. P. Murphy and Charles F. Bolanz, on felonious fraud, having on or about July, 1898, as a firm of investment bankers, styled Murphy & Bolanz, in a fiduciary capacity feloniously misappropriated to themselves and embezzled said H. D. Peck's cash money held by them and to be by them loaned and invested in real estate loans and security for said Peck's sole use and benefit, on commission to be paid by the borrower of the money: And all under false and pretended temporary insolvency and a premeditated, prearranged and fraudulent business failure and deed of assignment dated July 25, 1898, to hinder, delay, deceive, cheat, and swindle their over 400 patrons," etc. Appellant, Kruegel, also admits the rendition of the judgment of the Forty-Fourth district court, rendered November 23, 1904, in case No. 23151 as pleaded by defendants adjudging that they were discharged in bankruptcy from said Peck

judgment, but avers in substance that said judgment was null and void: First, because the federal courts have exclusive jurisdiction over all bankruptcy matters; second, because at the time of the rendition of said judgment in case No. 23151, Judge Morgan was judge of said court and presided at the trial and judgment, and he, with a number of others, were creditors of said Murphy & Bolanz, and that he in a fraudulent arrangement with them was paid in full while Peck and the others got nothing and that he was thus disqualified to preside and that appellant protested to his presiding, etc.; third, because an inspection of the said judgment shows that appellant and the clerk of said court, H. W. Jones, and his successors in office, were enjoined and restrained from issuing or causing to be issued any other and further execution on said judgment, and said sheriff Johnson and his successors in office were enjoined from levying any execution on any property of said defendants, and that said Jones was therefore disqualified from performing any clerical duties in said suit, because he must have been a party to the suit. And therefore everything connected with said judgment was and is void.

He also further pleaded, as ground why limitation did not run against him, that by said judgment in No. 23151, he and the district clerk and his successors were perpetually enjoined from having issued and from issuing any execution on said Peck judgment and said Johnson, as sheriff and his successors were by said judgment perpetually enjoined from levying any execution issued thereon, "and thereby attempted to invalidate, repudiate, and confiscate said judgment and to show to the world that relator (Kruegel) had no such valid judgment as he claimed, and consequently no cause of action, and thereby concealed from Kruegel his cause of action or the fact that he had one, and misled him to believe that he had no cause of action against respondent Johnson, as sheriff; whether he was misled, or believed it, or not, it was sufficient if he could have thereby been misled to believe it;" and fraud and concealment of fraud and of cause of action, as well as injunction, suspends the running of the statute of limitation until the injunction is dissolved.

Appellant Kruegel further pleaded, in substance, that appellees, in November, 1905, by a cross-action filed in case No. 12634, Herman Kruegel v. Murphy & Bolanz et al., then pending in the Fourteenth district court of Dallas county, in a motion for penalty proceeding identical to this, recovered a judgment perpetually enjoining appellant from bringing, instigating, and prosecuting any more suits, motions, or proceedings against these appellees for the failure of appellee Johnson to execute and return the execution involved in this suit, and that by reason

of said judgment of the Forty-Fourth district court of November 23, 1904, in case No. 23151, and of said judgment of the Fourteenth district court in case No. 12634, defendants are estopped to plead limitation, and he pleads said judgments as a bar to the running of the statute of limitations.

On October 29, 1914, the case was called for trial, and the appellees' general and special exceptions to appellant's motion were presented and sustained, and said motion dismissed. Judgment was thereupon rendered that appellant, Kruegel, take nothing by his suit, and that appellees recover their costs. From this judgment, Kruegel appealed.

There are numerous assignments of error, but we shall not state and discuss them in detail. Neither of them, we think, is briefed as required by the rules prescribed by the Supreme Court for the preparation of cases for submission in this court. The principal questions arising on the appeal are: (1) Do appellant's pleadings show upon their face that the cause of action alleged was barred by the statute of limitation at the time the original motion of appellant was filed? (2) Were said pleadings obnoxious to a general demurrer on the ground that they showed no cause of action against appellees which appellant was entitled to maintain? The second of these questions at least is fundamental.

[1, 2] According to the allegations of appellant's amended motion the execution which the appellee Johnson, as sheriff of Dallas county, is charged with having failed to levy and return was issued on the 3d day of February, 1908, and the original motion charging him with a dereliction of duty in failing to do so was not filed until April 28, 1914. The period of limitation prescribed by our statute in a case of this character is 5 years. And an execution when issued and placed in the hands of an officer is returnable to the first day of the next term of the court, or in 30, 60, or 90 days, if so directed by the plaintiff, his agent or attorney. Vernon's Sayles' Texas Statute, art. 3730. If no return day is specified in the execution, it is returnable on the first day of the next term of the court from whence it is issued. Tillman v. McDonough, 2 Willson, Cas. Civ. Ct. App. § 52. The record does not disclose whether or not a return day was specified in the execution in question, but whether there was or was not is immaterial here. The longest time that could lawfully intervene between the issuance of appellant's execution and the date when it should be returned was 90 days, and considering that appellant's alleged cause of action accrued 90 days after the issuance of the execution, and that limitation began to run from that date, more than 10 years had elapsed before the filing of his motion herein, and any right of action he may have had by reason of the failure of appellee Johnson

to execute and return said execution was barred, unless the statute of limitation did not run because of some one or all of the matters alleged in avoidance of appellee's plea thereof.

[3] The matters alleged, as reasons why the statute of limitation did not run and could not be invoked as a bar to appellant's right of recovery, are: (1) That by a judgment rendered in the district court of Dallas county on November 23, 1904, in cause No. 23151, styled Charles F. Bolanz et al. v. Herman Kruegel et al., it was adjudged that J. P. Murphy and Charles F. Bolanz and the firm of Murphy & Bolanz were, by their discharges in bankruptcy, released and discharged from liability on the Peck judgment, and the issuance and levy of any execution under said judgment on the property of the said Murphy & Bolanz, or either of them, perpetually enjoined; (2) that an attempt was made by the procurement of said judgment to thereby invalidate, repudiate, and confiscate the Peck judgment, and to show that appellant, Kruegel, had no valid judgment against Murphy & Bolanz, as claimed by him, and consequently no cause of action against appellee Johnson, and thereby concealed from appellant, Kruegel, his cause of action, of the fact that he had one and misled him to believe that he had no cause of action against appellee Johnson as sheriff, and, whether he was misled, or believed it, or not, it was sufficient if he could have thereby been misled to believe it; and (3) that the appellees herein, on a cross-bill filed in cause No. 12634, styled Herman Kruegel v. Murphy & Bolanz et al., pending in the Fourteenth district court of Dallas county, a proceeding identical with the present one, recovered a judgment perpetually enjoining appellant from bringing and prosecuting any more suits, motions, or proceedings against them on the alleged cause of action in this suit. It is clear, we think, that neither the first nor the second foregoing matter alleged by the appellant was sufficient to prevent the operation and bar of the statute of limitation. The judgment enjoining the issuance and levy of execution under the Peck judgment was rendered, according to appellant's pleadings, long after the issuance and return day of the execution, which he charges appellee Johnson refused to levy and return, and in no sense restrained or attempted to restrain the appellant from proceeding against the said Johnson, under the articles of the statute upon which the present action is based, for the alleged failure on his part to levy and return said execution. Said judgment, according to appellant's allegations, had no other effect than to enjoin the levy of any execution which may have been in the hands of the appellee Johnson at the date of its rendition, and the issuance and levy of any execution subsequent to the rendition thereof. It did not therefore interrupt the running of the statute of lim-

itation and authorize the maintenance of this proceeding.

[4, 5] The allegations to the effect that said judgment was procured for the purpose and with the intent to show that appellant, Kruegel, had no valid judgment against Murphy & Bolanz and consequently no cause of action against appellee Johnson, and thereby concealed from appellant his cause of action, or the fact that he had one and misled him to believe that he had no cause of action against appellee, etc., are insufficient to show any legal reason why the statute of limitation did not commence and continue to run against appellant's alleged cause of action. If it can be said that the intent charged, and the manner of the alleged concealment of appellant's cause of action from him and its effect to mislead him as claimed, would, in any event, under requisite or necessary allegations, be sufficient to prevent the running of the statute of limitation until it was, or by the use of reasonable diligence might have been discovered by him, still we think appellant has failed to make such allegations. It is a well-established rule of law that when the fraud relied upon to prevent the running of limitation is unknown to the injured party, or is concealed, lapse of time will not be laches which bars relief, unless such party has failed to use reasonable diligence to discover the fraud. But it is equally well settled in this state that fraud prevents the running of the statute of limitations only until the fraud is discovered, or until by the exercise of reasonable diligence it might have been discovered. *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 522; *Anding v. Perkins*, 29 Tex. 348; *Bremont v. McLean*, 45 Tex. 10; *Bass v. James*, 33 Tex. 110, 18 S. W. 336; *Boren v. Boren*, 38 Tex. Civ. App. 189, 35 S. W. 48. It is not averred by the appellant when he discovered the alleged purpose and fraud of the appellee Johnson and others, in obtaining the judgment enjoining the issuance and levy of execution under the Peck judgment, or when he realized or discovered that he had been misled thereby to believe he had no cause of action against the said Johnson for failing to execute and return the execution issued on said Peck judgment in February, 1903. Nor does he allege what diligence he used to discover the alleged fraud or that it could not have been discovered by the exercise of reasonable diligence in time to have enabled him to institute this proceeding, before the bar of statute of limitation. His allegations of fraud and the alleged effect of the judgment restraining the issuance and levy of execution on the Peck judgment were not therefore sufficient to show that his alleged cause of action was not barred by the statute of limitation, and consequently that his motion did not disclose on its face that it was subject to appellee's plea of limitation by demurrer.

[6] We think, however, that the third matter mentioned above and alleged by the

appellant in his supplemental motion was sufficient to show that appellee's special demurrer, asserting that it appeared from appellant's amended motion filed herein that his cause of action was barred by limitations, was not well taken. As has been seen, the matter alleged and here referred to was that the appellees had obtained, by a cross-action filed in the suit of the appellant, *Herman Kruegel v. Murphy & Bolanz*, No. 12634, then pending in the district court of Dallas county, Tex., a judgment perpetually enjoining and restraining him from thereafter bringing or prosecuting suit, motion, or proceeding against appellee Johnson for failing or refusing to levy and return the execution issued on the Peck judgment on the 3d day of February, 1903. The failure to levy that execution as directed by appellant and to make return thereof is the basis of the present proceeding, and the judgment rendered in the cross-action mentioned enjoining appellant from thereafter bringing or prosecuting any suit or proceeding against appellee Johnson for such failure or refusal was according to appellant's allegations, obtained in November, 1905. This was long before the time had expired under the statute of limitations, within which appellant was authorized to file a motion against appellee Johnson, under the articles of the statute hereinbefore referred to, to recover the penalty denounced in said statutes for the alleged failure to execute and return his said execution. He was entitled, so far as the question of limitations is concerned, to the full period of 5 years from the date his alleged cause of action accrued to institute a proceeding to recover said penalty, and as he was deprived of the greater portion of that time by the judgment restraining him from bringing and prosecuting such a proceeding, the running of limitation was thereby suspended, and his right, if any he otherwise had to maintain the same, was not barred.

[7] But the trial court, in addition to holding that appellant's motion showed upon its face that his cause of action was barred by the statute of limitations, held, in effect, in sustaining appellee's general demurrer, that appellant's pleadings were insufficient to show a cause of action, which he was entitled to maintain, and this ruling gives rise to the second principal question stated in the former part of this opinion, which we are called upon to decide. The trial court, as shown by conclusions of law filed, held that if appellant "was enjoined, as he pleads he was, then he has had no right to bring this action." Appellant complains of this holding of the court and says, in effect, and correctly so we think, that the same had reference to his plea that he had been enjoined from bringing any suit or proceeding based on his alleged cause of action. In this rule

of the court we think there was no error. The appellant pleaded, as we have seen, in substance, that the appellee Johnson in November, 1905, in a cross-action filed in an identical proceeding with the present one then pending in the Fourteenth district court of Dallas county, Tex., and styled Herman Kruegel v. Murphy & Bolanz et al., No. 12634, recovered a judgment in said court against appellant perpetually enjoining and restraining him from bringing and prosecuting any more suits, motions, or proceedings against appellee and the sureties on his official bond to recover, under articles 3776 and 3777 of the statute, the amount of the Peck judgment mentioned above for the failure on the part of the said Johnson to levy and return, as directed, the execution issued and placed in his hands under said judgment on February 3, 1903, and nothing is alleged to relieve appellant of the legal effect of said injunctive judgment. So far as the pleadings show said judgment restraining appellant from bringing and prosecuting a proceeding of the character now before this court against appellee and his sureties has never been appealed from or set aside, and is now, and was at the time this proceeding was instituted, in full force, and binding on appellant. It thus appearing by appellant's own pleadings that he had been enjoined by a judgment of a court of competent jurisdiction from bringing and prosecuting this action or proceeding, and it not appearing by appropriate allegations that said judgment had been appealed from or set aside and annulled, the general demurrer of appellees was by the trial court properly sustained.

[8, 9] It is assigned that:

"The court erred when respondent's counsel had closed his argument in support of respondent's [appellee's] general and special demurrers to relator's [appellant's] motion for penalty, and relator was about to make counter argument thereto and just begun, and as well argument in support of his own general and special demurrers to respondent's special answers, and then excusing the jury which had been impaneled and the parties in the case until next morning at 9 o'clock a. m. to go into trial of another case, and then next morning at 9 o'clock a. m., without giving relator an opportunity to be heard or say or argue anything in opposition to respondent's argument and demurrers and as well in support of his own demurrers to respondent's special answers, and in dismissing the case or motion thereon, and without even giving relator an opportunity to amend if he could amend his pleading if insufficient or defective in law."

This assignment of error is not entitled to consideration, because: (1) It presents two separate and unrelated questions; and (2) because there is not subjoined thereto, or to either of the propositions urged thereunder, a brief statement, in substance of such proceedings, or part thereof, contained in the record as is necessary and sufficient to explain and support the contention made, as is required by rule 81 (142 S. W. xiii), prescribed

by the Supreme Court in regard to the briefing of cases for submission in this court. The substance of the bill of exceptions reserved to the action of the court here complained of, showing that such action was taken, should have been stated in support of the assignment and propositions thereunder, at least the page of the transcript where such a bill could be found should have been stated. Neither of these things was done. Indeed, there is no statement whatever in support of the propositions contended for. Appellant contents himself by simply stating that "none seems necessary."

[10] But, however, if we were disposed to consider the assignment of error, we are not prepared to say the same points out reversible error. We have discovered in the transcript, without the aid the rules require appellant to give us by his brief, a bill of exception purporting to have been taken and reserved to the action of the court here complained of; but neither the assignment of error nor the said bill of exceptions states that appellant asked leave before or after the court sustained appellee's exceptions to his motion and dismissed his case to amend his pleadings or that appellant desired to do so. If appellant desired to amend his motion after the court sustained appellee's demurrers thereto, he should have requested permission of the court to do so, and upon refusal of such request he should have reserved a bill of exception to such refusal and made it appear affirmatively thereby that such request had been made and refused. This the record fails to show he did.

[11] In reference to the complaint that the court sustained appellee's demurrers to appellant's motion without hearing a reply argument by appellant and refused to allow appellant to argue his exceptions to the special answer of appellees, it is sufficient to say that such action on the part of the court was largely discretionary, and affords no sufficient ground for a reversal of the case, unless it is made clearly to appear that he abused his discretion, to the prejudice of appellant. No such abuse appears by the record sent to this court. On the contrary, we think it appears that appellant has not been injured by the ruling of the court in these particulars. This is for the reason that appellant's pleadings showed, and the trial court so held, as hereinbefore pointed out, that appellees had procured in November, 1905, in a court of competent jurisdiction, a judgment which had not been set aside or annulled, enjoining and restraining appellant from bringing and prosecuting any suit or proceeding against appellee for his failure to execute and return the execution issued February 3, 1903, which alleged failure is the basis of this action.

[12] The appellant further asserts that the trial court stopped him while he was reading his amended motion for a new trial

herein and caused an order to be entered of record striking out and dismissing said motion, as a file paper in this suit. This action of the court is complained of and made the basis of appellant's fourth assignment of error. This assignment, however, like the one just discussed, is not entitled to consideration for the reason that neither it nor the propositions advanced under it is supported by the statement required by rule 81 promulgated by the Supreme Court for briefing cases for submission in the Courts of Civil Appeals. Neither the order claimed to have been entered dismissing the motion for a new trial nor a bill of exceptions reserved to the action of the court is copied or its substance stated in the brief in support of the assignment. Nor are we referred to the page of the transcript where such an order or bill of exceptions may be found. In fact no statement whatever in support of the assignment or any proposition under it is made.

[13, 14] We find, however, in going through the transcript, what purports to be an order dismissing appellant's motion for a new trial and what purports to be a bill of exceptions taken to such action of the court. In explanation of this bill of exceptions the trial court says, in effect, that appellant's said motion was dismissed because of appellant's cruel and wanton attack therein on Judge Morgan, formerly judge of the Forty-Fourth district court of Dallas county. If, however, we were disposed to waive the defective briefing of the assignment of error, we would not feel authorized to reverse the case because of the matter therein complained of, notwithstanding the court may have erred in striking out appellant's motion for a new trial. While the court was probably authorized to require the appellant to eliminate from said motion any irrelevant and scurrilous matter, he was not, we are inclined to think, authorized because thereof to strike out the entire motion. But if the court was not authorized to strike out and refuse to consider appellant's motion for a new trial, and if the ruling was properly presented by brief for review in this court, the action does not authorize a reversal of the case. The case went off on demurrers to appellant's petition or motion, and no motion for a new trial in the district court was essential to appellant's right to have that court's action reviewed on appeal. This being true he has suffered no material injury by the dismissal of said motion by the trial court, and that action can furnish no sufficient reason for a reversal.

The assignments of error that have not been mentioned are not entitled to be considered, because not briefed in accordance with the rules, or have been disposed of against appellant by what we have already said, or disclose no reversible error.

The judgment of the court below is affirmed.

W. T. RAWLEIGH MEDICAL CO. v. FITZPATRICK et al. (No. 5579).*

(Court of Civil Appeals of Texas. Austin.
Feb. 16, 1916. Rehearing Denied
March 22, 1916.)

1. MONOPOLIES — 17(2) — CONTRACT IN RESTRAINT OF TRADE — STATUTE.

A contract, whereby defendant agreed to buy only from a medical company, and that the goods so purchased should be resold by him at definite prices, fixed by the medical company, and that he should have no other business or employment, was violative of Rev. St. 1911, arts. 7796, 7798, the Texas Anti-Trust Act, as in restraint of trade, and illegal and void under article 7799.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. 17(2).]

2. COMMERCE — 40(1) — STATE ANTI-TRUST ACT — MERCHANDISE IN INTERSTATE COMMERCE.

Where defendant, a resident of Texas, agreed with an Illinois medical company that it should sell him goods at wholesale prices, to be shipped to him in Texas, he further agreeing to buy only from the company, to resell at prices fixed by it, and to have no other business, such contract, violative of the Texas Anti-Trust Act (Rev. St. 1911, arts. 7796, 7798), was not enforceable as touching merchandise in interstate commerce, because the recited agreements relative to the sale at fixed prices, etc., operative after title to the goods passed to defendant upon their arrival in Texas, rendered the whole contract illegal and void.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 29, 30; Dec. Dig. 40(1).]

Error from District Court, Coleman County; John W. Goodwin, Judge.

Suit by the W. T. Rawleigh Medical Company against R. P. Fitzpatrick and others. To review a judgment for defendants, plaintiff brings error. Affirmed.

Snodgrass, Dibrell & Snodgrass, of Coleman, for plaintiff in error. Critz & Woodward, of Coleman, for defendants in error.

RICE, J. This suit was brought by the W. T. Rawleigh Medical Company, a private corporation of Freeport, Ill., plaintiff in error, against R. P. Fitzpatrick, J. E. Seymour, and C. L. Grable, defendants in error, to recover \$676.26, a balance claimed to be due it by the former for merchandise sold by it to him, payment of which was guaranteed by said Seymour and Grable. It was alleged by plaintiff in error that on the 23d of November, 1909, it entered into a written contract with said R. P. Fitzpatrick, the performance of which was guaranteed by said Seymour and Grable, whereby, in consideration that plaintiff in error would sell to him on credit, at wholesale prices, to be sold by him at retail, certain merchandise therein mentioned, to be shipped to him from Freeport, Ill., to Lorraine, Tex., he bound himself to pay for said merchandise at certain stipulated times, and, among other things, agreed to sell no other goods than those sold him by said company, and to sell all such goods at regular retail prices to be indicated by

said company, and to have no other business or employment; which contract was subject to acceptance by plaintiff in error at its home office, and to continue in force only so long as his said account and the amount of his purchases were satisfactory to said company. Defendants in error, among other things, interposed a general demurrer to plaintiff's petition, on the ground that said contract above set out, upon which the suit is based, is violative of the anti-trust statutes of this state, which demurrer was sustained, and, plaintiff refusing to amend, the suit was dismissed, from which judgment this writ of error is sued out.

Plaintiff in error contends that the action of the court in sustaining said demurrer was incorrect and ought not to be upheld, for the reason that it appeared from the petition that the sale and purchase of the goods in question was a transaction involving interstate commerce and therefore did not come within the purview of the anti-trust statutes of this state. So, the questions presented for our consideration are: (1) Whether or not the contract set out, and under which the goods were purchased, is in violation of our anti-trust laws; and (2) if so, can such statutes be urged as a defense to the payment of the account, since the same was based upon and grew out of an interstate commerce transaction?

[1] We think there can be no doubt but that said contract was in violation of articles 7796 and 7796 of the Revised Statutes of 1911, and, if so, was illegal and void, as declared by article 7799 of said statutes, because defendant Fitzpatrick thereby bound himself to buy from no one but plaintiff in error, and that said goods so purchased should be resold by him at definite prices, fixed by plaintiff in error, and further agreed to have no other business or employment. These provisions of said contract were in restraint of trade and rendered the contract illegal and void. *Wood v. Texas Ice & Cold Storage Co.*, 171 S. W. 497; *F. R. Watkins Medical Co. v. Johnson*, 162 S. W. 394. And see, also, *Armstrong v. Rawleigh Medical Co.*, 178 S. W. 583, where a contract for the sale of goods almost exactly similar to the one under consideration was held to be in violation of our anti-trust statutes. See, also, *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; *T. & P. Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 84 S. W. 919; *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27.

[2] But it is further contended on the part of plaintiff in error that, notwithstanding said contract may be violative of the anti-trust statutes, yet said statutes constitute no defense here, because the transaction involves interstate commerce, and cite in support of this contention, among others, the following cases: *Albertype Co. v. Feist*, 102 Tex. 219, 114 S. W. 791; *McCall v. Stiff Dry*

Goods Co., 142 S. W. 659; *Stein Double Cushion Tire Co. v. Fulton Co.*, 159 S. W. 1014; *Eclipse Paint Mfg. Co. v. New Process Roofing Co.*, 55 Tex. Civ. App. 563, 120 S. W. 532; *Maroney Hardware Co. v. Goodwin Pottery Co.*, 120 S. W. 1068; *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718.

The majority of the above cases have been ably reviewed and distinguished by Mr. Justice Taliaferro in *Watkins Medical Co. v. Johnson*, supra, from the case of *Fuqua v. Pabst Brewing Co.*, supra, and shown not to be in conflict therewith. In the latter case, notwithstanding the fact that it was a suit to recover for beer sold by a Wisconsin brewer to a Texas dealer, and came within the protection of the commerce clause of the federal Constitution, yet the court held that the contract under which it was to be sold, being in contravention of our anti-trust laws, would prevent the enforcement of the claim sued upon, saying, among other things:

"It is clear then, that when any shipment of beer was delivered under the contract by the company to Kingsbury at Amarillo, the title thereby vesting in him, as we have seen above, the same ceased to be an article of interstate commerce, and, in so far as the contract dealt with it thereafter, it was not a contract with reference to an article of interstate commerce, and the clause of the Constitution above quoted does not prevent said statute from invalidating same. The case then comes to this: The parties contracted for the sale and purchase of beer to be transported from Milwaukee to Amarillo, to be there delivered to Kingsbury and become his property. So far the transaction was interstate commerce and not subject to state regulation without the consent of Congress, nor did the statute undertake in any way to regulate or prohibit same. But the parties by the same contract voluntarily went further, and so dealt with the subject, after it had ceased to be an article of interstate commerce, as to create a 'trust,' as above shown, in violation of the statute. A portion of the stipulations of the contract being lawful and others unlawful, the taint of illegality affects and destroys the whole. *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053. The commerce clause of the Constitution was not designed to protect the contractual rights of a person who thus voluntarily intermingles an otherwise legal interstate commerce transaction with an entirely local and unlawful one. We are therefore of the opinion that, independent of congressional action, the contract sued upon was void."

The same doctrine was reannounced and followed in *Watkins Medical Co. v. Johnson*, supra, and in which a writ of error was denied October —, 1915, by our Supreme Court (170 S. W. xviii), and is therefore the latest expression of that tribunal upon the subject. See, also, *Armstrong v. Rawleigh Medical Co.*, supra.

We think the facts of the present case bring it clearly within the doctrine announced in the three last cases just mentioned, and must control, notwithstanding the contrary views expressed in *McCall v. Stiff Dry Goods Co.*, supra; for which reason we hold that the demurrer was properly sustained.

While it is true that that portion of the

contract providing for the sale and shipment of the merchandise constituted interstate commerce, and therefore could not have been affected by the anti-trust statutes of this state, yet, by reason of the fact that under the agreement the title to the goods passed to Fitzpatrick upon their arrival in Texas, it must be held that the laws of this state thereafter control his connection therewith; and, if the provisions of said contract above recited were in contravention of our statutes upon the subject, then the whole contract was thereby rendered illegal and void, and no recovery could be predicated thereon, because, if a portion of the contract is illegal and void, the whole must fall. See *Burck v. Abbott*, 22 Tex. Civ. App. 219, 54 S. W. 314, where it is said:

"That a part of the consideration for the contract was lawful can make no difference. The part of the consideration which is illegal taints the whole, and the courts will not expend their time in the inquiry as to what part of it was lawful. Nor does it vary the rule that appellants who invoke the doctrine are equally guilty, and can thus by their unlawful acts obtain an unconscionable advantage. The policy of the law is to discountenance the making of such contract, and it is thought that this can be done in no more effective way than by refusal to enforce them, and this is done without regard to the effect it may have upon the parties to the prohibited transaction."

In *Wegner v. Biering*, 65 Tex. 509, 510, the court says:

"It is obvious that when there is ample valid consideration to support the promise sued on, yet, if to the abundance of valid consideration there has been added a leaven of what is illegal, the whole contract is tainted. Story on Cont. § 583; Bishop on Cont. § 471; Pollock on Cont. 318."

In *McNeese v. Carver*, 89 S. W. 432, the court says:

"If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal."

Believing that the court did not err in sustaining the demurrer its judgment is in all things affirmed.

Affirmed.

COPPARD v. FARMERS' & MERCHANTS' STATE BANK. (No. 5622).*

(Court of Civil Appeals of Texas. San Antonio. March 1, 1916. Rehearing Denied April 5, 1916.)

1. CORPORATIONS — 487(1)—POWERS—ULTRA VIRES ACTS—VALIDITY.

It is not every ultra vires act of a corporation that is void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893, 1898; Dec. Dig. —487(1).]

2. CORPORATIONS — 426(1)—ACTS OF AGENTS—RATIFICATION.

An act, ultra vires, though not void, may be ratified either by acquiescence of those charg-

ed with management of the corporation or by affirmative ratification.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702; Dec. Dig. —426(1).]

3. CORPORATIONS — 462 — POWERS — MERCANTILE CORPORATIONS.

The mere fact that the buyer of notes was a mercantile corporation would not make ultra vires its act in buying such notes from which it might largely profit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1816-1819; Dec. Dig. —462.]

4. CORPORATIONS — 426(10)—ACTS OF OFFICERS—LIABILITY.

Where money obtained from a loan from the plaintiff bank was placed to the credit of the defendant corporation and credit entered in its passbook, and used to purchase collateral notes for the benefit of the corporation, it could not escape liability on the loan on the ground that it was the independent act of an officer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1704, 1714; Dec. Dig. —426(10).]

5. CORPORATIONS — 414(2)—ACTS OF OFFICERS—LIABILITY.

Where a note was executed by the president of the defendant corporation within the apparent scope of his authority, it was immaterial on the liability of the corporation how the money was to be used.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1641; Dec. Dig. —414(2).]

6. CORPORATIONS — 870(3) — POWERS — IMPLIED POWERS.

A corporation is not restricted to the actual wording of its charter, but has implied powers reasonably necessary or usually incident to its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1517, 1518; Dec. Dig. —870(3).]

Appeal from District Court, Karnes County; F. G. Chambliss, Judge.

Action by M. Coppard, as trustee of the J. L. Bain Mercantile Company, bankrupt, against the Farmers' & Merchants' State Bank. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Jas. D. Crenshaw, of San Antonio, for appellant. J. L. Browne and A. J. Parker, both of San Antonio, for appellee.

CARL, J. Appellant, as trustee of the J. L. Bain Mercantile Company, bankrupt, sued the Farmers' & Merchants' State Bank for the conversion of certain assets of the bankrupt estate of the J. L. Bain Mercantile Company. The plaintiff's petition alleges that J. L. Bain Mercantile Company became bankrupt about April 10, 1913, and plaintiff was duly appointed and qualified as trustee of said estate; that prior thereto various notes and accounts belonging to the bankrupt company were in the hands of the defendant bank for the purpose of collection, the proceeds to be placed to the credit of the Bain Company; that said notes and accounts

amounted to about \$3,000; and it is charged that same have been converted by the bank.

The defendant bank, among other things, answered that about October 1, 1912, the J. L. Bain Company was indebted to it and had placed notes and accounts with it to secure such indebtedness, such collateral amounting to about \$8,000. The note which was so secured was for \$3,193.80, dated October 1, 1912, and due November 1, 1912, with interest at 10 per cent. per annum after maturity, and providing for the payment of 10 per cent. of the principal and interest as attorney's fees, if not paid when due, etc., payable to the order of the Farmers' & Merchants' State Bank and signed by J. L. Bain Mercantile Company, J. T. Cook, and W. M. McCammon. It was further alleged that after the maturity of said note it was placed with an attorney for collection, and thereafter certain credits were made on this note in the aggregate sum of \$3,004.08, leaving a balance claimed as due on same in the sum of \$397.26, and the bank asserted its right to hold said collateral until said debt was paid in full.

The plaintiff by supplemental petition alleged that said note was executed without authority of the board of directors of the Bain Mercantile Company, and was therefore ultra vires and void; also that the note was the personal debt of McCammon, the Bain Company being a mere surety, and that it was not authorized to become such surety under its charter; that the money so borrowed was obtained by McCammon to take up and pay off his note due the First State Bank of Runge, in the sum represented by the note given.

By supplemental answer, appellee alleged that the note was executed by authority of the board of directors of the Bain Company; that this company received the benefits of the loan; that McCammon owned practically all the capital stock of the Bain Mercantile Company; that no stockholder objected, and that said act in giving the note and placing the collateral was ratified and approved; that McCammon as president of the Bain Company had always signed notes, indorsements of notes, checks, etc., for the corporation, and no act of his had ever been questioned by the stockholders or creditors, and therefore the corporation was estopped to deny his authority to act for it in this instance. It was denied that the corporation was a mere surety, but it is alleged that it was principal and received the benefits, and the proceeds of the note were passed to the corporation's credit.

This cause was submitted on special issues, and the issues and the jury's answers are as follows:

"(1) Was the loan of \$3,195.80 made by defendant bank on or about October 1, 1912, as shown by the notes in evidence made for the use and benefit of the J. L. Bain Mercantile Company? Answer this question 'Yes,' or 'No.'"

"Yes."

"(2) Did the defendant bank at the time making the loan for \$3,193.80, as shown by note in evidence, believe that it was made for the use and benefit of the J. L. Bain Mercantile Company? Answer this question 'Yes,' or 'No.'"

"Yes."

"(3) Was there a definite agreement and understanding between W. M. McCammon as president of the said J. L. Bain Mercantile Company and the defendant bank acting through its officers that the money obtained by this loan of 193.80 was to be applied and used for the specific purpose of buying and obtaining the note obtained from the Runge Bank, and that the proceeds of said loan should not be used by J. L. Bain Company for any other purpose? Answer this question 'Yes' or 'No.'"

"No."

Upon said answers, judgment was entered that the plaintiff take nothing, from which this appeal is prosecuted.

The purpose for which the J. L. Bain Mercantile Company was chartered was the purchase and sale of goods, wares, merchandise, agricultural and farm products. It is shown that the Bain Company had been engaged extensively in cotton buying as well in the mercantile business. The note was made and the loan obtained, as found by jury for the benefit of the corporation. A deposit slip for the proceeds of the loan, interest, was issued to the Bain Mercantile Company, and the evidence shows that collateral notes obtained therewith belonged to that corporation. McCammon was owner of all the stock of the Bain Company except two or three shares, for which Cook and the other stockholder had given notes which had never been presented for payment. In other words, McCammon was the corporation, to all intents and purposes. He commonly acted for the corporation. The transaction occurred October 1, 1912, and the corporation became bankrupt some time in April, 1913. During all this time the stockholders and directors of the corporation knew about the transaction whereby this debt was created on behalf of the corporation. Certainly a majority of the stockholders and directors, because McCammon, who owned but two or three shares, and Cook, another director, who owned one share for which he had not paid, signed the note personally.

[1] It is not every ultra vires act of a corporation that is void. *Steger v. Davis*, 8 Tex. Civ. App. 28, 27 S. W. 1068. See *Irrigation Co. v. Hahn Bros. & Co.*, 105 Tex. 236, 14 S. W. 1187; *Canadian Telephone Co. v. Seibert*, 159 S. W. 905.

[2] There is no reason why an act which is not void may not be ratified, and this ratification may be by acquiescence of those charged with the duty of managing the affairs of the corporation. *Ft. Worth Pub. Co. v. Johnson et al.*, 80 Tex. 228, 14 S. W. 843, 16 S. W. 551.

Judge Hobby says in the case last cited:

"An express assent, it is said, is not essential on the part of the stockholders to operate and

equitable estoppel upon them. It may be inferred from the failure to promptly condemn the unauthorized, although not illegal, act and to seek judicial redress."

The jury found that the bank, at the time it made the loan, believed that it was making the same for the use and benefit of the Bain Mercantile Company. Even if we concede that the loan was made for the purpose of getting possession of the Runge collateral, that was for the benefit of the Bain Company, because it was thought there was a substantial equity in those notes.

[3] The simple fact that this was a mercantile corporation would not place it beyond its power to conserve and add to its assets by taking over notes where it might largely benefit.

"It has been held that a ratification by a corporation of an unauthorized act of its officers in executing a deed of trust of its property, for the benefit of its creditors, may be ratified by the express sanction of all its shareholders and directors, although no formal resolution to that effect is passed." 10 Cyc. p. 1074.

The same authority says (10 Cyc. p. 1075):

"And even where the act complained of is ultra vires the company, the shareholders collectively, or a minority of them, may lose by their supineness the right to have the aid of a court of equity in undoing the act, under the corporation of the equitable doctrine of laches. Where a voidable act may be ratified by the shareholders, by taking a course of conduct with reference to it, upon full knowledge of the facts, it is immaterial that they proceed in ignorance of the legal effect of such acts."

[4] The money obtained from this loan was placed to the credit of the Bain Company, and credit entered in its passbook. The evidence shows that the collateral notes which McCammon bought were for the corporation's benefit, and a majority of its directors took action in regard thereto and all of its stockholders, except the holder of one share. *Gaston v. Campbell Co.*, 130 S. W. 222; *Modern, etc., Co. v. Blanke*, 116 S. W. 153; 10 Cyc. pp. 1078 and 1116; *Waller v. Gorman Co.*, 141 S. W. 834.

[5] The note was executed by the president of the Bain Company and within the apparent scope of his authority, and what the money was to be used for or how it was to be expended would make no difference. *Houston Land & Loan Co. v. Danley*, 131 S. W. 1144.

[6] A corporation is not restricted to the actual wording of its charter, but carries with it those implied "powers which are reasonably necessary to the business, or which are usually incident to its prosecution." *Northside Ry. Co. v. Worthington*, 88 Tex. 571, 30 S. W. 1055, 53 Am. St. Rep. 778; *Ft. Worth City Company v. Smith Bridge Company*, 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167.

The judgment is affirmed.

LOCKNEY STATE BANK v. BOLIN.

(No. 924.)

(Court of Civil Appeals of Texas, Amarillo. Feb. 16, 1916. On Motion for Rehearing, March 15, 1916.)

1. APPEAL AND ERROR ⇨1045(8)—HARMLESS ERROR—CHALLENGES TO JURORS.

Plaintiff was not injured by the overruling of a challenge to a juror where, though he exhausted his peremptory challenges in rejecting such juror, it did not appear that after exhausting his challenges he was required to accept an objectionable juror.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4126; Dec. Dig. ⇨1045(3).]

2. EVIDENCE ⇨138—ADMISSIBILITY—SIMILAR ACTS.

In an action on a note which defendant claimed was forged by G., where defendant testified to an admission by G. that he signed the note and there was therefore no question of intent or identity, evidence that G. had also forged the name of a third party to checks was not admissible without some connection being shown to make it admissible as a part of a system or design.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 414, 414½; Dec. Dig. ⇨138.]

3. WITNESSES 345(2)—IMPEACHMENT—COMMISSION OF OFFENSES.

It was not permissible to impeach G. by showing the forgery of such checks on his cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1126; Dec. Dig. ⇨345(2).]

4. NEW TRIAL ⇨99—NEWLY DISCOVERED EVIDENCE—DILIGENCE AND MATERIALITY.

In an action on a note claimed by defendant to have been forged by G., plaintiff moved for a new trial for newly discovered evidence consisting of the testimony of an apparently disinterested witness regarding the execution of a note by defendant at a certain time, the witness not knowing what note was executed. The supporting affidavits excluded negligence on plaintiff's part as to its accessibility to, or acquisition of, any knowledge of the testimony. The testimony was conflicting as to who executed the note. *Held*, that a new trial should have been granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. ⇨99.]

5. EVIDENCE ⇨471(1)—OPINION EVIDENCE—SUBJECTS OF OPINION EVIDENCE.

Testimony that one of the ways in which bankers discovered that checks had been forged was that their customers afterwards would come in and state that they had given no such checks was incompetent, as the jury were as competent to judge that matter as the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2149; Dec. Dig. ⇨471(1); Witnesses, Cent. Dig. §§ 833, 988.]

On Motion for Rehearing.

6. EVIDENCE ⇨271(1)—DECLARATIONS—SELF-SERVING DECLARATIONS.

While in an action on a note which defendant claimed was forged by G., if plaintiff had introduced a letter from G. to defendant referring to the note, defendant's statements to G. soon after receiving the letter that he never signed the note and knew nothing about it would have been admissible, such statements were self-serving, and it was error to admit

them where defendant himself introduced such letter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068, 1070; Dec. Dig. ¶ 271(1).]

7. EVIDENCE ¶ 271(1)—DECLARATIONS—SELF-SERVING DECLARATIONS.

In an action by a bank on a note which defendant claimed G. forged, it was error to permit defendant to introduce a notice from the bank as to the maturity of the note and then testify that in a conversation with the cashier he denied the execution of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068, 1070; Dec. Dig. ¶ 271(1).]

8. APPEAL AND ERROR ¶ 1029—REHEARING—GROUNDS.

Appellee was not injured by the court's consideration of the alleged error of the trial court in denying a new trial for newly discovered evidence, though there was no bill of exceptions regarding the matter, where the judgment was clearly reversible on other grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. ¶ 1029.]

Appeal from Floyd County Court; E. P. Thompson, Judge.

Action by the Lockney State Bank against H. S. Bolin. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

A. P. McKinnon, of Floydada, and Crudginton & Works, of Amarillo, for appellant. T. F. Houghton and J. B. Bartley, both of Floydada, and Martin, Kinder, Russell & Zimmermann, of Plainview, for appellee.

HENDRICKS, J. The appellant bank sued Bolin on a note for \$383.50, dated December 1, 1918, providing for interest and attorney fees. Bolin pleaded non est factum, and the jury, in response to a single special issue, answered that he did not execute the note sued on.

[1] Appellant's first assignment complains of the trial court's action in overruling his challenge for cause to the juror, L. E. Williams. Appellant rejected this juror with a peremptory challenge and exhausted all of its challenges in the selection of the jury. However, the bill of exceptions does not show that after exhausting its peremptory challenges it was required to accept an objectionable juror; hence no injury is shown. *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673.

[2, 3] Appellant's theory is that the original note, of which the present note is a renewal, was executed direct to the bank, under the following conditions: That J. C. Garrison requested a loan of \$350 from Bolin, and the latter not having the money, Bolin executed a note straight to the bank, lending the money to Garrison, in consideration of which Garrison and his father executed an indemnity note to Bolin; all of which the latter denied, contending that he never signed either the original or the renewal note, and that the same was signed by Garrison in order to cover his shortage on the bank's books and free the same from suspicion upon examination by the bank examiner. When

J. C. Garrison was upon the stand, over the objection of the appellant, he testified on cross-examination that he had signed the name of Henry Kell to checks on the Lockney State Bank, and had drawn thereon several hundred dollars.

The general rule is that you cannot convict a man of one offense by showing the commission of similar offenses. However, when the object of such collateral matter is to show system, or design, or if similar offenses tend to establish identity, or intent, they may be placed in evidence. In this case, Bolin denies that he signed the note, and testifies to an admission of Garrison that he signed it, also an accompanying chattel mortgage to secure it. It is a plain issue of Bolin's signature, or Garrison's forgery, and the question of Garrison's intent or identity, to be shown by the commission of similar offenses, of course, are not in the case. The principle of its admissibility is either upon system, plan, or design. It is insisted that, to be a part of a system or design, some connection must be shown to make it admissible.

The danger of inferring that an act is proven because a similar act has been admitted, unless there is some connection, is apparent. To show that a party has been a knave on other occasions, creates a prejudice which may operate in injustice against the cause actually considered. It is certainly influential on the mind, and in many instances, to many men would raise a presumption of guilt to show the commission of similar offenses, though isolated and unconnected. The rule has been guarded, as well as the exceptions, and it is easier to state the rule and the exceptions than to apply it.

"The added element then must be, not merely a similarity of results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan, of which they are the individual manifestation." *Wigmore on Evidence*, vol. 1, § 304.

Otherwise you would only furnish the jury testimony of isolated instances which would affect the defendant's character; neither is it permissible to impeach this witness on the score of his credibility with this character of examination and testimony. *Justice Brown*, in the case of *M., K. & T. Ry. Co. v. Creason*, 101 Tex. 337, 107 S. W. 528, discloses the distinction, and the departure of the Court of Criminal Appeals of this state, "from the rule established by the Supreme Court both for civil and criminal cases at the time that it had jurisdiction of criminal matters." That case rejected the testimony of a witness on cross-examination, showing that he had been indicted for felony, or other crime. We think this admission by Garrison of signing Kell's name to checks and getting money thereupon, of itself, without some further connection, was improper.

The court also permitted the defendant, Bolin, to testify on direct examination, over

plaintiff's objection, that after the trouble had arisen over the note that he (Bolin) stated to Garrison that he would have nothing to do with the note and knew nothing about it. The court also permitted the father of Bolin, over the plaintiff's objections, to corroborate the testimony of his son, H. S. Bolin, the defendant. In the condition of this record, such statements were self-serving. The testimony was upon direct examination, and the declarations of the defendant were at a time after the trouble over the note had arisen.

"The declarations offered in evidence in such cases are at best hearsay, and are inadmissible under the general rule; and we are of opinion that if the declarations are sought to be brought within the exception, the grounds which take it out of the rule ought clearly to appear. The reason that evidence of former declarations of a witness are admissible in such case is that his testimony having been assailed on the ground that he had an interest to fabricate it, proof that he made statements consistent with that testimony at a time when he had no such interest tends to show that the testimony was not an afterthought and to rebut the theory of fabrication." *Insurance Co. v. Eastman*, 95 Tex. 38, 64 S. W. 864.

[4] In this case the court should have granted a new trial on the showing made by defendant as to newly discovered testimony. The affidavits, with the motion, clearly exclude negligence of the defendant bank as to its accessibility to, or the acquisition of, any knowledge of such testimony, and the issues were drawn, conflicting to such an extent as to who executed the note, that the judgment should have been set aside. In this connection, we have in mind the affidavit of an apparently disinterested witness, in regard to the execution of a note by Bolin at a certain time, though the witness did not know what note was executed.

[5] It was clearly error to permit W. A. Robins to testify that one of the ways in which bankers discovered that checks have been forged upon them is that their customers afterwards come in and state that they have given no such checks; the jury were as competent to judge that matter as Robins, even if the following testimony of Bolin had been admissible.

No proof was made by the bank in regard to any declarations or statements of admissions made by Bolin as to the note; he was not asked any question in regard to receiving notice that the note was due, and his statement to the cashier of the bank, testified to by him, on direct examination, denying his execution of the note, after having received such notice, and after the bank was pressing the obligation, is equally self-serving, in the condition of this record, and inadmissible. *Insurance Co. v. Eastman*, *supra*.

We have permitted the correction of the record under the certificate of the clerk of

the county court, applicable to one of appellant's bills of exception.

The cause is reversed and remanded.

On Motion for Rehearing.

[6, 7] Appellee, Bolin, introduced the letter from Garrison "referring to the note," and then testified that "soon after receiving the letter," Garrison came to see him and he "then told Garrison that he never signed the 'note' and knew nothing about it. Though the contents of the letter were not introduced, however, for Bolin to 'open the way' for its introduction, and then on direct examination to build a case of denials by self-serving declarations, is not proper. If the bank takes the initiative and introduces the letter, Bolin's statements to Garrison are of course then admissible and appropriate. As to the notice from the bank to Bolin as to the maturity of the note, appellant never introduced it; the introduction by appellee of said notice and the self-serving declarations of Bolin upon direct examination, based upon its introduction by him, are wholly improper.

[8] This is the first time our attention is called to the lack of a bill of exceptions in regard to the refusal of a new trial on newly discovered testimony; however, appellee is not injured, the cause being so clearly reversible on other grounds discussed in the original opinion.

With the foregoing explanation, the motion for rehearing is overruled.

GULLY v. GULLY. (No. 1525.)*

(Court of Civil Appeals of Texas. Texarkana. Jan. 28, 1916. On Petition for Rehearing, Feb. 17, 1916.)

1. DIVORCE \Leftrightarrow 324—LIABILITY OF PARENT TO MAINTAIN CHILD.

While a husband during marriage is liable for the support of his children as an accompaniment to his control over the family, yet as divorce emancipates the wife from her subordinate position and she has, under Rev. St. 1911, arts. 4068, 4069, an equal right with her husband to the guardianship of the children, and as article 4634 declares that the court pronouncing a decree of divorce shall also order a division of the estate of the parties in such a way as shall seem just, having regard for the rights of each party and their children, both parents are, after a divorce, liable to maintain minor children of the marriage.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. \Leftrightarrow 324.]

2. DIVORCE \Leftrightarrow 308—ACTIONS—PARTITION OF PROPERTY.

While in granting a divorce the court may make necessary orders concerning the custody of the children, it cannot thereafter set apart, for the maintenance of the children, portions of the community property apportioned between the spouses.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. \Leftrightarrow 308.]

3. DIVORCE \Leftrightarrow 324—MAINTENANCE OF CHILD—ACTIONS.

Where a husband and wife were divorced, their property partitioned, and the custody of the children awarded to the wife, she is, having maintained the minor children, entitled to recover from her former husband one-half the cost of such maintenance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. \Leftrightarrow 324.]

On Petition for Rehearing.

4. DIVORCE \Leftrightarrow 308—DECREE—VALIDITY.

In a statutory proceeding for divorce, the court has no power to make incidental decrees against the spouses in personam for payment of a monthly stipend for future support of minor children of the marriage.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. \Leftrightarrow 308.]

Hodges, J., dissenting in part.

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by Mrs. M. E. Gully against T. R. Gully. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

H. N. Nelson, of Carthage, for appellant. Young & Young, of Marshall, for appellee.

HODGES, J. This is a suit by Mrs. M. E. Gully, the appellee, against her former husband, to recover the value of necessities supplied by her to the children of the marriage after a divorce had been granted.

The material facts as disclosed by the record are undisputed, and are substantially as follows: The appellant and the appellee had formerly been husband and wife. In October, 1912, a divorce was granted at the instance of the wife, who was also awarded the custody of seven minor children ranging in age from 2 to 18 years. The parties were possessed of considerable property, most of which belonged to the community. The decree of divorce provided for a partition of all the community property except a tract of 6.27 acres of land upon which the family resided, and the household and kitchen furniture. This was set apart to the wife for the use of herself and the minor children. The divorce decree also provided that the children should be supported jointly by the father and mother, and fixed the amount that each should contribute for that purpose at \$50 per month. Upon the refusal of the appellant to make those payments the appellee filed a motion in the court which granted the divorce, asking for an order to sell certain portions of the community property which had been set aside to the husband, in order to satisfy the monthly installments which had matured up to that time. A judgment was rendered in her favor, but on appeal to this court was reversed upon the ground that the trial court in granting the divorce exceeded his powers in attempting to fix a personal liability in that manner against the divorced husband for the support of the children. See *Gully v. Gully*, 173 S. W. 1178. In March, 1915,

Mrs. Gully filed this suit, alleging, among other material facts, that she had supported and maintained the seven children since the granting of the divorce and had furnished them with such necessities as their condition in life demanded, amounting in the aggregate to \$4,100, and asked for a judgment reimbursing her for those expenditures. The case was tried before the court without a jury, and a judgment rendered in her favor for \$2,957.70.

The principal ground here relied on for a reversal is that the facts were insufficient to support the judgment. The case made by both the pleadings and the evidence is not one where the father's credit has been pledged by the divorced wife or child for necessities supplied to the child by some third party who owed it no duty, but is one where the divorced wife, possessed of ample means, after having supplied the children's wants, seeks reimbursement from her former husband upon the sole ground that the duty of supporting their children rests primarily upon him. We have not been referred to, nor have we been able to find, any cases in this state where this precise question has been decided. While the ruling made by this court on the former appeal is supported by other decisions in this state (see *Gully v. Gully*, supra, and cases there cited), that ruling furnishes no precedent for sustaining the judgment here appealed from. In other jurisdictions where similar controversies have arisen there is much diversity of opinion and considerable conflict in the conclusions announced. The greater number of those cases support the ruling of the trial court, holding that the divorced husband is liable to the wife under facts substantially the same as those disclosed in this case. *Pretzinger v. Pretzinger*, 45 Ohio, 452, 15 N. E. 471, 4 Am. St. Rep. 542; *Fulton v. Fulton*, 52 Ohio St. 229, 39 N. E. 729, 29 L. R. A. 678, 49 Am. St. Rep. 720; *Riggs v. Riggs*, 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809; *Evans v. Evans*, 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 294; *Brown v. Brown*, 132 Ga. 712, 64 S. E. 1092, 31 Am. St. Rep. 229. There are other cases, however, which hold to the contrary. *Brow v. Brightman*, 136 Mass. 187; *Hall v. Green*, 87 Me. 122, 32 Atl. 796, 47 Am. St. Rep. 311; *Glynn v. Glynn*, 94 Me. 465, 48 Atl. 105; *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107; *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Spade v. State*, 44 Ind. App. 529, 89 N. E. 604. See the following for collation of cases: *Spencer v. Spencer*, 97 Minn. 56, 105 N. W. 483, 114 Am. St. Rep. 695, 7 Ann. Cas. 901; *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270, 12 Ann. Cas. 137; *Evans v. Evans*, 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 294. How much of this diversity of opinion is due to local

statutory enactments we are unable to say. Doubtless in most, if not all, of the states where these controversies have arisen the Legislatures have made some special provisions which varied the common-law doctrine regarding the property rights of the husband and wife and their respective duties toward their children after divorce. It is apparent from the arguments used by some of those courts which permit the divorced wife to recover reimbursement for necessities furnished by her that the ruling is predicated upon the assumption that relative status of the father and mother toward their children after separation is much the same as it was before; that the father still holds the superior right to their custody and control, and that the authority of the mother remains subordinate till the court granting the divorce provides otherwise. They treat the mother as occupying toward her children a relation similar to that of an interested collateral relative, whose rights are only secondary. Hence it was not illogical, in such instances, to hold that the father's financial duties and obligations remained the same. In the Pretzinger Case, referred to above, the wife separated from her husband on account of his misconduct, which furnished grounds, not only for the decree of divorce, but for awarding her the custody and control of the minor child. She was afterwards permitted to recover from the husband reimbursement for necessities which she had furnished the child while in her care. In *Fulton v. Fulton*, supra, the same court, at a later date, in a similar controversy, denied the wife the right of recovery because in that instance the divorce had been granted on account of her misconduct, although she had been awarded the custody of the child. In undertaking to harmonize these rulings the court, in the *Fulton Case*, said:

"Where separation and divorce result from the misconduct of the husband, *Pretzinger v. Pretzinger*, 45 Ohio St. 452 [15 N. E. 471] 4 Am. St. Rep. 542, asserts the primary liability of the father, in a contest between him and the mother, and in such case, the right of the mother to recover against the father for such reasonable necessities as she has furnished, is established. That case is grounded in the principle that, as the primary liability rests upon the father, he cannot, by his own misconduct, shift it to the mother. *Dickman, J.*, saying in reference to the natural duty resting on parents to support their children, that: 'This natural duty is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony. * * * It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, * * * or to enable the father to convert his own misconduct into a shield against parental liability.' * * * Again: 'There is evidently no satisfactory reason for changing the rule of liability, when, through ill treatment, or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife, and commit to her the custody of her minor children.' *Pretzinger v. Pretzinger*, 45 Ohio St. 458 [15 N. E. 473] 4 Am. St. Rep. 542. In the case before the court, however, the wife was the aggressor, and it is this feature by which it is

to be distinguished from *Pretzinger v. Pretzinger*, 45 Ohio St. 458 [15 N. E. 471] 4 Am. St. Rep. 542, for in that case the husband was in fault. It does not necessarily follow that because a father cannot, by his own misconduct, shift from himself to the mother his primary liability to support his minor children, that the mother cannot, by her misconduct, produce that result, at least to the extent of denying to her a right to recover against him for expenses she has incurred for necessities for their support, in the absence of a request or promise by him in the premises. The contest is between the parents. By the law of nature, the responsibility of each for the birth of children is equal; the moral obligation of nurture, protection, and reasonable support bears upon each according to his or her capacity to afford it. *Schouler*, in referring to this obligation, says: 'This is said to rest upon a principle of common law; but perhaps it may be more reasonably referred to the implied obligation which parents assume in entering into wedlock and bringing children into the world.' *Schouler's Domestic Relations*."

According to these decisions, the rule to be observed in any given case is determined by who was responsible for the separation. If this resulted from the misconduct of the husband, his primary common-law liability for the support of the child continues; but if the wife was the guilty party and secures the custody of the child, she becomes primarily responsible for its support, and has no claim for assistance from the husband. It is not intimated that the legal status of the husband and wife toward each other after divorce is in any manner affected by what may have caused the separation; this altered status is the same, regardless of which was at fault. We shall now proceed to discuss the principle upon which these decisions rest, and to state what occurs to us as appropriate objections.

In justification of the rule it is said that to hold otherwise would permit the husband, in many instances, to profit by his own wrongful conduct; that he might abandon his wife, or by some form of cruelty cause a separation that results in a divorce and an order placing the custody of the child with the mother, and thus shift to her an obligation which the law had placed upon him. In every case where this doctrine is applied this argument is, in substance, repeated. In fact, it appears to be the only argument of any weight which is relied upon to support that rule. If the argument is applicable and sound, the rule is just; but if the argument is inapplicable, or unsound, the rule cannot be sustained. It will be noted that this method of testing the liability of the husband takes no account of the physical or financial condition of the divorced wife and mother, or of the welfare of the child. Her inability to alone assume the burden of supporting the child may be just as great, and the demands upon the husband for the welfare of the child may be just as pressing, in those cases where the fault lies at the door of the mother as where the father is to blame. But these considerations are pushed aside, and the sole question is: Whose misconduct brought on the condi-

tion? Hence the remark that children will not be permitted to suffer because of the dissensions of their parents has no application. If we may judge of the purpose of this rule by the conditions to which it is applied, it appears to have been designed more to punish a guilty husband than to aid a struggling wife or to provide for the welfare of the children. To say that the husband shall not, in those instances where he alone is responsible for the separation, escape his primary obligation to support his child concedes that but for his guilt the legal effect of being divorced and the loss of custody of the child would relieve him from that obligation. The inference is that when the law deprives him of the legal custody of his child it also relieves him of the primary duty of supporting the child, but that by reason of his wrongful conduct he is estopped from claiming such relief. Such an estoppel has its basis in the assumption that in all cases the pecuniary burden of supporting the children so far outweighs the value of their services and earnings and the benefits to be derived from their constant society and companionship that the net result of the altered situation is a gain to the father and a loss to the mother who secures the child. To so hold is to class the legitimate fruits of marriage as a curse, and not as a blessing. It is possible that instances may be found where the services of the children have no value, or where the father has fallen so low that he no longer has those normal instincts which long for the society and companionship of his offspring, and which finds a joy in the privilege of watching and directing their training and education. But the rule is not confined to that class of cases. It treats alike the refined and the depraved. It is not every husband who provokes his wife to sue for a divorce that is a degenerate man or an unloving father. The true history of such domestic discords is not always written in the court records, or disclosed upon the divorce trial.

Again, it is the common-law duty of the husband to support his wife. During the marriage relation this is just as imperative as the obligation to support the child. It would therefore seem logical that the rule of estoppel which prevents him from shifting one burden would for the same reason continue the other. This, however, is met with the reply that he may cease to be a husband, but does not cease to be a parent. The answer is more specious than logical; for the husband is estopped, by the rule referred to, not because he is a parent, but because he has been a bad husband, thus clearly showing that the ultimate purpose is to shield the wife, and not simply to provide for the child.

The application of the rule to particular cases is surrounded with such difficulties that it may often lead to the perpetration of wrongs as grievous as those which it seeks to avoid. Suits of this character in this state

are not considered as continuations of the divorce proceeding, but are to be treated as ordinary actions for debt, and are to be governed by the rules of evidence applicable in such cases. In the trial of the issues an inquiry as to the conduct which caused the separation must be conclusively answered, either by the record in the divorce suit, or the trial court must, reopen and try again the same questions upon which the divorce judgment is founded. The divorce record usually consists only of the pleadings of the parties and the decree of the court. To make these conclusive upon the defendant husband is to invoke an estoppel by judgment in order to sustain an estoppel in equity, thus making a harsh rule of law serve the purpose of supplying grounds for a liberal equitable rule. The unreliability of divorce judgments as evidence of all the facts which equity should consider in applying a rule of estoppel in such cases is too well known to need illustration. On the other hand, to reopen the old issues and publicly air the domestic troubles which led to the divorce suit every time the wife might have a cause of action for supplies furnished would often lead to deplorable consequences. The animosities which such a course would be calculated to keep alive, the criminations and recriminations which would be revived between parents, and in which the children must take a part, or witness as silent spectators, would yield a harvest of evil greater than that which the rule is designed to suppress. If such a rule could be confined to those extreme cases where penniless mothers were compelled by cruel fathers to assume the burden of supporting the common offspring, it would have much to commend it to our humane consideration. But, unfortunately, this cannot be done without the exercise of a judicial power which dispenses with all rules and substitutes the arbitrary discretion of the court. It seems to us that the test adopted in such cases is too remote, too variable and indeterminate to be received as a rule of law. The condition of the authorities on this subject is not such as to make the doctrine stare decisis, and we therefore feel at liberty to treat the question as still an open one.

[1] If the divorced husband is liable to his former wife in an action of this character, it is because, under circumstances which made it necessary, she has discharged a debt which was exclusively or primarily his. The law will imply a promise on his part to reimburse her only when she has done that which he was legally bound to do. But what warrant is there for saying that this duty to support the children after divorce and custody awarded to the wife is primarily that of the husband? There is no express statutory provision in this state which makes it so; neither is there any established rule of the common law which so grades the responsibility of the parents. Parentage is the real

basis of the obligation to support, and it will not be contended that the relation of father to child is superior to that of the mother. Neither, when considering the sum of all the duties and responsibilities inseparably connected with rearing a child from birth to maturity, is there any just ground for saying that the task which the laws of nature, if not those of the land, have imposed upon the mother is lighter than that laid upon the father. Under our statute, as well as at common law, the husband is, during marriage, exclusively liable for the pecuniary obligations incurred for the family support. The wife is liable only when she may contract to be bound, and then only for necessities furnished to herself or children. But that class of necessities which must be purchased, such as food and clothing, and the usual expenses which result from contracts, frequently constitute a comparatively small portion of what may properly fall within the term "necessaries." The ceaseless vigilance and constant care exacted of the mother are no less necessities, essential to the welfare of the child; and they often make the greater burden. For wise reasons the law has never undertaken to make an exact partition of the parental duties. Except as to the pecuniary obligations incurred, these must be shared in common by the husband and wife; and, if one or the other becomes a defaulter, the consequences must be accepted as the common risk which all those who enter into the marriage relation assume.

The pecuniary liability of the husband during marriage is the logical accompaniment of his position as the head of the family and the authority which he may exercise. As a husband, he has the right to select the family domicile and change it at his pleasure, dictate how the family shall be maintained and the limit of the expenses which shall be incurred; he has exclusive control of the children, a right to their services and earnings, and may direct how and to what extent they shall be trained and educated; he has the exclusive management and control of his own separate property and that which belongs to the community, and until recently, in this state, he had also the exclusive control and management of the separate estate of his wife and the right to her personal earnings in any business calling she might enter. But when a divorce takes place he is stripped of this superior authority, the wife is emancipated from her subordination, and rehabilitated with all the rights of a feme sole. She then stands before the law as his equal as to all their personal and property rights, and may claim her interest in the common accumulations. She holds with him an equal right to the guardianship of their children. Rev. Civ. Stat. arts. 4068, 4069. There is then no just reason why she should not also share equally with the husband the burdens of supporting the children of the

marriage, unless it be because she is a woman and he a man. But our laws recognize no such distinction. Women are not the favorites of the law. As regards her personal duties and legal obligations, a feme sole is governed by the same rules which apply to men. It will not be contended that after divorce the mother is absolved from any part of her obligations as a parent. The most that has been claimed is that her duties are secondary. If during marriage her obligation to do that which is necessary for the child's welfare is secondary only in that respect where her powers are subordinate, there is little justification for saying that her obligations remain secondary after her subordination ceases. Our statute seems to treat the property of the parents as being equally subject to appropriation for the use of the children after divorce. Article 4634 is as follows:

"The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest himself or herself of the title to real estate."

It has been held that under this statute the court decreeing the divorce may take all or any part of the common property, and even the separate property of either spouse, and set it apart for the use of the party to whom the custody of the children has been awarded. *Rice v. Rice*, 21 Tex. 58; *Fitts v. Fitts*, 14 Tex. 448. No distinction is made between the property of the husband and that of the wife in fixing this use; nor is there any suggestion that the court should be controlled in making this appropriation by the marital misconduct of either party. Here we have a clear legislative recognition of the equality of obligations of the parents to support their children. What right, then, has a court to say that they shall be unequal? or that one is primary, and the other secondary? We do not wish to be understood as holding that either the father or the mother ever ceases to be liable for the support of their children during minority. As between them and the children, or third parties who owe the children no duty, the parental obligation is unaffected by the divorce decree. If for any reason the legally appointed custodian should fail to provide the children with such necessities as they had a right to demand, the credit of the other parent may be pledged to meet the need. *Fowlkes v. Baker*, 29 Tex. 135, 94 Am. Dec. 270. However, when the wife has supplied them, and there is no question of her ability to supply them in future, she has no more right to claim reimbursement from the husband than he would have to a claim upon her were their situations transposed.

[2] There is also in the petition of the appellee an alternative prayer, asking that in

the event she is not permitted to recover the reimbursement sought, certain portions of the community property awarded to the appellant in the divorce suit be set apart for the use of herself and the children. While the court granting the divorce retains the right to make such orders as may be necessary concerning the custody of the children, he has no further control over the property which has been partitioned between the husband and wife. He can afterward no more resort to this property than to property which had been subsequently accumulated by the husband. What was awarded to the appellant in that decree became his separate estate, to be disposed of in any manner he saw fit.

[3] Thus far the conclusions announced are unanimously agreed to by all the members of this court. But Chief Justice WILLSON and Associate Justice LEVY are of the opinion that after divorce the liability of the parents for the support of their children being equal, the one who has the exclusive custody and who furnishes the supplies may claim contribution from the other to the extent of one-half of the outlay made. The writer does not concur in that view, for reason hereafter stated.

In the first place, even if the principle of contribution should be applied in any event, the pleadings of this case are not such as to invoke that character of relief. This is but an ordinary action for reimbursement for the entire sum expended for necessities, and no attempt is made to account for any of the revenues or benefits resulting from the exclusive custody of the children. Contribution, whenever applied, is an equitable doctrine, and its enforcement is conditioned upon an accounting by the party claiming it for all the common benefits enjoyed by him and which both may be entitled to share. It would seem inequitable to say that the custodian has the right to appropriate to her own use the entire value of the services which shall be utilized and made remunerative, and then claim reimbursement from the other without any accounting. As the case is presented on this appeal, the appellee is entitled to recover all of what she expended, or none.

My next objection applies to contribution as a policy of the law. Its enforcement, in cases of this kind, must necessarily give rise to the same unwholesome litigation between the divorced parents which makes suit for full reimbursements obnoxious, and I need not here repeat what has already been said upon that subject. The difficulties which obstruct a fair application of the rule are not to be overlooked. For what shall contribution be claimed? Is it to be limited to that which the custodian buys and pays for? or shall it include the value of all that which he or she supplies and which may be classed as necessities? As previously stated, the food and clothing and expenses for which debts must

be contracted are far from being all the necessities essential to a child's welfare. To say that the right must be limited to those articles which require an expenditure of money is to adopt an arbitrary test, manifestly unjust in many instances. One parent may be willing to perform many of the essential duties, such as making the clothing, preparing the family meals, and nursing and attending the children during sickness or infancy; while others may elect to employ parties to perform those services. Yet such services constitute necessities, regardless of who performs them. To limit the right of the industrious and frugal parent to what he or she may buy from others, either as services or food and clothing, and extend that of the less frugal and more indolent, is manifestly arbitrary and unjust. On the other hand, to say that the custodian may claim contribution for all the necessities supplied, whether bought from others or resulting from his or her services, is to take the domestic management of the family out of the hands of the parent and place it under the supervision of courts and juries. For in every litigated case the defendant would have the right to a judicial determination, not only of the reasonableness of what was done, or furnished as necessities, but of the value of the services of the children and of whether or not the children had been properly employed.

Still another barrier to contribution arises in this case from the judgment rendered in the original divorce suit. The court, acting upon that occasion by virtue of the statute previously quoted, did make an allowance to the appellee for the benefit of herself and the children. The extent of the allowance is, in such cases, limited only by the amount and value of the property within the jurisdiction of the court, and by what to him "shall seem just and right having due regard to the rights of each party and their children." Such allowances are evidently intended as an advanced contribution from the party whose property is subjected to use for the support of the children. Doubtless this provision in the law was made in order to prevent subsequent litigation between the parents, growing out of their joint obligation to support their children, and when applied in any case it should preclude the right of one who has been a party to the judgment from thereafter asking for further assistance. When both parties, together with their children and property, are before the court is the proper occasion for the adjustment of such controversies. If the judgment then rendered is not conclusive of the claim of one parent against the other for assistance, the one whose property is so taken is subjected to a double liability. For, as we have seen, ample provision for future needs may then be made. But if that judgment may be disregarded in a subsequent suit for reimbursement, there is no hindrance to collecting twice for the same necessities.

In the absence of an appeal, or some complaint, we must assume that the provision made in this case by the court when the divorce was granted was sufficient. The fact that the court in the divorce suit also undertook to impose an illegal obligation does not affect the conclusiveness of the judgment which he had the authority to render. An examination of the cases which support the right of the mother to have reimbursement discloses significant reference to the fact that no provision had been made for the support of the children at the time the divorce was granted.

Again, after divorce, the right of custody of the children is equal; and when one parent is awarded that exclusive right, the legal effect is to deprive the other, not only of his or her right of custody, but of the further right to share in the benefits and revenues resulting from the services of the children. Such a decree is usually rendered at the special instance of the party who secures it, upon a representation and proof that he or she is both willing and able to bear alone the responsibility of supporting and maintaining the children. This would appear to be an assumption of whatever burden it carries. If the custodian should thereafter complain that the burden was too onerous, it may be answered that he or she voluntarily sought and secured the benefits to which the burden was inseparably attached. In the authorities previously cited it is generally held that the duty to support goes with the right of custody, as a result of the benefits and advantages thereby conferred.

If the duty to support the child rests upon parentage, the obligations of the parents being equal and independent of their financial condition, then the husband may, with equal propriety, claim contribution from the wife when he, having the custody, has supplied the required necessities. The spectacle of a robust and wealthy father, who is raising his children in idleness, suing and securing a judgment for contribution against a penniless and decrepit mother, is alone enough to condemn the rule. Yet that situation is made possible if the principle announced by the majority of this court in this instance is to be upheld.

While the writer thinks the case should be reversed and a judgment here rendered in favor of the appellant, in obedience to the holding of the majority the judgment of the trial court will be reformed, and the recovery reduced to one-half the sum.

On Petition for Rehearing.

LEVY, J. [4] It is believed by a majority of the court that the motion for rehearing should be overruled. Appellant urges that his divorced wife may not, in this case, recover of him the expenses, either all or one-half of same, incurred by her for the support of the minor children. There is com-

prehended in the judgment of the trial court the finding of fact, which has ample support in the evidence, that the money expended by the wife was for the supply of necessities for the minor children and was confined to a reasonable amount. And it was proven that in the divorce proceedings the custody of the minor children was awarded to the wife. An incidental decree, it appears, undertook to make provision for the future support of the children against each of the parents through payment of a monthly stipend. It was proven, though, that upon appeal the incidental decree was held void and inoperative, upon the ground of lack of power in the court in a statutory proceeding for divorce to make incidental decrees against the parents in personam for payment of a monthly stipend in future support of their children. *Gully v. Gully*, 173 S. W. 1178. The decree, therefore, must be regarded, it is thought, as having, in legal effect, omitted to make any provision for the future support of the minor children of the marriage. And, in view of the facts, the principal question for decision is one of law, as to the effect of a decree giving custody of the children to the wife, yet omitting to provide for their support. Some of the cases rule that a divorce decree, awarding custody of the children to the mother, even though making no provision for their support, has the legal effect to relieve the father of liability for the reasonable support of the children while in the mother's custody. The majority of the cases, though, as stated by Justice HODGES, hold that where the decree of divorce makes no provision for the minor children, the father is not relieved of his obligation to support them, and the mother, who has the custody of the children, may recover from the father a reasonable sum for necessities furnished. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542; *Evans v. Evans*, 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 294; *Brown v. Brown*, 132 Ga. 712, 64 S. E. 1092, 131 Am. St. Rep. 229; *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817; *Spencer v. Spencer*, 97 Minn. 58, 105 N. W. 483, 114 Am. St. Rep. 695, 7 Ann. Cas. 901; *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270, 12 Ann. Cas. 137, and others. It is believed that the rule formulated in these cases cited above stands upon a correct legal principle, which is applicable and should govern the decision of the instant case. By the common law the parents were under legal obligation to support, protect, and educate their children. 1 Cooley's Blackstone (4th Ed.) p. 394; 2 Kent, Com. 191; 1 Parson, Con. 251, approved in *Fowlkes v. Baker*, 29 Tex. 135, 94 Am. Dec. 270. Divorce and separation of the parents do not, it must be admitted, operate and have effect to destroy the relation

of parent and child. And there is no statute which changes, after divorce and separation, the common-law rule respecting the obligation of the parents to support their children. Though by the common law the primary duty of providing this support was cast upon the husband during the marriage relation, it was only so because of the disabilities of coverture attaching to the wife. Yet the divorce operates to remove the disabilities of coverture, and consequently to cast and devolve joint and equal duties upon the parents thereafter respecting the support of their children, unless modified by the terms of the decree. And there is clear legislative recognition of the equality of the obligations of the parents after a divorce had been granted. The wife holds with the husband an equal right to the guardianship of the children. Article 4069, Vernon's Sayles' Stat. And no distinction is made between the property of the wife and husband in fixing liability for the support of the children. Article 4634, Vernon's Sayles' Stat.; *Rice v. Rice*, 21 Tex. 58; *Fitts v. Fitts*, 14 Tex. 443. And the simple fact that the mother has been awarded custody of the children does not, in legal principle, operate and have the effect to change this rule and relieve, by adjudication, the father of any further obligation of support on his part. *Bemus v. Bemus*, 133 S. W. 503. The chief consideration of her designation as custodian is the personal welfare of the minor children, and the right to this care and control of the children is the extent of the adjudication between the parents. There is not involved nor determined in such simple decree the question of liability of either parent, as between themselves or to third parties, for the future support of the minor children. Hence the decree awarding custody could not legally avail, in defense, as a plea of adjudication against further liability. Therefore, as the parents after divorce become jointly and equally obligated to reasonably maintain their children during nonage, and as the decree of custody in favor of the wife does not undertake nor legally operate to discharge their obligation by making provision for the children, it is not perceived upon what legal principle the father could predicate a plea in bar, or a want of any liability, or a defense of satisfaction and discharge, as a matter of law, of his part of the legal obligation. Payment or provision by the father, as a fact, is not involved in the instant case.

The mother and father after divorce being jointly and equally obligated to reasonably maintain their dependent children of nonage, the mother may not, in this case, it is believed, recover the whole of the expenses paid, but, having paid the whole of such expenses, may recover one-half thereof, which was the excess paid by her beyond her equal

share. It is a familiar principle that when two persons are jointly and equally liable for the same debt, and one is compelled to pay the whole of it, he may have contribution from the other to obtain from him the payment of his due proportion or share. The right to contribution in the case of joint debtors depends on the fact of common indebtedness, and may be obtained on the basis of the amount actually expended is reasonably done. Pleading the facts, as appellee does, entitles her to recover what she may legally show herself entitled to, and such pleadings would not be insufficient to support a judgment for one-half of the sum sued for.

If it had appeared, which it did not, that a child was sufficiently earning its own support, it may be that the father could defend against liability for its support; for in that instance the earnings of the child, legally belonging to the parents, but collectible by the custodian, would be regarded as furnished jointly by the parents, and to that extent be an actual discharge of the obligation.

It is insisted by appellee that, as the custody of the minor children devolves upon the mother much personal care and attention that is of value in the maintenance of such children, such valuable services may be regarded as performance in kind of the mother's portion of the obligation of maintenance, and the father is only bearing with the mother the joint obligation of maintaining the minor children when he provides reasonably for their necessary support. Of course that contention pertains to the question of whether or not the recovery by appellee of the whole amount of the present judgment should be sustained. It is thought the present record does not sufficiently authorize the appellee to recover except one-half of the proven expenditures.

Motion overruled.

JENNINGS, County Judge, et al. v. CARSON.
(No. 912.)

(Court of Civil Appeals of Texas, Amarillo.
March 15, 1916. Rehearing Denied
March 29, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS — 39 —
CREATION OF NEW DISTRICTS—REVIEW OF
PROCEEDINGS.

Acts 34th Leg. c. 86, amending Acts 32d Leg. c. 26 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 2849a-2849c) § 4, vests in the county board of school trustees the authority theretofore vested in the county commissioners' court, with respect to subdividing the county into school districts and making changes in school district lines. Section 4a gives to the district court general supervisory control over actions of the county trustees in creating, changing, and modifying school districts. Section 8 requires the county school trustees to appoint the county superintendent as their secretary and executive officer, but his duties under the

act are purely clerical and ministerial. Section 10 provides that all appeals from the decisions of the county superintendent shall lie to the county school trustees, and from the said trustees to the state superintendent, and thence to the state board of education. *Held*, that since the duties of the county superintendent are only ministerial and there could be few occasions for an appeal from him, a party aggrieved by the action of the trustees in the matter of the creation or alteration of the districts may seek relief from the court without first exhausting the remedy of appeal to the state superintendent and the board of education.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 68, 69; Dec. Dig. ¶39.]

2. SCHOOLS AND SCHOOL DISTRICTS ¶36 — CREATION OF NEW DISTRICT—REVIEW—PROCEEDINGS—STATUTE.

Acts 34th Leg. c. 36, § 4a, giving the district court supervisory control of the actions of the county trustees in creating, changing, and modifying school districts, does not authorize the court to compel the trustees to create a new district when they have refused to do so, since such supervisory power is a special power and, even though given to a court of general jurisdiction, must be limited to the grant when strictly construed.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 59½; Dec. Dig. ¶36.]

3. SCHOOLS AND SCHOOL DISTRICTS ¶39 — CREATION OF NEW DISTRICT — REVIEW OF PROCEEDINGS—CONSTITUTIONAL PROVISIONS.

Const. 1876, art. 5, § 8, as amended in 1891, gives the district court appellate jurisdiction and general supervisory control over the county commissioners' court, and general original jurisdiction over all causes of action whatever for which a remedy of jurisdiction is not provided by the Constitution or laws. Acts 33d Leg. c. 129, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), empowers the county commissioners' court to reduce the area of any school district and create such additional school districts as may be necessary for the best interests of the children, with certain restrictions. Acts 34th Leg. c. 36, transferred this power to the county school trustees. *Held*, that the district court, under the Constitution could supervise the action of the school trustees in refusing to create a new school district, as well as creating or altering one.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 68, 69; Dec. Dig. ¶39.]

4. SCHOOLS AND SCHOOL DISTRICTS ¶36 — CREATION OF NEW DISTRICTS—REVIEW OF PROCEEDINGS—INJUNCTION.

Where some of the children residing in a territory which it was sought to have created into a new school district were compelled to go seven miles to school, and when the streams were swollen were unable to go at all, and the existing district was about to issue bonds for the construction of a new building, after which, under Acts 33d Leg. c. 129, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), its boundaries could not be changed until the bonds were paid, the district court can issue an injunction restraining the issuance of the bonds, and a mandatory injunction compelling the creation of a new district, notwithstanding the rule which ordinarily forbids a court from interfering with the action of an inferior tribunal, so long as the latter is exercising its constitutional and statutory powers in a lawful manner, in matters calling for the exercise of discretion.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 59½; Dec. Dig. ¶36.]

5. STATUTES ¶122(1)—TITLE—MEANS TO ACCOMPLISH PURPOSE.

Acts 34th Leg. c. 36, § 4a, giving the district courts general supervisory control of the action of the county school trustees, being a specification of the means whereby the objects of the act expressed in title were to be carried out, is not void because not mentioned in the preamble to the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 175; Dec. Dig. ¶122(1).]

6. SCHOOLS AND SCHOOL DISTRICTS ¶159½ —TRANSPORTATION TO AND FROM SCHOOL—STATUTE.

Acts 34th Leg. c. 36, authorizing the classification of school districts into elementary and high school districts, but providing that the classification shall not be so made as to deprive any child of opportunity to attend a school properly classified within three miles of his home unless free transportation for such child shall be provided, does not authorize the trustees to provide free transportation for children to and from common school districts.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 207; Dec. Dig. ¶159½.]

Appeal from District Court, Hemphill County; Frank Willis, Judge.

Suit for injunction by L. M. Carson against J. L. Jennings, as County Judge, and others. Decree for the plaintiff, and defendants appeal. Affirmed.

H. B. Hoover, of Canadian, for appellants. Baker & Willis, of Canadian, for appellee.

HALL, J. Appellee, as plaintiff below, filed this suit in the district court of Hemphill county, against appellant Jennings, as county judge and ex officio secretary of the county school board, including as defendants F. R. Jamison, president of said board, C. A. Gilly, H. T. Holland, Frank Merry, and R. T. Alexander, trustees, constituting the entire board, alleging, in substance, that school districts Nos. 4 and 5 each contained more territory than was required by law, each having their schoolhouse beyond the reach of many children of scholastic age residing therein; that on the 27th day of July, 1915, plaintiff had four children of scholastic age, and, joined by 19 other parties interested in the school affairs of the neighborhood, all residing within the territory of the proposed new district, by written petition to the county board of trustees prayed for the formation of a third district, to be so constructed as to take a strip of territory six miles long and three miles wide from the west side of said district No. 4 and certain territory described in the petition from district No. 5, and that said new district should be numbered 17. It is further alleged that if said new district was created, it would leave ample territory in districts Nos. 4 and 5, with sufficient population to maintain schools, and having schoolhouses easily accessible to the children in the districts as then created; that the trustees to whom the petition was presented, refused to grant the prayer; and that such refusal

was tantamount to a denial of educational opportunities to the children within the proposed new district, which is alleged to be a gross abuse of their power and authority on the part of such trustees. The petition further sets out certain inconveniences to plaintiff, and other residents in the district, suffered on account of the present location of the schoolhouses therein; that a petition is being circulated in school district No. 5, to vote an issue of bonds to the amount of \$1,000, for the purpose of building a schoolhouse therein; that if the election is ordered, the bonds will be issued when, under the law, no change can be made in the district. The prayer is that the district court take supervisory control of the action of the county board of trustees in rejecting the petition; that the court exercise its authority and correct the abuse of power on the part of such trustees and enter a decree, forming and establishing a new district, to be numbered 17, for a writ of mandamus, compelling the trustees to create such district, and for an injunction restraining Jennings, as county judge, from calling the election to vote upon the bond issue in district No. 5. A temporary writ of injunction was granted, and at the time ordered by the trial judge the appellants appeared, filing their joint answer to the original petition. The answer consists of a general demurrer and various special exceptions, a general denial and special answer, to the effect that the petition for a new school district was presented to the defendants as a county board; that in acting upon the same they were fully advised of the matters pertaining thereto, and, in the exercise of their discretionary powers, looking to the good of all the people in the district, concluded that it was to the best interest of the majority of the patrons in the district, and to the educational advantages of the children therein, to reject the petition; that in so doing they acted without prejudice or bias, and in no wise abused the discretion vested in them, and, so acting, saw fit to reject the petition, and that their action was not subject to supervision by the district court. Upon a trial the same day, at a regular term of the district court, without a jury, judgment was entered, forming school district No. 17, perpetuating the injunction, and granting the mandamus prayed for.

[1] Acts 34th Leg. 1915, ch. 36, p. 68, amending Acts 32d Leg. ch. 26 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 2849a-2849o), vests in the county board of trustees all the authority theretofore vested in the county commissioners' court with respect to subdividing the county into school districts and to making changes in school district lines, and to such other matters as pertain to the location, conduct, maintenance, and discipline of schools, the terms thereof, and other matters of interest in school affairs in the county. (Section 4.)

Some of the provisions of this act are confusing. Section 10 provides that all appeals from the decisions of the county superintendent of public instruction shall lie to the county school trustees, and from the said county trustees to the state superintendent of public instruction, and thence to the state board of education. Section 8 of the act requires the county school trustees to appoint the county superintendent as their secretary and executive officer. His duties, under the various sections of the act, are purely clerical and ministerial. All matters requiring the exercise of discretion, and which under previous laws were under the jurisdiction of the county superintendent, are, by this act, vested in the county trustees. Since the county superintendent has no discretionary powers, it is difficult to conceive of any action on his part from which it would ever be necessary for any one to appeal. The amended act did not provide that the district court should have general supervisory control of the actions of the county trustees in creating, changing, and modifying school districts. The amendment, however, has this provision (section 4a), and under it this suit was instituted. Upon original consideration of this case we applied the rule announced in *McCullum v. Adams*, 110 S. W. 526, to the effect that appellant could not seek relief in the court until his remedy of appeal to the state superintendent and the state board of education had been exhausted. Upon reconsideration we have concluded that by reason of the uncertain provisions of the act, relating to appeals from the county superintendent and the addition of section 4a, giving the district court general supervisory control, it is not necessary, under the facts alleged, to first appeal to the state superintendent and the state board of education, but that in a proper case the aggrieved party may seek relief in the district court; but is this such a case?

[2, 3] The action complained of here is not the action of the board in creating, changing, and modifying districts, but appellant complains because the board refuses to act and to create a new district by changing two existing districts. The power herein conferred upon the district court is a special authority, and the rule, according to the weight of authority, is that where special powers are conferred on the court, either of otherwise or general limited jurisdiction, it is rigorously restricted to those granted, and the grant itself is strictly construed. The court can take no additional power from its general jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. Nothing is to be presumed which is not expressly given. 2 Lewis' Sutherland's Statutory Constr. § 564. The act in question nowhere gives the district court authority to create districts, either originally or in the event of a refusal on

the part of the county board to do so. Under section 4a, the district judge can do nothing more than supervise and control the acts of the county trustees, in the event they undertake to create, change, or modify districts. Therefore, if the district court can, by mandamus, compel the county school trustees to create a new district, as has been done in this case, the authority for such action must be looked for outside of the act in question. This act vests the county school trustees with all the authority heretofore exercised by commissioners' courts, with respect to subdividing counties into school districts and making changes in school district lines, but does not, in express terms, make their decision final. Acts of 1913, p. 259, § 1, Vernon's Sayles' Civil Statutes, art. 2815, empowers the county commissioners' court to reduce the area of any common school district and create such additional school districts as may be necessary for the best interests of the school children, limiting the right of the commissioners, however, to reduce school districts so as to contain not less than nine square miles. By the act of 1915, under which this suit was brought, this authority, as stated above, is transferred to the county school trustees. Article 5, § 8, of the Constitution of 1876 was amended September 22, 1891, and this provision added:

"The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law."

This provision is followed by the further statement:

"And shall have general original jurisdiction over all causes of action whatever for which a remedy of jurisdiction is not provided by law or this Constitution."

Our Supreme Court, in *Oden v. Barbee*, 103 Tex. 449, 129 S. W. 602, held that, under the provisions of the Constitution quoted above, at the request of citizens and taxpayers of the unorganized county, the district court had the right to enjoin proceedings to effect the illegal organization of such county, and that it was no answer to the suit of such citizens to say that it was a political question, and one not cognizable by the courts.

In *Stephens v. Buie*, 23 Tex. Civ. App. 491, 57 S. W. 812, Judge Raney, in affirming the action of the trial court sustaining a demurrer to a petition instituted against the commissioners' court of Upshur county, to review their action in fixing the boundaries of a school district, says that the trial court was justified in his action because the petition fails to allege that the discretion and control exercised by the commissioners were oppressively, illegally, and fraudulently used, the inference being that if the petition had so alleged, the demurrer should have been overruled.

The case of *McLaughlin v. Smith*, 140 S. W. 248; *Id.*, 105 Tex. 330, 148 S. W. 289,

grew out of the action of the commissioners' court of Crosby county in subdividing that county into school districts in such manner as to give the Emma district 200 sections of the best lands in the county and to none of the other districts more than 35 sections of land. The petition alleged that the action of the district court was fraudulent, and was an abuse of their discretion. In answering a certified question from this court, Judge Brown said:

"A discussion of the authority of the district court to enforce performance of the duty of redistricting that county is justified alone by the use of the word 'may' in the law. The facts which give it the form of discretionary power are amply sufficient to authorize the action and judgment of the district judge, who did himself great credit by laying the strong hand of justice on a scheme to pervert official duty to selfish ends."

Quoting from 2 Lewis' *Sutherland on Statutory Construction*, § 636, he said in part:

"Permissive words in respect to courts or officers, are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised. Such words, when used in the statute, will be construed as mandatory for the purpose of sustaining and enforcing the rights, but not for the purpose of creating a right or determining its character. They are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice or which concerns the public interest or the rights of third persons. A direction contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional when the good sense of the entire enactment requires its provisions to be deemed compulsory. Where a statute confers power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power' and 'authority' in such case means duty and obligation."

[4] We recognize the rule which ordinarily forbids one court from interfering with the action of an inferior tribunal, so long as the latter is exercising its constitutional and statutory powers in a lawful manner and in matters calling for the exercise of discretion. In the instant case, the allegations showed that some of the applicants for the creation of the new district were required to send their children as far as seven miles, and many of them lived over four miles from the nearest schoolhouse; that district 5 was about to issue \$1,000 in 20-year bonds. The plaintiffs' pleadings show that on account of streams, which were frequently so swollen they could not be crossed, the children of many of the applicants were denied the privilege of schools. Based upon these and other facts, the allegation is that the county school trustees had grossly abused their powers in denying the petition. If the action of those vested with authority, as in the *McLaughlin-Smith Case*, *supra*, in subdividing the county into inconvenient districts in the exercise of their discretion, results in such an injury as entitles the plaintiff to invoke the equitable powers of the district court to remedy the wrongs done, we

see no reason why a refusal of the board to act when due consideration for the welfare of a considerable part of the patrons of the school district demands it should not also give the complainants the right to apply to the courts for redress. The broad provision of the Constitution, quoted above in our opinion, vests the district court with authority, where the wrong complained of is the refusal to act as much as if it is caused by an affirmative act. They exercise judicial discretion in both instances.

The prayer in the *McLaughlin v. Smith* Case, supra, which was granted by the trial court, is in part that 24 sections of land included by the county commissioners in the Emma school district be taken out of that district and annexed to the Crosbyton district, and this action was approved by both this court and the Supreme Court. The effect of the decision in that case was a revision by the district court of a matter involving the exercise of discretion on the part of the commissioners' court. It was shown in the instant case that the petitioners lived in a sparsely settled, but rapidly growing, section of the country. According to article 2815, Vernon's Sayles' Civil Statutes, school districts which have issued bonds cannot be changed until the bonds have been paid. In the *McLaughlin v. Smith* Case, as in this, the commissioners were threatening to issue bonds for the construction of a schoolhouse, and the suit was brought to enjoin their issuance, as well as to reform the districts. If the lands owned by the petitioners herein were about to be burdened with a bond issue, which would be an incumbrance for 20 years, and under the statute cited prevent subsequent county trustees from redistricting during that period, we think "a strong and mischievous case of pressing necessity," giving the petitioners a right of action and entitling them to both a prohibitive and mandatory injunction, existed. *Jeff Chaison Townsite Co. v. McFaddin, Weiss & Kyle Land Co.*, 56 Tex. Civ. App. 616, 121 S. W. 719. In the case cited, Judge Reese said:

"Many of the restrictions upon the use of mandatory injunctions have, in modern times, given way to a more liberal construction of the powers of a court of equity in the use of such form of injunctions. * * * Mandatory injunctions which require of a party the performance of some act always, to some extent, anticipate the judgment of the court, and therefore should be granted with caution, and only when the necessity is great. But not only is the power to grant them undoubted, but the remedial and restraining power of a court of equity would be greatly impaired if such was not the rule." *Joyce on Injunctions*, §§ 101-103, 1892; 1 *High on Injunctions*, § 2; 6 *Pomeroy's Equity Jurisprudence*, §§ 554-556; 5 *Pomeroy's Equity Jurisprudence*, § 510; *Lumber Co. v. Lumber Co. (C. C.)* 86 Fed. 528-533; *New Iberia Rice Milling Co. v. Romero*, 105 La. 439, 29 South. 876; *Powhattan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1228."

If appellee was entitled to have the new district carved out of the two already existing, under the Constitution and authorities cited, we think he was entitled to the prohibitive injunction, restraining the bond issue, and, finally, to a mandatory injunction, requiring the trustees to create the district.

[5] What has been said disposes of most of the questions raised by appellant on this appeal. It is insisted that section 4a, giving the district court supervisory control of the action of the county board of school trustees, is void, in that this purpose is not mentioned in the preamble to the bill. We understand the rule to be that when an act of the Legislature expresses the subject of the act fully in its title, it embraces and expresses all the means provided therein to accomplish the object, and therefore the specification in the body of the act of the means by which the object may be accomplished does not render the act obnoxious to the constitutional requirement that every law shall embrace but one subject, and that such subject shall be expressed in its title. Section 4a is merely a provision for carrying out and enforcing the duties enjoined upon the county officers mentioned in the act, and is not an attempt to enlarge the jurisdiction of the district court. Under the clause of the Constitution quoted above, we think the district court had the jurisdiction required to render the judgment in this case. *Doeppenschmidt v. I. & G. N. Ry. Co.*, 100 Tex. 532, 101 S. W. 1080; *Davey v. County of Galveston*, 45 Tex. 291.

[6] The Act of 1915, p. 68, does not provide for the free transportation of children to and from schools in common school districts. The court did not err in overruling appellant's exception upon that ground.

We think the evidence is sufficient to sustain the judgment. The motion for rehearing is granted, and the judgment is affirmed.

SAN ANTONIO & A. P. RY. CO. v. BLAIR.*
(No. 5526.)

(Court of Civil Appeals of Texas. San Antonio.
March 1, 1916. Rehearing Denied
March 22, 1916.)

1. MASTER AND SERVANT ⇨278(1)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the death of a railroad employee from injury received when a trunk was thrown over or slipped from a pile of trunks on a platform and struck him, evidence held to warrant a finding that the porter handling the trunks was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 957; Dec. Dig. ⇨278(1).]

2. EVIDENCE ⇨77(5)—PRESUMPTIONS—FAILURE TO PRODUCE.

Where the defendant master had in its employ at the time of trial servants who witnessed the fatal accident, but failed to produce them,

it will be presumed that their evidence was not favorable to the master.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. ¶ 77(5).]

3. MASTER AND SERVANT ¶ 285(5)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

Where a railroad employé was injured when a trunk fell or was thrown from a stack on a platform and the trunks if properly piled would not have fallen, the fact that a trunk fell is in itself sufficient to show negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 581, 898, 955; Dec. Dig. ¶ 285(5).]

4. WITNESSES ¶ 344(2)—IMPEACHMENT—VERACITY.

In a civil case the veracity of a witness cannot be impeached by proof of specific immoral conduct, but such impeaching testimony is confined to general reputation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1125; Dec. Dig. ¶ 344(2).]

5. MASTER AND SERVANT ¶ 88(7)—INJURIES TO SERVANT—COURSE OF EMPLOYMENT.

Where a railroad employé was sitting on the edge of a platform waiting for other employes to perform certain labor which had to be done before he could commence work, he was in the discharge of his duties as an employé of the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 150; Dec. Dig. ¶ 88(7).]

6. DEATH ¶ 18(2)—ACTIONS—RIGHT OF ACTION.

Where a son contributed money at times to the support of his father, the irregularity of such contributions will not prevent the father from recovering damages for the son's wrongful death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. ¶ 18(2).]

7. DEATH ¶ 99(1)—AWARD—EXCESSIVENESS.

A railroad employé, 27 years of age, earning \$125 to \$130 a month, who was strong, healthy, and experienced as a railroad man, received injuries resulting in death. Held that, in view of his possibilities of advancement in his chosen profession, an award of \$25,000 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126; Dec. Dig. ¶ 99(1).]

8. DEATH ¶ 88—DAMAGES—RECOVERY.

In an action by a wife for the wrongful death of her husband, she can only recover her pecuniary loss and cannot recover for loss of care and attention.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. ¶ 88.]

Appeal from District Court, Karnes County; F. G. Chambliss, Judge.

Action by H. A. Blair against the San Antonio & Aransas Pass Railway Company. Plaintiff dying during its pendency, the action was revived in the name of Mrs. Lula Blair, administratrix. From a judgment for plaintiff, defendant appeals. Affirmed.

Proctor, Vandenberg, Crain & Mitchell, of Victoria, Williamson & Klingeman, of Karnes City, and Boyle & Storey, of San Antonio, for appellant. C. L. Bell, of Karnes City, and C. C. Harris and Arnold, Cozby & Peyton, all of San Antonio, for appellee.

FLY, C. J. This suit was instituted by H. A. Blair, seeking to recover damages al-

leged to have accrued by reason of personal injuries inflicted on him through the negligence of a porter in throwing a trunk upon him. He obtained judgment, but upon appeal to this court the judgment was reversed, and the cause remanded. 173 S. W. 1186. Since that time it was shown that H. A. Blair had died and his widow, Lula Blair, as administratrix and for G. W. Blair, father of deceased, filed a third amended petition, in which she alleged that her husband was injured through the negligence of appellant, in that its porter, who was engaged in placing trunks on a platform near where H. A. Blair was sitting, caused a trunk to fall upon and against him, and in the alternative it was alleged:

"That a trunk fell from the top of other trunks or baggage standing on said baggage platform, and in falling the said trunk struck H. A. Blair inflicting injuries upon him which resulted in his death as herein alleged; and the said trunk which fell had been placed upon the top of other trunks or baggage by the employé, or employes, of the defendant in the discharge of the duties of their employment for the defendant, and who had been intrusted by the defendant with the duty of handling trunks and baggage on said platform; and the said trunk which fell had been placed in an insecure position on top of other trunks or baggage, and the placing of said trunk in an insecure position upon other trunks or baggage, was negligence upon the part of the defendant, and such negligence was a direct and proximate cause of the trunk falling and of striking H. A. Blair, and of the injuries and death of H. A. Blair, and of the damages set forth in this petition."

The cause was tried with the aid of a jury, and resulted in a verdict and judgment in favor of Lula Blair, as administratrix, in the sum of \$24,500, and in favor of G. W. Blair for \$500.

[1-3] On the former appeal of this case it was held that, as to the only allegation of negligence, namely, that the porter had thrown the trunk upon and against H. A. Blair, evidence was insufficient. On the former trial deceased alone had sworn that the negro porter was at or near the pile of trunks when the trunk fell or was thrown, and this court held that the evidence did not tend to show that the trunk was thrown as was alleged. In the amended petition, upon which the last trial was had, the allegations were changed and amplified so as to make a case of the negligent handling or negligent placing of the trunk so that it fell from its position and struck the deceased. On this trial not only was the testimony of deceased introduced, but Grasshoff, who was with him at the time, testified that he saw the porter standing at the place from which the trunk fell. He also testified that it was customary for employes to sit or lie down on the platform near the piles of trunks or sit or stand on the ground near such platform, and passengers did the same. It was in evidence that H. A. Blair was very tall and could probably have seen the negro as he swore he did. There was no break or opening in the line of trunks

after the trunk fell which struck Blair. Grasshoff swore that he had been working about the platform for two or three years, and had never known a trunk to fall before. The testimony as to the porter being at or near the place whence the trunk fell was not contradicted, although the porter, Dock Hackett, and another witness, James Quigley, who was near or on the platform at the time, were present. Neither was placed on the witness stand, although both were in the employment of appellant and were in attendance on the trial as witnesses for appellant.

The fact that Grasshoff corroborated deceased, on this trial, as to the presence of the negro porter near the trunk when it fell; that no opening was left in the line of trunks when the trunk fell; that the height of deceased was proved; that employes and passengers were permitted, without warning, to use the platform near the piles of trunks; that no trunk had ever been known to fall before—each and all are facts not had on the former trial, which go to strengthen the theory that the trunk fell because it was not carefully and properly placed in its position. The fact that appellant, although it had its witnesses present, failed and refused to place them on the stand is another pregnant circumstance tending to establish the truth of appellee's testimony. The presumption is that the evidence of their witnesses would not have shaken the evidence of appellee's witnesses, nor strengthened the case of appellant. *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744, 26 Am. St. Rep. 801. As said in *Mitchell v. Napier*, 22 Tex. 120:

"Where a party is thus afforded the opportunity to explain, and fails or refuses to do so, the rational and legal presumption is, that a disclosure of the truth would make against him."
* * *

It was said by Lord Mansfield:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

This is a quotation from an English case found by this court in *Jones on Evidence*, § 19. If the porter was not where the evidence of Grasshoff and H. A. Blair placed him, he and Quigley should have been placed on the stand to deny it.

Whatever may have been the aspect of the case on the former trial, the evidence at this time tends to show that the porter either caused the trunk to fall by handling it, or that he negligently piled it in such a manner that it slipped off its place and fell. There was other testimony besides that of Grasshoff tending to show that H. A. Blair could have seen a man standing behind the line of trunks. The height of the platform was shown, and it was not high enough with the trunks piled, as they were, to obscure the vision of a man in the position occupied by H. A. Blair. A photograph indicates that

the head of a man sitting down extended above the platform.

The testimony tends to show that if the trunks had been properly piled, none of them would have fallen; that H. A. Blair was in a position where it was customary for employes to go, and that it was not contributory negligence for him to occupy the position he held at the time of the accident. This conclusion is reached, not in view of the evidence on a former trial, but in view of that on the present trial. If the trunk had been properly stacked none would have fallen, and this circumstance in itself would furnish sufficient evidence to authorize a verdict for appellee. *McCray v. Railway*, 8 Tex. 168, 34 S. W. 93; *Washington v. Railway*, 90 Tex. 314, 38 S. W. 764. The first, second, and third assignments of error, which question the sufficiency of the testimony to sustain the verdict, are overruled.

[4] While appellee was upon the stand appellant sought to obtain from her testimony tending to show that she had been the proprietress of a house of prostitution and plied the vocation of a bawd therein during the years 1911, 1912, and 1913, before her marriage to deceased, which testimony was denied by the court. The evidence was clearly inadmissible. In civil cases it is not permissible to impeach the veracity of a witness by proof of immoral conduct. The evidence to impeach a witness in a civil case in Texas must be confined to testimony as to his general reputation. *Insurance Co. v. Faires*, 1 Tex. Civ. App. 111, 35 S. W. 55; *Railway v. Roberts*, 144 S. W. 691; *Railway v. Adams*, 42 Tex. Civ. App. 279, 114 S. W. 453; *Mood v. Roland*, 46 Tex. Civ. App. 412, 102 S. W. 911; *Railway v. Creason*, 101 Tex. 335, 10 S. W. 527. However disreputable the conduct of appellee may have been in past years it has no bearing upon the issues of this case, and the only effect of the testimony would have been to hold the erring woman up to the scorn and contempt of those hearing the testimony. She may have reformed, at least the law will not permit such wartime attacks upon her, but will give her the privilege, unmolested, of doing as the woman brought to Jesus by scribes and pharisees was admonished to do, "Go and sin no more." The fourth, fifth, and sixth assignments of error are overruled.

The seventh assignment of error attacks the sufficiency of the evidence to justify the submission of a charge as to negligence on the part of appellant. It is disposed of by the discussion of the testimony made in connection with the first three assignments of error.

[5] The eighth assignment of error is overruled. H. A. Blair, while waiting on other employes to perform certain labor, so as to prepare for his work, was in the discharge of his duties as an employe of appellant, and consequently the clause in the charge, c

which complaint is made, is correct. *Railway v. Welch*, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839; *Meyse v. Railway*, 41 Mont. 272, 108 Pac. 1062; *Railway v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Thomas v. Railway*, 108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954.

The ninth, tenth, eleventh, and twelfth assignments of error are without merit. The charge complained of is not upon the weight of the evidence, and was justified by the facts.

The thirteenth and fourteenth assignments of error are overruled. The evidence does not show that Blair, as a matter of law, was guilty of contributory negligence. The evidence tended to show that there was no vibration of the platform that would dislodge a trunk in a properly constructed pile and a trunk was never known to fall from the platform before. The employees constantly occupied positions on or near the platform. This testimony was not elicited on the former trial. A question of fact as to contributory negligence was raised by the negligence which was properly submitted to the jury.

[8] The evidence showed that H. A. Blair contributed money at times to the support of his father, G. W. Blair, and that evidence justified a verdict for \$500, in favor of the father. The irregularity of the contributions did not preclude a recovery. *Railway v. Martin*, 25 Tex. Civ. App. 204, 60 S. W. 808. As said by this court in that case:

"It was for the jury to decide from the evidence what sums appellant might reasonably have expected to receive from her father, and in arriving at a conclusion * * * they could take into consideration the sums that had been contributed before his death, whether they had been given in stated amounts at stated times or not."

The charge presented every phase of the case, and the court did not err in refusing the special instructions asked by appellant.

[7, 8] The verdict is very large and as an original proposition would not be sustained by this court, but there is no evidence of passion or prejudice on the part of the jury, and this court has no authority to reduce the amount. Blair was 27 years of age when hurt, and was earning from \$125 to \$130 a month. He was strong and healthy, and was an experienced railroad man. His life was before him with all of its possibilities for accomplishment and increase of earning power. He was stricken down in the vigor of his young manhood, and we cannot say in the face of the verdict of the jury that his life was not worth to his wife the sum found by the jury. After the injuries were inflicted upon him he sickened, grew weaker and finally died, and his wife was not only deprived of the money that he earned and confided to her trust, but she lost the care, attention, and assistance that is tendered by every good and affectionate husband. The law only gives compensation for

the pecuniary loss in cases of this class, but, as said by the Supreme Court in *Railway v. Lehmberg*, 75 Tex. 61, 12 S. W. 898:

"Every parent and husband has, for his wife and children, a pecuniary value beyond the amount of his earnings by his labor or vocation."

In the last case cited the court laid down the rule, since followed, in regard to the amounts found by juries in cases of this character. Says the court:

"The difficulties of proof are known to the lawmaker. In some states an attempt has been made to remove them to some extent by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law and no rule is prescribed for making the calculation upon facts capable of exact ascertainment, it necessarily follows, we think, that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience, and sense of justice should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice, or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements, their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not precisely defined, we think the law intends that the jury's estimate, rather than the equally undefined one of the judges, shall prevail."

It is true that the size of a verdict itself might conclusively evidence that improper motives actuated and controlled the jury, but can it be said that a verdict of \$25,000 for the life of a young robust man, with all the expectations, hopes, ambitions, and possibilities ahead of him, in a country where possibilities so often ripen into realities, and hopes into rich fruition, who was earning a fine salary, evidences passion and prejudice on the part of the jury? We think not.

The judgment will be affirmed.

POSTEX COTTON MILL CO. v. McCAMY.* (No. 920.)

(Court of Civil Appeals of Texas. Amarillo.
Feb. 9, 1916. Rehearing Denied
March 15, 1916.)

1. MASTER AND SERVANT §185(2)—INJURY TO SERVANT—SCOPE OF EMPLOYMENT.

To render a master liable for the act of a servant, it is not necessary that the master specifically authorize the servant to do the particular act; it being sufficient if the act falls within the servant's course of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 387; Dec. Dig. § 185(2).]

2. MASTER AND SERVANT §287(4)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action by plaintiff, whose leg was broken, in putting a heavy bolt of cloth into a machine, the question whether a servant who assisted plaintiff and was negligent was acting

within the scope of his authority, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1045, 1060; Dec. Dig. ¶¶ 287(4).]

3. APPEAL AND ERROR ¶¶ 934(2)—REVIEW—JUDGMENT—FINDINGS.

In view of Rev. St. art. 1985, declaring that upon appeal an issue not submitted and not requested by a party to the cause shall be deemed as found by the court in such manner as to support the judgment, provided that there be evidence to sustain the finding, a judgment in favor of an injured servant, based on special findings of the jury, will be upheld, though there was no finding that the negligence relied on was the proximate cause of the injury and the court, in rendering judgment, stated that he based his judgment on the findings made by the jury alone; it appearing that there was sufficient evidence to show that the negligence relied on was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. ¶¶ 934(2).]

4. MASTER AND SERVANT ¶¶ 247(5)—INJURIES TO SERVANT—ACTIONS—DEFENSES.

Where one of plaintiff's superiors directed him, when he needed assistance in putting a heavy bolt of clothing in a machine, to call him, plaintiff's failure to call such superior is no defense to an action for injuries resulting from the negligence of his other superior, who assisted him in placing the cloth in the machine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 799; Dec. Dig. ¶¶ 247(5).]

5. MASTER AND SERVANT ¶¶ 347—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT.

The Employers' Liability Act of 1913 (Acts 33d Leg. c. 179) is valid.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. ¶¶ 347.]

6. MASTER AND SERVANT ¶¶ 281(12)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In a servant's action, evidence *held* to warrant a finding that the servant was guilty of negligence which was a joint contributing cause of the injury and so, under Employers' Liability Act, recovery was properly diminished.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 995; Dec. Dig. ¶¶ 281(12).]

Appeal from District Court, Garza County; W. R. Spencer, Judge.

Action by G. R. McCamy against the Postex Cotton Mill Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Bean & Klett, of Lubbock, Higgins & Hamilton, of Snyder, A. B. Williams, of Battle Creek, Mich., and H. G. Smith, of Post, for appellant. R. A. Baldwin, of Slaton, Cornell & Wardlow, of Sonoro, and Lipscomb & Lipscomb, of San Antonio, for appellee.

HENDRICKS, J. G. R. McCamy, the appellee, sued the appellant, Postex Cotton Mill Company, on account of personal injuries alleged to have been sustained in the employment of appellee while engaged in operating a calender machine used in the bleachery department of appellant's factory for ironing and finishing cloth, in that one W. R. Gilbert, an employé of appellant, while acting within the scope of his employment, negligently permitted a roll of cloth to fall upon

plaintiff while he, said Gilbert, was assisting plaintiff to place the roll of cloth on said machine. Appellant's factory is divided into several departments: A gray room; the bleaching room or wash room; the finishing or calender room; and the sheet room or sewing room. The calender machine, at which plaintiff was working when he received his injury, was located in the finishing room, or calender room. As a part of plaintiff's duty, it was necessary to remove this heavy roll of cloth, weighing some 500 or 600 pounds, from a platform and place the same upon a truck, and with the aid of the truck place the roll on the calender machine. This bolt of cloth was 81 inches in length, and about 3 feet in diameter. The truck had to be removed from under the roll of cloth before the latter could be placed on the calender machine, and in order to eliminate the truck, it was necessary to raise one end of the bolt of cloth; and in raising one end of the bolt, the end of a bar, around which the cloth was wrapped, was placed on top of a slot, and then it became necessary to move it so that one end of a cylinder with a shoulder, would fit in the shoulder of the slot. On the particular occasion, while McCamy was attempting to make the connection with the bolt of cloth upon the calender machine, and while Gilbert was assisting in the operation, it is claimed that the latter, without the knowledge of McCamy, placed his foot on the end of the iron bar, giving it a shove in the wrong direction, causing it to fall on McCamy, instead of catching in the socket. McCamy's right leg was broken in two places. The jury found, on the submission of special issues, that the negligence of plaintiff and Gilbert produced the injuries; that Gilbert's contributing acts, causing the injury, were done within the general scope of his employment. They also found additionally that it was not a part of the duties of Gilbert to help change the rolls of cloth on the calender machine, but was within the scope of his employment for him to do so at the time of plaintiff's injuries. They found that McCamy requested Gilbert to assist him in this matter, but that McCamy did not tell Gilbert to shove or push the roll of cloth at the time of the accident. They found that a man of ordinary care would have pushed the truck south so that the journal would enter the socket before taking the truck out from under the cloth, and that a man of ordinary care, while the journal was lying on top of the loop at the north end, would not have caused the roll of cloth to have been pushed or shoved, to set the journal at the south end in the socket.

[1, 2] Appellant assails the judgment of the court on these findings that there is no evidence to support the findings of the jury that the defendant's employé, Gilbert, was acting within the scope of his employment at

the time of the injury. There seems to be no criticism by appellant that the findings of the jury that it was not the duty of Gilbert to assist in placing the cloth upon the calender machine, but that it was within the scope of his employment to do so, are inconsistent in their nature. It is insisted that Gilbert, during the month of April, 1914, was at work in the sheet factory, or the sewing room of that department, and that it was not his duty to perform any labor in the finishing room where the calender machine was located; that one Thomas Hardeman was in reality the foreman, and at the time McCamy was employed, the latter was instructed by Hardeman to call upon him or one Price when it was desired to make a change of rolls of cloth on the calender machine. The jury answered that such instructions were given by Hardeman. At that time one H. W. Fairbanks held the position of general manager of this mill. McCamy testified:

"I had a conversation with Mr. Fairbanks with reference to what Gilbert was doing, in the bleachery department, at the post office one day at noon, something like two weeks prior to this accident. Mr. Fairbanks asked me how everything was getting along at the bleachery. We had been having trouble with zigzag cloth, I told him it was bum as ever—still rotten. I meant the way things was getting along in regard to getting out good stuff. He said, 'There is going to be a change right away—maybe to-morrow.' He said: 'Hardeman may come out and Gilbert will take charge of the business there. Gilbert is an experienced man, and has been working something like 18 years.' * * * It was the following day, after I had the conversation with Mr. Fairbanks, that Mr. Gilbert came down to the bleachery and began the work I have already testified he was to perform."

Fred Johnson, the shipping clerk at the mills, also testified:

"That he had a conversation with Fairbanks in regard to Gilbert's authority. 'He told me that Mr. Gilbert was to have charge in the bleachery. Mr. Fairbanks told me he had charge of the bleachery.'"

The question on cross-examination was asked the witness:

"Was Mr. Hardeman over the entire bleachery? A. That is what I thought, but Mr. Fairbanks told me Mr. Gilbert had charge of the bleachery. Mr. Fairbanks told me the—before Mr. McCamy was hurt; I do not exactly remember what time. Mr. Hardeman and Gilbert had some misunderstanding (we presume in regard to their authority) and we were talking about it. Mr. Hardeman told me that they had words about it. Mr. Fairbanks said he (Gilbert) had charge at that time. It was something like a day or two before that Mr. Hardeman told me that he and Gilbert had some differences."

The testimony of Henry Foreman, of the following character, with reference to the bleachery, seems to have been introduced without objection, and had reference to a time shortly after the accident:

"What was it Mr. Gilbert said to Miss Josie (meaning one of the girl employes in the factory)? A. He just says that Hardeman hasn't got anything to do with it, or no more to do with it."

McCamy also said:

"Prior to my injury Gilbert was working in all the departments. * * * He was working

in the bleachery department on April 20, 1914 (the date of appellee's injuries). * * * I observed that he was doing anything he saw fit to do or wanted to do. Just walk up and take hold of a machine, or help the fellow through the machine, or anything to do in the bleachery department at all times."

It is true that there is testimony in the record that Hardeman continued to remain in charge of the bleachery department in the factory, but a jury could conclude, notwithstanding such testimony, that Gilbert was also placed in charge, with the same authority, and that, for some reason—whether from the weakness of the general manager, or otherwise, is not shown—the two men, Hardeman and Gilbert, had differences over the question of their authority in the department mentioned. It seems to be conceded in the argument of appellant that Hardeman, who had instructed McCamy to obtain assistance, either from him, Hardeman, or Price, had the authority to perform the act which Gilbert in reality attempted to perform—to help McCamy place the bolt of cloth upon the calender machine. It is not necessary, under the authorities, that the master specifically authorize the commission of his servant to do the particular act, but it is only necessary that the authority covers the area of responsibility for the act which is performed, and this is considered the scope of employment or the course of employment.

"An act, though not ordered, is within the scope of employment if of such a nature as might be justified without such order." *Gilmartin v. New York*, 55 Barb. (N. Y.) 239.

In very many instances the negligence or tortious acts of the servant are not only without express authority to do the wrong, but in violation of the duty to the master, and the principal is liable for such torts if within the scope of the employment. We do not think that Gilbert was a "volunteer," under the testimony, when he assisted McCamy in the performance of the particular work, at the time of the injury. After reading the voluminous statement of facts in this record, and testimony considerably in detail, as to the duties of some of the employes, we think that by the answer of the jury that it was not the duty (though in the scope of his authority) of Gilbert to assist McCamy they meant it was not his particular employment, or handicraft, in the master's business.

[3] Appellant also assigns that the findings of the jury show that the act of the defendant's employé, Gilbert, alone was not the proximate or remote cause of the injury complained of. From the testimony only of McCamy, the jury could have found that Gilbert's acts were the sole and proximate cause of the injury, though finding the negligence concurrent. Gilbert said that plaintiff told him to shove or push the roll of cloth; plaintiff testifying that he did not tell him to do so. The jury found that plaintiff did not tell

Gilbert to shove the cloth. Appellant argues that, though the jury finds that Gilbert's acts were a concurring cause of the injury, and the trial court having stated that he based his judgment on the findings made by the jury alone, and not on any findings of his own, there could be no judgment, because the concurring negligence of Gilbert is not shown. Whatever the trial court might have stated in regard to basing his judgment on the findings of the jury, he returned a judgment nevertheless, and the evidence and findings sustain it. In this case the question of proximate cause vel non was not submitted to the jury; neither was there any request. The evidence sustains concurring negligence by Gilbert and McCamy in producing the injury. Article 1985 (though the issue of proximate cause was not specifically found by the jury), provides that upon appeal or writ of error an issue, not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment, provided there be evidence to sustain such a finding. We seriously doubt that a trial judge, where the evidence actually sustains an issue though not found, when he has pronounced the judgment, can hamper his judgment to that extent by saying that he did not base it upon any additional findings of his own, but exclusively upon the jury's findings. The statute says:

"Upon appeal, an issue not submitted shall be deemed as found by the court, in such manner as to support the judgment"

—if there is evidence to sustain such finding. The statute is a rule to the appellate courts. However, the findings of the jury in this case, we think, support the judgment.

[4] Neither do we agree with appellant that the failure of McCamy to call on Hardeman or Price could, on account of such omission, be such an intervening cause, or omission, as to be a proximate cause of the injury. The failure of McCamy to call on Hardeman or Price cannot in law be the gravamen of appellant's defense. What Hardeman or Price would have done under the conditions is speculative. An omission, if negligence, must be an efficient cause in order to be a proximate cause, and such omission in this case could not be considered an intervening proximate or concurring efficient cause, especially if Gilbert had the right to assist McCamy.

[5] Appellant also attacks the constitutionality of the Employers' Liability Act of 1913 (Acts 33d Leg. c. 179) because the same contains subject-matter of legislation not embraced in the title, and the title of the act is false and delusive. This court passed upon this question in the case of Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 312, 313. Until the Supreme Court destroys the particular provisions with reference to fellow servants,

contributory negligence, and assumption of risk, this court will continue to assume the constitutionality of those provisions.

[6] The trial court submitted to the jury: "What amount, paid now, would fairly and reasonably compensate the plaintiff for the injuries, if any, sustained by him?"

He also submitted:

"In the event you find that the plaintiff was guilty of negligence, that either proximately caused or contributed to the injuries, if any, complained of, to what extent should the damages, if any, sustained by plaintiff, by reason of his injuries, if any, be diminished, on account of such negligence, if any, on the part of plaintiff? State the amount, if any, in dollars and cents."

To the submission of the first question, the jury answered, "\$4,000.00." The jury responded to the second question, "\$2,000.00," reducing the former amount to that extent, on account of contributory negligence of the plaintiff. There are no exceptions to these submissions nor to the charge of the court along the same line. The plaintiff made a motion that the court enter judgment in his favor for the sum of \$1,000.00, which was overruled. The proposition is that contributory negligence, in order to constitute a defense, must be the proximate cause of the injury complained of, and that an analysis of the testimony and a consideration of the findings of the jury preclude concurrent negligence. Though the jury might have answered that McCamy did not tell Gilbert "to shove," as testified to by Gilbert, and though we think that McCamy's omission to call on Hardeman or Price could not be considered as a contributing cause, however, upon careful consideration of Gilbert's testimony, we believe the jury could have found concurring negligence of McCamy with Gilbert, upon other conclusions derivable from his testimony. We overrule the cross-assignment.

The judgment of the lower court is affirmed.

YANTIS v. JONES et al. (No. 5636.)

(Court of Civil Appeals of Texas. San Antonio. March 15, 1916.)

1. BILLS AND NOTES \S 357 — NEGOTIATION AND TRANSFER—"HOLDER FOR VALUE."

A bank to which notes were indorsed as collateral security for a valuable consideration without notice was a holder for value and entitled to the same protection as if the transfer had been an absolute sale.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 909-912, 961; Dec. Dig. \S 357.]

For other definitions, see Words and Phrases, First and Second Series, Holder for Value.]

2. BILLS AND NOTES \S 358 — NEGOTIATION AND TRANSFER—BONA FIDE HOLDERS.

A valid antecedent debt is a valuable consideration for the transfer of a note as collateral security.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 913-923, 961; Dec. Dig. \S 358.]

3. CANCELLATION OF INSTRUMENTS \Leftrightarrow 4 —
 REFORMATION OF INSTRUMENTS \Leftrightarrow 19(1) —
 GROUNDS—MISTAKE.

An instrument will not be set aside or reformed on the ground of mistake of one of the parties unless superinduced by the fraud of the other.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 4; Reformation of Instruments, Cent. Dig. §§ 74, 76-78; Dec. Dig. \Leftrightarrow 19(1).]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Robert S. Yantis against Mary K. Jones and another. From a judgment for defendants, plaintiff appeals. Affirmed.

R. L. Edwards, of San Antonio, for appellant. Butler L. Knight, of San Antonio, for appellees.

FLY, O. J. This is an action of trespass to try title to 10 city lots out of original lot 142 and new city blocks 2125 and 2136, bounded on the north by Castro street, on the east by North Zarzamora street, on the south by Rivas street, and on the west by North Banderita street, in the city of San Antonio, instituted by appellant against Mary K. Jones and her husband, L. Jones. It was alleged in the petition that the property was conveyed to Robert S. Yantis by Jesse Yantis and Frank M. Yantis, man and wife, on June 24, 1914. Appellees answered by plea of not guilty and that the land had been conveyed to Mary K. Jones on December 1, 1913, by Jesse Yantis and wife, and setting up the circumstances under which the deed was executed. No jury was demanded, and the court rendered judgment in favor of appellees quieting their title to the land.

The evidence discloses that Jesse Yantis, the father of appellant, was desirous of selling 87 lots of land in San Antonio, and employed L. Jones and G. W. Carter to sell 71 of the same, in consideration of which the remaining 16 lots were to be conveyed to Mary K. Jones. The 71 lots were sold to John Morrow for \$36,000, one half cash and the other half in two notes, one for \$12,000 due in five years, and the other for \$6,000 due in six years. The deed to Morrow was executed on December 1, 1913, and on the same date a deed was executed to Mary K. Jones under the terms of the following contract, omitting the preface and attesting portion:

"Whereas, the said parties of the second part, as the agents of the party of the first part, have obtained for the said party of the first part a purchaser for certain 71 lots in the city of San Antonio, Bexar county, Texas, and the said party of the first part has this day conveyed to one John Morrow, of Robertson county, Texas, said 71 lots, said deed reciting a consideration of \$36,000.00, \$18,000.00 in cash or its equivalent, and two notes Nos. 1 and 2, being for the sums of \$12,000.00 and \$6,000.00, respectively, due 5 and on or before 6 years after date, with interest from date at the rate of 8 per cent. per annum;

"And whereas, said party of the first part has this day executed a deed to Mary K. Jones to

certain 16 lots in the city of San Antonio, Bexar county, Texas:

"Now, therefore, it is agreed between the parties hereto that said deed executed by said party of the first part to said Mary K. Jones shall be deposited by the parties hereto in the Merchants' & Mechanics' Bank in the city of San Antonio, Bexar county, Texas, to be held by said bank in escrow until said note for \$12,000.00 shall have been hypothecated or sold by the said party of the first part, and upon the sale, hypothecation or cashing of said note, said deed deposited in escrow shall be delivered to the said Mary K. Jones or her agent.

"It is further agreed and understood that upon the sale, cashing, or transfer of said note for \$12,000.00 by said party of the first part that said party of the first part shall pay unto the said parties of the second part the sum of twelve hundred (\$1,200.00) dollars in cash, the same being due the said parties of the second part as their commission for the sale of said 71 lots."

In pursuance of that contract a deed to 16 lots was executed by Jesse Yantis and wife to Mary K. Jones, and placed in escrow with a certain bank. Afterwards the note for \$12,000 was placed with the Citizens' Bank & Trust Company as collateral to secure a note for \$8,450 given by him for borrowed money, and suit was instituted on the note by the bank against Morrow, the maker of it. In April, 1914, the deed to Mary K. Jones was delivered by the Merchants' & Mechanics' Bank to L. Jones, and he went into possession of the land. Before the deed was executed by Jesse Yantis and Frank M. Yantis, his wife, to their son, the appellant, the latter was shown the contract made by his father, and was informed that the deed to Mary K. Jones had been delivered to her, and that appellees had gone into possession of the land. There was no consideration for the sale of the land to appellant. There was no mistake as to the contract between Jesse Yantis and L. Jones and G. W. Carter. Jesse Yantis fully understood the terms of the contract when he signed it. Under the terms of the contract, if the note was sold or transferred, the deed was to be delivered to Mary K. Jones, and it was so delivered. The notes were transferred and delivered to the bank as collateral security for the notes executed by Jesse Yantis to the bank. Jesse Yantis received the benefit of the notes executed to him by Morrow.

[1, 2] The bank, when the notes were indorsed to it, as collateral security, for a valuable consideration, without notice, was a holder for value and entitled to the same protection as if the transfer had been an absolute sale. A valid antecedent debt would be a valuable consideration. Colebrooke, Coll. pp. 7, 8. Undoubtedly the indorsement of the note or the making of the collateral security contract with the bank would be a transfer within the contemplation of the contracting parties. While the word "hypothecate" is improperly applied in case of a delivery of promissory notes as collateral se-

curity, still the evidence showed that the parties so understood and desired it.

While we doubt whether evidence of the sense in which the scrivener used the word "hypothecate" in the contract was permissible, still the witness stated:

"I put it in there; don't know really whether I knew what it meant, but, lawyerlike, I wanted to use a big word to impress my clients, was, perhaps, the purpose of putting it in there."

He might, as stated in the bill of exceptions, taken because of the refusal to allow him to define "hypothecate" as he used it, have thought it meant "sell"; still it is extremely doubtful, for he did state:

"I might possibly have had in mind this: That if Mr. Yantis had gone out and used this note and had gotten, say, \$12,000 secondhand, I believe that the intention of the parties Jones was to get a commission, for the purpose of Yantis was to get money and get substantially \$12,000, and I might have put that in so as to protect Jones from a hypothecation of all the note. * * *

If that means anything, it means that the parties had in view that Yantis might use the notes as he did use them for collateral security. If that is what the parties intended, it would not matter what the scrivener may have thought the word "hypothecate" meant.

In the mortgage or deed of trust given by Jesse Yantis to the West End Lumber Company on the Morrow notes the power to sell the notes was given, the proceeds to be used in paying certain debts due the Citizens' Bank & Trust Company, the residue to be used in paying debts due the lumber company. This was undoubtedly a transfer within the meaning of the contract. L. Jones swore that he explained the contract to Yantis and that they understood it to mean if the notes were mortgaged or money obtained on them the deed was to be delivered. He said:

"I told him, 'Now, if you take this note and mortgage it or put up and get money on it, our contract is up;' and he says, 'Yes,' and the deed in the bank should be turned over. * * *

[3] It would seem useless to consider the question of mutual mistake in the contract when one party swore positively that he fully understood the contract and explained it to the other party. If Jesse Yantis was mistaken as to the contract, the evidence fails to show it, and, if he was mistaken, that would not suffice, for the reason that it takes at least two to make a mutual mistake. No one objected to the language of the contract at the time, and the rule is thus stated in Pomeroy, Equity Jurisprudence, § 843:

"If an agreement or written instrument or other transaction expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied or expressed, even though it should be incontestably proved that their in-

tention would have been different if they had been correctly informed as to the law. These rules are settled with perfect unanimity where one party has been mistaken in such a manner; they are also applied by very many cases where the same mistake is common to both parties."

An instrument will not be set aside or reformed on the ground of mistake of one of the parties unless superinduced by the fraud of the other. *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311. Fraud is not charged nor shown in this case. The evidence tends to show that there was no mistake upon the part of either of the parties, but that each fully understood the contract to mean that upon the notes being sold, mortgaged, or pledged the deed, placed in escrow, should be delivered to Mary K. Jones.

The judgment is affirmed.

CATTLEMEN'S TRUST CO. v. BLASIN-GAME. (No. 870).*

(Court of Civil Appeals of Texas. Amarillo. Dec. 15, 1915. On Motion for Rehearing, Feb. 23, 1916. Second Motion for Rehearing Denied March 22, 1916.)

1. ACTION \Leftrightarrow 69 — STAY — OTHER ACTION PENDING.

Where pending suit in O. county by B., the maker of two notes against C., the payee, to recover what B. had been compelled to pay the innocent holder of one of the notes, and to cancel the other, on the ground of fraud in the procurement of both, C. institutes action in T. county on the unpaid note, and obtains default judgment, and B. files a writ of error superseding the judgment, for the purpose of reviewing it, in F. Court of Civil Appeals, B.'s suit should, on plea of abatement, be postponed till determination of such writ of error; the court of T. county in proceeding to judgment without interposition there of plea in abatement becoming dominant in the litigation.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 744-751; Dec. Dig. \Leftrightarrow 69.]

2. JUDGMENT \Leftrightarrow 568—RES JUDICATA.

Judgment by default for the payee suing on a note, when made final, is a bar to suit by the maker to cancel the note for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1013; Dec. Dig. \Leftrightarrow 568.]

3. APPEAL AND ERROR \Leftrightarrow 930(2) — PRESUMPTION—FOLLOWING INSTRUCTIONS.

It will be presumed on appeal that the jury followed instructions as to what facts they must find before finding verdict against defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757; Dec. Dig. \Leftrightarrow 930(2).]

On Motion for Rehearing.

4. JUDGMENT \Leftrightarrow 585(2)—RES JUDICATA.

Judgment by default for the payee in an action on a note is not a bar to a suit by the maker to avoid another note on the ground of fraud in the contract under which both notes were given.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1078, 1083; Dec. Dig. \Leftrightarrow 585(2).]

5. COURTS \Leftrightarrow 121(6)—JURISDICTION—AMOUNT IN CONTROVERSY—PARTIAL ELIMINATION.

Where suit is brought by the maker of two notes, sufficient in amount to give the court ju-

riediction, to cancel them, it is not deprived thereof by elimination of one of the notes by the payee thereafter instituting an action thereon and obtaining a default judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 421; Dec. Dig. § 121(6).]

Error to District Court, Ochiltree County; Frank P. Greever, Judge.

Suit by J. M. Blasingame against the Cattlemen's Trust Company. Judgment for plaintiff, and defendant brings error. Reversed and rendered in part, and in part affirmed.

A. H. Kirby, of Ft. Worth, for plaintiff in error. Newton P. Willis, of Canadian, and J. W. Payne, of Ochiltree, for defendant in error.

HENDRICKS, J. On April 16, 1914, the defendant in error, J. M. Blasingame, instituted suit against the plaintiff in error, the Cattlemen's Trust Company of Ft. Worth, in the district court of Ochiltree county, Tex., alleging that two certain promissory notes, one for the sum of \$750, and the other for the sum of \$250, executed and delivered by him upon a certain subscription contract for stock in said trust company, were obtained by fraud of the agent of said company, on account of alleged misrepresentations inducing the execution and delivery of said notes. The \$250 note was made payable directly to the agent who solicited the subscription contract, and was transferred before the maturity of same to an innocent holder, on account of which Blasingame was compelled to pay the same on presentation. The \$750 note was made payable directly to the trust company, and remained in the latter's possession. The defendant in error sued for the recovery of the money representing the compulsory payment of the \$250 note, and interest, on account of the alleged fraud, and for the cancellation of the larger note upon the same ground.

On April 24, 1914, subsequent to the institution of Blasingame's suit in Ochiltree county upon the fraud as alleged, the Cattlemen's Trust Company sued Blasingame in the district court of Tarrant county on the \$750 promissory note (which, in terms, was payable at Ft. Worth, Tex.), and thereafter, upon proper service, obtained judgment in the district court of said county for the full amount, principal, interest, and attorney's fees in said note, except a credit of \$15 disclosed in said judgment. Blasingame failed to answer the trust company's petition upon said note in the suit in Tarrant county, but thereafter filed a writ of error bond superseding said judgment, for the purpose of reviewing the same by petition in error in the Court of Civil Appeals of the Second Supreme Judicial District at Ft. Worth. When this suit by Blasingame against the trust company, based upon the alleged fraud, was called for trial in the district court of Ochiltree county, the trust company, as

defendant, in due order of pleading, presented a plea in abatement, setting up the institution of its suit upon the \$750 note in Tarrant county, the judgment obtained thereon, exhibiting proper service, and the filing by Blasingame of the writ of error bond as a supersedeas of said judgment, also alleging the failure of Blasingame as to any defense in said suit, and further averring that the \$750 note was one of the two notes executed by plaintiff as a part of the same transaction for the stock in defendant company, praying for abatement of this case, or, if not abated, that the trial of the same be postponed until the disposition of the other cause pending on writ of error in the Court of Civil Appeals to the Second Supreme Judicial District.

[1] The first assignment of error in plaintiff in error's brief is predicated upon the refusal of the trial court to abate or postpone the trial of the cause, as prayed for. Defendant in error asserts broadly that the trial court did not err in refusing to abate or postpone the suit, "because a prior suit for the same cause would not abate another suit in Texas." He cites authorities where, on account of two causes of action pending for the enforcement of the same right, it is suggested that a litigant will be compelled to elect upon which cause he will continue the enforcement of his rights, and that it is a matter of costs, and it is not a pure matter of abatement as at common law. Upon the suggestions in the decisions referred to that it is not a pure matter of abatement as at common law, but is a matter of election and costs, some of the Courts of Civil Appeals, in several decisions, have extended the doctrine to the extent that a subsequent suit for the same cause of action will not abate a prior suit.

The Austin court, through Justice Rice, in the case of Thomas Goggan & Bros. v. Morrison, 163 S. W. 122, refused to follow the logic of such opinions, stating that:

"If two suits between different parties could be maintained in different courts at the same time, involving the same subject-matter, the anomalous condition would be presented of one court ordering the performance of a certain thing which the other might forbid."

And the Ft. Worth court, by Justice Speer, in the case of Sparks v. National Bank of Commerce, 168 S. W. 48, referring to the Goggan Case, also condemned the consequences of such a position, saying:

"Not only does this rule [announced in the Goggan Case] avoid the evil of a multiplicity of suits, * * * which the law abhors, but it likewise avoids the possibility of conflicting judgments, thus producing interminable confusion and controversy."

And the Galveston Court, through Justice McMeans, in the case of Miller & Vidor Lumber Company v. Williamson, 164 S. W. 442, reviews practically all the authorities cited in defendant in error's brief, presenting the following illustration bearing upon the in-

tolerable condition resultant from the logic of such holdings: In that case the plaintiff and defendant in the two suits were reversed, and Justice McMeans, says:

"Suppose both suits should be tried in the respective courts in which they are brought, and the jury upon conflicting evidence should return a verdict for the plaintiff in each court, and a judgment rendered in accordance therewith should be entered; that thereafter the defendant in each suit should appeal, and the appellate court should hold on each appeal that, as the verdict was rendered on conflicting evidence, and as the law was properly applied by the court in its charge, it was not authorized to disturb the judgment. Here we would have a judgment of two courts of co-ordinate jurisdiction, both affirmed, one of which would be for the plaintiff in each suit; or, in other words, both parties to the suit would have recovered a judgment for the same land. Which party then would have the better title? Their difficulties would be no nearer a solution than before the suits were begun."

Writ of error denied by the Supreme Court.

This record discloses that the defendant has procured a judgment upon a petition alleging the liability of Blasingame on account of the execution and delivery of a certain \$750 note, the same note which Blasingame is attempting to cancel, after having failed to answer in the Tarrant county suit, which, in the event of a final determination upon appeal of the judgment upon the note against Blasingame in the Tarrant county suit, and upon an affirmance of this cause canceling the \$750 note, as the Austin and the Galveston courts suggest, we would have the anomalous, and, we will add, the intolerable, condition of one court rendering a judgment in favor of an alleged right, and another court, in effect, rendering another judgment denying the same right; and, as Justice McMeans further interrogates, which of these judgments prevails? The defendant in error, however, says that the trial court did not err in refusing to abate or postpone the suit, "because the district court of Ochiltree county, having first acquired jurisdiction of the cause of action between the parties hereto, is entitled to maintain exclusive jurisdiction thereof, undisturbed by any other tribunal," citing numerous authorities, declaring the familiar principle. The authorities have no application to the condition of this record. Blasingame should have presented to the district court of Tarrant county a plea of pendency of another suit previously instituted, involving the same subject-matter, and on account of such failure the district court of Tarrant county not having been advised, of course, rendered a judgment upon the allegations of the petition. The Cattlemen's Trust Company did not perpetrate a fraud upon the jurisdiction of the court; it is more a question of lack of vigilance on the part of Blasingame.

In the case of *Cook v. Burnley*, 45 Tex. 97, where the holder of a judgment obtained in a suit instituted subsequent to the filing of a previous suit between the same parties,

pleaded the subsequent judgment, as *res adjudicata*, against the maintenance of the suit formerly instituted, the contention was made that the bringing of the subsequent suit and the judgment rendered therein was fraud upon the jurisdiction of the court wherein the previous suit was pending and was void. The Supreme Court said:

"This position is certainly not tenable. For though that might be a good plea if properly pleaded, and at the proper time, in abatement of the second suit, it is no defense to a judgment recovered in a suit brought since this one in a court of competent jurisdiction."

The principle of superior jurisdiction and dominance of the Ochiltree district court in regard to the litigation is destroyed by the lack of vigilance of Blasingame and the rendition of the judgment upon the \$750 note in the suit in Tarrant county. The latter court, in proceeding to judgment, becomes dominant in the litigation, at least upon the condition of this record until the determination of that suit in the appellate court upon the appeal. The litigation in Ochiltree county is subservient to that appeal. Of course, on account of the judgment having been superseded by the writ of error bond in the Tarrant county case, the question here is not one of *res adjudicata*, except argumentatively as one of future consequence, and of inconsistent judgments which might ensue, presenting anomalous and intolerable conditions where two cases involving the same subject-matter are finally determined.

[2] We take it that it would not be disputed what the judgment upon the note adjudicating the liability of Blasingame on same, obtained in the Tarrant county district court, when made final, is a complete adjudication to the extent that Blasingame could not cancel the same note in another jurisdiction, having failed to present a plea in the former suit.

"The judgment of foreclosure obtained by appellee against appellant on the notes given for the purchase money of the thresher would operate as a bar of his right to rescission, but of his remedy for a breach of warranty." *Standefer v. Aultman & Taylor Machinery Co.* 34 Tex. Civ. App. 160, 78 S. W. 552.

In the case of *Arnold v. Kyle*, 67 Tenn. (Bart.) 323, the higher court of chancery in Tennessee specifically held that a judgment at law upon a promissory note, though defense was interposed, was a complete bar to an original bill attempting the cancellation of the same note in a court of equity on account of fraud, especially where the complainant, attempting to cancel the note, knew the fraud before the rendition of the judgment in the other court.

The following authorities, while not wholly upon the point, upon very similar conditions, though, sustain the principle. *Whitcomb v. Cuthbert*, 70 App. Div. 220, 41 N. Y. Sup. 818; *Bingham v. Kearney*, 136 Cal. 175, 10 Pac. 597; *Shaw v. Milby* (Ky.) 63 S. W. 577; *Cannon v. Castleman*, 162 Ind. 6,

N. E. 455; *Le Gnen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121.

[3] The condition is presented upon this record as to the proper disposition of the case in this court. Some of the assignments in plaintiff in error's brief, upon a consideration of them alone, exhibit error. Plaintiff in error, however, submitted a requested instruction, which was given by the trial court, requiring the jury, in effect, to find every ground of fraud alleged in plaintiff's petition as true before they could find a verdict against defendant. The presumption is that the jury followed the charge of the court, and, that being so, there is one ground, at least, in plaintiff's petition, with evidence sufficient to sustain it, which the jury under this charge evidently found to be true, and which is not affected by plaintiff in error's assignments. In an ordinary case this condition would suggest the procedure by this court of an affirmance of a part of the case, and a definite disposition of another part, if the trial court had jurisdiction when it acted upon the whole case. It is suggested by plaintiff in error that we would be unable to affirm that part of the judgment of the trial court permitting the recovery by defendant in error of the sum of \$250, and interest paid by him, on account of the question of jurisdiction. We do not decide that question. Aside, however, from this question of jurisdiction, upon mature consideration of this whole case, we are convinced that the district court should not have permitted the litigation over the \$750 note merged in the judgment of the Tarrant county district court, and, if we attempted to affirm that part of the judgment based upon the payment of the \$250 note, and should order the district court to suspend the hearing of that part of the case involving the \$750 note, we would be ordering something which the district court originally could not have ordered. Such a judgment would not have been a final judgment. It might be said that, if the whole case in Ochiltree county is a more enlarged cause of action than that adjudicated in Tarrant, the pendency of another suit in which judgment has been rendered should not avail the plaintiff in error. We still, however, have the problem, left of the court's sitting and rendering two judgments, exemplified in this case (if the motion presenting the final determination of the Tarrant county judgment could be regarded), wherein one court cancels the very note upon which judgment has been rendered by the other and the first judgment finally determined and affirmed by the appellate court.

Plaintiff in error insists that, the merger into judgment of the \$750 note being a part of an entire transaction, also producing the \$250 note, said judgment, if finally determined, would not only be a bar to any litigation in Ochiltree county upon the \$750 note, but

further would be a bar to any proceeding involving the \$250 note arising out of the same contract of subscription and the same transaction. We do not care to go that length without going into an extended discussion upon the point. If, however, the district court should not have litigated and adjudicated a part of plaintiff's cause of action set up in his petition, it would follow that it would have been its duty to have postponed the whole case on account of the condition produced by the lack of vigilance of Blasingame in not answering the suit in Tarrant county. It might be suggested that this court should reform that part of the judgment based upon the \$250 note, and change the same into an interlocutory judgment for that amount. If the question of jurisdiction could be overcome in order to reach such a procedure, and upon the suggestion that this court could and should do what the district court should have done, we can find no precedent for such a course. It would be a precedent permitting a district court to carve out of a petition and litigate a part of same for the purpose of entering an interlocutory judgment, and then postpone the balance of the cause, retry the same at some other time upon the same issues upon the remainder of the cause of action, and then render a final judgment upon the whole case, whatever the disposition by the Court of Civil Appeals at Ft. Worth. Courts do not sit to try a case in "piecemeal."

Plaintiff in error presents a motion in this court exhibiting the final determination for the appeal from the Tarrant county district court's judgment, praying for a dismissal of the whole suit in Ochiltree county, on the theory that the subject of controversy between these parties has ceased to exist; that, the main part of this suit having been eliminated, it is shown to this court that the Ochiltree county district court has nothing to litigate, for the reason that the remainder of the demand is not within the jurisdiction of that court. A proposition of this character brings in its train an extended investigation upon our part into a question not briefed here, whether, upon any supposable theory, by amendment, setting up facts as allegations of excuse for not answering the suit in Tarrant county, the plea of *res adjudicata* could be avoided, and whether such a proceeding should be remitted to the court in which the judgment was rendered. We overrule the motion. This same motion does show, however, if we could regard it, that since this case has been brought here this plaintiff in error has attempted to execute his judgment; another suit has been filed by Blasingame; the Court of Appeals at Ft. Worth has issued a writ of prohibition against the district judge of the Thirty-First judicial district from interfering with the judgment in those forums; and we have the almost "interminable confusion and contro-

versary" spoken of by Justice Speer, which concretely exemplifies the rule contended for by appellee in producing results.

With the lights before us we think the proper disposition of this case is to reverse and remand upon the whole case. It may be that the final working out of the rights of the parties will operate as a hardship. If so, the condition, as presented upon this record, is one created by defendant in error. We are convinced that the rule declared, upon the condition of record here, is the safe rule, grounded upon a sound public policy. The whole case, upon plaintiff in error's plea in abatement, should have been postponed until the determination of the case in the Court of Civil Appeals at Ft. Worth upon the Tarrant county judgment.

A discussion of plaintiff in error's other assignments is probably unnecessary.

The cause is reversed and remanded.

On Motion for Rehearing.

[4] The turn of this case upon rehearing requires a decision of the questions of res adjudicata, and of jurisdiction, each rather complicated, as applied to the condition of the record.

The defendant in error, in his motion for rehearing, admits that the holding on the original hearing as to the Tarrant county judgment on the \$750 note ends the matter against him as to that phase of the litigation. He asks that the former order, reversing and remanding the case as a whole, be set aside, and for an affirmance of that part of the judgment for the \$250 recovered by him, and that this court reverse and render against him the judgment of the trial court cancelling the \$750 note. The \$750 note upon which judgment was rendered in the district court of Tarrant county against Blasingame was a part of the same transaction with the execution and delivery of the subscription contract and the \$250 note which Blasingame was required to pay, the amount of which payment he was permitted to recover in the district court of Ochiltree county against the Trust Company. The issue of fraud which permitted a recovery of the \$250 against the trust company in the suit in Ochiltree county would have defeated the \$750 note, if it had been interposed and successfully maintained against the latter note in the suit in Tarrant county. We do not think that the question of fraud as a litigated issue properly belonged to nor was within the scope of the litigation in the Tarrant county suit, the petition containing the usual allegations for recovery upon a promissory note, the judgment being one by default.

Plaintiff in error cites the case of *Town of Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205, as "peculiarly apt under the facts of this case." Analyzing the material facts in the majority and dissenting opinions in the case of *Cromwell v. Sac County*, 94 U. S. 851, 24

L. Ed. p. 197, as basis for the majority opinion, it would seem, on principle, in attempting to apply each case to this record, that the *Morgan Case* is robbed of its legal significance as an authority, both cases decided by the Supreme Court of the United States.

The *Beloit-Morgan Case* involved a judgment by default upon certain bonds. The same defendant, the city of Beloit, attempted to enjoin Morgan in a subsequent suit from proceeding in certain suits upon other and different bonds, but of the same series and held by the same title and owner as in the previous suit. The court said:

"All the objections taken in this case might have been taken in that. * * * Under such circumstances a judgment is conclusive, not only as to the res of that case, but as to all further litigation between the same parties touching the same subject-matter, though the res itself may be different. * * * A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."

The court also held the bonds were required to be paid under a subsequent statutory enactment.

In the case of *Cromwell v. Sac County* a party was the owner of four bonds of the county, to which were attached numerous coupons. The first suit was upon some of the coupons, and the question was one of innocent purchaser. The county answered that the bonds originated in fraud, and it seems that the plaintiff failed to prove that he paid value. The second suit was on the four bonds owned by the plaintiff and four coupons for interest attached thereto. In that cause plaintiff proved that he was an innocent purchaser, and the headnotes written by Justice Field as reflecting the opinion in part state:

"* * * Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Justice Field does not comment on the case of *Town of Beloit v. Morgan*, though Justice Clifford, the dissenting judge, quotes therefrom, unless the following in the majority decision would be considered a difference of opinion affecting the *Beloit Case*:

"A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit. It does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding."

Justice Cooley of the Supreme Court of Michigan, in the case of *Jacobson v. Miller*, 41 Mich. 90, 1 N. W. 1018, applying the *Cromwell Case*, went a considerable distance along that line. That cause involved a previous judgment for rent upon a lease contract, the defendants pleading the general issue, with-

out denying under oath the execution of the lease required under the statute of that state in order to put its execution in issue. In a subsequent suit upon the same lease Justice Cooley held the actual execution of the instrument could be litigated, saying:

"The execution of the lease was not denied in the former suit. No issue was made upon it, and the defendant, by not denying it, suffered a default in respect to it which left it wholly outside the issue made and actually passed upon. Consequently it was not and could not have been considered by the court as a point which in that suit was open to controversy. * * * It is said, however, that the defendants in the first suit were at liberty to put the execution of the lease in issue, and that it was their duty to do so then if they proposed to contest it at all. This is upon the ground that public policy will not suffer the withholding of a defense with a view to further litigation, when a single suit might determine the whole controversy. This is, no doubt, true where the defense is sought to be made use of in the retrial of a dispute respecting the same subject-matter of the former litigation. * * * The question now is whether the proposition is applicable to a case where the subject-matter of a second suit is different." 41 Mich. 90, 1 N. W. 1016, 1017.

The Supreme Court of Alabama held, in the case of Crowder v. Red Mountain Co., 127 Ala. 254, 29 South. 847, where a judgment was rendered by default for accrued interest upon a promissory note (the note stipulating annual installments of interest) it was not res adjudicata in a subsequent action, brought by the same plaintiff against the same defendant, to recover the principal sum due upon the note; the defendant pleading in the second suit a want of consideration for the note sued upon. To the same effect as to a judgment by default is the case of Unfried v. Hebrer, 63 Ind. 72. Also see Williams v. Williams, 63 Wis. 58, 23 N. W. 111, 53 Am. Rep. 253; Shirland v. First National Bank, 65 Iowa, 96, 21 N. W. 201.

The case of Adams v. Adams, 25 Minn. 72, is directly on the point. It involved a judgment by default upon one of several negotiable promissory notes founded upon the same illegal consideration, and it was held that, no issue upon the facts of consideration having been tendered by the petition, the defendant was not estopped from setting up in a second action upon another of said notes the defense of illegality of consideration. The Supreme Court of Minnesota said:

"The operative effect" of the default judgment as estoppel "in another action between the same parties upon another of said notes not directly involved, * * * though resting upon the same * * * consideration, is limited to the precise points which were then actually controverted, and to the matters which were embraced in the issue there tendered, upon the determination of which such judgment was rendered."

The case of Worth v. Carmichael, 114 Ga. 699, 40 S. E. 797, is directly in point. Where two notes were given upon a consideration arising upon the same transaction, a judgment by default rendered in favor of the payee against the maker upon one of such notes was not a bar in a subsequent action

to the defense of fraudulent representation. The court said:

"The rule is well settled that a judgment rendered in litigation between the same parties does not operate as an estoppel in a subsequent suit between them on a different cause of action, except as to such issues as were actually tried and determined in the former litigation; and the fact that the cause of action in the two suits arose out of one and the same transaction does not alter the rule."

The case of Andover Savings Bank v. Adams et al., 1 Allen (Mass.) 28, involved a previous judgment for the plaintiff in an action in installments of interest due on a certain note. Plaintiff also subsequently sued for the principal of the note, which had really matured when the former action was begun. Chief Justice Bigelow of the Supreme Court of Massachusetts said:

"The promises to pay the debt at one time and the interest at another are several, and afford distinct causes of action."

It is understood that we are not approving the principle as applied to the basis of facts in all the cases above cited, but the same are used argumentatively.

Justice Hurt said, in the case of H. & T. O. Ry. Co. v. Perkins, Adm'r, 2 Willson, Civ. Cas. Ct. App. § 520:

"* * * A judgment on one does not bar a new action on the other, unless by establishing some matter fatal to both."

The case of Moore v. Snowball, 98 Tex. 16, 81 S. W. 5, 66 L. R. A. 745, 107 Am. St. Rep. 596, the majority opinion of the Supreme Court holds that a suit to cancel a tax judgment of foreclosure upon land, on the ground that it is void, and the sale thereunder likewise void, is not res adjudicata in another suit between the same parties wherein the subsequent suit admits the validity of the judgment, but attacks the sale under the execution on account of irregularities and inadequate consideration.

If Blasingame had interposed the defense of fraud against the \$750 note (it being a companion to the \$250 note), and had not succeeded in the defense, the judgment upon the \$750 note would present a different question. Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256, squarely on the point. The logic of plaintiff in error is that the judgment upon the \$750 note merges the subscription contract in the judgment; hence the \$250 note, a part of the same transaction, in so far as the particular defense is concerned is also merged. The fact remains, however, that in reality there was no such issue tendered, litigated, or decreed upon in the Tarrant county suit. It was outside the issue.

[5] It is asserted that, if the district court of Ochiltree county had sustained the plea in abatement, the court would not have had jurisdiction for the recovery of the \$250. Plaintiff alleged that defendant's agent made false representations as to past dividends by the company. The evidence was sufficient to put it to the jury. The special charge submitted by defendant and given

by the court required the jury to believe all the allegations of fraud before a verdict could be rendered. Defendant's petition on the \$750 note was filed subsequent to Blasingame's petition in Ochiltree county.

"All of the cases seem to concur in the proposition that the 'plaintiff's demand, as set out in his petition, and not the amount of the verdict, is, in general, the criterion by which to determine the question of jurisdiction.' * * * They likewise concur in the conclusion that the case should be dismissed for the want of jurisdiction 'when it appears that the plaintiff, in stating his demand, has improperly sought to give jurisdiction where it did not rightfully belong.'" Hoffman v. Building & Loan Ass'n, 85 Tex. p. 410, 22 S. W. 154.

Also:

"It is now the settled law in this court [Supreme Court] that, although the amount claimed in the petition may be sufficient to give the court jurisdiction of the case, yet, if the facts alleged * * * show no cause of action as to such part of the whole sum sued for as to reduce it below the amount [on demurrer] for which the court has jurisdiction, the suit should be dismissed." Carswell v. Habberzettie, 90 Tex. 1, 88 S. W. 738, 22 An. St. Rep. 597; Telegraph Co. v. Arnold, 97 Tex. 365, 77 S. W. 249, 79 S. W. 8.

The case of Railway Company v. Grayson County Nat. Bank, 100 Tex. p. 17, 93 S. W. p. 431, by the Supreme Court, is analogous. The bank asserted liens on three cars of wheat shipped over defendant's road, and claimed by plaintiff to have been unlawfully delivered to other parties. The original petition in the district court alleged the damages for wrongful delivery of the three cars at \$1,641.45. Pending the litigation the railway company settled with the bank for two of the cars of wheat, which reduced the claim to \$377.79 on the remaining car. The case was tried on an amended petition setting up this amount, and a motion to dismiss the case was made in the Supreme Court, on the ground that the district court had no jurisdiction over the amount in controversy in the amended petition. The Supreme Court said:

"The suit as made by the original petition being for more than \$1,000, the district court alone has jurisdiction to try it. Where a plaintiff sues for an amount sufficient to give that court jurisdiction, the court may proceed to judgment, although the amount he is entitled to recover be found to be less than \$500. In the absence of a plea to the jurisdiction averring that the sum claimed is fraudulently alleged for the purpose of giving jurisdiction to the court, the amount claimed as shown by the petition is 'the amount in controversy,' and fixes the jurisdiction. Where the court acquires jurisdiction by the original petition, it retains it to the end of the suit."

It is difficult at times to determine in which category, upon a question of jurisdiction, a case belongs, and which principle will control. Here the plaintiff, Blasingame, in the Ochiltree district court, filed a petition involving a subject-matter clearly within that court's jurisdiction. Thereafter the defendant in that suit, and, as shown by this record, after citation upon it, filed the suit

on the \$750 note in Tarrant county, recovering the judgment stated. We can see no difference in principle between the elimination of a part of a demand by settlement and an elimination of a part by subsequent judgment in a subsequent suit between the same parties, where rendered by default. There is no fraud in either case, and upon the influence of the case last cited, 100 Tex. 17, 93 S. W. 431, we think the district court of Ochiltree county could have litigated the allegations in plaintiff's petition for the \$250.

The testimony complained of in appellant's brief, though it may have been erroneously admitted, did not affect the issue of false representation with reference to past dividends.

The motion for rehearing of defendant in error is granted. The judgment reversing and remanding this cause as a whole is set aside. That part of the judgment of the district court of Ochiltree county overruling plaintiff in error's plea in abatement in regard to the \$750 note is reversed and rendered. The judgment for the defendant in error, Blasingame, for the recovery of the \$250 is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. WASHBURN. (No. 5514.)*

(Court of Civil Appeals of Texas. Austin.
Feb. 2, 1916. Rehearing Denied
March 8, 1916.)

1. APPEAL AND ERROR ⇐739—ASSIGNMENT OF ERROR—GROUPING REFUSAL TO GIVE SEVERAL PEREMPTORY CHARGES.

An assignment of error is not objectionable in that it groups four separate requests for peremptory charges which the court refused, the four requests having been made upon different reasons, since, it not being incumbent on the court to assign any reasons in giving a peremptory charge, such four charges were in legal effect but a single request.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3034-3036; Dec. Dig. ⇐739.]

2. APPEAL AND ERROR ⇐719(8)—ASSIGNMENT OF ERRORS—FINDINGS—JUDGMENT.

Where, in a personal injury case by an employee against a railroad, there were findings of fact by the jury establishing plaintiff's injury through the negligence of defendant and without contributory negligence, and there was no assignment of error that the findings were not supported by the evidence which strongly tended to so support, the findings will be adopted on appeal as the facts in the case, requiring affirmation of judgment for plaintiff in the absence of any error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2976, 2977, 3490; Dec. Dig. ⇐719(8).]

3. TRIAL ⇐139(1)—PERSONAL INJURY—EVIDENCE—PEREMPTORY CHARGE—REFUSAL.

Where in such case there was evidence sufficient to raise the issue of defendant's negligence, it was not error to refuse peremptory charges requested by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-334, 338-341; Dec. Dig. ⇐139(1).]

4. NEGLIGENCE \S 101—COMPARATIVE NEGLIGENCE—INJURIES TO SERVANT.

In an action by the servant against his master for injuries received through the master's negligence, contributory negligence is not a complete defense to the action under the statutes, but only reduces the damages in proportion to such contributory negligence. Vernon's Sayles' Stat. art. 6649.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 85, 163, 164, 167; Dec. Dig. \S 101.]

5. APPEAL AND ERROR \S 664(4)—EVIDENCE—EXCLUDING CUSTOM—STATEMENT OF FACT CONFLICTING WITH BILL OF EXCEPTIONS.

Where error was assigned on the refusal of the court to allow a witness to testify whether defendant railroad had a custom of allowing its men to work between and under cars, and the bill of exceptions showed that the witness would have testified that there was no such custom, but the statement of facts showed that the witness did so answer, the statement of facts will control.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2859; Dec. Dig. \S 664(4).]

6. TRIAL \S 85—RECEPTION OF EVIDENCE—PARTLY INCOMPETENT EVIDENCE—GENERAL OBJECTION.

The admission of evidence partly admissible and partly inadmissible, over an objection to such evidence as a whole is not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 222-225; Dec. Dig. \S 85.]

7. TRIAL \S 85—EVIDENCE PARTLY INCOMPETENT—EXCLUSION.

Where, in an employee's personal injury case against a railroad, the defendant offered in evidence a written statement made by an employee shortly after the injury occurred, a small part of which was admissible while part was clearly inadmissible, it was not error to exclude such evidence on objection thereto, since it is not the duty of the court or the opposing side to separate the competent from the incompetent evidence upon an objection to the offer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 222-225; Dec. Dig. \S 85.]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by W. D. Washburn against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. C. Huff, of Dallas, Spell & Sanford, of Waco, and Walter Collins, of Hillsboro, for appellant. Roy & Young, of Ft. Worth, Shurtleff & Cummings, of Hillsboro, and Ramsey, Black & Ramsey, of Austin, for appellee.

JENKINS, J. Appellee was a member of a labor crew of appellant, known as the "signal gang." While crossing from one side of the track to the other, there was a slight movement of the train and his knee was caught between the drawheads, by reason of which he suffered the injury complained of. The case was tried before a jury on special issues, and judgment was rendered for appellee.

[1] Appellee objects to our considering appellant's first assignment of error, for the reason that the same complains of the re-

fusal of the court to give four different special charges. We overruled this objection for the reason that each of these special charges is a peremptory charge to find for the defendant, each giving a separate reason for such charge, and therefore they are properly embraced in one proposition. Had the court seen proper to peremptorily instruct the jury to return a verdict for appellant, while it would have been proper for the court to state his reasons therefor, it was not incumbent upon the court to do so, and therefore these four special requested charges, in legal effect, amount to but one requested charge, and that is to instruct the jury to return a verdict for the defendant.

[2] The issues submitted to the jury and their findings thereon are as follows:

"(1) Was it the custom of the employees of the defendant, such as plaintiff was, after being ordered by the foreman to go to work, to go between the cars in the manner that plaintiff went between the same at the time he was injured? A. Yes.

"(2) Was it the custom of the defendant to have its engine disconnected from its cars before ordering its employees, such as plaintiff was, to do work about said cars? A. Yes.

"(3) Was the defendant's engine disconnected from the string of cars in which the flat car in question was situated at the time plaintiff was ordered to go to work? A. No.

"(4) If you have found that the engine was not disconnected at the time the plaintiff was ordered to go to work, then was the act of the foreman in ordering the plaintiff to work under said conditions negligence? A. Yes.

"(5) If you have found that such act was negligence, then was such negligence the proximate cause of the plaintiff's injury? A. Yes.

"(6) At the time the plaintiff was injured, if he was, did the defendant's agents and servants cause an engine to be moved against said car and injure plaintiff's knee, as alleged? A. Yes.

"(7) If you have found that the defendant's agents and servants caused an engine to move said cars, then was such act, if any, upon their part, negligence? A. Yes.

"(8) If the defendant's agents and servants did cause an engine to move said cars, and if the same was negligence, was such negligence a proximate cause of plaintiff's injury? A. Yes.

"(9) Was the plaintiff guilty of negligence in going between said cars at the time and under the circumstances that he did? A. No.

"(10) If the plaintiff was guilty of negligence in going between said cars, was such negligence a proximate cause of the injury? A. No."

The court also submitted to the jury the amount of damages suffered by appellee, and judgment of the court was entered in accordance with their finding thereon.

There is no assignment that the findings of the jury, nor any of them, are not supported by the evidence. There is evidence which, to say the least of it, strongly tends to support the finding of the jury on each of said issues, and hence we adopt said findings as the facts of this case; for which reason the judgment of the trial court should be affirmed, unless the court committed some error of law in the trial thereof.

[3, 4] The evidence being sufficient to raise

the issue of negligence, as alleged by appellee, the court did not err in refusing peremptory charges, as requested by appellant, for which reason we overrule the first assignment of error. Said assignment, in so far as it relates to requested charges Nos. 1 and 4, is overruled because they instructed the jury to return a verdict for the defendant if the plaintiff was guilty of contributory negligence. Contributory negligence is not, under the statutes of this state, an absolute defense, in cases of this character, but only reduces the damages in proportion to such negligence. Article 6649, Vernon's Sayles' Stats.; Freeman v. Kennerly, 151 S. W. 580; Railway Co. v. Keeran, 149 S. W. 355.

[8] The second assignment of error relates to the ruling of the court in not permitting the witness Will Calmbach to answer the following question:

"Do you know whether there is or is not such a custom of the railroad company as for men to perform their work by going between the cars and under the cars? Is there such a custom by the railroad company?"

The bill of exception shows that if the witness had been permitted to answer he would have testified that there was no such custom of the railroad company in existence at any time. The statement of facts shows that the witness did answer this exact question in the manner indicated by the bill of exceptions. There being a conflict between the statement of facts and bill of exceptions, the statement of facts will control. Railway Co. v. O'Malley, 18 Tex. Civ. App. 200, 45 S. W. 226; Ramsey v. Hurley, 72 Tex. 200, 12 S. W. 56; Railway Co. v. Moore, 28 Tex. Civ. App. 603, 68 S. W. 562; Railway Co. v. Oliver, 150 S. W. 856.

[8, 7] The third assignment of error is as follows:

"The court erred in sustaining and not overruling plaintiff's objection to the offer on the part of defendant to introduce as evidence for the jury's consideration a statement made by said witness Massingill, and about which the said witness Massingill had testified in response to questions propounded him on cross-examination by plaintiff, as is more fully shown by bill of exception No. 20."

It is true that where evidence is admitted over an objection to the same as a whole, a part of such evidence being admissible and a part not, no reversible error is committed. Houston Chronicle v. McDavid, 157 S. W. 223; Compress Co. v. Railway Co., 18 Tex. Civ. App. 622, 45 S. W. 988; Railway Co. v. Gormley, 91 Tex. 393, 48 S. W. 880, 66 Am. St. Rep. 894; Wells v. Hobbs, 57 Tex. Civ. App. 375, 122 S. W. 453; Railway Co. v. Cuneo, 47 Tex. Civ. App. 622, 108 S. W. 718; Railway Co. v. Frazier, 87 S. W. 400; Wandeloer v. Bank, 106 S. W. 416; Tuttle v. Moody, 100 Tex.

241, 97 S. W. 1087; Furniture Co. v. Henry, 67 S. W. 341; Railway Co. v. Hall, 81 Tex. Civ. App. 464, 72 S. W. 1053; Dolan v. Meehan, 80 S. W. 101; Moore v. Bank, 38 U. S. (13 Pet.) 802, 10 L. Ed. 176. But it is equally well settled that where evidence is offered as a whole, only a part of which is admissible, the court does not commit error in sustaining an objection to such testimony. In such case it is not the duty of the court nor of the party objecting to the same to separate the admissible from the inadmissible. Cole v. Horton, 61 S. W. 504; Hill v. Taylor, 77 Tex. 300, 14 S. W. 386; Colorado County v. Travis County, 178 S. W. 845; Robinson v. Stuart, 73 Tex. 270, 11 S. W. 275; O'Brien v. Hillburn, 22 Tex. 624; Berger v. Kirby, 135 S. W. 1122; Insurance Co. v. Good, 25 Colo. App. 204, 136 Pac. 825; Allen v. Insurance Co., 163 Iowa, 217, 143 N. W. 579, 48 L. R. A. (N. S.) 600; Ickes v. Ickes, 237 Pa. 582, 85 Atl. 889, 44 L. R. A. (N. S.) 1118; Jose v. Hunter (Ind. App.) 108 N. E. 398; Mining Co. v. Melzner, 48 Mont. 174, 136 Pac. 45; Railway Co. v. Dilburn, 178 Ala. 600, 59 South. 440; Hart v. Brierley, 189 Mass. 598, 76 N. E. 289; Gardner v. Barden, 34 N. Y. 438; Abbotts Civ. Jury Trials, pp. 300, 301; Elliott on App. Pro. § 745; Thompson on Trials, § 678. We quote from Elliott, supra, as follows:

"The court is under no duty to dissect an offer of evidence, and separate the competent from the incompetent. If a party offers evidence composed of proper and improper elements, the entire offer may be rightfully rejected. The only offer upon which error can be successfully alleged is one wherein no incompetent evidence is contained."

As will appear from an examination of the above authorities, this text is sustained by the decisions in this and other states.

The evidence objected to was a written statement made to appellant by an employé shortly after the injury occurred. It was objected to on the ground that it was hearsay and immaterial. The court sustained the objection. A small part of this statement was admissible in explanation of the testimony of the witness on cross-examination; the most of it was clearly inadmissible for any purpose. The appellant made no statement of the purpose for which the statement was offered, and did not offer that part of the same which would have been admissible, disconnected from the other part.

The remaining assignments of error, relating to the remarks of counsel for appellee and the amount of the verdict, are without merit.

For the reasons stated, our previous opinion herein is withdrawn, the motion for rehearing is granted, and the judgment of the trial court is affirmed.

Affirmed.

WORDEN v. KROEGER. (No. 508).*

(Court of Civil Appeals of Texas, El Paso.
Jan. 27, 1916. On Rehearing,
March 23, 1916.)

1. TRIAL \S 348—INSTRUCTIONS—SUBMISSION OF SPECIAL ISSUES.

Where the case is submitted upon special issues, it is improper to submit a special charge calling for a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 822, 823, 827; Dec. Dig. \S 348.]

2. MASTER AND SERVANT \S 217(1), 235(7)—DUTY OF SERVANT—INSPECTION.

A servant assumes no duty of inspection of the tools he uses, assuming only the risk of a danger of which he has actual knowledge and of hazards of which he might learn by exercise of that ordinary circumspection which a prudent man uses since he may rely upon the assumption that the master will do his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 574, 714; Dec. Dig. \S 217(1), 235(7).]

3. MASTER AND SERVANT \S 217(25)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A carpenter who used a sawing machine without a cut-off guide, knowing its purpose, and that it was dangerous to operate without one, as he testified, "taking a chance," assumed the risk of injury when so performing the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 593, 594; Dec. Dig. \S 217(25).]

4. APPEAL AND ERROR \S 1170(9) — DISPOSITION—IMMATERIAL ERROR.

Under rule 62a of the Court of Civil Appeals (149 S. W. x), providing that judgment shall not be reversed for error which did not result in the rendition of an improper judgment, in a servant's action for injuries, where it was apparent from his own testimony that he assumed the risk, error in submitting a special charge calling for a general verdict, where the case was submitted upon special issues, was not cause for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4066, 4543; Dec. Dig. \S 1170(9).]

On Rehearing.**5. MASTER AND SERVANT \S 276(4)—INJURY TO SERVANT—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.**

In a carpenter's action for injuries while operating a mechanical saw, evidence held insufficient to prove that the rough table top caused or contributed to cause the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 951, 959; Dec. Dig. \S 276(4).]

Appeal from District Court, El Paso County; P. R. Price, Judge.

Suit by Frank Lull Worden against Otto P. Kroeger. From a judgment for defendant, plaintiff appeals. Affirmed.

Jones, Jones & Hardie, of El Paso, for appellant. A. R. Grambling and John L. Dyer, both of El Paso, for appellee.

HARPER, C. J. Appellant brought this suit against appellee for \$20,000 damages for the loss of a portion of his thumb and fingers, in substance based upon the following allegations: That appellee was a contractor, and was engaged in the construction of a build-

ing in El Paso; that appellant was employed as a helper about said work; that in the work a machine was owned and operated by appellee in sawing lumber; that to operate said machine was not within the scope of appellant's employment; that one Wilson, being the vice principal and foreman, ordered appellant to operate said machine; that he objected to doing so, for the reason that it was not his work, and that he did not understand the machine and the manner of its operation, but said foreman insisted and compelled him to do so; that the said machine was unsafe, unfit, and defective for the purposes for which it was being used; that appellant was an inexperienced man, unacquainted with the dangers incident to the operation of the machine all of which appellee and his foreman knew, and failed to instruct the appellant as to the proper mode of operating the machine or to caution him as to the dangers; that while attempting to operate the said machine by reason of the defects therein his hand was thrown against the saw and four of his fingers cut off.

Appellee answered that appellant was in his employ as a carpenter to do whatever was necessary in connection with the construction of the building, and not as helper to perform ordinary labor; denied that Wilson was vice principal; denied that appellant was commanded to operate the machine, but was only directed to work it in the usual and customary way; further alleged that appellant was an able carpenter and understood said machine, its defects and dangers, if any existed, or could have known thereof by the exercise of ordinary care; that the injuries to plaintiff and the cause thereof were such as arose in the course of the use and adjustment of the machine and incident thereto, and he therefore assumed the risks; that the injuries were caused by appellant's own negligence by reason of the manner in which he elected to perform the work, and it was the proximate cause thereof.

The cause was submitted to a jury upon special issues. Verdict and judgment for defendant, appellee, from which this appeal is taken.

The appellant's seven assignments and propositions thereunder charge error in certain special charges upon negligence and assumed risk; the points being that, the trial court having submitted the cause by special issues fully and correctly, it was error to submit a special charge at the request of defendant upon the same questions, because giving of the additional charges overemphasized defendant's theory of the case, and, further, because where a case is submitted upon special issues, it is inappropriate to give a special charge calling for a general verdict. The defenses pleaded were contributory negligence upon the part of the plaintiff and that under the facts he assumed the risk.

In the explanatory portion of the charge is a definition of what constitutes negligence upon the part of plaintiff, and the following issues were submitted:

"No 13. Do you find from the evidence that the plaintiff was guilty of contributory negligence in operating the machine at the time of his injury without a cut-off guide?

"If you have answered question No. 13 in the affirmative, then, but not otherwise, the court submits to you this additional question:

"No. 14. Do you find that such contributory negligence, if any, upon the part of plaintiff, was the proximate cause or one of the proximate causes of his injury?"

In addition to the above questions, at the request of defendant, the court gave the following special charge:

"You are charged that, if you believe from the evidence in this case that the plaintiff had the capacity and opportunity to know and appreciate the dangers in reference to using the machine without a cut-off guide, and if you believe by the exercise of that ordinary circumspection that an ordinarily prudent person would have used in the same circumstances he would have known of the dangers in reference to using the machine without a cut-off guide, and he remained in the service of the defendant and used the machine without a cut-off guide, and was injured by reason thereof, and that the same was dangerous, as a matter of law, he assumed the risk, and would not be entitled to recover, and, so believing, you must return verdict in favor of the defendant on the issues submitted to you by the court in reference thereto."

And similar special charges were given for the defendant upon the issue of assumed risk, and the record shows other similar charges to the ones copied above upon the defensive issue of contributory negligence.

[1] It is improper to submit a special charge calling for a general verdict where the case is submitted upon special issues. *H. & T. C. Ry. Co. v. Kincheloe*, 58 Tex. Civ. App. 123, 119 S. W. 905; *Moore v. Pierson*, 100 Tex. 114, 94 S. W. 1132, Id., 93 S. W. 1007. And the writer is of the opinion that the additional special charges with those in the original charge makes the charge subject to the criticism that it gave undue prominence to the issues mentioned, and, if there was any material conflict in the evidence adduced upon the issues of assumed risk and contributory negligence, it would constitute reversible error. The other members of the court express no opinion in this respect, for the reason that we all agree that under the facts in this case the cause must be affirmed, because he admits that he knew of the defects in the table and the machine he was operating, and realized the dangers attendant upon its operation in the condition it was; therefore assumed the risk.

Appellee was contractor for and had under construction a building in El Paso. In this work there was in use a circular saw which was placed upon a table and there run by a machine. The machine was provided with a cut-off guide; that is, an appliance which, when attached to the machine, guides the lumber being sawed so that the saw may pass accurately and safely through

it. The evidence shows that the lumber that is being sawed may be guided with the hands without a cut-off guide, but all the witnesses testify that it is not a safe way to do the work.

The negligence charged in this case is that appellant was an inexperienced man in the operation of a saw; that the top of the table upon which the saw was placed and along which the lumber being sawed moved was rough and uneven; that the machine which operated the saw was not equipped at the time of the accident with a cut-off guide; that because of the condition of the table top and the absence of the cut-off guide it was dangerous to operate the machine; that appellant did not know of nor realize the danger in operating the machine with the table top in the condition it then was without a cut-off guide, and with his hands.

Appellant testified:

"I am 51 years old. The table top when I went there to my actual knowledge had been in use five or six months. It was worn, and I remember seeing both Mr. Cain and Mr. Marti take slivers off the top of it. I should judge I worked for Mr. Kroeger from the latter part of July until the third week in December. I worked down there where they were building the Little Caples Building possibly three weeks. They had a machine down there something similar to this. There was no change made in the machine after Mr. Marti quit. There was no change made in the machine when Mr. Cain quit. I don't know the last name of the man who used the saw when they were building the Little Caples Building. I worked with him as a helper. He used the guide. I saw him use the guide. I knew he used the guide. I saw him use it all the time. I saw Mr. Cain use the guide. I saw Mr. Marti use the guide when he was working on it. I saw every other man who worked on it use the guide. No; I was not the only one who used the saw after Marti quit. If a carpenter would come along and want a piece of material he would cut it out himself, if they wanted a number of pieces they would generally call me. I used that saw off and on three weeks before I was hurt. I was doing the principal sawing. If carpenters around the building wanted things they would go to Mr. Wilson and tell him what they wanted, and Mr. Wilson would send the man to me, tell me what was wanted, and I would cut it out for them: I sawed it off. I used that saw for three or four weeks before I was hurt. I had seen other men use the guide. I used a guide in ripping. The principal part of my work has been ripping work. For three weeks before I was hurt I had been sawing both blocks and ripping. I had seen the men at the Little Caples Building cutting blocks. I did the principal sawing. I sawed blocks and ripped. I did that for three weeks before I was hurt. I was working on and off at the machine for three or four weeks before I was hurt. I had seen the other man use the guide. There was no guide there, and furthermore than that I had only 20, 30, or 40 blocks to cut. I had seen these other men take chances on cutting their blocks. I thought I would take a chance. When I had a few blocks to saw I took the chance, and when I took the chance I got hurt. I knew the guide was the safe way to handle the machine. In preference to getting fired, I preferred to do something that was dangerous. Instead of taking the time and telling him there was no guide, I took the chance and used it without the guide. I knew that the table was rough. I worked on the machine with it that way with that knowledge.

When I took the chance I got hurt. I believe that I mentioned the fact that there was no guide to Mr. Wilson. It had been thrown into the scrap. When I mentioned it to him, it was his duty as a foreman to have one made, but I worked on the machine knowing that he had not provided one. When I could saw diagonally or crosswise, I sawed without a guide. I knew the top was rough. I saw it did not have a guide on it. I knew there was danger connected with it. Instead of quitting work I went ahead and worked on it. I guess the guide was down by the machine when Mr. Cain sawed off stuff without it. Every time I saw Mr. Marti do any cut-off work he was using the guide. If he was not using it, it was down by the side of the machine. I probably used the guide up to the time that the machine was moved from the front part of the building to the rear part, when the guide was taken off and thrown out in the scrap. I had seen them use the guide, and had seen them cut off without the guide. I appreciated the necessity of using it. I thought I could use the machine with safety without the guide. I did not know it; I thought it. I preferred to take the chance."

[2] The law in this state is established to be that:

"The servant owes no duty of inspection. He assumes the risk of a danger of which he has actual knowledge, and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment. Since, in the absence of knowledge to the contrary, he may rely upon the assumption that the master will do his duty, he is under no obligation to look out for the master's negligence; but he cannot shut his eyes to dangers that are obvious to an ordinary man, or to an experienced man if he be experienced." *St. L. S. Ry. Co. v. Hynson*, 101 Tex. 543, 109 S. W. 929.

[3] Appellant's own testimony shows that he knew the machine had no cut-off guide, knew the purpose of one, and also that it was dangerous to operate the saw without one; so it must be held that he assumed the risk of injury in performing the work as he did. If appellee was negligent in failing to keep a cut-off guide handy to the machine, still the risk of damage was assumed by Worden, and he cannot recover on that account. Furthermore, plaintiff admitted that a guide was the safe way to operate the machine, and, instead of taking the time to tell appellee of the absence of the guide, he says:

"In preference to running the risk of being fired, I took the chance of doing it the dangerous way, and got hurt."

In making this choice he assumed the risk of injury which might result from the performance of his work in the way he had chosen. Of the two ways in which he might have performed his work, one safe and the other hazardous, he chose that which was dangerous from which choice his injury resulted. *Railway Co. v. Mathis*, 101 Tex. 342, 107 S. W. 530; *Labatt, Master & Servant*, vol. 1, § 258.

[4] From the testimony of appellant, as well as that of the other witnesses, it is apparent that no other judgment should have been entered. Rule 62a (149 S. W. x).

Affirmed.

On Rehearing.

Appellant, by motion for rehearing, urges with much earnestness that there is sufficient evidence in the record to require the court to submit the question of whether Worden realized the dangers in operating the saw without the cut-off guide with the table top rough and worn. We have again carefully considered the evidence, and are confirmed in our opinion that:

"Appellant knew of the defects in the table and the machine he was operating thereon, and realized the dangers attendant upon its operation in the condition it was without the guide."

[5] But, if we should be wrong in this conclusion, we find no evidence in the record which tends to prove that the rough table top caused or contributed to cause the injury. The only testimony in the record describing the cause of plaintiff's hand coming in contact with the saw is the following:

"I was working on the roof of the building the day I was hurt, helping to move the terra cotta from the seventh floor to the roof, and Mr. Wilson sent a man up from the ground floor to tell me to come down and cut some wedges. I went down and went out to the scrap pile, got some stuff, about 2x6 stuff of different lengths, took it into the rear of the saw, took the nails out of it, and then, if I remember right, after I had the nails all out of it, I went and got a square and marked the piece across the square—that is so I would get the 6-inch lengths—and then started my machine, pulled the switch, and I had sawed about 20 blocks 6 inches long, shoving through this way; the last block that I sawed, shoving through this way, something caught the block, but turned it into the saw and drove my hand in here. That was about 3:30 in the afternoon, or something like that. I know I got hurt on the saw, but exactly how it would be impossible to say, because it was done so quickly that I can't explain. I couldn't make a positive oath as to exactly what caused me to cut my hand."

In the absence of proof of the exact negligence charged, there can be no recovery. The motion is therefore overruled.

NATIONAL EQUITABLE SOC. OF BELTON v. CARPENTER. (No. 1559.)

(Court of Civil Appeals of Texas. Texarkana.
Feb. 13, 1916. On Motion for Rehearing, Feb. 24, 1916.)

1. BUILDING AND LOAN ASSOCIATIONS — 26—CONTRACTS—FRAUD—RESCISSION.

Plaintiff, who in his application for defendant's loan contract stated that he had examined its plans, had read a printed copy of the kind of contract applied for, and understood all its provisions, and that in making the application he did not rely upon any statements or guaranty on the part of the defendant's agent, had no right to rescind the contract delivered to him, because he did in fact rely upon the agent's representations to him made without the authority or the knowledge of the association, and, notwithstanding he had not read the contract, was chargeable with knowledge of its contents when he accepted it, and hence was not entitled

to rescind on the ground of the agent's misrepresentation as to the terms of the loan.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. ¶26.]

2. BUILDING AND LOAN ASSOCIATIONS ¶26—APPLICATION FOR CONTRACT — KNOWLEDGE OF CONTENTS.

In such case, where it did not appear that plaintiff was prevented by any fraud of the agent from reading the application before he signed it, he was in no position to claim that he was ignorant of its contents, although in fact he did not read it.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. ¶26.]

On Motion for Rehearing.

3. BUILDING AND LOAN ASSOCIATIONS ¶41(7) — BREACH OF CONTRACT — PROOF OF DAMAGES.

If such suit was treated as one for damages for breach of the contract actually made as explained by the society's agent, plaintiff was not entitled to judgment, where he merely showed that the society had agreed to lend him money within a time specified, and failed to do so, as that did not show any damage.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 84; Dec. Dig. ¶41(7).]

4. FRAUD ¶49—FRAUD OF AGENT—ACTION FOR DAMAGES—PROOF.

If such suit is treated as one for damages for the deceit of the society's agent inducing plaintiff to enter into a contract he otherwise would not have made, plaintiff was not entitled to judgment, where he did not allege and prove any facts which would enable the court to measure his damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45; Dec. Dig. ¶49.]

Appeal from Bowie County Court; Lee Tidwell, Judge.

Suit by J. W. Carpenter against the National Equitable Society of Belton. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

The suit was by appellee against appellant. It was to recover back \$110 paid by the former to the latter for and on one of its "loan contracts," and was commenced in a justice court. As grounds for the recovery he sought, appellee alleged as follows:

"That defendant is a corporation under the laws of the state of Texas, and on the 26th day of February, A. D. 1913, was pretending to make loans, for the purpose of improving and building homes, to persons desirous of borrowing money for that purpose upon real estate security. That said defendant on or about said date and in Bowie county, Texas, by its duly authorized agents, fraudulently procured and induced plaintiff to subscribe for one of its contracts and then and there stating and representing to plaintiff that if he would pay to the defendant the sum of one hundred ten and no/100 dollars, that defendant would immediately, as soon as plaintiffs presented it with an abstract of title to certain real estate, make a loan of the sum of one thousand dollars to plaintiff at 8 per cent. interest per annum, and that plaintiff, relying upon said statement and representation so made to him by defendant, paid to said defendant the

sum of one hundred ten and no/100 dollars and thereafter within ninety days made application to the said defendant and offered to the said defendant an abstract of the title to the real estate upon which the loan was to be made and which would be acceptable to the defendant, and upon which he applied for the loan in the sum of one thousand dollars; that said statements so made in Bowie county, Texas, were fraudulent and untrue, and made for the purpose of procuring and inducing the plaintiff to pay to the defendant the said sum of one hundred ten and no/100 dollars, and without any intention on the part of the defendant to make the said loan, or any other loan; and that since said date and time defendant has refused to make any loan whatever, and refuses to repay plaintiff said sum of money, but has appropriated same to its own use to plaintiff's damage in the sum of one hundred ten and no/100, with interest from the 26th day of February, 1913, for which he prays judgment and for costs of suit."

In the county court, to which an appeal was prosecuted, judgment was rendered in appellee's favor for the sum he sued for. This appeal is from that judgment.

It appears from the record that appellee applied to appellant for a "loan contract," through and at the instance of one King, appellant's agent, to whom he at the time paid \$10 as the price thereof. The application was in writing, and was as follows:

"Application for a Contract of National Equitable Society of Belton (Incorporated) Belton, Texas.

"I, J. W. Carpenter, being of legal age, hereby apply for one of your contracts for the amount of \$1,000 in accordance with the plans of the society as set out in said contract, and have paid Mr. King & Mathews, a solicitor (whose authority, I understand, extends only to the sales of contracts issued by the society under their printed covenants and requirements), \$10 as purchase price for same, and I agree to pay the society hereafter, without notice, a monthly installment of dues on said contract of \$1,000 on or before the 15th day of each month following the date hereof, until the contract issued hereon is surrendered for a paid-up certificate of deposit, or cash surrender value, or on account of a regular loan being granted, or until said contract is fully paid according to its printed covenants and requirements.

"I have examined the plans of the society and have read a printed copy of your contract and am familiar with and understand and accept all the covenants and requirements of said contract, and I make this application expressly and solely upon the terms and conditions of this application, and the covenants and requirements of said contract issued by the society, and not upon the faith of any statements, promise, undertaking or guarantee on the part of said solicitor or any other person, and it is hereby expressly agreed that this application without being corporeally attached thereto shall be a part of the contract issued hereon and every condition hereof and statement herein is as binding as if corporeally attached to or incorporated in said contract.

"In witness whereof, I hereunto subscribe my name this 21st day of February, 1913.

"Signature, J. W. Carpenter.
"Street Address, 1403 Olive Street.
"City, Texarkana; State of Texas."

Appellant thereupon delivered to appellee, and he accepted as a compliance with his

application as shown by his indorsement thereon, appellant's obligation as follows:

"Contract.

"National Equitable Society of Belton, hereinafter styled 'the society,' for and in consideration of the sum of \$10.00, being the purchase price hereof, in hand paid by J. W. Carpenter, hereinafter called 'the holder hereof,' of Texarkana, Texas, the receipt of which is hereby acknowledged, and the payment by the holder hereof of \$10.00 monthly, in advance on the 15th day of each month consecutively, for the term hereof, does hereby with said holder hereof and his heirs, executors, administrators and assigns, subject to the terms of the written application herefor, and the covenants and requirements hereto attached, both of which application and said attached covenants and requirements are expressly made a part hereof, and as fully incorporated herein as if set forth completely above the ensuing signatures, agree and bind itself:

"(1) That from each payment, except the purchase price and the first two made hereon, the society will deposit to the credit of the loan reserve fund, with a state or National Bank, designated by the society as a depository, 85 per cent. thereof, with all fees and fines, to be held by said bank and paid out by it for the purpose only of making loans or settlements on contracts, as and when the society may direct; and that from said loan reserve funds, all prior claims thereon having been satisfied, the society, whenever the accumulation is sufficient, will lend the holder hereof, at the rate of interest hereinafter provided, and repayable in the manner and form, and as and when, as hereinafter stipulated, the sum of \$1,000.00, only on lawful, good and sufficient real estate security, legally mortgageable by the said the holder hereof for said loan: Provided, that prior to the making of said loan said the holder hereof shall have made at least 10 of the hereinabove stipulated monthly payments, which may be done in advance if desired by said the holder hereof.

"(2) When ten of the hereinabove stipulated monthly payments have been made hereon, either in monthly installments or on cash payments, in advance, the holder hereof at any time thereafter may file his application for a loan on acceptable real estate security, subject to the approval of the executive committee; but it is expressly understood that no loan will be approved for more than 85 per cent. of the value of the property offered, as ascertained by appraisal thereof, within the opinion of the executive committee. The priority of right to a loan shall be determined by priority of filing applications therefor, but the executive committee shall have the right to reject any application for a loan on account of insufficiency of security offered.

"Witness the signature and seal of the society by and through its duly authorized officers, this 26th day of February, A. D. 1913, in duplicate.

"National Equitable Society of Belton,
"Per E. C. Clabaugh, President.

"J. W. Hearon, Secretary.

"This contract is accepted by me with full understanding of all the terms and conditions hereof and hereto attached, all of which have been read by me this 10th day of March, A. D. 1913.
"J. W. Carpenter."

One of the "covenants and requirements" referred to in the contract as attached to and forming a part of it was as follows:

"(13) The society shall be bound by and responsible for only such statements as are contained in this contract, and the application therefor, and no officer or agent, or solicitor of this society, general or special, or state agent, has any authority to promise a loan in any particular time, or bind the society by any promise,

representations or any statements not contained in this contract, or in the application therefor."

Having each month for six months after the obligation was delivered to him paid appellant the sum of \$10, and then the sum of \$40, making, with the \$10 paid by him at the time he applied for the contract, a total of \$110 paid by him to appellant, appellee, on a blank furnished to him for the purpose, applied for the loan of \$1,000 appellant had agreed to make to him. With reference to this application appellee testified:

"I was notified within a few days that the same had been received and filed, and as soon as acted upon I would be notified. I waited about 90 days after I had submitted my plans and made application for my loan, and not being notified that the loan had been made, I wrote the society, and was then notified that there was no certain time in which my loan would be made, and that the society would make no definite promise of the time when I might expect and get my loan. This was the first time that I knew or had any idea I would not get my loan as the agent told me, and as I expected. I then ask for the return of my money, but was refused. I was requested to continue paying \$10 per month to the society until I had paid a total of \$1,000 or until the society got ready to make me a loan."

He further testified that the agent (King) represented to him that if he would apply for the contract and pay \$110 as he did, appellant would, "within from 30 to 60 days, and not over 90 days at the outside," from the time he paid the \$110, loan him \$1,000 on the security of property he owned, and which the agent had inspected and declared to be amply sufficient security for a loan of that amount, and that he was induced by such representation so made to him to apply for the contract and pay appellant \$110 as above stated.

L. H. Henry, of Texarkana, for appellant.
Wheeler & Wheeler, of Texarkana, for appellee.

WILLSON, C. J. (after stating the facts as above). [1, 2] The theory upon which the suit was brought and prosecuted was that appellee, having a right to do so, had rescinded the contract he entered into with appellant and was entitled to recover back the sum he had paid to it. Without deciding whether they were or not, it may be conceded, in disposing of the appeal, that the representations made by the agent (King) and relied upon by appellee, as he claimed, were of such a character as would have entitled him to a rescission had it appeared that King was authorized by appellant to make them on its behalf; for if the representations were of that character the judgment, nevertheless, cannot be sustained, because it appeared that King was not authorized to make them, and that appellee was chargeable with knowledge of the fact that King exceeded his authority to act for appellant when he made them. So far as the record shows to the contrary, appellant neither authorized nor knew anything about the repre-

representations made by King. In obligating itself as it did in the contract it acted in utter ignorance, it seems, of the fact that such representations had been made to appellee, and, moreover, in reliance, it seems upon his understanding fully the terms upon which it sold its "loan contract," for in his application to it appellee assured it that he had examined its plans, had read a printed copy of the kind of contract he applied for, was familiar with and understood all the covenants and requirements of such a contract, and in making the application did not rely upon "any statements, promise, undertaking or guarantee on the part of said solicitor (King) or any other person." In the face of such representations as those just recited, made by appellee to appellant, it is obvious, we think, that he had no right to rescind the contract appellant delivered to him, because he did in fact rely upon the representations made to him. To hold otherwise, it seems to us, would be to say, in effect, that appellee could induce appellant to enter into a contract with him on his assurance that certain representations had not been made to him, and then rescind it on the ground that they had been made to him. The theory upon which, it seems, appellee thought he was entitled to the relief he obtained, was that he made the application for the loan on a blank furnished to him by the agent, did not read it carefully before he signed it, and as a matter of fact when he signed it had not read nor seen a copy of one of appellant's loan contracts. "I signed my name to the application," he testified, "without paying much attention to what I signed." It did not appear that he was prevented by fraud of any kind practiced upon him by the agent from reading the application before he signed it. Therefore, it must be said, it did not appear that he was in a position to claim that he was ignorant of the contents of the application. *Loan Co. v. Thomas*, 28 Tex. Civ. App. 379, 67 S. W. 457. If, however, it did not appear that appellee was in the attitude of having induced appellant to enter into the contract in reliance upon the truth of the representations contained in his application, we nevertheless would be of opinion the judgment in his favor was unwarranted. It will be noted, as is shown in the statement of the case above, that appellee by his writing indorsed thereupon accepted the contract tendered to him by appellant "with full understanding of all the terms and conditions hereof and hereto attached, all of which," he said, "have been read by me." One of the "terms and conditions" referred to as "hereto attached," was the one numbered "13," set out in the statement above. If appellee read

that, as he said he did, in his written acceptance of the contract, he must have known that King, in making the representations he did as to the time when appellant would make the loan, was acting outside his authority as appellant's agent. Testifying as a witness, however, appellee said he did not read the contract before he accepted it. The excuse he gave for not reading it was that it "was hard for him to understand." It does not appear in the record that he failed to read the contract, or have it read and explained to him, because of any act or conduct of appellant or its agent. Therefore we think it must be said that it appeared as a matter of law that notwithstanding he did not read it appellee was chargeable with knowledge of the contents of the contract at the time he accepted it, was bound by its terms, and hence was not entitled to the relief he sought. *Gibson v. Brown*, 24 S. W. 575; *Insurance Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 871; *Casualty Co. v. Thomas*, 178 S. W. 606; *Wooters v. Railway Co.*, 54 Tex. 294.

The judgment will be reversed, and judgment will be rendered in favor of appellant.

On Motion for Rehearing.

It is insisted that we erred in treating appellee's suit as one to rescind the contract between him and appellant. It was so treated because it was to recover back the money he had paid to appellant. He was entitled to that relief only upon the theory that he had a right to rescind the contract.

[3] His suit, he says in the motion, was for "damages for breach of the contract actually made as explained by the agent." If it was, then, plainly, he was not entitled to the judgment he obtained, because he did not prove he sustained any damage. Proof merely that appellant had agreed to lend him money within a time specified and failed to do so, lacked much of showing that he was thereby damaged.

[4] If the suit should be treated as one for damages for deceit of the agent, whereby appellee was induced to enter into a contract he otherwise would not have made, as appellee seems to argue it might have been, then he was not entitled to the recovery he had, nor to any recovery, for the same reason, to wit, because he did not prove that he suffered any damage. If he was so induced to enter into the contract, and if for any reason it was of less value to him than he had a right to expect it to be, he should have alleged and proven that fact and the facts which would have enabled the court to measure the damages he suffered.

The motion is overruled.

**NATIONAL EQUITABLE SOC. OF BELTON
v. CAMP et al. (No. 1584.)**

(Court of Civil Appeals of Texas. Texarkana.
March 8, 1916. Rehearing Denied
March 16, 1916.)

1. FRAUD — 20 — KNOWLEDGE OF FACTS.

Plaintiff, who before signing an application for a loan contract with defendant loan society read and studied its terms, and knew that they stated that its agent had no authority to change the terms of the written contract or make any oral agreement not in the written contract, and that the agent's statement that she could get a loan within 30 days, and not over 60 days, was not authorized, if conflicting with the contract, which expressly stated that loans would be made only when the society's accumulation was sufficient, thus having knowledge of the incorrectness or falsity of the agent's statement before she acted upon it, had no ground for an action for damages against the society for the agent's alleged fraud, as she could not be said to have been deceived.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. — 20.]

**2. BUILDING AND LOAN ASSOCIATIONS —
26 — RESCISSION OF CONTRACT — FRAUD.**

Such suit, if treated as a suit to rescind the contract and to recover the money paid under it, could not be maintained, as plaintiff could not be said to have been actually misled by the statement or opinion of the agent into accepting the contract as it was written.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Dec. Dig. — 26.]

Appeal from Bowie County Court; Lee Tidwell, Judge.

Action by Mrs. S. E. Camp and others against the National Equitable Society of Belton. Judgment for plaintiffs, and defendant appeals. Reversed, and judgment rendered for the defendant.

The appellee brought the suit to recover the amount of money paid to appellant society in virtue of a certain contract executed by it, averring that she was induced to apply for and enter into the contract through fraudulent statements made to her by the agent of the society and relied on by her. The fraudulent statements which induced her to apply for the contract are, as alleged:

"The agent stated to her if she would buy a contract of them [appellant] and pay them [appellant] \$10.00 and then make ten monthly payments to the society, they would loan her a \$1,000.00; or if she would pay to the society the \$100.00 in advance, that the society would loan her a \$1,000.00 in July, which would be in about four months."

The prayer was:

"Wherefore plaintiff prays that the defendant society be cited to answer this complaint, and that plaintiff have judgment against defendant society requiring said society to refund back to plaintiff the \$110 that she paid said society for the contract bought of said society, with interest and costs of suit, and for general and special relief as she may be entitled to in both law and equity."

The application for and the contract executed and received by appellees are fully set out in the companion case of *National Equi-*

table Society of Belton v. J. W. Carpenter, 184 S. W. 585, lately decided by this court. The evidence on the part of the appellee shows that the agent of the society came to her and solicited her to make application to the society for a loan contract with the society for \$1,000. Her testimony is as follows:

"I wanted the money with which to build me a house, and I asked the agent when I could get the money and he said that I could get it when I paid into the society \$100, paying \$10 each month. I told the agent that if I could not get the loan right away I would not want the contract; he said that he did not know about that. He then told me that if I would pay to the society \$100 in cash I could get a loan within 30 days and not over 60 days at the outside. I told the agent that if I could get the loan within that time I would take the contract, and this statement by the agent was the inducement that caused me to take the contract; otherwise I would not have taken it. * * * I saw the agent several times before I made application for a loan contract, and several times before I made any trade with him. He left a loan contract with me for me to read and I read it and studied its terms. I read both the application and the loan contract before I signed them, and knew that they contained statements which said that the agent had no authority to change the terms of the written contract or make any oral agreement that was not in the written contract. Before signing the application for a loan and the loan contract I discussed the terms of the loan contract with my son-in-law, who read the application and the loan contract before I signed them. * * * I paid the agent \$10 and he gave me a receipt for it. I sent the society \$100. When the time came for me to get a loan, according to the agent's promise, I wrote the society to know why I had not received a loan on my application previously made therefor, and it wrote me that they could not make me a loan then, but that it would get to it as soon as it could. * * * I have not received a loan from the society nor any of my money back that I paid in."

The written application to the society for the loan, signed by appellee, recites:

"I have examined the plans of the society and have read a printed copy of your contract and am familiar with and understand and accept all the covenants and requirements of said contract, and I make this application expressly and solely upon the terms and conditions of this application, and the covenants and requirements of said contract issued by the society, and not upon the faith of any statement, promise, undertaking or guarantee on the part of said solicitor or of any other person."

The written loan contract subsequently executed by the society and accepted by appellee, has the following stipulation respecting the time when a loan will be made:

"The society, whenever the accumulation is sufficient, will lend the holder hereof, at the rate of interest hereinafter provided, and repayable in the manner and form, and as and when, as is hereinafter stipulated, the sum of one thousand dollars only on lawful, good and sufficient real estate security, legally and mortgageable by the holder hereof for said loan: Provided, that prior to the making of said loan said the holder hereof shall have made at least ten of the stipulated monthly payments, which may be done in advance if desired by the said the holder hereof."

And the contract of loan has the following clause:

"The society shall be bound by and responsible for only such statements as are contained in this contract and the application therefor, and no officer or agent or solicitor of this society, general or special, or state agent, has any authority to promise a loan in any particular time or bind the society by any promises, representations or any statements not contained in this contract or in the application therefor."

In a trial before the court judgment was entered for appellee for the money paid the society.

L. H. Henry, of Texarkana, for appellant.
J. W. Hillman, of Texarkana, for appellees.

LEVY, J. (after stating the facts as above). [1] Appellee in the brief remarks that:

"The suit is brought for the purpose only to recover back the money paid by the plaintiff to the society, based upon the fraudulent statements made by the agent of the society to induce plaintiff to enter into the contract and pay to the society the \$100 in cash."

And it is believed that under the facts of the case it must be held that there is no ground furnished to entitle appellee to the relief sought. Appellee, according to her evidence, before signing the application and before accepting the loan contract, read over "and studied its terms," and "knew that they contained statements which said that the agent had no authority to change the terms of the written contract or make any oral agreement that was not in the written contract." Further, she discussed, she said, the terms of the contract with her son-in-law before signing the contract. Having read the contract and "studied its terms," before applying for and before accepting the contract, the appellee would be held to know that it expressly stated that the agent or solicitor had not "any authority to promise a loan in any particular time." And with this information afforded appellee, she would fully know that the statement of the solicitor that she "could get a loan within 30 days and not over 60 days at the outside" was not authorized if it conflicted with or varied the stipulation in the loan contract, which, according to her testimony, was left "with me for me to read" before acceptance and signing. Referring to the contract itself that was intended to be offered she would know that its terms explicitly stated that the loan would be made only out of the loan reserve fund of the society "whenever the accumulation is sufficient." So, from the evidence, appellee is in no position to say that she entered into and accepted the loan contract upon the faith and trust which she reposed in the statement of the agent soliciting the application for the contract. Therefore, as the appellee had, as conclusively appears, knowledge of the incorrectness or falsity of the statement of the agent, which was promissory in its nature, before she acted upon it, she has no ground for an action for damages against appellant for the agent's al-

leged fraud, for she cannot be said to be deceived. 1 Clark & Skyles on Agency, § 500.

[2] And treating the action as one to rescind the contract and recover the money paid under it, the appellee may not maintain such suit under the facts, for she could not be said to have been actually misled by the statement or opinion of the agent into accepting the contract as it was written. Smith on Frauds, §§ 62 and 126 at page 144; Jackson v. Stockbridge, 29 Tex. 304, 94 Am. Dec. 290. What has been said in the case of Society v. Carpenter, supra, is decisive of this case.

The judgment is reversed, and judgment will be here rendered in favor of appellant, with all costs.

NATIONAL EQUITABLE SOC. OF BELTON v. DUNNINGTON. (No. 1583.)

(Court of Civil Appeals of Texas, Texarkana.
Feb. 2, 1916. Rehearing Denied
Feb. 24, 1916.)

1. FRAUD \S 58(1)—ACTION TO RECOVER MONEY PAID—EVIDENCE.

In a suit to recover the sum paid to the defendant loan society under an agreement for a future loan as damages from the fraudulent representations of its agent, evidence held insufficient to sustain a judgment for the plaintiff.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55; Dec. Dig. \S 58(1).]

2. FRAUD \S 50—BURDEN OF PROOF.

In such suit, plaintiff had the burden of proving that he was entitled to the relief sought.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. \S 50.]

3. BUILDING AND LOAN ASSOCIATIONS \S 26—LOAN CONTRACT—RESCISSION—TIME.

Plaintiff, if entitled to reject the contract of the defendant loan society when tendered, because it materially differed from what its agent said it would be, was required to act promptly upon a discovery of the fraud or variance.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. \S 26.]

Appeal from Bowie County Court; Lee Tidwell, Judge.

Action by C. H. Dunnington against the National Equitable Society of Belton. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for the defendant.

L. H. Henry, of Texarkana, for appellant.
Wheeler & Wheeler, of Texarkana, for appellee.

HODGES, J. This suit was instituted in the justice court by the appellee to recover the sum of \$110 theretofore paid to the appellant under some kind of an agreement for a future loan, which will more fully appear in what follows. The nature of the plaintiff's demand is thus stated in the citation issued in the justice court:

"Defendant is a corporation under the laws of the state of Texas, with its principal office in the town of Belton, Bell county, Texas; and was on the 15th day of March, 1915, pretending to make loans for the purpose of improving and building homes to persons desirous of borrowing money for that purpose on real estate security; that defendant on or about the said date, in Bowie county, Texas, by its duly authorized agent, fraudulently procured and induced plaintiff to subscribe for one of its contracts by then and there stating and representing to plaintiff that if he would pay to defendant the sum of \$110.00 that defendant would immediately make a loan to the plaintiff in the sum of one thousand dollars upon real estate security which plaintiff offered as security for said loan; and that plaintiff, relying upon said statement and representations so made to him by the defendant, paid to said defendant the sum of \$110.00. That said statements so made were fraudulent and untrue and made for the purpose of procuring and inducing plaintiff to pay to said defendant the sum of \$110.00, and without any intention on the part of the defendant of making said loan or any loan, and that since said date and time defendant has refused to make any loan whatever, and refuses to pay to plaintiff said sum of money, but has appropriated same to its own use and benefit, to plaintiff's damage in the sum of \$110.00."

This is the only statement of the facts pleaded and relied on by the appellee for the relief sought.

The defendant answered, in substance, as follows: (1) That the defendant had a written loan contract with the plaintiff setting forth the terms upon which defendant was to make plaintiff a loan of \$1,000; that plaintiff failed and refused to comply with the terms of the written contract, which he had signed and accepted. (2) That defendant instructed its agent who sold plaintiff the contract to make no contract other than the one signed and accepted by plaintiff; that by the terms of that written contract plaintiff was advised that defendant's agent had no authority to make any other contract, oral or written, and the defendant is not bound by the oral contract which the plaintiff alleged was made with defendant's agent. (3) That plaintiff has defaulted in his monthly payments, and under the terms of his written contract all the payments theretofore made have become forfeited to the defendant.

This appeal is from a judgment in favor of the appellee for the full amount sued for.

[1] The first assignment of error in effect assails the judgment of the court as being without support in the evidence. The appellee testified in his own behalf, in substance, as follows: That on or about the 15th of March, 1913, he met the agent of the appellant, who explained to him appellant's method of lending money to those who desired to purchase or improve homes. The agent stated that the borrower would have to pay \$10 cash and \$10 per month for a contract for the loan of \$1,000, and that the borrower could get a loan immediately after the payment of \$110. This amount could be paid monthly or all at one time. The loan would become available within 30 or 60 days from the time of payment, but if \$100 was paid at

one time the loan could be obtained at once. On that explanation the appellee made an application to the appellant company through its agent for a loan contract of \$1,000, and sent a draft for the sum of \$100 to the appellant at Belton, Texas. He received in return a passbook showing the payment of that amount. He was also instructed by the appellant to send in an abstract of title to the property he wanted to place as security for the prospective loan. The abstract was sent in, and the appellee was informed by letters from the appellant that it would pass on his application as soon as practicable. This transaction occurred about the 22d of March, 1913. In April the appellee received the following letter:

"We have your favor of the 7th with regard to your application for a loan and beg to advise you that as soon as we can have an inspection of the property your application will be passed on, when you will be notified."

No objection was made to the character of the security offered. Not receiving loan, the appellee again, on May 8th, wrote the appellant, demanding the loan. In reply the appellant advised him that by its terms and conditions the contract which he held had no cash value until after payments had been made for 18 months, and he could borrow on the contract only after having paid for 6 months. He was also informed that his application was on file; that the property was being examined, and as early as possible the loan would be passed on and the appellee would be notified accordingly. The appellee says that this was the first notice that he had that he would not get a loan as the agent had told him. He immediately wrote to the society, demanding a refund of his money. This was refused, and he declined to make any further payments. On cross-examination he admitted that he signed a written application, which was later introduced in evidence by the appellant. He does not remember that he read the application before signing it, but says that the agent might have read it to him. He had the opportunity to read it. He did not see a loan contract until after he had paid the agent \$10 and had sent \$10 to the company. He did not sign the loan contract; the agent did not ask him to sign it, and nothing was said about signing it. The agent had told him that the contract would provide that he should be entitled to a loan as soon as he paid in \$100 to the appellant society. He relied upon these statements as to what the contract would contain. One other witness was offered by the appellee, who testified that he heard the agent explain to the appellee what the contract would contain, and that he stated that it would provide that the society should make the loan within from 30 to 60 days from the time the \$100 was paid in. The defendant then offered in evidence the following application:

"Application for a Loan Contract of National Equitable Society of Belton (Incorporated), Belton, Texas.

"I, C. H. Dunnington, being of legal age, hereby apply for one of your contracts for the amount of \$1,000.00, in accordance with the plans of the society as set out in said contract, and have paid King & Matthews, a solicitor (whose authority, I understand, extends only to the sale of contracts issued by the society under their printed covenants and requirements), \$10.00 as purchase price for same, and I agree to pay the society hereafter without notice a monthly installment of dues on said contract of \$10.00 on or before the 15th of each month following the date hereof, until the contract issued hereon is surrendered for a paid-up certificate of deposit, or cash surrender value, or on account of a regular loan being granted, or until said contract is fully paid according to its printed covenants and requirements.

"I have examined the plans of the society and have read a printed copy of your contract and am familiar with and understand and accept all the covenants and requirements of said contract, and I make this application expressly and solely upon the terms and conditions of this application, and the covenants and requirements of said contract issued by the society, and not upon the faith of any statements, promise, undertaking or guarantee on the part of said solicitor or any person, and it is hereby expressly agreed that this application without corporeally attached thereto shall be a part of the contract issued hereon and every condition hereof and statement herein is as binding as if corporeally attached to or incorporated in said contract.

"In witness whereof, I hereunto subscribe my name this 13th day of March, 1913.

"Class B. [Signature] C. H. Dunnington."

The nature of the appellee's cause of action, as disclosed by the statement in the citation, appears to be one for damages resulting from the false and fraudulent representations of the appellant's agent. These false and fraudulent representations, according to the appellee's testimony, consisted of statements by the agent that if the appellee would pay the sum of \$110 he would receive a contract from the appellant society which would entitle him to a loan of \$1,000 immediately or within 60 or 90 days upon approved real estate security. It is further shown that the sum of \$110 was paid and the security demanded was furnished, but that the loan was refused upon the ground that still other payments must be made by the appellee before he was entitled to the loan under the terms of his contract. The proof shows that the first step in procuring a loan under this arrangement was the presentation by the prospective borrower of the written application quoted above. Upon its face this application was not for the loan direct, but "for one of your (appellant's) contracts for the amount of \$1,000, in accordance with the plans of the society as set out in said contract." A further perusal of the application shows that it was contemplated that upon the payment of certain sums of money named a written contract governing the rights and liabilities of the contracting parties was to be executed and delivered. This instrument also shows that the authority of the soliciting agent extended only to the taking

of the application for the contract, and not an application for the loan. He may have misrepresented what the contract would provide with reference to the time when and the conditions under which a loan might be obtained. But the application recites that the appellee had examined a printed copy of the contract and was familiar with all of its covenants and requirements. This application furnished the data upon which the appellant was to act in executing and issuing its contract to the appellee.

The appellant had a right to assume that the applicant had done all that his application recited that he had done. If he had failed to examine a printed copy of the contract for which he applied, was ignorant of its terms and conditions, and was relying solely upon what the agent told him the contract would contain, then he misled the appellee by himself making false statements concerning material matters of fact. On the other hand, if he had in truth examined the contract, as stated in his application, and accepted its terms, his right to recover damages depends upon a breach of that contract, and not upon a failure of the appellant to do what the agent said the contract would provide for. If the agent misrepresented the contract as to when loan would be available, that was an error of opinion for which the principal cannot be held responsible. Mechem on Agency, § 743. The construction of the contract was a matter equally open to the appellee; and if he relied upon the opinion of the agent, he did so at his peril.

The contract is not in the statement of facts, and cannot be looked to for the purpose of ascertaining its terms and conditions. But there is no contention that the appellant has breached that contract, and there is no remedy for the breach of a contract it did not make. If the appellee is entitled to recover any damages, it is because the appellant did not execute and deliver him a contract in substantial accord with the representations of the agent. But the suit does not appear to be based upon a reliance of that character; in fact, there is no averment or evidence of what that written contract contained; neither is there any evidence of its rejection by the appellee after it was presented to him. While he testified that he did not sign the contract, there may have been and doubtless was sufficient to bind him.

[2, 3] Assuming that under the facts before us the appellee might have rejected the contract when tendered because it materially differed from what the agent said it would be, it devolved upon him to act promptly upon a discovery of the fraud or variance. *Wells v. Houston*, 23 Tex. Civ. App. 629, S. W. 597. The evidence shows that months after the contract had been executed the appellee was demanding a loan which

could be claimed by him only under the terms of the written contract. It is not charged that this written contract was for any reason void or unfair; hence we must conclude that it was one by which the parties might be bound to the fulfillment of their respective engagements. To relieve the appellee in this instance because of the false statements of the agent, would be to shield him from the legal consequences of his own misrepresentations.

The facts of this case are in all material respects similar to those of *National Equitable Society of Belton v. Carpenter*, 184 S. W. 589, recently decided by this court. We think the principles of law there announced furnish the correct rule for the determination of this controversy.

The appellee is the mover in this litigation, and it devolved upon him to adduce sufficient evidence to show that he was entitled to the relief sought. In this he has failed, and there is nothing to indicate that his case might be strengthened upon another trial.

The judgment of the county court will therefore be reversed, and judgment will be here rendered in favor of the appellant, together with all costs both of this court and of the court below.

CLEVELAND et al. v. GAINER et al.
(No. 1010.)

(Court of Civil Appeals of Texas. Amarillo.
March 15, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS ¶33 — SIZE OF DISTRICT—STATUTE.

Under Acts 83d Leg. c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), touching the formation of common school districts and providing that in any county containing a population of less than 10,000 no common school district shall be organized or surveyed so that its geographic center will be more than 4 miles from its farthest boundary, the consolidation, in a county of less than 10,000 population, of two school districts, to result in the creation of a single district 30 miles in length and 16 miles in width, was illegal.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 55; Dec. Dig. ¶33.]

2. SCHOOLS AND SCHOOL DISTRICTS ¶111—BONDS—ENJOINING ILLEGAL ISSUE.

Taxpayers and residents of a school district which the county commissioners consolidated with another, forming a single district so large as to be violative of Acts 83d Leg. c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815) touching the formation of such districts, were entitled to a temporary injunction restraining the commissioners from issuing bonds for the support of a school in the illegal district, and from levying a special tax to pay interest, etc., and restraining the tax collector from collecting or attempting to collect such taxes.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 265-268; Dec. Dig. ¶111.]

3. SCHOOLS AND SCHOOL DISTRICTS ¶33—ILLEGAL CONSOLIDATION — CURATIVE PROVISION OF STATUTE—APPLICATION.

The curative provision of Acts 83d Leg. c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), providing that all school districts "heretofore laid out and attempted to be established" and "heretofore recognized" by the county authorities as school districts, are validated in all respects as though they had been duly and legally established in the first instance, which became effective in July, 1913, being retrospective, does not apply to an illegal consolidation of two school districts effected February 11, 1915.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 55; Dec. Dig. ¶33.]

4. SCHOOLS AND SCHOOL DISTRICTS ¶33 — CURATIVE PROVISION OF STATUTE—APPLICATION.

A curative act validating school districts previously established and recognized will not be construed to validate the action of the county commissioners, in consolidating two districts illegally, which was a fraud upon the rights of residents and taxpayers in one of the former districts.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 55; Dec. Dig. ¶33.]

Appeal from District Court, Yoakum County; W. R. Spencer, Judge.

Suit for injunction by George Cleveland and another against J. T. Gainer and others. From an order dissolving a temporary injunction in vacation, petitioners appeal. Reversed and remanded.

W. H. Bledsoe, of Lubbock, for appellants. G. E. Lockhart, of Tahoka, and Kimbrough, Underwood & Jackson, of Amarillo, for appellees.

HALL, J. This is an appeal from an order of the district judge, dissolving a temporary injunction in vacation. Appellants, George Cleveland and Le Roy McCravy, as plaintiffs, presented their petition for injunction to the district judge, in which it is alleged, in substance: That they are residents of Yoakum county. That the defendant J. T. Gainer is the duly elected, qualified, and acting county judge of said county. That D. B. Tingle, S. J. Dixon, P. Z. Conrad, and Pat McHugh are the duly elected, qualified, and acting county commissioners, and with said Gainer constitute the commissioners' court of said county. That J. C. Keller is the duly elected, qualified, and acting tax collector of said county. That Yoakum county is a duly organized county, and now has, and at various dates shown had, a population of less than 10,000. That after the organization of said county, in 1908, the commissioners' court thereof, in the proper discharge of their duties, divided said county into common school districts. That common school district No. 1 was created in the northwest corner of said county so as to include about 275 sections of land. That common school district No. 3 was created in the southwest corner of said county so as to contain about

156 sections of land. That said common school district No. 3 continued to exist with said boundaries from its creation until February 11, 1915, when said commissioners' court entered an order consolidating it with common school district No. 1, to be thereafter known as common school district No. 1; said consolidated district including territory 30 miles in length, extending from the north to the south line of the county and at its widest point being 16 miles east and west. That it contains a large portion of the best lands in said county. That the town of Plains, a village of less than 500 people, is situated on section No. 427, in said original common school district No. 1, near the center of said county north and south and about 14 miles east of the west line of said county. That, at the time of the attempted consolidation of said districts, district No. 1 had a scholastic population of about 54, and district No. 3 had a scholastic population of about 6, and said consolidated district now has a scholastic population of about 75. That the school building for common school district No. 1 was situated in the town of Plains, and is now used for said consolidated district. That plaintiff George Cleveland is a bona fide resident, taxpayer, and voter in said county, and together with his wife and children lives on section No. 643 in district No. 3, about 14 miles from the town of Plains, by section lines. That plaintiff Le Roy McCravey is a bona fide resident, taxpayer, and voter in said county, and with his wife and children lives on section No. 582, in said district No. 3, about 12 miles from the town of Plains, by section lines. That each of said plaintiffs owns the land upon which he resides and has owned the same and resided thereon for many years prior to the attempted consolidation of said two school districts. That at the time of the attempted consolidation of said districts said county had a population of less than 2,000. That the county has a great deal of fine land and should, within a few years, contain many settlers. That said district No. 3 is equal in quality and desirability to any other portion of said county and should well support a large population, as the county settles up, and now, and in the future, will demand and be entitled to public schools, independent of those existing in the town of Plains. That such action of the commissioners' court, in consolidating said districts, was at the request of the citizens of the town of Plains, and those residing in the immediate vicinity, and over the protest of these plaintiffs and a large majority of the residents of said district No. 3. That such action was for the sole purpose of building up a school at the town of Plains, regardless of the fact that it would deprive plaintiffs and the other residents of their district of a school for their children, and compel them to either move to a school community or to another county

that they might have the advantages of a school for their children, such as is guaranteed them by the law. That such action of the commissioners' court was without authority of law and in contravention of laws of this state. That said consolidation of such districts for the benefit of the school at Plains was in fraud of the rights of plaintiffs and the other residents of district No. 3. That after such consolidation the commissioners' court of said county received and entertained a petition from the citizens of the town of Plains and ordered an election to determine whether or not bonds in the sum of \$6,000 should be issued for building a schoolhouse for said district in the town of Plains. Upon said order said election was held, and 36 votes being cast for such bonds and 20 votes against, on May 11, 1915, said election was declared in favor of the issuance of the bonds and an order entered accordingly. That said bonds are not yet issued, but the commissioners are threatened to issue and sell the same, which, if done, will fix said district so that the limits thereof cannot be reduced during the 20-year period provided for the maturity of said bonds. That at said time the court ordered levied a tax of nine cents on the \$100 valuation of all property in said district for the purpose of paying the interest on and creating a sinking fund for the payment of said bonds. That in obedience to said order the tax assessor of said county assessed said tax against all property in said consolidated district, including that owned by plaintiffs, and that same now appears on the tax rolls of said county as due by these plaintiffs and other taxpayers of said district, and is, and will continue to appear as, a lien against the property owned by plaintiffs for the amount appearing to be due by them. That thereafter the citizens of the town of Plains petitioned the said commissioners' court to order an election for the purpose of determining whether or not a special tax should be levied against all property in said district for the support of said school. Said election was ordered and held, and an order entered declaring said election had carried, and said court thereupon levied a special tax for the maintenance of said school, said tax being for 30 cents on the \$100 valuation, and, under the direction of said court, the county tax assessor assessed said tax, placed same upon the rolls of said county, and same now appears as being due by the plaintiffs and the other taxpayers of said district, and will continue to appear as a lien against their property for the amount claimed to be due by them. That defendant Keller, as tax collector for said county, is demanding and attempting to collect said tax levies from these plaintiffs and other taxpayers of said district. That plaintiffs own their property in said district and desire to pay their taxes thereon, but

collector, acting under the orders and direction of said commissioners' court, refuses to take the taxes legally due by plaintiffs without their paying said special tax so levied, which they claim to be unlawfully assessed against them. That the acts of said commissioners' court, in so consolidating said district, in ordering said bond election, in levying said special tax to pay the interest and sinking fund thereon, and in levying said special tax for the support of the school in said consolidated district, are wholly without authority of law and are in contravention of the laws of this state, and in fraud of the rights of plaintiffs, as well as of many other taxpayers of said district No. 3.

Plaintiffs pray for injunction to restrain the defendants Gainer, Tingle, Dixon, Conrad, and McHugh from issuing and selling said bonds, from levying a special tax against plaintiffs or their property for the purpose of paying the interest thereon or for creating a sinking fund for their payment or for the support of a school in said consolidated district, and from directing and causing the defendant Keller to collect or attempt to collect said special tax from each of the plaintiffs, and restraining the defendant Keller from demanding or collecting said special tax from plaintiffs, and, upon final hearing, that they have judgment making such injunction permanent and setting aside the order of said commissioners' court in consolidating said districts and declaring said order to be void, leaving said districts as they were, and legally are at this time, and declaring said special tax so levied against these plaintiffs to be void and of no effect, and canceling the respective levies thereof, as against plaintiffs.

Upon presentation of the petition, duly verified, to the district judge, in vacation, on January 16, 1916, he granted the injunction as prayed for, making the case returnable to the April term of the district court of Yoakum county. Upon the filing of the petition and bond, the injunction was issued and served. On January 28, 1916, the appellees presented to the court in vacation their motion to dissolve the injunction, it being in effect a general demurrer, whereupon the court sustained the motion dissolving the temporary injunction, but continued the case for hearing at the regular term. Appellants contend that the injunction was properly issued, that the petition was not subject to general demurrer, and that the court erred in sustaining the motion and dissolving the injunction.

[1] The first proposition is that consolidating the two districts resulted in the creation of a district containing 431 sections of land; that its geographical center is more than 4 miles from the farthest line of the district, and is therefore unauthorized and illegal. The allegations are that the county contains a population of less than 10,000.

The Acts of the 33d Legislature, Regular Session, c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, § 2815), relating to the formation of common school districts, provides that in counties containing a population of less than 10,000 no common school district shall be organized or surveyed in such a manner that the geographical center of the same will be more than 4 miles from the farthest line of said common school district. The district in question, being 30 miles in length and 16 miles in width, is clearly a violation of this statute.

[2] The facts, as alleged in the instant case, show a cause of action very similar to that presented to this court in the case of *McLaughlin v. Smith*, 140 S. W. 248, and which was reviewed by the Supreme Court, 105 Tex. 330, 148 S. W. 288. In both opinions the right to maintain such an action was recognized, and the action of the county commissioners was declared to be a nullity. The right to enjoin the sale of bonds was upheld, and the creation of the Emma district was set aside. We think the rules announced in that case are applicable here.

[3] The appellees contend that because chapter 129, supra, of the Acts of the 33d Legislature, contains this provision, "that all school districts in this state heretofore laid out and attempted to be established by the proper officers of any county, and heretofore recognized by said county authorities as school districts of said county, are hereby validated in all respects, as though they had been duly and legally established in the first instance." We are not called upon in this case to pass upon the question as to whether it is the duty of the county school authorities to redistrict their counties in accordance with the provisions of this act, and shall therefore express no opinion as to the validity of districts 1 and 3, before their consolidation. It is only the matter of consolidation with which we have to deal. The consolidation was effected February 11, 1915. The act in question became effective in July, 1913. The curative provision in the act therefore, being retrospective, does not apply to the consolidated district.

[4] The petition alleges, in substance, that the action of the county commissioners, in consolidating two districts, was a fraud upon the rights of the petitioners and other patrons of the school residing in district No. 3. If this allegation be true, a curative act would not be construed to validate such a proceeding. We would not impute to the Legislature the intention of making that valid which every consideration of equity condemns as fraudulent and void.

We think the court erred in dissolving the temporary injunction, and the judgment so doing is reversed, and the cause remanded. Reversed and remanded.

**ANGELINA COUNTY LUMBER CO. v.
HINES et al. (No. 53).***

(Court of Civil Appeals of Texas. Beaumont.
Jan. 8, 1916. On Motion for Rehearing,
March 2, 1916.)

**1. STIPULATIONS \S 14(4)—EVIDENCE—CHAR-
ACTER OF TITLE—LIMITATION.**

Where the parties in an action of trespass to try title agreed that the plaintiff owned a certain named league, unless it was divested by the claimed limitation title of the defendants, who by their pleas expressly claimed title by limitation only to a part of another league, the plaintiff was entitled to judgment.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. \S 27; Dec. Dig. \S 14(4).]

**2. JUDGMENT \S 256(1) — PLEADING \S 387
—CONFORMITY—NECESSITY.**

A judgment must conform to the pleadings and the proof, and the pleadings and the proof must agree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 446, 454; Dec. Dig. \S 256(1); Pleading, Cent. Dig. \S 1300-1304; Dec. Dig. \S 387.]

Appeal from District Court, Sabine County; A. E. Davis, Judge.

Action by the Angelina County Lumber Company against L. R. Hines and others. Judgment for defendants, and plaintiff appeals. Reversed and rendered.

Mantooth & Collins, of Lufkin, and W. D. Gordon, of Beaumont, for appellant. W. F. Goodrich, of Hemphill, and Minor & Minor, of Beaumont, for appellees.

MIDDLEBROOK, J. This is a suit in trespass to try title, appealed from the district court of Sabine county, in which appellant was plaintiff, and L. R. Hines, George Hunnecutt, and his wife, Lillie Hunnecutt, G. E. Pratt, A. M. Jones, George Tucker, A. J. Tucker, and his wife, Maggie Tucker, were defendants; and by supplemental petition Elizabeth A. Perry and W. D. Gordon were vouched in as warrantors.

The land involved is about 67 acres of the John S. Lacy league in Sabine county, Tex. Defendants L. R. Hines and George Hunnecutt were disposed of by agreed judgments. The following agreement constitutes the beginning of the statement of facts:

"It is agreed between the counsel for all parties that the plaintiff has title from the sovereignty of the soil to the John S. Lacy survey, described in plaintiff's petition, unless it is affected by and divested through defendant's plea of the statutes of limitation under the three, five and ten years statutes.

"It is also agreed that as to the warrantor, Gordon, the Angelina County Lumber Company bought the land and paid the consideration as alleged in the pleadings, at the rate of \$7.50 per acre on 27th of January, 1906."

Thus it will be seen that the only issues before the trial court were the defendants' pleas of three, five, and ten year statutes of limitation.

The case was tried before the court without the aid of a jury, and the honorable trial

court found in favor of the defendants on their pleas of limitation and rendered judgment in their favor for 67 acres of the land sued for, 31 acres to Andrew J. Tucker and his wife, and "about 36 acres" to A. M. Jones, G. E. Pratt, and W. F. Goodrich; and in favor of plaintiff against W. D. Gordon upon his warranty for the sum of \$489.75, with 6 per cent. per annum interest thereon from the 1st day of April, 1911.

Numerous deeds were introduced in evidence, all of which deeds in which the land in question is involved describes the land as a part of the Moses Hill headright survey; but under the agreements of the parties, and our view of the proper disposition of the case, it is not necessary to quote these deeds at length.

The evidence shows and the honorable trial court found that the land in controversy is on the John S. Lacy league in Sabine county, Tex., to which the plaintiff has record title from the sovereignty of the soil. The evidence also shows that George Tucker bought 317 acres of land on the 31st day of May, 1881, from George W. King, being a part of the Moses Hill headright survey; but that in surveying the land 66 $\frac{2}{3}$ acres of the land included in his 317 acres were taken out of the John S. Lacy league, of which the plaintiff is owner.

George Tucker testified as to the issues of limitations as follows:

"I live on this 317 acres; I moved there in 1881, and have lived there all the time except about a year. * * * I lived on it from 1881 to about three years ago. * * * I have gone around this land. Of my own knowledge this has been identified there on the ground since 1879, and I know where the lines were all the time, and bought it and went on it in 1881, moved on it and made my house on it, and have continuously, from the time I went on the land until 1912, lived on the land. * * * I first cleared about 49 acres in 1882. * * * Through all of this time I claimed this 317 acres of land to the metes and bounds as set out in the deed, and as the line was marked on the ground, as far back as 1878. I cultivated and used the land for myself all the time, and paid the taxes on the land every year on 317 acres, as described in the deed from George King to myself, made in 1881. Nobody else was in possession of the land before I went on it; it was all in the woods. The survey of this 317 acres of land was made in 1879, and I paid the taxes on it continuously from 1881 and claimed this particular land during all that time. * * * I claimed the land under my deeds. * * * I rendered and paid taxes on this land always as on the Moses Hill survey; we thought it was on the Moses Hill survey. We knew the lines as set down on the Moses Hill, and didn't know that it went over on the John S. Lacy, and I guess I never claimed any land on the John S. Lacy league. I bought on the Moses Hill and believed that was the line and if I got over outside of the Moses Hill, I didn't know it. It was a mistake on my part if I got over on the Lacy survey, and every one of my tax receipts as far as I know read that way. (It is admitted that all the tax receipts call for the land on the Moses Hill.) I never rendered any land on the Lacy league; I rendered 317 acres on the Moses Hill. As to whether or not it is

a fact that it was only about seven years that I put that last few acres there across the line, that according to Mr. Arthur's testimony in the line between the Moses Hill and the John S. Lacy surveys; I will say that I think it was ten years ago. I think it was in January, 1905, that I cleared it. I think it can be identified that some of it was cleared across the line about twelve years ago, but I wouldn't swear it. As to whether or not I would swear that it was done as far back as 1905, I will say that I think it was, but at that time I didn't know that I had gone over on the Lacy league; I didn't know anything about it. But I did know that I claimed to the line, whether it was on the John S. Lacy or on the Moses Hill."

Andrew Tucker testified substantially as did his father, George Tucker, and in addition thereto as follows:

"I heard Mr. Arthur testify and know where that line runs as described by him as being the north line of the John S. Lacy league; I saw the stakes in the field where he made the line; it cuts off a corner of the southeast part of the field; I believe it is the S. E. There is some 8 or 10 acres in that portion. That is down on the creek; it might possibly lack a little of being that much, but there is between ten and six acres of it. I can't positively fix the date; but that part of the field has been there sixteen or eighteen years. There is a little corner that runs over on the land in question, that has possibly not been there over ten years. * * * Just a little corner, not over a quarter of an acre. We never claimed or paid taxes on any land except on the Moses Hill survey. We thought all of it was on the Moses Hill and never knew, till Mr. Arthur ran this line, that we were over the line. This other line was supposed to be the Moses Hill line. We didn't claim any land outside of the Moses Hill. We claimed to that line and thought it was on the Moses Hill and paid taxes on the Moses Hill, and if we got off the Moses Hill, it was a mistake on our part. When Mr. Arthur ran the line it cut off a kind of V-shaped piece of land south of Mr. Arthur's line. * * * I didn't see Mr. Arthur go over that land and measure it, and don't know that that part of the field don't exceed more than four acres; I didn't measure it. I mean that to the best of my knowledge, there is more than four acres. That is only guess work, but to the best of my knowledge there would be about six acres, and possibly more, * * * but I wouldn't say that it amounted to six acres in actual measurement."

All of the pleas of the defendants under the different statutes of limitation describe the lands they are claiming as on the Moses Hill survey.

Appellant's first assigned error is:

"Because the court erred in rendering judgment for each of the defendants Tucker, Jones, and Goodrich, for the specific interest by them; defendants having agreed that the legal title to this tract of land was in plaintiff, unless their respective pleas of limitation is sustained by proof sufficient to warrant a judgment on the statutes of limitation as pleaded by them. * * *"

Defendant Andrew J. Tucker's pleas of limitations describing the land he claims under the three-year statute of limitation is as follows:

"Being 817 acres of land, a portion of the Moses Hill headright survey beginning at the northeast corner of George Humecutt's land. * * *"

Then follows a metes and bounds description of the land he claims. Under his plea

of the five-year statute of limitation, he describes the land he claims as the land, "last above described." "Last above described" refers to his description of the land in his three-year limitation plea.

In his plea under the ten-year statute of limitation he describes the land as "situated in Sabine county, Texas, a portion of the Moses Hill headright survey, described as follows." Then follows a metes and bounds description of the land that he claims under his ten-year plea of limitation. Goodrich, Jones, and Pratt give the same description in their different pleas of limitations as to original survey, and in each instance describe the land as on the Moses Hill survey.

[1] The undisputed evidence of the surveyor, Arthur, and the map made by him and introduced in evidence by the defendants, show the 67 acres of land in dispute to be on the John S. Lacy league. This being true, we think the agreement between counsel settles this case. The agreement is that appellant is the owner of the John S. Lacy league described in its petition, unless it is divested through appellees' pleas of limitation. Hence the defendants' pleas of limitation must be looked to in order to determine the status and legal effect of the agreement. These different pleas dispute a claim by defendants to any land on the John S. Lacy league, for in each instance they claim on the Moses Hill survey, and do not claim elsewhere than on the Moses Hill survey.

[2] Under these facts, the pleadings of the defendants and the agreement of counsel for all parties, quoted above, the appellees cannot recover any land on the John S. Lacy league. To do so is to violate the most elementary rules of practice. The pleadings and the proof must agree, and be in harmony with each other. If the pleadings and the proof must harmonize with each other, can it be said that a judgment can be legally entered and enforced that is contrary to the pleadings? We think not. Yet that is exactly what is done in this case, if the judgment is permitted to stand. The defendants' pleadings state, affirmatively, that the lands they claim by limitation are on Moses Hill survey. Defendants' counsel agree that plaintiff is the owner of the John S. Lacy league as described in its petition, unless it is divested of such ownership by their pleas of limitation and the proof under said pleas. Their pleas of limitations affirm that the lands they claim by such pleas are on the Moses Hill headright survey. Such being true, if they recover, they must recover on the Moses Hill survey. The defendants' witness, who surveyed and made a map of the land, says the land in question is on the John S. Lacy league, and the copy of the map he made, which is a part of the statement of facts of this case, shows, conclusively, that the land in question is on the John S. Lacy league. The judgment awards

lands on the John S. Lacy league contrary to the pleadings of the defendants, and therefore cannot be permitted to stand, and appellant's first assignment of error is sustained.

The second assignment of error is as follows:

"The court erred in rendering judgment for either of the said defendants upon the statute of limitation, as pleaded by them; their pleas of limitation nowhere claiming such possession as taken and held under some written memorandum of title other than a deed which fixed the boundaries of their respective claims duly registered as required by the statute."

Under this assignment, this proposition of law is asserted:

"An encroachment on the Lacy survey by mistake, with no intention to claim any of the Lacy, is fatal to the plea of title by limitation."

The deeds introduced in evidence by the defendants all describe their lands on the Moses Hill survey. Their pleadings fix their claims to lands on the Moses Hill survey, and they testify that they do not claim any land except on the Moses Hill survey, and that if they got over on the Lacy survey, it was a mistake on their part. Such being true, and it being true, also, that the judgment decrees land on the John S. Lacy league, such judgment is unwarranted both under the pleadings and the proof; therefore the second assignment of error is sustained.

Two propositions are presented under the second assignment of error; the second, presenting the law applicable to a small encroachment, not being sufficient to apprise the owner of any adverse claims except as to the land actually inclosed. Under our disposition of the case, it is not necessary to discuss nor to pass upon this phase of the case.

The third assignment of error is submitted as a proposition, and is to the effect that the defendants Jones and Goodrich cannot recover upon their pleas of limitations because the land they claimed was segregated from the Tucker land, before Tucker had matured any title by prescription, and after it was so segregated, Goodrich and Jones had and proved no sort of possession, and therefore under no phase of the case could Jones and Goodrich recover under their pleas of limitation.

It is not necessary for us to pass upon this assignment under our disposition of the case. We think, under the pleadings, the agreement by counsel for all parties, and the proof of this case, judgment should have been rendered for the plaintiff; therefore the cause is reversed and rendered, and judgment is here entered for the plaintiff for the land sued for.

Reversed and rendered.

On Motion for Rehearing.

Appellees have filed an exhaustive motion for rehearing in this case, which under careful consideration discloses no question for review other than this court considered and disposed of in the original opinion; and we still think that the agreement entered into, as quoted in the original opinion, the pleadings of appellees, and the undisputed evidence that the land in dispute is a different grant from the grant specifically pleaded by appellees, and the testimony of the appellees' witnesses precludes a recovery by them. Authorities: Davidson et al. v. Equitable Sureties Company, 96 S. W. 787; Titte v. Garland, 99 Tex. 201, 87 S. W. 1152; Holland et al. v. Nance, 102 Tex. 177, 114 S. W. 346.

The motion for rehearing is overruled.

LONGINOTTI v. McSHANE. (No. 1546.)

(Court of Civil Appeals of Texas. Texarkana.
March 2, 1916. Rehearing Denied
March 9, 1916.)

1. FRAUDS, STATUTE OF §118(4)—CONTRACT OF SALE—MEMORANDUM—TELEGRAMS.

Under the statute of frauds, Rev. St. art. 3965, the agreement or memorandum required in case of a contract for the sale of realty need not be contained in one instrument, but may take the form of telegrams if, read as one, they present a concluded contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. §118(4).]

2. VENDOR AND PURCHASER §16(1) — CONTRACT OF SALE—LETTERS AND TELEGRAMS.

A letter intended to finally inform the purchaser that the vendor would not take less than \$17,500, to which the purchaser replied that he would give that amount and to wire him at once, and a telegram from the agent that the vendor accepted that amount, to which the purchaser promptly replied authorizing the agent to close with the vendor for that amount, in connection with a deed definitely describing the realty, furnished in writing the essentials of a written concluded contract of sale.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §17; Dec. Dig. §16(1).]

3. VENDOR AND PURCHASER §75—CONTRACT — TIME FOR PERFORMANCE — REASONABLE TIME.

A contract for the purchase and sale of realty silent as to the time of performance gave a reasonable time for performance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§113-118, 126; Dec. Dig. §75.]

4. VENDOR AND PURCHASER §81—TIME FOR PERFORMANCE — REASONABLE TIME — QUESTION FOR JURY.

Evidence in a purchaser's action for damages for the breach of a contract to sell certain realty held to make the purchaser's failure to perform within a reasonable time a question for the jury.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§136, 137; Dec. Dig. §81.]

5. VENDOR AND PURCHASER **350** — PURCHASER'S ACTION FOR DAMAGES—EVIDENCE—DEED.

In such action, the deed executed by the vendor for the purpose of performance of his part of the agreement and intended for delivery to the purchaser was admissible to establish the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1043-1046; Dec. Dig. **350**.]

Levy, J., dissenting in part.

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

Action by Louis Longinotti against John P. McShane. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded for trial.

The action is by appellant to recover of appellee damages for alleged breach of a contract to sell appellant a certain lot in the city of Texarkana for \$17,500 cash. The appellee urged, among other things, the statute of frauds, requiring the agreement, or some memorandum, to be in writing. At the conclusion of all the evidence the court peremptorily instructed the jury to find a verdict in favor of the appellee. Appellant seeks review of the ruling of the court.

Appellee resides in Texarkana, and appellant in Memphis, Tenn. Jas. A. Longinotti is the son of appellant, and was acting as agent for his father. In January, 1912, appellee placed with J. M. Christopher, a real estate broker in Texarkana, the property in suit for sale. Christopher was to receive an agreed commission from appellee upon the sale. The testimony shows that Christopher entered into negotiations with appellant. The following was the correspondence passing in the form of letters and telegrams:

Letter:

"Texarkana, Texas, February 13, 1912.

"Mr. Louis Longinotti, % Pullman Hotel, Hot Springs, Ark.—Dear Sir and Friend: I was talking to you in regard to the Joe McShane building on the corner of Broad and Maple streets, which you are very well acquainted with as for location. I have just been talking with Mr. McShane this afternoon, and he says he will take \$19,000.00 for the property, so now I think it is worth the money; so I will leave it to you to judge as to that. He said he is offered \$200.00 per month for that building if the town goes wet, and he hasn't any lease on it to any one; so now you can figure for yourself.

"If you think you cannot pay the \$19,000.00 you will please notify me at once by mail in regard to the deal. Hoping, though, that you will decide upon taking the property. The Stevens building is sold; it was sold to Mitch, who, as you know, is running a lunch counter; it was sold for \$6,100. I am very sorry that you did not take it, as I think same was a safe investment; but nevertheless we cannot get every good thing that comes along.

"Hoping this will find you and your brother Joe well and enjoying good health, I am,

"Yours respectfully, J. M. Christopher."

Telegram:

"Memphis, Tenn., April 2, 1912.

"J. M. Christopher, % Hart Building, Texarkana, Texas: Wire my expense if Benjamin or McShane house sold, if not best all cash price.

"James A. Longinotti."

Telegram:

"Texarkana, Texas, Apr. 3, 1912.

"James A. Longinotti, Care Cordova Hotel, Memphis, Tenn.: Your message received would have replied sooner but waiting on Benjamin just got him decide to take eighteen hundred cash, the McShane building eighteen thousand is least can be bought for please answer immediately if want either building or both my expense.

J. M. Christopher."

Telegram:

"Texarkana, Texas, April 4th, 1912.

"Jas. A. Longinotti, Cordova Hotel, Memphis: Answer my message yesterday as am holding off other answer my expense.

"Jas. Christopher."

Telegram:

"Memphis, Tenn., April 4th, 1912.

"Mr. Jim Christopher, Care Hart Building, Texarkana, Texas: Give McShane seventeen thousand cash and you one hundred fifty answer.

James A. Longinotti."

Letter:

"Texarkana, Texas, April 5th, 1912.

"James Longinotti, Esq., Memphis, Tenn.—Dear Sir: Your telegram received and I have just seen Mr. McShane and figured with him and he turned the \$17,000.00 cash for the building down; he says that he will not take less than \$17,500.00. He says that will be the least dollar that will buy it, as the first of the year he can get \$190.00 per month rent for it.

"So now, Mr. Longinotti, if you want the building you will please wire me at my expense, as real estate is advancing rapidly here, there being a great demand for it on Broad Street.

"You mentioned the Benjamin building; I sold that for \$18,500.00 spot cash for Benjamin; so you see real estate is picking up, and you know when you were here some several days ago we went over and examined this building and I told you at the time that this building was easily worth \$20,000 as it is corner property. And I still think that it is worth that. So now if you are going to buy this building at the price quoted you, you want to decide right away and wire me at my expense. I am figuring with other parties on this building, and have got McShane down \$250.00 less than I have ever got him down before.

"Hoping you will decide to take and wire me to that effect, at my expense, I am,

"Yours sincerely, J. M. Christopher."

Telegram:

"Memphis, Tenn., April 6, 1912.

"Jim M. Christopher, 214½ State St., Texarkana, Texas: Will give seventeen thousand five hundred wire me at once my expense I have another deal to close. James A. Longinotti."

Telegram:

"Texarkana, Ark., Apr. 6, 1912.

"James A. Longinotti, Cordova Hotel, Memphis, Tenn.: Received telegram just got through with McShane he accepts seventeen thousand five hundred wire me to close deal at once with McShane.

J. M. Christopher."

Telegram:

"Memphis, Tenn. April 6, 1912.

"Mr. J. M. Christopher, 214½ (State St., Texarkana, Texas: Authorize you close with McShane for seventeen thousand five hundred.

"Louis Longinotti."

Telegram:

"Texarkana, Texas, April 9th.

"Louis Longinotti, Care Cordova Hotel, Memphis, Tenn.: McShane demands purchase money to-morrow morning. Wire Mr. Grim to pay McShane on approval of title your lawyer. Have consulted Rodgers. "J. M. Christopher."

Lettergram:

"Memphis, Tenn. April 9, 1912.

"W. R. Grim, Texarkana, Ark. Bought through Jim Christopher from McShane his house corner of Broad and Maple streets for seventeen thousand five hundred, on approval of title by Rollin Rodgers and yourself pay seventeen thousand five hundred to McShane. Have deed made to Longinotti and Campanova. Charge account. Kindly act with your usual interest in our behalf. Thank.

"[Signed] Louis Longinotti."

This lettergram was received by Mr. Grim between 8:30 and 9 o'clock a. m. of April 10th, and read over telephone to Mr. McShane.

Telegram:

"Texarkana, Tex., Apr. 10, 1912.

"Mr. Louis Longinotti, Hotel Cordova, Memphis, Tenn.: Lettergram received. Notified McShane. He said he had already sold property to A. L. Ghio. [Signed] W. R. Grim."

According to the evidence given by Mr. Christopher, Mr. McShane "read all these telegrams the same as I did, and advised me to answer them," and Mr. McShane "authorized me to make the price" stated in the letter of April 5th. Christopher further testified, in respect to the telegram of Longinotti dated April 6th, that he showed it to Mr. McShane and—

"he read the telegram and held it in his hand I suppose five or six minutes, and says, 'Well, I will do that; you go and wire them I will accept it. I want Mr. Louis Longinotti's signature to the bottom of the reply.'"

The reply was from Louis Longinotti himself authorizing Mr. Christopher to close the deal. It was undisputed that appellant had on deposit, subject to his check and order, in the Texarkana National Bank, of which Mr. Grim was president, more than the amount of the price of the property. Appellee, according to the evidence, sold the property to A. L. Ghio between 8:30 and 9 o'clock of the morning of April 10th. It is unnecessary to further set out the evidence.

Mahaffey & Keeney, of Texarkana, for appellant. Glass, Estes, King & Burford, of Texarkana, for appellee.

LEVY, J. (after stating the facts as above). The first assignment of error urges that there were issues of fact that should have been submitted to the jury for decision, and that the court erred in giving a peremptory instruction against plaintiff.

[1] It has been decided that the agreement or memoranda required by our statute to prevent frauds (article 3965) need not be contained in one instrument, but may take the form of telegrams if they, read as one, present a concluded contract. *Duble v. Batts & Dean*, 38 Tex. 313; *Railway Co. v. Sette-*

gast, 79 Tex. 256, 15 S. W. 228; *Bailey Railway Co.*, 17 Wall. (U. S.) 106, 21 L. 611; 1 *Warvelle on Vendors*, § 101; 20 C. 254.

[2] And a majority of the court are of opinion that, looking to the memoranda evidence in this case, it may be said there was furnished in writing the essentials of a written concluded contract of sale between the parties. In connection with the deed, which should have been admitted in evidence, there was definitely described the estate. The letter of April 5th may be regarded as intended to finally inform Longinotti that, respecting the price, McShane "will not take less than \$17,000." He says that will be the least dollar that he will buy it." And it may be said upon receipt of the letter Mr. Longinotti promptly replied: "Will give \$17,500, wire me at once my money, I have another deal to close." There was a definite offer to pay the price stated for the property. And acceptance may convert it into a legal agreement. The reply to this offer there follows the telegram which read:

"Received telegram, just got through with McShane, he accepts seventeen thousand five hundred, wire me to close deal at once with McShane."

And Longinotti promptly replied:

"Authorize you to close with McShane seventeen thousand five hundred."

And these two telegrams had the effect of completing the contract. It is thought, to accept the offer and make a completed contract of sale. A valid memorandum appearing from which it may be inferred that a contract of sale was made, there remained in the case, it is thought, issues which the court could not, as a matter of law, undertake to decide upon, and which would have to be passed to a jury for decision.

[3] The letters and telegrams, if found to be authorized by McShane, that effectuated a contract of sale, are silent as to the time of performance. Consequently the doctrine of reasonable time, which applies to an agreement when no time of performance is specified, would be read into the contract. 1 *Warvelle* (2d Ed.) on *Vendors* 138; 2 *Page* (Ed. 1905) on *Contracts*, § 1. Thus, if it devolved upon Mr. McShane to perform the first act toward performance of execution and tendering a valid deed, he had the right to a reasonable time in which to do so. Likewise Mr. Longinotti would have the right to a reasonable time from the date of the contract within which to put him in a condition to perform his part. Neither Mr. McShane nor Mr. Longinotti would be in default under the contract, or entitled to abandon the contract, before a reasonable time for performance elapsed.

[4] What constitutes a reasonable time for prompt action being contemplated, must in each particular case depend upon the situation of the parties, considering the cir-

stances attending the performance. In order, therefore, for appellee to predicate the right to abandon the contract, the court should have been authorized to say, under all the circumstances, as a matter of law, that a reasonable time for performance had elapsed and Mr. Longinotti was in default at the time of the sale of the property by McShane to Ghio. It is thought that the court could not so declare as a matter of law. It would appear that appellee was ready and offering to perform on April 8th, and directing that a telegram be forwarded to appellant at Memphis, Tenn., demanding performance on his part by, according to Christopher's evidence, 9 o'clock a. m. of April 10th. Regarding this telegram as evidence, as it is, of a request or demand by McShane that the purchaser hasten the performance, the purchaser upon receiving this notice could fairly expect to perform by and at that time. And the reply telegram of Longinotti to Mr. Grim could not be taken as conclusive of an intention not to perform at the time set by McShane, if he did set that time, for the other testimony of Longinotti is that he was ready, willing, and able to perform at all times. All this, therefore, was sufficient evidence to require the jury to decide whether or not there was a breach or failure by Longinotti.

[5] It is concluded that the deed executed by McShane on April 8th should have been admitted, because the evidence shows it was executed for the purpose of performance by McShane of his part of the agreement and was intended for delivery. The deed, in connection with the correspondence, sufficiently furnished in writing memoranda of definitely described real estate. *McCown v. Wheeler*, 20 Tex. 372; *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447.

The writer does not agree that the letters and telegrams, considered as if blended into one and signed by the parties, import a present concluded contract in writing of sale of the property. If the memoranda relied on, consisting of the letters and telegrams, do not show a concluded agreement, then there was no completed agreement in any writing, and the statute of frauds would have application. The deed, if in evidence, shows on its face a different agreement. The letters and telegrams show on their face a series of connected correspondence, in which the parties were merely endeavoring to agree upon a price and then afterwards formally enter into a contract of sale of the property. The telegram of April 6th, sent by the son of appellant to the real estate broker, was clearly a reply only to the letter of the real estate broker sent the day previous. And the words of the telegram, "Will give seventeen thousand and five hundred," were only intended, as explained by the writing of the letter, as the manifestation of assent on the part of Longinotti, given to the real estate broker, that the price stated was satisfactory

and that he was willing to come up to that price. And so understanding that the wording of the telegram intended only willingness to pay that price, the real estate broker then further communicated with the son of appellant saying to the effect that he had notified the owner of the property of the willingness to give that price, and that the owner (McShane) indicated acceptance or assent to such price, and to therefore "wire me [real estate broker] to close deal at once with McShane." Appellant himself, and not his son for him, then promptly "wired" to the real estate agent, "Authorize you close with McShane for seventeen thousand five hundred." Was this the expression of a present completed contract according to the intent and understanding of the parties at the time these latter telegrams were sent and received? The word "deal," as used, evidently refers to final agreement in particulars of the trade or contract for the property then in open negotiation between the parties. And authorizing a third person to act for the proposed buyer, as Longinotti did, with the seller, to "close deal" or trade, is inconsistent with the intention of having or understanding there was any present agreement completed and concluded. The parties by the phrases "close deal" and "authorize you close with McShane" contemplated, in the light of their acts, further mutual transactions or agreement in respect to the property in order to have and conclude a mutual agreement or contract of sale between them. If the parties did not by the telegrams intend to make a present agreement, the law cannot and does not give the memoranda the legal effect of a present agreement. Consequently the minds of the parties could not be said to have met in complete and formal final agreement until, according to the language, the "deal" or trade was closed or concluded by McShane, acting for himself, and Longinotti, acting through Christopher as intermediary or agent, entering into final and formal agreement of sale and purchase. A deal or bargain is not closed or concluded with the seller and purchaser, acting through an authorized intermediary, until such agreement is actually entered into by the seller and such intermediary or agent. If such agreement was made at all it was not in writing in any form, as shown by the evidence.

But even taking the view of the majority—that the words "McShane accepts" should be construed as having the legal effect of a completed contract by acceptance of a proposal of Longinotti—then it would follow, I think, that the further wording, "authorize you close with McShane for seventeen thousand five hundred," would necessarily be construed as Longinotti's appointing Christopher as his agent to finally carry out or perform the terms of sale. If the parties knew a contract was already effected between them, the phrase "close deal" was meant to accomplish a change from one of

the parties to the other of interest or title to the property. In the performance of the completed terms of sale by Longinotti, acting through Christopher, there were only the acts of receiving the deed from McShane and paying over the money. According to the evidence Longinotti had the money in the bank at Texarkana. And according to the evidence McShane tendered the deed to Christopher; and, failing to pay over the purchase price, as Longinotti, or Christopher for him, did, McShane demanded of Christopher the money. Christopher, as agent of Longinotti, informed his principal of the demand of McShane; and Longinotti, instead of authorizing the bank to pay unconditionally the money, superadded terms not agreed upon. The court could have said, as a matter of law, that a reasonable time necessary to receive a deed and pay the money had elapsed, and that Longinotti by his telegram was not ready, willing, and prompt to execute his part of the contract, even if McShane had not waited until precisely 9 o'clock of April 10th.

Judgment reversed, and the cause remanded for trial.

ALDRIDGE et al. v. HAMLIN et al.*
(No. 886.)

(Court of Civil Appeals of Texas. Amarillo.
March 4, 1916. Rehearing Denied
March 22, 1916.)

1. ELECTIONS 295(1)—VOTERS—RIGHT TO VOTE—POLL TAX.

Where an elector on the 1st day of January, 1912, was subject to payment of a poll tax and failed to pay the same, his vote at an election October 18, 1913, is properly rejected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 77-81; Dec. Dig. 295(1).]

2. ELECTIONS 294—VOTERS—CONVICTION.

Where a voter had been convicted of felony and his sentence suspended under Acts 32d Leg. c. 44, which was held unconstitutional, the suspension was void and the voter was not qualified, not having been pardoned.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 91; Dec. Dig. 294.]

3. ELECTIONS 295(1)—VOTERS—EVIDENCE.

Where the vote of two Mexicans was questioned, testimony that the precinct in which they lived was sparsely settled, that no other Mexicans lived there, and that such persons had not resided there for sufficient time to vote, is admissible and will support a finding rejecting their ballots.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297; Dec. Dig. 295(1).]

4. ELECTIONS 272—VOTERS—RESIDENCE.

Where one whose ballot was rejected owned a farm in the county and intended to return whenever he could find some one who would live with and care for him, the ownership of the farm did not constitute a residence, it appearing that he actually was in another county.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 67, 68, 70; Dec. Dig. 272.]

5. ELECTIONS 295(1)—VOTERS—EVIDENCE.

In an election contest, evidence held sufficient to warrant the rejection of a voter's bal-

lot on the ground that he resided in another state.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297; Dec. Dig. 295(1).]

6. ELECTIONS 278—VOTERS—RESIDENCE.

Where one actually resided in the county and sent his children to school there, the fact that he voted at a school election in another state and paid poll taxes there, it appearing that he wanted to keep his legal residence in such state to acquire public lands, will not preclude him from voting in the county of his residence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. 273.]

7. ELECTIONS 273—VOTERS—REMOVAL.

That a resident, in the discharge of his duties, temporarily removed from the county, being assured by the railroad company for which he worked that he would be returned, will not, where he retained his family home in the county, deprive him of his residence therein, and right to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. 273.]

8. ELECTIONS 300—VOTERS—QUALIFICATIONS.

In an election contest, the question whether a voter had resided in the county for a sufficient length of time to vote, held a question of fact.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 308-313; Dec. Dig. 300.]

9. ELECTIONS 272—VOTERS—QUALIFICATIONS.

A voter who managed a business in Texas took his meals in a town across the state line in New Mexico, but he slept and kept his effects in the building where the business was carried on. Held, that his residence was in Texas and he was entitled to vote therein.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 67, 68, 70; Dec. Dig. 272.]

10. ELECTIONS 272—VOTERS—RESIDENCE.

That a voter who had resided in the county and state for a sufficient length of time intended ultimately to return to a distant state, does not deprive him from acquiring a legal residence and the right to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 67, 68, 70; Dec. Dig. 272.]

11. ELECTIONS 273—RESIDENCE—TEMPORARY REMOVAL.

That one who owned a farm in the county and resided there, temporarily removed during a season of drought, but returned, does not deprive him of his residence in the county, and he may vote therein.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. 273.]

12. ELECTIONS 273—VOTERS—TEMPORARY REMOVAL.

That a voter temporarily removed from the county, but intended to return and resume business therein, does not, where he retained his home in the county, work a loss of residence, depriving him of the right to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. 273.]

13. ELECTIONS 295(1)—VOTERS—EVIDENCE.

In an election contest, evidence held sufficient to sustain a finding that a challenged voter had a residence in the county and was entitled to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297; Dec. Dig. 295(1).]

14. ELECTIONS \S 234—VOTERS—EVIDENCE.

Where from practical considerations a voter had changed his mind as to his vote on the question of a change of the county seat, his ballot will not be rejected because of subsequent attempts to coerce him into voting as he did.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 205; Dec. Dig. \S 234.]

15. ELECTIONS \S 295(1)—CONTEST—VOTERS—RESIDENCE—EVIDENCE.

In an election contest where a voter's ballot was questioned, evidence held sufficient to sustain a finding that he had acquired residence in the county.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 297; Dec. Dig. \S 295(1).]

16. ELECTIONS \S 73—CONTEST—VOTERS—RESIDENCE.

Where a voter, while waiting to get a residence in a Texas town, temporarily removed to an adjacent New Mexico town, the fact of his temporary residence, that he acted as if he was a resident of New Mexico, will not, it appearing that he returned, deprive him of his right to vote in Texas.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 69, 70; Dec. Dig. \S 78.]

17. CONSTITUTIONAL LAW \S 35—EXERCISE OF POWERS—MANDATORY PROVISIONS.

Where a power is expressly given by the Constitution and the mode of exercise is prescribed, such mode is exclusive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 34½; Dec. Dig. \S 35.]

Appeal from District Court, Parmer County; D. B. Hill, Judge.

Election contest by J. H. Aldridge and others against J. D. Hamlin and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Carl Gilliland, of Hereford, and Madden, Trulove, Ryburn & Pipkin, of Amarillo, for appellants. W. Boyce, of Amarillo, and Sam G. Bratton, of Clovis, N. M., for appellees.

HENDRICKS, J. This case involves the contest of an election, over the removal of the county seat of Parmer county, Tex., from Farwell to Parmerton. The county judge, in announcing the returns and declaring the result of the election, stated a total of 228 votes, 110 for the county seat remaining at Farwell, 114 for removal to Parmerton, three for Friona, and one for Bovina. As canvassed, Parmerton not having received the majority (its vote being equal to Friona and Farwell), the result was declared in favor of the county seat remaining at Farwell. The election was ordered on September 15, 1913, and held October 18, 1913.

The district judge concluded that the vote of one of the boxes was incorrectly shown in the returns and the ballots in that box were recounted, and, after passing upon the qualifications of certain voters, challenged by both sides, and rejecting two ballots, on account of their condition, announced a numerical result as follows: "For remaining at Farwell, 100 votes; for removal to Bovina, 1 vote; for removal to Parmerton, 95 votes; for removal to Friona, 3 votes;" the

trial judge also declaring, "that the true result of said election was in favor of the county seat remaining at Farwell."

The trial court sustained 17 challenges offered by the contestees as to the qualifications of voters casting their ballots for removal to Parmerton, which were deducted by the court from Parmerton's vote. The action of the trial court rejecting ten of said voters is not excepted to in this court. The appellants, however, attack the rulings of the court as to the qualification of the following voters, deducted from the total vote for removal to Parmerton: T. M. Yelverson, Wilbur Ford, A. J. Grim, S. G. Deanda, Meteo Romo, Jim Martin, and W. A. Anderson.

[1] W. A. Alderson (or Anderson) was a claimant of public land in New Mexico, but the court held he was in reality a resident and citizen of Parmer county, Tex., on the theory that his evanescent visits to his claim and temporary stay of very short duration in New Mexico did not manifest a real intention to reside on the land, or make that state his home; that he worked for one Jernig, a ranch owner in Texas, continuously since 1910, and for a year or more previous to the election was foreman of Jernig's ranch; that some time during 1912 he relinquished his claim in New Mexico, concluding that he could not make his proof of occupancy. The court had the right to conclude that he was a resident of the state of Texas, on the first day of January, 1912, and, being subject to the payment of a poll tax, and not having the same, was not entitled to vote.

[2] The court found that the voter Wilbur Ford was convicted of a felony (theft of cattle), and his punishment assessed at two years in the penitentiary; that he had not been pardoned, nor his civil rights restored. The trial judge had suspended the sentence of this defendant under the provisions of chapter 44, Acts of the Thirty-Second Legislature. This act, affecting this particular question, was held unconstitutional in the case of Snodgrass v. State (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144, and in a companion case (Cr. App.) 150 S. W. 178. The law was amended and held constitutional on account of the elimination of certain features, in Baker v. State, 70 Tex. Cr. R. 618, 158 S. W. 998. We are disposed to follow the Court of Criminal Appeals on this question, and hold that the sentence of suspension was void, and that the voter was not qualified.

Deanda and Romo, whose votes were deducted by the court from Parmerton's total, were Mexicans. They began to work for the railroad company on the section at Bovina in September, 1913, and left in November, 1913.

[3] Another Mexican, who was a section hand upon the same section, and who voted

at the same election, testified that Deanda and Romo began work at Bovina after he (Rubalcoba) went there. Elliott and Warren, in the employment of the railroad company, testified from the records of the company that the Mexicans began work for the railroad company in Parmer county, in September, 1913, and their work ended in November, 1913. Bovina, where these men worked, was not a large place, and the precinct is sparsely settled. Others testified as to their acquaintanceship with the people of that section and knew of no other Mexicans residing in this precinct, except those working on the section. The testimony, though of a negative character as to the residence of these Mexicans (except during the period of their employment as section hands), was sufficient to exclude the time of residence to qualify them as eligible voters. This character of testimony is permissible and relevant. *McCormick v. Jester*, 53 Tex. Civ. App. 306, 115 S. W. pp. 282, 283.

The finding of the trial court, as to the residence of Jim Martin in Texas, making him eligible to a poll tax, which he failed to pay, is so fully sustained by the voter's own testimony, it is unnecessary to discuss it.

[4] The voter A. J. Grim, rejected by the court, was an old man, unmarried and unable to take care of himself. He came to Parmer county in 1906, bought some land and improved it for the purpose of making the same a tenant farm and home, "provided he could get some one there with whom he could stay." He worked at a hotel in Bovina, Parmer county, in part pay for his room and board, until the building was burned. In the fall of the year 1912 he went to Hereford, Deaf Smith county, staying at various hotels, making occasional trips to Parmer county, to look after his rents—the length of his visits being brief. He said:

"I went to Hereford to work at the hotels, because I could not get employment in Bovina and at no place close to my farm."

Part of the time while residing at Hereford, he was a hotel drummer, meeting trains at that place. His mode and manner of living at hotels at Hereford was similar to that at Bovina.

We are inclined to think that his intention to make his farm home at a time in the future, provided he could associate some one with him who would care for him, interposed a condition of expectation and contingency insufficient to constitute a residence on his farm in Parmer county, especially after he removed to Deaf Smith county, if the trial court was disposed to take that view of it.

[5] The court clearly had a right to reject the voter Yelverton. The statement of the evidence by appellants, under their thirty-first assignment of error, shows that the voter, beginning as early as April, 1913, was living and earning a livelihood in Curry county, N. M., though he claimed his home

at Bovina, Tex. There is no testimony that Yelverton ever lived in Parmer county, except the hearsay statement by one Bruner, for whom Yelverton worked, that the latter claimed that his home was in that county. He married in January, 1914, but at least to that time was found continuously working and residing in New Mexico. It was with the trial court to decide the place of his residence.

[6] As to the challenges of contestants, the appellants herein, against some of the votes cast for Farwell, and overruled by the court, we find as follows: Ike Brown was a man of family, and proved his occupancy upon public land in New Mexico. In February, 1912, he removed with his family to Parmer county, occupying a rented farm, and later moved to Farwell, his children enjoying the benefits of the public schools and at the time of trial had not returned with his family to New Mexico. The principal fact of resistance to this vote is, that Brown, in April, 1913, paid a poll tax and voted at a school election in New Mexico, stating, in substance at the time he voted, that he wanted to hold his residence there until he received his patent, and that was why he was voting and paying his taxes there. The trial court found:

"That his real home at the time he voted in New Mexico was in Texas, and that his claim of residence in New Mexico was merely technical and made for the purpose of avoiding possible trouble in securing patent to his land."

We have the personal presence of Brown, with his family residing in Texas for the period indicated, and a portion of the time sending his children to the public schools, constituting material testimony of his real intention and real abode. The matter of difference between feigned and real residence, as applied to public land, is sometimes easily discerned. The trial court evidently thought this voter had some peculiar notion that a claim of residence in New Mexico was necessary to obtain a patent, but that such manifestations of claim were not bona fide.

[7] As to the voter P. E. Turner, we think the trial court would not have been justified in finding him ineligible. For several years prior to August 1, 1913, he had lived with his family in Farwell, Parmer county, owning his own residence, and was section foreman for the Santa Fé Railway upon that date. On said date he was ordered by the company to take charge of the section at Folsom, in Potter county, Tex., and moved with his family in the section house at that place, occupying the position of section foreman until after the election. He was informed that he was transferred to fill a temporary vacancy and later would be transferred back to Parmer county, and at the time his deposition was taken had been ordered back. He kept his residence at Farwell, unrented, with a part of his household goods remaining

therein, and with an evident intention to maintain his residence in Parmer county.

[8] As to the voter Frye, his testimony on direct examination, considered alone, makes him ineligible. He said he went to Farwell in January, 1918. On cross-examination he testified that he knew at the time he voted in the election October 18, 1913, that he should have lived in Texas 12 months and in Parmer county 6; that he came to Texas from Arkansas in August, 1912, and "struck" Parmer county in September of the same year; that he was only in New Mexico long enough to gather a 120-acre crop and that he considered at the time he voted that he resided in the state 12 months and in the county 6 months preceding the election. He said, "My wife and I first moved to Farwell from Grannals, Ark., in September, 1912." It is shown that he purchased a home in the latter part of December, 1912, or in January, 1913, from one J. B. Younger, known as the Wimberly place, situated in Farwell, and lived southeast of the town before he moved to that property. The period of his residence was a fact question for the trial judge.

[9] The findings of the court as to the vote of N. E. Sidebottom are as follows:

"I find that he is a single man; the evidence does not show where he resided on January 1, 1912, and as to whether he paid a poll tax to the state of Texas for that year. He took charge of Nobles Bros. grocery house at Farwell in the spring of 1913, or before. He took his meals in Texico, N. M., March, 1913, to September, 1913. The evidence does not show where he usually slept during the six months next preceding the election. He did not pay a poll tax to the state of Texas, in Parmer county, for the year 1912. I conclude as a matter of law that the evidence is not sufficient to show that he is a qualified voter."

Mrs. Murphy and daughter testified that the voter boarded at their hotel twice; that he began to board in March, 1913, and quit boarding September 1, 1913, and roomed at their place once. Walling testified that his place of business was close to the Nobles Bros. grocery store, and that Sidebottom took charge of the business some time in the spring of 1913; that he noticed a trunk in the office and a cot by the trunk and Sidebottom informed him that it was his bed; that he often saw lights in the office at night and that nobody worked there except Sidebottom, who had exclusive control. Maddox testified that when the voter was in charge of the Nobles Bros. store in Farwell, he observed the bed and a trunk in the building. There was no hotel in Farwell, and the towns of Farwell and Texico are in reality one, divided by the state boundary—Farwell being in Texas and Texico in New Mexico. One McKay, who seems to be a frequent witness in this record, testified that Sidebottom was rooming in July, 1918, with one J. N. Williams, in Texico, and in that month, on invitation, he visited his room. The trial judge had the right to reject the testimony of Mc-

Kay, and if he believed that Sidebottom took his meals in Texico, that fact would not deprive him of the right to vote, if he resided in Texas. The testimony of Mrs. and Miss Murphy, that the voter roomed at their hotel once, is insufficient to disqualify this voter. The court could find from the testimony of Walling and Maddox that the voter used the store as his principal abode for sleeping. Whether this voter resided in Parmer county or some other county previous to the time he took charge of Nobles Bros. store is not shown. As to his poll tax, it is merely shown that he did not pay one to the state of Texas, in Parmer county, for the year 1912. The record is not satisfactory on this subject, but we are not disposed to reject the court's finding, considering the burden of proof.

[10] The voter Dobbins moved with his wife from Galveston, Tex., to Chicago, Ill., about January 1, 1911. He had entered the employ of the Capital Freehold & Investment Company, under contract, as land commissioner, which expired January 1, 1914. His duties as land commissioner kept him in the Panhandle of Texas, where the company's lands were situated, the principal part of the time, and in April, 1912, he purchased a lease contract on a bungalow in Friona, Parmer county, which expired January 1, 1913, and moved to that place with his wife in April. He testified that they moved to Parmer county "to make it our home during the rest of the time I was under contract with the Capital Company." Before he moved from Galveston his furniture had been burned, and when he went to Chicago he bought furniture, rented a flat and began to live in that city. He sublet the flat in Chicago, "for the period of six months with the privilege of extension." He said, "We had the flat in Chicago under a lease and could not get released." He testified that in October or November, 1912, his sublessee did not desire to renew the lease for their furniture in Chicago, and being unable to heat the bungalow his wife went to Chicago, for the winter, until the apartment could be sublet, which was done in May, 1913. In the spring of 1913 he moved some of his furniture from Chicago and bought some, changing his place of residence from Friona to Farwell. There was testimony of declarations by Dobbins that they were "camping out" while in Texas. There was testimony also of statements in regard to Chicago as his home, and particularly a declaration that he did not claim his residence in Texas, at the time of a certain bond election, held in August, 1913, and gave that as his reason for not voting at that election in Parmer county. The trial court accepted Dobbins' statements as to his residence in Texas, and unless the statements that he moved to Parmer county to make his home for the time he was under contract with the company, would reject him as a voter, on account of his residence, the court had a right

upon the testimony to receive the vote. Appellees cite *McCrary on Elections*, § 70, and the report of a case of *Cessna v. Meyers*, found in the appendix on page 284, to the effect that where a person goes to a place to work for a stated period only, he nevertheless acquires a residence there, if he has no other home to which he expects to return when his employment ceases. Appellees very pertinently remark that if the law were as stated by the appellants, a school-teacher, a Methodist minister and other classes of persons who are employed for a stated period of time, for that reason alone, may not acquire a residence and become legal voters. Contestants, of course, couple this contractual condition with other testimony in regard to Dobbins' intention as to a home in Chicago. The court resolved it, however, and under the rule we are unable to overturn it. See *Langhammer v. Munter*, 80 Md. 518, 31 Atl. 800, 27 L. R. A. 331; *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 702, 703.

[11] M. B. Tisdell lived in Parmer county from 1905 to 1911, inclusive, with his family, owning an improved farm near Farwell. He was about 75 years of age and in the spring of 1912 left with his family to Hall county, renting land and raising a crop in that county during the years 1912 and 1913. He retained his home and farm in Parmer county, and continued to own the same to the time of the election. On account of a drought in Parmer county, extending for a period of 4 years, he testified that:

"It became necessary for us to go where we could raise a money crop to enable me to pay out my property at Farwell, so I moved temporarily to Hall county for that purpose."

He said he never intended to make the latter county his home, but intended to return to Parmer county and maintain his permanent home on his farm near Farwell, and at the time his depositions were taken, he was moving back to the latter county. The court had the right to receive him as a voter.

[12] W. W. Stroud resided at Farwell with his wife and children 2 years previous to the death of his wife, and, after the latter's death, he removed to Amarillo, employed at different occupations. He owned a furnished home at Farwell, but removed a part of his household goods to Amarillo, and testified that during the year 1913 he and his sons were in Farwell frequently and spent a great part of the time at that place; that he still owned his residence property at that time and considered Farwell as his permanent place of abode, intending to return as soon as conditions would permit and engage in business at that place; that he did not intend to transfer his place of permanent residence to Potter county or any other place. One Schrieber of Amarillo testified that Stroud, while working for him, from June, 1913, to and including October, 1913, made several visits to Farwell. Residents of Farwell also testified to seeing Stroud on occa-

sions at Farwell during the latter's stay at Amarillo. On the whole, we think the court had the right to reject the challenge. *Davis v. State*, 75 Tex. 420, 12 S. W. 961; *Rathgen v. French*, 22 Tex. Civ. App. 489, 55 S. W. 579.

[13] Appellant's assignment in this court, challenging the vote of Claude Rea, does not question the failure to pay a poll tax for the year 1912, nor the lack of an exemption certificate for the purpose of voting. The statement under the assignment is as follows:

"The voter, Claude Rea, testified by deposition taken on April 6, 1914, that he was 22 years of age, and a single man; that his occupation was feeding cattle; that on January 1, 1913, he was working for the V V N's, and had worked for them since October, 1912, all the time and slept in Farwell at the ranch; that he worked for the V V N's in Bailey county, Tex., from April 18, 1913, to October 18, 1913, and slept in Bailey county, Tex., between April 18, 1913, and October 18, 1913, as regularly as he did anywhere else."

The position is that the uncontroverted testimony is to the effect that he usually slept, at nights, from April 18, 1913, to October 18, 1913, in Bailey county, Texas, and that under the statute his residence in Bailey county, at least during that period, disqualifies him as a voter in Parmer county.

The further inference from the testimony is, that this young man owned a small house in Farwell and freighted for the V V N ranch, and when at Farwell lived at the little house; that he had a bed and kitchen outfit in it, and after he quit the ranch he lived in the two-room house in Farwell. It is not shown how much of the time was spent in Farwell while engaged in freighting or other work, nor the length of time he was engaged in freighting for the particular ranch. He said that between April 18, 1913, and October 18, 1913, he slept at nights in Bailey county and he did not know as to the time he slept there, saying that he did so about as regularly as he did anywhere else.

One Hopping testified that he became acquainted with Claude Rea when he was hauling cake for the ranch mentioned; that when he came for a load at Farwell or Texico, he would spend the night in his house; that no one lived in it except himself, and in which he kept his bed and camping outfit.

The testimony as to this voter is so indefinite that it is impossible to form an intelligent conclusion as to the amount of freighting the voter performed and the usual place of sleeping, in the performance of his work. In connection with the deducible fact that he owned a house in Farwell, with a bed and camping outfit in same, using it for a place of abode at times, we sustain the court's finding as to the eligibility of this voter. The burden was upon appellants.

[14] Quoting from appellants' brief:

"Contestants allege that T. O. Cunning cast his vote at Bovina, in precinct 3, for the county seat to remain at Farwell, that his vote was so counted, canvassed, and returned, but that said vote was illegal and void because, but for the

intimidation and threats of partisans of Farwell, said voter would have cast his vote for the county seat to be removed to Bovina."

It is admitted that Cuning cast his vote for Farwell. He was engaged as a pumper for the Santa Fé at Bovina station. He said that in a conversation just before the election, a certain attorney informed him:

"That we would have to vote in favor of the railroad and they did not want to build a depot at Parmerton. * * * It is my understanding that the attorney used the words that I would 'lose my job' during the conversation."

There was a telegram addressed to the agent of the company at Bovina, signed by one of the higher officials of the railroad, which the voter Cuning saw before he voted. This telegram refers to some conversation between the pumper and the attorney, and the agent was instructed to inform the pumper and other employes that the company could not consistently advise them one way or the other; but if it was their intention to work to the company's interest, they should use their judgment as to the manner in which the company would be most benefited. Lucas, the agent, testified that Cuning, "was possibly a little disturbed as to some parties trying to make it unpleasant if we cast our vote in a certain way. I was not."

This agent is still in the employ of the company, and it is not shown how he voted. Cuning further testified that he was under the impression that if he did not vote for Farwell he would be likely to lose his employment with the company, and that he received that impression from both the telegram and the conversation. He said:

"I do not remember whether I intended to vote otherwise for Bovina, but I believe I did. I was in favor of Bovina."

It is noted that the ground of contest is that but for the alleged intimidation this voter would have cast his vote for Bovina. The trial court, in passing upon this question, could have excluded the alleged intimidation and could have concluded that it is not shown that this voter otherwise would have voted for Bovina. The telegram was sent on the 17th of October and the election was held on the 18th. Cuning further testified:

"Earlier in the campaign before election day, I had been in favor of removing the county seat from Farwell and changed my intention after I found I could not get it at Bovina."

Then following is a statement that there was something else that influenced him, also stating the conversation with the attorney and the telegram mentioned. The court found that the evidence was insufficient to show that he was threatened with loss of his employment, and that he was intimidated and caused thereby to vote as alleged.

It is evident that practical considerations had, as a contributing element, caused a change of intention in regard to his vote, be-

fore such conversation and telegram, on account of the hopelessness of Bovina's candidacy. It is asserted that his vote for removal to Bovina, under the circumstances, would have had the same legal effect on the result of the election as a vote for remaining at Farwell. Under pre-existing rules, this logic would follow; it is unnecessary to decide the point whether the testimony sufficiently raises intimidation depriving Cuning of his free will as to any predisposition for Bovina.

[18] We think the trial court had the right to infer that C. E. Dodson was a voter in Farmer county, on account of his residence in Farwell. He moved to Farwell either in 1910 or 1911, and had been engaged as a clerk in a dry goods store prior to May, 1913, when the store was burned. He continued to work for the same employer for a month or two subsequent to the fire, collecting debts. It is inferable that the elements contributing to his residence in Farwell were his wife's condition and his accessibility to the public school for his children. He rented a house from one Nobles, and after the cessation of employment in Farwell he made a visit to Oklahoma and upon his return he went to his farm in Bailey county, testifying that at that time it was with the expectation of helping the man employed on the place and getting his folks out of town for a while, but with the intention of returning to Farwell for the purpose of schooling his children, and also that his wife could be near a physician. When he went to his farm seven miles away in Bailey county, in the summer of 1913, he left some of his goods in the rent house at Farwell, stating to Mr. Nobles, the landlord, that either in September or October he desired the house again and was moving out temporarily; that if Nobles had an opportunity to rent the house he could put his household goods in the barn; that after the election he again concluded to resume his residence at the farm and removed the balance of his household goods. The fact that he left a part of his household goods at Farwell is inconsistent with a resumption of permanent residence on the farm and entirely consistent with the intention of returning to Farwell, as a place of continued residence. It is suggested that Dodson does not state that he intended to permanently reside in Farwell; however, he was contestant's witness and we are not informed whether he was ever asked such a question. We are unable to assume that the fact of leaving a part of his household goods in Farwell is merely evidence of a simulated intention to exercise the right of suffrage. The trial court had the right to weigh this testimony, and it is not in such a condition as that we can say that the residence of this voter during the necessary period was in Bailey county, instead of Farmer county.

As to the vote of John Foster, contested

on the ground of residence and failure to pay poll tax, appellants' statement under the twenty-sixth assignment of error is not sufficiently extended. Analyzing further the testimony of H. C. Foster, the father of the voter, and giving it the permissible inferences in favor of the court's findings, for the purpose of supporting it, a different conclusion as to the eligibility of John Foster can be deduced. It would be a repetition of reasons applicable to other voters already discussed. The record does not show that the young man was subject to a poll tax. We sustain the finding.

[16] E. W. (Shorty) Stafford left Portales September 5, 1912, for Farwell, upon a previous arrangement with J. D. Hamlin, of that place, as we infer, for employment. His wife went to Friona, and in January or February, 1913, Hamlin not being able to arrange a house for them in Farwell, suggested that they move to Texico, until a house could be "fixed" for their occupancy. A part of his "stuff" (we assume it was household goods) was left at Farwell when they moved to Texico, and the testimony strongly suggests an intention of returning, and that the residence in Texico was only temporary, except for the following fact: He said while in Texico he started to make the race for city marshal of that place and thought maybe he could stay over there because he was not going to get the house in Farwell. He returned to Farwell prior to May, 1913, moving into the house arranged for him. He further testified in regard to his candidacy for office:

"The reason I did not continue to run for city marshal of Texico was because I didn't claim Texico my home, and because I didn't want it; I could not work on this side and hold office; some of them said I could not run and I don't think my name was ever put on the ticket."

While in Texico he also managed the waterworks and operated a blacksmith shop in Farwell.

We think it can be inferred that his first residence in Farmer county was an abandonment of his original domicile in Roswell, N. M. It is inferable that when he moved across the line into Texico (the two towns being the same except for the boundary) he intended to resume his residence in Farwell, leaving a part of his household goods at that place, with an arrangement for the "fixing" of a house for his return and future occupancy—Hamlin allowing him to use the house in Texico as a matter of accommodation. The trial court could conclude that his abandonment of an intention to run for city marshal was on account of his claim of residence in Farwell. We overrule the assignment.

Other assignments, based upon challenges leveled against other voters counted for Farwell, are unnecessary to decide. We are not disposed to agree with the trial court as to some of them, and others present close

questions, inexpedient to discuss. If some votes were deducted from Farwell's total is apparent, however, that Parmerton not receive the majority prescribed under law, even if you could assume that it is situated within a radius of five miles of geographical center of the county.

Appellant's assignments, relative to questions of testimony, are unnecessary to discuss in detail. Most of them do not affirm nor are connected with, the findings of particular voters passed upon. If we reject the testimony of the railroad officers testifying from the records, in regard to two Mexicans, it would not change our opinion with reference to the court's findings to those two voters. The question of payment of expenses, as applicable to particular voters discussed here, could not affect the vote of Tisdell, which would alter this result, if the assignment were sustained.

The appellants in this case introduced testimony of a surveyor as to the geographical center of Farmer county. The certificate of the commissioner of the general land office, though solicited by the county judge before the election, was not mailed, received or recorded until after the election. Farwell is more than five miles from the center, a majority of voters voting at an election could move the county seat from that place to another within five miles of such center in such case the center to be determined by a certificate from the commissioner of the general land office, under the Constitution as well as under the statute.

[17] Appellants' contention is that the certificate in this case has no vitality under the conditions, and that they could prove the matter by other and different testimony. "It is an accepted rule of construction that where a power is expressly given by the Constitution and the mode of its exercise is prescribed, such mode is exclusive of all other modes." *Crabb v. School District*, 105 Tex. 198, 14 S. W. 529, 39 L. R. A. (N. S.) 601, Ann. 1915B, 1146. In view of the principle that the selection and designation of county seat is a political question, though the constitutional amendment of 1891 gives the district court power to try all cases of contest of election—a most interesting question is presented, but not decided.

Judgment of trial court is affirmed.

COFER et al. v. BEVERLY. (No. 942)
(Court of Civil Appeals of Texas. Amarillo.
March 15, 1916.)

1. PLEADING—§ 228—INTENDMENTS FAILING—ABSENCE OF SPECIAL EXCEPTION.

In the absence of special exception, a reasonable intendment will be indulged in favor of a plea.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 584-590; Dec. Dig. § 228.]

2. BILLS AND NOTES §129(1)—MATURITY—ELECTION OF HOLDER.

Where the maturity of a note rests at the election or option of the holder, until such option is exercised the debt, for the full amount, will not be considered due.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283, 284, 286-291; Dec. Dig. §129(1).]

3. BILLS AND NOTES §129(2)—MATURITY—FAILURE TO PAY INSTALLMENT—OVERDUE PAYMENT.

Where the failure to pay an installment of a debt ipso facto gives rise to a cause of action upon the whole debt, it is not the rule that by acceptance of payment of overdue installments or extension of time upon an installment the creditor waives the default.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 285, 292; Dec. Dig. §129(2).]

4. BILLS AND NOTES §129(2) — VENDOR'S LIEN NOTE—OPTION TO DECLARE DUE—ESTOPPEL.

Where the holder of a vendor's lien note, providing that failure to pay it or any installment of interest should, at the holder's option, mature such note, made an agreement with the makers that an interest installment might be paid subsequently to its due date, when such makers had realized funds therefor from the sale of grain raised on the premises, such holder and his assignee were estopped from declaring the entire debt due and foreclosing for the makers' failure to pay the installment of interest on the due date; the makers discharging their obligation to the assignee by tendering interest as soon as they learned of the transfer of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 285, 292; Dec. Dig. §129(2).]

5. BILLS AND NOTES §129(2) — RELEASE FROM PAYMENT.

Where a mortgagor makes an honest but unsuccessful effort to find the mortgagee and to tender him his interest and is prevented from ascertaining the owner of the note, the courts have the power to release the mortgagor from the effect of nonpayment which would otherwise mature the whole debt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 285, 292; Dec. Dig. §129(2).]

6. BILLS AND NOTES §344—AGREEMENT TO EXTEND TIME FOR PAYMENT OF INTEREST—BINDING FORCE ON ASSIGNEE.

Where the holder of a vendor's lien note exercised his option, when an installment of interest fell due, to declare the whole debt due for failure to pay the installment, an agreement by such holder, after declaring the note due, to extend the time for payment of interest, bound his assignee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 366-368; Dec. Dig. §344.]

7. BILLS AND NOTES §318—PRECIPITATING MATURITY—POSITION OF PURCHASER.

Where the purchaser of a vendor's lien note from the holder thereof was in possession of facts which would have led him to knowledge that by agreement between the holder and the makers the time for the payment of an installment of interest was extended, such purchaser stood in the shoes of the holder, and could not, under the provisions of the note, precipitate maturity of the whole debt for failure to pay the installment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 754; Dec. Dig. §318; Vendor and Purchaser, Cent. Dig. § 864.]

Appeal from District Court, Dallam County; D. B. Hill, Judge.

Suit by Wm. Beverly against W. R. Cofer and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Clifford Braly, of Dalhart, and Ben H. Stone, of Amarillo, for appellants. Tatum & Tatum, of Dalhart, for appellee.

HUFF, C. J. Appellee, Wm. Beverly, brought this suit against the appellants, W. R. Cofer and L. W. Cofer, on a vendor's lien note, alleged to have been executed on the 27th day of February, 1914, payable to John F. Ladd and Bernice C. Ladd, for the sum of \$2,000, payable to their order on or before five years after date, with 6 per cent. interest from date, interest payable annually at Dalhart, Tex. It is provided in the note "that the failure to pay said note or any installment of interest thereon, when due, shall, at the option of the holder of said note, mature said note," and for 10 per cent. attorney's fees. The vendor's lien was sought to be foreclosed on a certain section of land. It is alleged that about the — day of January, 1915, John F. Ladd and Bernice C. Ladd sold and transferred the note to Willie C. Dawson, for a good and valuable consideration, and that about the 17th day of March, 1915, Willie C. Dawson, joined by her husband, G. W. Dawson, sold and transferred the note to the appellee Beverly. The appellants by answer alleged:

"That on the date said interest on said note became due and payable, to wit, February 27, 1915, said note was owned and held by G. W. Dawson and his wife, Willie C. Dawson, as their community property, but said note being in reality indorsed to and held in the name of the said Willie C. Dawson, and that on or about the said last-mentioned date, defendant W. R. Cofer, acting for himself and defendant L. W. Cofer, at the instance and request of the said L. W. Cofer, approached the said G. W. Dawson concerning an extension of the time in which the said owners and holders of said note would require the payment of said interest before exercising their option of accelerating the payment of said note and accrued interest thereon. That the said W. R. Cofer, then and there stated and explained to the said G. W. Dawson that if said holders of said note then required that said interest be immediately paid, defendants would immediately raise the amount required and pay said interest, but that it was the purpose and desire of defendants to pay said interest from the proceeds of sale of certain grain raised on the lands and premises herein sought to be foreclosed upon, and which grain was then prepared, and being prepared, for market and sale. That said grain would be brought in and marketed at Dalhart, Tex., as soon as reasonably possible, and the sum necessary to pay said interest would be thereby acquired and applied in payment of said interest, and requested that the date of payment of said interest be extended to such a future date as would reasonably enable defendants to so market said grain and so raise said funds. That the said G. W. Dawson, then and there for himself and wife, Willie C. Dawson, agreed and promised defendants said requested extension. That while no

definite future date was then fixed and designated at which said interest was to be paid, and to which extension was granted as aforesaid, still defendants allege that 20 to 30 days was a reasonable time in which to have so marketed said grain, and further say that it was then understood and contemplated by the said Dawson and defendants that the time stated would be required to so market said grain and thereby raise said interest money, and that the said Dawson intended to, and did, then and there, as aforesaid, extend the due date of said interest for the period of time mentioned."

The appellants further allege that they relied on the representations and agreements so made, and were endeavoring to comply therewith when the Dawsons sold the note to the appellee, that neither of the Dawsons notified or advised appellant of the transfer of the note to appellee, and that appellee made no presentation of the note to the appellants, but wrongfully attempted to declare the principal sum called for then due and payable. They allege that they were first notified that J. R. Beverly, a brother of appellee, had purchased the note, and that they called on him and were informed that it was his brother, the appellee, who purchased the note, and that he was then out of town, etc., and they alleged, substantially, that they were unable to find him, and the note was placed in the hands of attorneys by Beverly about the 18th or 19th of March, who notified the appellants that they held the note, and that they tendered the interest due on the note, together with the accrued interest on that sum, to the attorneys, who refused to accept the same, and notified the appellants that they would institute suit for the full amount. They further alleged that it would be a great hardship on them at that time to meet the entire obligation, and but for the agreements that they had had with Dawson and their inability to find the owner of the note, they would have paid the interest at maturity, and that they could have done so and would have done so but for the fact that the time for paying the interest was extended. They also set up the value of the premises, and that it would be inequitable to sell the property at this time, and set up their inability to obtain the full amount of the note, principal, and interest. There was a general exception to this answer by the appellee, which the court sustained, and, the appellants declining further to amend, the court rendered judgment for the appellee for the full amount of the note, principal, interest, and attorney's fees, foreclosing the lien on the land securing the same. From this judgment the appeal is prosecuted.

[1, 2] The plea of appellants is, in its nature, a plea to abate. The provision of the note is:

"A failure to pay said note, or any installment of interest thereon when due, shall, at the option of the holder of the said note, mature said note."

[3] It is alleged that the owner and holder of the note, when the installment of interest fell due, agreed to extend its payment until the thrashing and marketing of certain grain, and that it was understood it would take about 30 days at the time of the agreement to do so. While the allegations are not very specific, yet every reasonable intendment will be indulged in favor of the plea in the absence of a special exception. The only exception presented and sustained is a general exception. As we understand the authorities, where the maturity of the note rests at the election or option of the holder, until such option is exercised, the debt for the full amount will not be considered due. *Harrington v. Clafin*, 28 Tex. Civ. App. 100, 66 S. W. 898; *Association v. Stewart*, 94 Tex. 441, 61 S. W. 387, 86 Am. St. Rep. 864; *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466. If the allegations of the answer are true, default in the payment of the interest was not suffered on account of the neglect of the makers of the note, but they sought the holder and secured an agreement to wait upon them until the grain mentioned could be marketed. This is evidence, at least, that the then holder of the note had waived the option to mature the note. In the case of *Association v. Stewart*, supra, our Supreme Court said:

"Authorities holding that by acceptance of payment of overdue installments, or extension of time upon an installment, and other like acts, the creditor waives the default, are relied upon, but those are decisions in which the contract is regarded as only giving to the creditor the right of election";

—but such is not the rule where the failure to pay an installment ipso facto gives rise to the cause of action upon the whole debt. Upon the latter proposition, that court said:

"Any agreement the parties might make, which would have the effect of obviating the default and restoring the contract to its original condition as if it had not been broken, would be supported by a sufficient consideration. The debtor would secure from the creditor further credit, and give up his right to discharge the whole liability at once. *Benson v. Phipps*, 87 Tex. 578 [29 S. W. 1061, 47 Am. St. Rep. 128]; *Austin, etc., Abstract Co. v. Bahm*, 87 Tex. 582 [29 S. W. 646, 30 S. W. 430]. But, aside from this, while neither party by his separate action or nonaction could impair the rights of the other, each could waive his own rights as they accrue from the default in payment of an installment, so as to estop him from relying upon such default. To accomplish this, it would only be necessary that each should so act as to justify the other in believing and acting upon the belief that the effect of the failure to pay an installment was to be disregarded, and that the contract should stand as if there had been no default. The principle of estoppel by waiver would, we think, have proper application in such a case. *Bish. on Con.* §§ 789-808; *Big. on Estop.* p. 633 et seq.; *Insurance Co. v. La Croix*, 45 Tex. 158; *Insurance Co. v. McGregor*, 63 Tex. 404. An agreement or waiver, having the effect supposed, may be inferred from the conduct and declarations of the parties as well as evidenced by their express stipulations."

In the case under consideration, as in the one above, it is said by the attorneys there was no binding agreement. The Supreme Court answered that proposition as follows:

"The distinction is in this: The contract was in writing, fixing times and terms of credit, which were affected only by the default causing maturity earlier than such dates. It was therefore only necessary to take away the effect of the default, and to restore the contract as it was before that occurred, when its terms would be perfectly definite and certain." *Lester v. Hutson*, 167 S. W. on page 327.

[4] It occurs to us that the principles announced in the above case settle the question that if the holder of the note waived his right to hasten the payment of the note, by entering into an agreement that the interest installment could be paid at a time subsequent to its due date, he and his assignee would be estopped from advancing the payment. If the maker of the note relied upon this promise it appears to us it would be inequitable to permit the holder of the note to refuse to receive the interest and to declare due the whole debt. It appears to be the holding of the courts where the option rests with the creditor, if the default is induced by—

"any agreement or promise upon which the debtor might rely, which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings, or the action might be abated upon the facts being properly pleaded." *Moore v. Sargent*, 112 Ind. 488, 14 N. E. 467; 2 *Jones on Mortgages*, §§ 1185, 1186.

Where the course of dealings lead the mortgagor to assume that if forfeiture would not be declared if the interest was paid within periods varying from one to six months after the time it became due, foreclosure has been refused by the New York courts. *French v. Row*, 77 Hun, 380, 28 N. Y. Supp. 849; *German, etc., v. Potter*, 124 App. Div. 314, 109 N. Y. Supp. 435. The reasons for refusing a foreclosure appear to us to be stronger in this case, where the parties agreed that the time for the payment of the interest installment shall be extended until certain grain is marketed. *Taylor v. McFatter*, 109 S. W. 395.

[5] It appears also from the answer that appellants were not notified that Dawson had transferred the note to appellee after the agreement to wait for the interest; that upon learning of this through rumor, appellants sought to find appellee, but he was not in town or at home, but was reported out of town. They allege they were ready to pay the interest, and sought him for that purpose, but could not find him. When they received the letter from the attorneys who had the note, they at once called upon them and tendered to them the interest, together with interest on the amount for the time delayed. This the attorneys refused to accept, and in a day or so thereafter instituted suit for the entire debt, with foreclosure. If a mort-

gagor has made an honest and unsuccessful effort to find the mortgagee and to tender to him his interest, and is thereby prevented from ascertaining the owner of the note, the courts have the power to release the mortgagor from the payment of the whole principal. 2 *Jones on Mort.* § 1185; *Noyes v. Clark*, 7 Paige (N. Y.) 179, 32 Am. Dec. 620; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; *Kerbaugh v. Nugent*, 48 Ind. App. 43, 95 N. E. 336; *Glatt v. Fortman*, 120 Ind. 384, 22 N. E. 300.

[6, 7] The interest was due February 27th, and the agreement, according to the allegation, was then had with Dawson. After that, on the 17th of March, Dawson transferred the note to appellee. The note stipulated the non-payment of interest, "when due," at the option of the holder shall mature the note. The appellee got the note after the interest was due. If the holder, at the time the interest so fell due, exercised his option, the note was past due when appellee became the holder, and proof of the agreement could be made and would bind the appellee. If the option had not been exercised when appellee purchased the note, the appellee was in possession of facts which would have led him to a knowledge that by agreement the time for the payment of the interest was waived. Appellee, we think, is in no better position than Dawson would have been.

Before concluding we will call attention to the case of *Workman v. Ray*, 180 S. W. 291, decided by this court, which may, upon casual consideration, be regarded as in conflict with this case. In that case, however, the option does not appear to have rested with the payee of the note, and we there construed the pleadings of the mortgagee as admitting the notes were then all due and payable. The contract was not urged as rendering the suit premature, but it was sought therein to recover damages for a breach of the contract. We there held there was no consideration shown for that contract, but that case certainly is distinguishable from this.

We believe the trial court was in error in sustaining the general exception to the answer of appellants, and the case will be reversed and remanded.

HOUSTON OIL CO. OF TEXAS v. JONES et al. (No. 46.)*

(Court of Civil Appeals of Texas. Beaumont. Jan. 13, 1916. On Motion for Rehearing, March 18, 1916.)

1. ADVERSE POSSESSION — 114(1)—EVIDENCE — SUFFICIENCY.

In an action to recover an undivided half interest in a tract of land on the ground that plaintiffs had acquired title by adverse claim and occupancy, evidence held sufficient to support a verdict for plaintiffs.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683; Dec. Dig. — 114(1).]

2. APPEAL AND ERROR ⇨1001(1)—FINDING—REVIEW.

Where in such action there was conflicting evidence as to whether there had been a break in the continuity of plaintiff's possession, a finding of the jury that there had been a ten years' continuous possession, which was supported by competent testimony, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. ⇨1001(1).]

3. APPEAL AND ERROR ⇨1060(3)—HARMLESS ERROR—STATEMENT TO JURY.

Where in such action plaintiff's counsel was permitted to state to the jury that the statute of limitations was suspended during the time of such alleged break of continuity, such action of the court was harmless error, where the jury on competent testimony found a ten years' continuous possession after such alleged break, and there was nothing in the record to indicate any bias on the part of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. ⇨1060(3).]

4. APPEAL AND ERROR ⇨1051(1)—HARMLESS ERROR—ADMISSION OF TESTIMONY ON FORMER TRIAL.

The admission on the second trial of such action of the evidence given by a witness on the previous trial, where he had been fully cross-examined, was not prejudicial error, where such witness was physically unable to attend court or answer interrogatories, and there was no indication that he was to be attacked as a witness by impeachment, and there was abundant evidence to support the finding of the jury without his testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4165, 4166; Dec. Dig. ⇨1051(1).]

5. TRIAL ⇨133(2)—CONDUCT OF COUNSEL—STATEMENT TO JURY.

Where plaintiffs' counsel in his opening argument stated to the jury, in effect, that the plaintiffs could not scour the county for witnesses as the defendant, being a corporation, had done for the purpose of finding witnesses to bolster up an unjust claim, and the trial court ruled that the statement was improper and withdrew it from the jury, with the instruction not to consider it, there was no ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ⇨133(2).]

Appeal from District Court, Newton County; A. E. Davis, Judge.

Action by H. C. Jones and others against the Houston Oil Company of Texas. Judgment for plaintiffs, and defendant appeals. Affirmed. Motion for rehearing overruled.

See, also, 161 S. W. 92.

Parker & Kennerly and Fred L. Williams, of Houston, for appellant. John B. Warren, of Houston, for appellees.

MIDDLEBROOK, J. Appellees, heirs of Mrs. D. M. Jones, deceased, instituted this suit in the district court of Newton county, Tex., for the recovery of a one-half undivided interest in 160 acres of land, a part of the Nathaniel Cochran survey in said county. The land was occupied first by appellees' father and mother during the marital relation. After the death of Mrs. D. M. Jones the Houston Oil Company instituted suit

against D. M. Jones for the land, and secured a judgment against him, but the heirs of Mrs. D. M. Jones, deceased, were not parties to the suit. They claimed the land under the ten-year statute of limitation. An agreement is of record which shows the title in appellant, Houston Oil Company, less it is divested of such title by virtue of plaintiffs' plea of limitation and the facts supporting the plea. The case was tried with a jury, resulting in a verdict and judgment for the appellees for 80 acres, but the land sued for; and the case is proper before this court on appeal. There is no conflicting testimony as to the ten years' adverse occupancy as pleaded by the plaintiff, and the evidence is voluminous; but for a full understanding of the case it is not necessary to set out the facts in full.

D. M. Jones testified upon the issue of limitation as follows:

"I first moved on the land that I now live on in the fall of 1865. * * * When I moved on the land, I built a log house 18 feet square on the south end of this 18-foot room a 8x18 feet, and on the west an open gallery. The east side of the 18-foot room was a kitchen built of split boards, 8 feet wide and 18 feet long. I had a log smokehouse 12x18 feet near the residence. I had a corner crib built of logs, about 12x16 feet. I also had a double house stable for horses about 12 feet square. I cleared 8 acres about 300 yards southwest of the house the first year I moved there. This was done in the fall of 1865 and the spring of 1866. I cleared 4 acres adjoining the 8 acres above mentioned on the south side in the fall of 1866 and the spring of 1867. I also cleared patches about the house and cow panned to the extent of about 4 acres. The clearing extended over a period of three or four years beginning with the year 1865. I lived on the place with my family continuously for a period of 12 years from the time I originally moved on it. Then Mrs. Tade, an aunt of mine, moved on the place, and occupied the same as my aunt continuously for a period of about 10 years. During this period of five years I lived about 1½ miles southwest from the place, but I used and cultivated the land in question each and every year during the time. I cultivated them continuously each year until I made a crop that year on the place. The land was not further occupied by me until the year 1902. I moved on it in March, 1902. I have lived there continuously since 1902. I cultivated the land which was cleared and mentioned each year I was on the place and five years Mrs. Tade occupied it."

There is testimony that D. M. Jones made improvements on the land to one W. Simmons about the year 1870. D. M. Jones denied such sale, and said the improvements he sold to Simmons were not on the land in controversy. One Biscamp testified that his father bought some oxen from D. M. Jones, and that he understood that Jones got the oxen from Simmons for the improvements "on that old place over there."

H. C. Jones, son of D. M. Jones, and one of the plaintiffs in this case, testified that his father was mistaken in saying he had cultivated the place ten or twelve years in 1865, and that he does not remember

g Mrs. Tabbe lived on the land, but does not remember her being there more than six or ten months. H. C. Jones was born in 1858. He also testified that he was at home and that few of its being cultivated until 1878, and then left home. He helped to cultivate the land till 1878.

A number of witnesses not related to the parties testified positively of Jones' occupation and tilling of the land up to 1882. There is testimony in conflict with the testimony that D. M. Jones occupied and cultivated the land from 1865 to 1882, some of the witnesses testifying that they saw the place in 1878, and that it was not in cultivation then; but there is abundant testimony that D. M. Jones did occupy, claim, and cultivate the land from 1865 to 1882. D. M. Jones at the trial of this suit lived upon the land with his son, H. C. Jones.

[1] Appellant's first assignment of error is to the effect that the verdict of the jury and the judgment of the court are not supported by the evidence, because plaintiffs failed to establish adverse claim and occupancy and title of the land described in their petition to metes and bounds thereof at any time or for a sufficient time to mature their title thereto.

Plaintiffs' prayer is for one-half of the 160 acres of land mentioned above, which is described by metes and bounds, alleging the survey of the land in 1872. They allege that they always understood the survey to contain 80 acres, but plead in the alternative that, if more land is included in the field notes than 160 acres, then they ask that such excess be taken off so as to leave to them their improvements, and that such excess, if any, be taken off of the north side of the tract. The judgment shows an agreement between the parties that the field notes include about 80 acres of land, and therefore a strip of 80 varas wide is taken off of the north side of the land, and is decreed to the appellant. This strip contains 9 acres. Such being the case, we fail to find merit in appellant's first assignment of error, and the same is overruled.

[2] Appellant presents five propositions under the first assignment of error, each of which is substantially that, there being a break in the continuity of possession by Jones when Simmons lived on the land, the governing limitation title is not commuted with, and therefore the verdict and judgment are not supported. We do not think these propositions of law are germane to the assignment; but, if properly assigned, we do not think such assignment is supported by the record. The following special issues were submitted to the jury:

Question No. 1: Have the plaintiffs and those under whom they claim had and held peaceable and adverse possession of the land described in plaintiffs' petition, cultivating, using, or enjoying the same, for a period of ten consecutive years prior to the year 1890?"

The jury answered this question: "Yes."

"Question No. 2: What years, if any, have the plaintiffs and those under whom they claim had and held peaceable and adverse possession of the land described in plaintiffs' petition, cultivating, using, or enjoying the same, prior to the year 1890?"

The jury answered this question: "1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, and 1882."

These findings by the jury are supported by competent testimony, and, such being the case, this court will not disturb such findings.

[3] Appellant's second assignment is very lengthy; but it claims that the trial court committed error in permitting appellees' counsel to state to the jury that the statute of limitation was suspended in 1870; that appellant was entitled to an answer from the jury stating just what years the land was actually occupied by appellees.

There could be no vice in such statement to the jury unless the jury should, without warrant of testimony, or contrary to their own convictions, by a preponderance of the testimony, begin with the year 1870 and find such occupancy for a sufficient length of time to perfect the title under the pleas. There is testimony to justify the finding of such occupancy after the year 1870, and the jury did so find, for they say that he so occupied and held the land up to and including the year 1882; and there is nothing in this record to indicate any bias on the part of the jury, nor that such statement had any tendency to injure the appellant's rights before the jury. The second assignment is therefore overruled.

The third, fourth, and seventh assignments of error are to the effect that the verdict and judgment are contrary to the law and facts of this case: (1) Because the plaintiff did not enter under any claim of right; (2) because the great weight and preponderance of the testimony is in favor of the defendant. What we have said in our disposition of the first assignment of error is sufficient to dispose of these assignments, and they are each overruled.

[4] The fifth assignment complains of admission of Jim Pearson's testimony as deduced upon a former trial of this case. The record shows that Mr. Pearson was stricken with apoplexy a few days before this trial, and that at the time of the trial was in a precarious condition, and unable either to attend court or answer interrogatories. There is no indication that he was to be attacked as a witness by impeachment. He had testified and had been fully cross-examined by appellant's counsel upon the former trial of the case. There is abundant evidence to support the findings of the jury without his testimony, and there is nothing in the record to indicate that a different verdict would have been found had he been there and testified again in person. The fifth assignment is overruled.

[5] The sixth assignment complains of the following language used by counsel for appellees in his opening argument before the jury:

"Plaintiffs in this case could not scour the country to find witnesses as the defendant could. The defendant, being a corporation, could, and did scour the country for the purpose of finding witnesses willing to bolster up the claim which the defendant knew was not just."

The trial court ruled that the statement was improper, and withdrew it from the jury, and instructed the jury not to consider the argument. We think it very unlikely that any injury to appellant resulted from these remarks by counsel, and therefore the sixth assignment of error is overruled.

This disposes of all the assignments of error presented for our consideration, and the judgment of the lower court is affirmed.

On Motion for Rehearing.

In the original opinion in this case we made a brief statement of the facts pertinent to the issues of limitation, some of which we quoted indirectly, and some of which we stated as facts, which we did not directly quote.

Counsel for appellant has filed motion requesting additional findings of fact, which motion we have granted, and we copy in full the additional facts suggested by counsel for appellant, as follows:

"Mrs. Herring testified: 'I have heard them speak about Mr. Simmons being there. I do not know whether my father put Mr. Simmons there or not, but I have heard him speak about his being there. I probably have heard him speak about making a trade with Mr. Simmons for the improvements, but I don't remember any particulars about it at all.'"

"E. Biscamp testified: 'My father's name was Fred Biscamp. He is dead. He died in December, 1873. I remember about my father and Jones trading for some oxen. We owned the oxen when my father died, and I know how long we kept them, because we bought a little place on Clear creek, and we boys cultivated it in 1872 and used the oxen we had got from Jones. Mr. Jones got those oxen from old man Bill Simmons. Jones traded him that old place over there, the improvements, so they said. I don't know that they did that; that was the understanding that he let him have them in payment to buy the place. I think Bill Simmons moved on the place about the time Mr. Jones got the oxen, and he stayed there a little while and left. I think Simmons went on the place first, and then Mrs. Tade. I don't know how long it was after Simmons left before Mrs. Tade went there.'"

"D. J. Lee testified: 'It don't really appear to me that Simmons lived there more than a month or two; a very short time, any way.'"

"H. C. Jones testified: 'My father is mistaken when he says I lived on the place with my family continuously for a period of twelve years from the time I originally moved on it; then Mrs. Tade, an aunt of mine moved on the place and occupied the same as my tenant continuously for a period of about five years. It is not a fact that during the time Simmons lived on the N. H. Cochran league and occupied the improvements he bought from me, and that I was living elsewhere than on the N. H. Cochran league. It is not a fact that the improvements which I sold to the said Simmons were on the land in controversy in the suit filed against me in the federal court at Houston, in which judgment

was rendered against me for the land in controversy.'"

We have quoted in *hæc verba* the testimony of these witnesses, as is set out in appellant's motion for additional findings of fact, out of deference to them. However, we think the brief statement of the facts made by us in the original opinion fairly presents every additional fact requested by the appellant.

In our original opinion we used the following language:

"A number of witnesses not related to the parties testified positively of Jones' occupation and tilling of the land up to 1882."

In appellant's motion for rehearing the statement is challenged by appellant's counsel as to the words "not related to the parties." Appellant asks that this part of the statement be corrected, because there was only one witness who so testified who was not related to some of the parties. There were a number of witnesses of different names who testified, and which is likely responsible for the clause "not related to the parties." We accept appellant's statement as true, without looking over the record, to relationship, and now correct that paragraph in the original opinion, and make it read,

"A number of witnesses testified positively of Jones' occupation and tilling of the land to and including 1882."

Appellant's motion for rehearing presents nothing but what we have heretofore considered and passed upon, and we see no reason for change of our original opinion in this cause, and the motion for rehearing is therefore overruled.

MILLER et al. v. FIRST STATE BANK TRUST CO. OF SANTA ANNA. (No. 5490.)

(Court of Civil Appeals of Texas. Austin, May 12, 1915. On Motion for Rehearing, July 2, 1915. On Appellee's Motion for Rehearing, March 29, 1916.)

1. APPEAL AND ERROR \S 188—RESERVATION OF GROUNDS—DEFECTIVE SERVICE OF PROCESS.

On appeal from the denial of a motion set aside a default judgment, the sufficiency of service will not be considered, where it was raised in the original motion to vacate, nor in the answer, but is presented for the first time on an amended motion to vacate not properly verified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1190-1204; Dec. Dig. § 188.]

2. JUDGMENT \S 145(2)—SETTING ASIDE DEFAULT—SUFFICIENCY OF APPLICATION.

To set aside a judgment by default a motion must show a meritorious defense as well as a sufficient excuse for failure to appear in answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 293; Dec. Dig. § 145(2).]

On Motion for Rehearing.

JUDGMENT \S 17(2) — **JUDGMENT BY DEFAULT—REQUISITES—SERVICE OF PROCESS.**
To authorize a judgment by default, the filer's return must show service of citation on defendants in the manner required by statute, even though the judgment shows that defendants were legally served.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 17(2).]

CORPORATIONS \S 507(18)—**ACTIONS—SERVICE OF PROCESS.**

Under Vernon's Sayles' Ann. Civ. St. 1914, 1860, requiring the citation in suits against corporations to be served on one of the officers of the company named therein or some agent of the company, a citation showing service only on the company by name is insufficient, since the binding service must be upon the identified officer or agent or one of the officers or agents prescribed by the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 1995-1997, 2000; Dec. Dig. \S 13(3).]

JUDGMENT \S 17(10) — **JUDGMENT BY DEFAULT—SERVICE OF PROCESS.**

Where the petition or citation in an action against a corporation fails to direct upon whom service is to be made, then, in order to sustain judgment by default, proof must be made that judgment is taken that the citation was served upon some one of the officers or agents named in the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 17(10).]

PARTNERSHIP \S 204—**ACTION — PROCESS—SERVICE.**

Jurisdiction to enter judgment by default against a partnership cannot be obtained by service on the partnership itself, Vernon's Sayles' Ann. Civ. St. 1914, art. 1363, requiring process to be served on a member of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 376-381; Dec. Dig. \S 204.]

JUDGMENT \S 143(1), 145(2)—**SETTING ASIDE DEFAULT—SUFFICIENCY OF APPLICATION.**

Where no legal service is had upon defendant, judgment by default may be set aside without showing a meritorious defense or a meritorious excuse for failure to appear; the judgment being void for want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 269, 271, 278, 279, 283, 285, 293; Dec. Dig. \S 143(1), 145(2).]

On Appellee's Motion for Rehearing.

CHATTEL MORTGAGES \S 229(2)—**CONVERSION OF MORTGAGED PROPERTY—ACTIONS—REMEDY.**

In an action on notes, and to establish a mortgage lien on live stock and cotton, and to recover for conversion of part of such stock and cotton, an answer alleging that, if defendants claimed any cotton on which plaintiff held a lien or mortgage, the money paid by them for to the seller was by the seller paid to plaintiff in partial satisfaction of the demands upon by plaintiff, and that the seller paid plaintiff the market value of the cotton less cost of picking it, stated a meritorious defense.

[Ed. Note.—For other cases, see Chattel Mortgage, Cent. Dig. \S 481, 483; Dec. Dig. \S 10.]

JUDGMENT \S 163 — **SETTING ASIDE DEFAULT—FORM AND REQUISITES OF APPLICATION.**

On an application to set aside a judgment by default, it was proper for the court to consider the answer filed in connection with the

motion in determining whether the motion disclosed a meritorious defense, though the verification of the answer was made on information and belief, without setting out the facts on which the belief was founded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 323; Dec. Dig. \S 163.]

10. JUDGMENT \S 143(13) — **SETTING ASIDE DEFAULT—FORM AND REQUISITES OF APPLICATION.**

A motion to set aside a judgment by default alleged that defendants lived 55 miles from C., the place of trial, that the only available route was by rail via B., and in order to attend court they would have to spend a night in B. and proceed to C. the next day, that the trip was tedious and expensive, that their attorney assured them they could reach C. in time to answer and defend the suit by leaving home on the morning of the day the case was to be called, and that, if plaintiff's attorney took judgment by default before their arrival, the court would set it aside, stating that he was well acquainted with the attorneys for plaintiff and had frequently exchanged courtesies with them, and that they would not insist upon judgment by default until after appearance cases were called for orders, that on the morning of September 8th they started for C. in an automobile, leaving home at 7 a. m., that a blowout delayed them for some little time, and that after repairing it they proceeded to C., arriving there a few minutes after the judgment was entered. *Held*, that this showed due diligence, and the motion to set aside the default judgment should have been granted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 286; Dec. Dig. \S 143(13).]

11. APPEAL AND ERROR \S 1173(1)—**DISPOSITION OF CASE—REVERSAL—CO-PARTIES.**

Where a member of a firm was sued only as a member of the firm, and therefore could not be held liable otherwise, and judgment was apparently rendered against him individually, pursuant to the statute making a judgment against a partnership collectible out of the individual property of the members of the firm served with citation, a reversal as to the firm required a reversal as to him, though he did not appeal, as plaintiff was not entitled to judgment against him, if not entitled to a judgment against the firm, and the statute prescribing that only one final judgment shall be rendered had application.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4562-4567, 4569, 4556; Dec. Dig. \S 1173(1).]

12. APPEAL AND ERROR \S 1173(2)—**DISPOSITION OF CASE—REVERSAL—CO-PARTIES.**

The reversal of a judgment against appealing defendants did not require the reversal of a judgment against nonappealing defendants upon separate and distinct causes of action, in which no recovery was sought or had against the appealing defendants, as the statute prescribing that only one final judgment shall be rendered did not apply.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4568, 4556; Dec. Dig. \S 1173(2).]

Appeal from Coleman County Court; F. M. Bowen, Judge.

Action by the First State Bank & Trust Company of Santa Anna against R. F. Miller

and others. From a denial of a motion to set aside a default, defendants appeal. Reversed and remanded in part, and affirmed in part, on rehearing.

Shropshire & House, of Brady, for appellants. Snodgrass, Dibrell & Snodgrass, of Coleman, for appellee.

RICE, J. This suit was brought by appellee against R. F. Miller, L. E. Miller, W. S. Gattis, James D. Gattis, Jim Bell, O. D. Mann & Sons, a partnership, and William Connolly & Co., a private corporation, all of McCulloch county; and against J. R. Raney Company, a corporation, and Sam Woodward, of Coleman county, to enforce collection as against R. F. Miller, principal, and Raney Company as indorsers on a note for \$250, with interest and attorney's fees, less a credit of \$17.50; and as against said Miller and the two Gattises for balance on a note of \$100, with interest and attorney's fees, and on a note for \$677.41 and \$100 attorney's fees, less certain credits; also to establish a mortgage lien on certain live stock and cotton, and as against the other defendants for conversion of part of said stock and 12 bales of cotton stating the aggregate value of such property alleged to be converted at \$970. No value as to said other mortgaged property was stated, nor was a foreclosure thereon asked. An amended petition was filed September 3, 1914, stating that such other property described in the mortgage was not in existence, and averred that as to it no foreclosure was prayed.

On the 8th of September, when the appearance docket of said court was called, no answer having been filed on the part of appellants, judgment by default was taken as against all of said parties except W. S. Gattis, Raney Company, and Woodward, the case as to first two being dismissed, but went in favor of the latter on the ground of his having a prior mortgage on the live stock. Within 20 minutes after the entry of such default judgment, these appellants, Mann & Sons and Connolly & Co., with their attorney, arrived in Coleman, and upon entering the courthouse yard they met counsel for appellee, whom they apprised of the fact that they had just arrived with their answer for the purpose of filing same and trying said cause, requesting him to return with them to the courthouse to set same down for trial, which said attorney declined to do, informing them that he had just a short while before, on the calling of the appearance docket, taken a judgment by default against them, and, upon his declining to agree that the same should be set aside, counsel for appellants filed in said court, about 2 o'clock on said day, their answer, and also their motion to vacate said judgment, in which said motion they set up their plea of personal privilege to be sued in McCulloch, the county of their residence, also a plea of misjoinder of parties, and alleged

that they had a meritorious defense, without stating what it was. They afterward on the 16th of September, filed an amended motion to vacate said judgment which, in addition to the matters set out in the original motion, asserted that Connolly & Co., who were sued as a corporation, were not in fact a corporation, and that the service upon M. Kenzie, their alleged secretary, was not in fact sufficient legal service, and that as Mann & Sons said service was not sufficient because O. D. Mann, upon whom the citation was served, was not in fact a member of the said partnership and never had been; asserting, also, that the amount in controversy was more than \$1,000, in that it was a suit to foreclose a mortgage on property of greater value than \$1,000, and also that the amount sued for was over \$1,000. And as an excuse for not sooner filing their answer they alleged: That they lived at Brady, miles from Coleman. That the only available route from Brady to Coleman was by road via Brownwood, and in order to attend said court they would have to go from Brady to Brownwood and spend the night in the latter place, and proceed to Coleman the next day, that such trip was tedious and expensive. That upon receiving citation they promptly referred the matter to their attorney for attention, who stated that he would have to go to Austin on the 5th, but that he would attend the trial at Coleman on the 8th, assuring them that they could reach Coleman in time to answer and defend their suit, leaving Brady on the morning of September 8th; likewise stating to them that, in the event plaintiff's attorney should take judgment by default before their arrival, that the court would set same aside and permit them to file their pleadings, stating that he was well acquainted with the attorneys representing the plaintiff, with whom he had frequently exchanged courtesies, and that they would not insist upon a judgment by default till after the appearance cases were called for orders. That, relying upon such statements and assurances by their said attorney, they awaited his arrival from Austin, he returning earlier than expected. Seeing an automobile on the morning of September 8th, these appellants, with their attorney, started for Coleman, leaving Brady at 7 a. m. That a few miles south of Coleman they had a blow-out in one of their tires, which delayed them some little time. That, after repairing same, they proceeded to Coleman, arriving there after judgment by default had been entered.

The court overruled the motion to vacate the judgment, from which appellants had prosecuted this appeal, urging, first, that the court had no jurisdiction, in that the value of the property mortgaged exceeded \$1,000. We overrule this contention, first because the amount sued for did not exceed \$1,000; and further for the reason that the original pe

tion did not seek a foreclosure upon the other property mentioned in the mortgage nor state its value, and did not indicate that such property was in existence; and the amended motion upon which appellee went to trial alleged that the other property described in the mortgage was not in existence at the time of filing the original petition, and expressly declared that it sought no foreclosure thereon, for which reason it did not appear from the face of the petition that the court was without jurisdiction. See *Cantrell v. Cawyer*, 162 S. W. 919.

[1] The question as to the sufficiency of the service, we think, is improperly raised. Neither the original motion to vacate nor the answer present this question, and it is for the first time raised in the amended motion to vacate the judgment, which is not properly verified. Appellants in their answer not having denied under oath the partnership and incorporation as alleged, as required by article 1906, Vernon's Sayles' Civ. Stat., no issue was raised with reference thereto.

[2] We think appellants' amended motion to set aside the judgment by default was properly overruled for the further reason that it failed to show a meritorious defense and a sufficient excuse for failing to appear and answer. In the absence of either, they were not entitled to have the same set aside.

"The rule seems to be well established in this state (*Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833, that, in addition to excusing his absence or failure to plead, the appellant must show by sufficiently circumstantial statement that he has a meritorious cause of action or defense; stating generally that he has a meritorious cause of action or defense is not sufficient. Enough should be stated, supported by affidavit, to show at least a prima facie case. Courts ought not in such cases set aside judgments rendered except upon a showing which, if true and unexplained, would change the result on a subsequent trial"—citing *Cowan v. Williams*, 49 Tex. 380; *Montgomery v. Carlton*, 56 Tex. 431; *Contreras v. Haynes*, 61 Tex. 103.

See, also, *Foster v. Martin*, 20 Tex. 119; *Gillasple v. Huntsville*, 151 S. W. 1114; *Schliecher v. Markward*, 61 Tex. 99; *Sharp v. Schmidt & Zeigler*, 62 Tex. 263; *Tinsley v. Corbett*, 27 Tex. Civ. App. 633, 66 S. W. 913; *Chambers v. Gallup*, 30 Tex. Civ. App. 424, 70 S. W. 1009; *W. U. T. Co. v. Skinner* (Civ. App.) 128 S. W. 715; *Bartlett v. Jones* (Civ. App.) 103 S. W. 706.

In *Foster v. Martin*, supra, Mr. Justice Wheeler says:

"The motion to set aside the judgment was in the nature of a motion for a new trial. To entitle the defendant to have the judgment set aside, as a matter of legal right, he should have brought his application substantially within the rules governing the granting of new trials. He should have made his application within the time prescribed, or shown some sufficient excuse for his neglect. His application should have shown a sufficient excuse for his failure to appear and make his defense to the action within the time allowed for pleading, and also that he had a meritorious defense. The application is deficient in all these particulars."

In *Sharp v. Schmidt & Zeigler*, supra, Mr. Chief Justice Willie says:

"It is fully established by our own decisions that, notwithstanding an illegal writ or service of process, a court of equity will not interfere to set aside a judgment until it appears that the result will be different from that already reached." *Schleicher v. Markward*, 61 Tex. 103; *Kitchen v. Crawford*, 13 Tex. 516. To make this appear the petition should aver matters which amount to a good defense to the original action. The nature of the defense must be given, so that the court for itself may determine the conclusion of law as to whether or not it is a good defense, and would produce a different result if proved upon another trial. The plaintiff's oath to such a conclusion is not sufficient."

Besides this, the motion was not properly verified. The affidavit was as follows:

"Before me, the undersigned authority, on this day personally appeared J. E. Shropshire, known to me to be the attorney for the defendants named in the foregoing motion, and upon oath stated that upon his own knowledge he believes the allegations of fact and statements contained in said motion are true."

In *Ruling Case Law*, vol. 1, p. 770, § 15, it is said:

"An affidavit should always be made by one having actual knowledge of the facts, if possible, and its allegations should be full, certain, and exact; a bare statement of one's belief being immaterial, unless the case is one where an affidavit as to belief only is required."

Again, on page 772, § 18, same volume, it is stated:

"Affidavits upon information and belief should allege facts definitely, and also set forth the sources of the affiant's information and the grounds of his belief, to enable the judicial mind to determine whether the belief is well or ill founded. Inasmuch as an affidavit upon information and belief cannot supply the place of a positive allegation, affidavits of this nature cannot ordinarily be used except when authorized by statute."

See, also, *Texas Farm & Land Co. v. Story*, (Civ. App.) 43 S. W. 933; *Scheffel v. Scheffel*, 37 Tex. Civ. App. 504, 84 S. W. 408; *Graham v. Brown*, 69 Tex. 323, 7 S. W. 342; *Smith v. Banks*, 152 S. W. 449; *Whitemore & Co. v. Wilson*, 1 Posey, Unrep. Cas. 213.

The motion did not set up any facts showing a meritorious defense. It is true, however, that it referred to the answer for such defense; but, even if we could consider the answer for this purpose (which is doubtful under the authority of *Runge v. Franklin*, supra), still, said answer is not properly verified, in that the verification is also made on information and belief, without setting out the facts upon which such belief is founded.

The excuse set up for failing to answer is insufficient. The parties were served in ample time and could have been present with their counsel at court, if they had left Brady the day before by rail. It is not sufficient to say that the trip would have been expensive and tedious. Furthermore, had they left an hour earlier in the morning by auto, they would have arrived at court, it seems, before judgment was entered. They should have

anticipated just such a contingency as happened and started earlier.

Finding no error in the action of the court in overruling the motion to set aside the judgment by default, the same is affirmed.

Affirmed.

On Motion for Rehearing.

Appellants have filed a motion for rehearing, assailing the judgment affirming this case, among other reasons: First, that the court below was without jurisdiction to render any judgment as against Connolly & Co. and Mann & Sons, on the ground of want of legal service on them or either of them. Second, because the judgment as rendered was in excess of \$1,000.

[3-6] To authorize a judgment by default, the sheriff's return must show service of citation upon the defendants in the manner required by the statute, and this is true, even though the recitals in the judgment show that the defendants were legally served. *Roberts v. Stockslager*, 4 Tex. 309; *H. & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Treadway v. Eastburn*, 57 Tex. 214; *Burditt v. Howth*, 45 Tex. 466; *Wheeler v. Ahrenbeak*, 54 Tex. 536. *William Connolly & Co.* were sued as a corporation. In suits against corporations our statute (article 1860, *Vernon's Sayles' Rev. Civ. Stats.*) requires that the citation shall be served on one of the officers of the company named therein, or some agent of the company. In the present case the citation only showed service was made upon *William Connolly & Co.* This return does not conform to the statute, and is therefore insufficient. The general rule is that the service of process, to be binding upon a corporation, must be made upon the identical officer or agent, or one of the officers or agents prescribed by the statute. *Clark & M. on Corporations*, § 267; *El Paso & S. W. Ry. Co. v. Kelly*, 83 S. W. 859. Neither the petition nor citation sets out the name of the president, secretary, or treasurer of such company, nor is the name of any agent representing it given therein, nor does it direct upon whom service should be made; but the company's name alone is set forth in the petition and citation, and the record fails to show that before judgment was taken by default proof was made that said citation had been served upon the president, secretary, or any agent of such corporation, as required by law. Where the petition or citation fails to direct upon whom service is to be made, as in the instant case, then, in order to sustain a judgment by default, proof must be made at the time when judgment is taken that the citation was served upon some one of the officers or agents named in the statute, which was not done in the present case; the service is therefore insufficient to confer jurisdiction over said corporation. *El Paso & S. W. Ry. Co. v. Kelly*, supra; *G. H. & S. A. Ry. Co. v. Gage*, 63 Tex. 568; *H. & T. C. R. Co. v. Burke*, supra.

[6] Again, suit was brought against O. D. Mann & Sons, an alleged copartnership, consisting of O. D. Mann and others unknown to plaintiff. The citation followed the petition in this respect, commanding the officer to summon O. D. Mann and O. D. Mann & Sons, a partnership, composed of the parties above stated, and the sheriff's return recited that it was served by delivering to each of the defendants in person a true copy of this citation, stating that O. D. Mann & Sons were served as well as O. D. Mann individually. The testimony of Mr. Shropshire, however, on motion for new trial and to vacate the judgment, showed that O. D. Mann was not in fact a member of said partnership, and this was not controverted. This being true, no judgment whatever could lawfully be rendered against said firm of O. D. Mann & Sons, for the reason that no member of said firm had been served, as required by article 1863, *Vernon's Sayles' Rev. Civ. Stats.*; and the attempt to serve the firm itself was futile, because it was not an entity under the law. See *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. Under the doctrine of said case, it would seem that the suit against Mann & Sons was improperly brought, in that it failed to give the names of all of the partners; but, apart from this, the attempted service was defective and insufficient, for which reason no judgment should have been rendered against Mann & Sons.

There was no allegation that O. D. Mann had converted any of the property upon which plaintiffs claim to have had a mortgage, for which reason judgment against him was improperly rendered. Besides this, it appears that the aggregate amount of the judgment rendered was in excess of \$1,000. Therefore the court had no jurisdiction to render the same.

[7] In order to set aside a judgment by default, it is not necessary to show a meritorious defense or negative a want of diligence on the part of the defendants, where no legal service is had upon them. This is required only where legal service has been had. It is immaterial that appellants, after judgment was rendered by default, filed an answer to the merits in connection with their motion to vacate the judgment, because the judgment was void for want of jurisdiction at the time it was in fact rendered, and appellants therefore had the right to have it set aside.

For the reasons indicated, the motion for rehearing is granted, the judgment is reversed, and the cause remanded.

On Appellee's Motion for Rehearing.

KEY, C. J. The nature of this case is sufficiently stated in the original opinion prepared by Mr. Justice RICE, when the judgment of the trial court was affirmed, and in his subsequent opinion, prepared when appellants' motion for rehearing was granted, and the judgment referred to reversed, and the cause remanded, though we may make

some addition thereto in the course of this opinion. After our last decision was made, and in due time, counsel for appellee, First State Bank & Trust Company, presented a motion for rehearing, accompanied by an elaborate and able argument, assailing the grounds upon which this court based its judgment of reversal; and while authorities cited and argument made have caused us to doubt the correctness of the reasons given for reversing the case, still we are of opinion that, in so far as the appellants are concerned, the judgment of reversal should not be set aside, though we concede that the case should not have been reversed as to judgments rendered against parties who have not appealed, except as to judgment against O. D. Mann.

[8] The only parties who have appealed are William Connolly & Co. and O. D. Mann & Sons; and upon further consideration we have reached the conclusion that as to them the trial court committed error in not setting aside the judgment by default rendered against them and O. D. Mann, for the reason that their amended motion, asking to have that judgment set aside, set up a meritorious defense, and disclosed a sufficient excuse for not having filed their answer before the default docket was called, and that this court fell into error when it ruled otherwise in the original opinion filed herein. In addition to the facts stated in the opinion referred to, we copy as follows from the answer filed in the court below by appellants on the same day that the judgment by default was rendered:

"Further answering in this behalf, these defendants would show to the court that, if they did purchase any of the cotton on which plaintiff held a valid lien or mortgage, they here charge that the money was paid by them, in so purchasing from R. F. Miller or L. E. Miller, to the said R. F. Miller, and that the said R. F. Miller, after receiving said money, paid the same over to the plaintiff in partial satisfaction of the demands herein sued upon by the plaintiff. Wherefore, in the event of such payment, plaintiff should not be now permitted to recover of and from these defendants the value of any cotton thus converted after the plaintiff has been paid the full market value of the same by the defendant R. F. Miller. In this connection these defendants charge that the defendant R. F. Miller paid over to the plaintiff the market value of said cotton, less the cost of picking same, and that the cost of picking the same constituted a claim against said cotton superior to the mortgage lien of plaintiff thereon."

In appellants' amended motion to vacate the judgment by default they alleged, among other things:

"That the order granting judgment by default against these defendants must have been entered against them but a few minutes before their arrival and appearance and tender of their pleadings therein. That upon their arrival these defendants tendered pleadings of the following nature: (a) A plea to the venue, showing that the plaintiff had no legal right to compel said defendants to appear and defend this cause in Coleman county, Tex.; (b) a plea of misjoinder of parties defendant and cause of action; (c)

a general exception to said pleadings because of misjoinder of parties defendant; and (d) a plea to the merits of said cause of action, praying in the alternative that, in the event that their special pleas should be overruled, said defendants should be heard upon their answer showing a meritorious defense to the cause of action. That all of said pleas are here referred to and made a part hereof, for the purpose of being considered by the court in connection with this motion to vacate said judgment by default."

[9,10] We think it was proper for the court below to consider the answer filed by appellants in connection with the motion to vacate the judgment by default, and that, when so considered, the motion disclosed a meritorious defense; and we are also of opinion that the diligence shown by the motion was as much, and perhaps more, than that shown in the recent case of *International Travelers' Ass'n v. G. L. Peterson*, 188 S. W. 1196, decided by this court. In granting a rehearing in that case, we cited and quoted from *Dowell v. Winters*, 20 Tex. 794, in which case there was no more diligence than in this or the *Peterson* Case. The *Peterson* Case is also authority upon the question of verification of the motion to vacate and the answer referred to in the motion, as there is no substantial difference between the two cases in that respect.

So, if it be conceded, as contended by counsel for the bank, that the filing of the motion to vacate the default judgment upon other grounds than the question of notice or service of citation cured whatever defect may have existed in that regard, still we are of opinion, for the reasons just stated, that appellants are entitled to a reversal of the judgment and to a trial upon the merits; and this conclusion is reached without reference to the so-called statement of facts, which counsel for appellee contend should not be considered. We agree with appellee's counsel that this court fell into error when it held that the amount sued for was not within the jurisdiction of the county court; but, as stated above, we rest our reversal of the case upon our present conclusion that the motion to vacate the judgment disclosed a meritorious defense, and a sufficient excuse for appellants not having filed their answer presenting such defense before the default docket was called.

[11,12] Except as to the judgment against O. D. Mann, we also agree with counsel for appellee that the judgment in its favor against parties who have not appealed should be affirmed, and that the judgment of this court reversing the case as to them is erroneous. As to O. D. Mann we hold that the judgment should be reversed for the reason that he was not sued otherwise than as a member of the firm of O. D. Mann & Sons, and we suppose that the court below rendered judgment against him individually because of the fact that the citation which was issued against the firm of O. D. Mann &

Sons was served upon him as a member of the firm. It is provided by statute that a judgment against a partnership is collectible out of the partnership property, and out of the individual property of the members of the firm who have been served with citation; and no doubt it was upon this theory that the judgment was rendered against O. D. Mann individually. In fact, he was only sued as a member of the firm, and therefore could not be held liable otherwise; and it necessarily follows that, if the appellee is not entitled to a judgment against the firm, it is not entitled to any judgment against O. D. Mann individually. In other words, the cause of action is one and the same against O. D. Mann and the firm of O. D. Mann & Sons, and therefore the statute, which prescribes that only one final judgment shall be rendered, has application, and for that reason a reversal as to one operates as a reversal as to all, though only one may have appealed. But, as to the judgments rendered in favor of the bank against the other defendants, that statute does not apply, because those judgments were based upon separate and distinct causes of action, in which no recovery was sought or had against O. D. Mann or O. D. Mann & Sons. *Danner v. Walker-Smith Co.*, 154 S. W. 295.

So our conclusion is that, in so far as appellee's motion for rehearing asks to have our former judgment reversing the case as between appellee and appellants Wm. Connolly & Co. and O. D. Mann & Sons and O. D. Mann, individually, set aside it should be overruled, but that the remainder of this court's judgment of reversal should be set aside, and judgment of the court below affirmed; and it is so ordered.

Motion overruled in part, and in part granted.

RODGERS et al. v. CENTRAL BANK & TRUST CO. (No. 7047).*

(Court of Civil Appeals of Texas. Galveston. Feb. 18, 1916. Rehearing Denied March 18, 1916.)

1. BANKS AND BANKING §64—AUTHORITY OF OFFICERS—LIQUIDATION.

The former president of the defendant bank became considerably indebted to the institution, whereupon land which he owned was conveyed to the bank. Thereafter 7 of the 15 directors, including the succeeding president, authorized him to convey such land to another, who paid into the bank \$5,000 to be credited upon the former president's obligations. After this was done, the bank went into liquidation, and lender, making the payment, demanded reimbursement, whereupon, the property being reconveyed, the succeeding president of the bank, who was its liquidating officer, executed its note which was indorsed by defendants, and out of the proceeds the indebtedness was paid. Rev. St. 1911, art. 378, declares that the board of directors of every bank shall meet at least once a month and pass on the business of the bank, and that no bills payable shall be made and no bills shall

be rediscounted by the bank without consent of the board of directors. Held that, in view of the fact that the original transaction was authorized only by 7 of the 15 directors, the bank did not become obligated to satisfy the note, and hence the second president as liquidating officer could not thereafter bind the bank by note executed to obtain funds to discharge the first, particularly as the subsequent note was not authorized by the directors; consequently, the indorsers having paid the note are not entitled to reimbursement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 125; Dec. Dig. §64.]

2. BANKS AND BANKING §64—AUTHORITY OF OFFICERS—LIQUIDATION.

Where the assets of a bank are being liquidated, the liquidating officer, though its president is not entitled to execute notes of the bank to take up former indebtedness.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 125; Dec. Dig. §64.]

Appeal from District Court, Harris County; E. R. Campbell, Special Judge.

Action by Richard Rodgers and others against the Central Bank & Trust Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

John G. Tod and Kittrell & Kittrell, all of Houston, for appellants. C. R. Wharton and Jno. C. Townes, Jr., both of Houston, for appellee.

PLEASANTS, C. J. This suit was brought by appellants, Richard Rodgers, John G. Tod and M. E. Foster, against the appellee, to recover the sum of \$5,000 and interest which plaintiffs alleged they had been compelled to pay as accommodation indorsers upon a note executed by appellee. Plaintiff's petition, among other allegations in regard to the note for the payment of which they as reimbursement from the defendant, contained in substance, the following: That at the time of making the note and before the negotiation thereof by defendant, as hereinafter set forth, the plaintiffs, at the special instance and request of the defendant and solely for its accommodation, indorsed said note, and thereby became liable, undertook and promised to pay said note when it became due in the event defendant failed to pay the same. It is averred that subsequently the plaintiffs as indorsers upon said note were compelled to pay the same, and that all of the money which was paid by them as indorsers was paid for the use and benefit of the defendant, which amount the defendant bank became liable to pay plaintiffs. The answer of defendant avers that the note was indorsed by plaintiffs and for the payment of which they seek reimbursement was executed without lawful authority by one F. W. Vaughan, formerly president of the defendant bank; that he was not authorized by the directors of the bank to execute the note; that the bank received no benefit from the note; that at the time of the execution of the note it was not a going concern, but

had gone into voluntary liquidation; that Vaughan was pretending to act as liquidating agent at the time of this transaction, but he had no authority as president of the bank to execute and deliver the note sued on; that the transaction was at its inception void, and the plaintiffs, by becoming indorsers thereon, did so voluntarily; that they were not requested to do so by the directors of the Central Bank & Trust Company; that at the time of these transactions the defendant was a bank organized under the laws of the state of Texas, with authority to conduct the business of receiving money on deposit, paying interest thereon, buying and selling exchange, gold and silver coin, loaning money, and doing such other things as are authorized by the banking laws of this state; that these laws do not confer authority upon said bank to execute notes of the character sued on and procure indorsers thereon and to become liable in such transactions; that these things were all ultra vires. The answer also contains a recital of all the negotiations and facts leading up to and in explanation of the execution of said note. The cause was tried in the court below without a jury, and the judgment rendered was that plaintiffs take nothing by their suit.

The trial judge, at request of plaintiffs, filed his conclusions of fact and law. We adopt as our fact conclusions the findings of fact filed by the trial judge, which are as follows:

"On March 16, 1910, F. E. Pye, who had been president of the Central Bank & Trust Company, a state bank, created and existing under the laws of the state of Texas regulating state banks, was indebted to said bank in very large sums of money, aggregating more than \$30,000, which said indebtedness was represented by unsecured notes and overdrafts. He approached John G. Tod, H. L. Mitchell, M. E. Foster, and F. W. Vaughan and asked them to indorse his two notes of \$5,000 each, which he would place with certain banks outside of the city of Houston and procure \$10,000 to be paid and applied on his indebtedness to the Central Bank & Trust Company, and agreed that if they would indorse said notes for him he would transfer to them, or some one for them as trustee, certain valuable property which he had in the city of Houston, which was commonly known as the Lombardi property, and hereinafter described. They agreed to do this. The notes were indorsed and discounted, and Pye, on March 16, 1910, conveyed the property to John G. Tod, by general warranty deed, absolute upon its face, reciting a consideration of one dollar. The deed was recorded in the deed records of Harris county on the same date, and its purpose was to secure the liability of the above-named indorsers upon the two notes referred to, and thereafter, to secure the Central Bank & Trust Company on account of the balance of Pye's indebtedness to it, and Tod held the property under this deed for such purposes.

"On April 19, 1910, a state bank examiner demanded that the title to said property described in said deed should be conveyed to the Central Bank & Trust Company, and Tod thereupon, for a nominal consideration, conveyed the property to it, the deed being one of general warranty, conveying absolute title, and the same was filed and recorded, but it was

understood that the same was held to secure the indebtedness of Pye, as above stated.

"On May 6, 1910, the following paper was executed: 'Mr. F. W. Vaughan, President, Central Bank & Trust Company, City—Dear Sir: You are authorized to convey lots 3, 4 and 5 and half of 11 and 12 in block 96, in the city of Houston, S. S. Buffalo bayou, to Southern Loan & Investment Company upon it paying into the bank \$5,000 to be applied to the credit of F. E. Pye's obligations, the Southern Loan & Investment Company executing an agreement binding said company to reconvey said property upon request of the bank upon it being repaid such sum of five thousand dollars. Yours truly, John G. Tod, Richard Rodgers, C. L. Bering, F. W. Vaughan, N. A. Sayre, August De Zavala, H. L. Mitchell, May 6, 1910.'

"The persons who signed the foregoing paper were 7 of the 15 of the board of directors of the Central Bank & Trust Company, and the property described therein is the property referred to in the deed described in the foregoing paragraphs. There was no meeting of the board of directors authorizing this action, and nothing appears upon the minutes of the directors in reference thereto, and said paper seems to have been informally signed.

"On May 6, 1910, a state bank examiner was insisting that the amount of Pye's unsecured indebtedness and overdraft to the Central Bank & Trust Company should be reduced or secured, and threatened to close up the institution if the same was not done, and upon said date the Central Bank & Trust Company, by F. W. Vaughan, president, conveyed the property hereinbefore described to the Southern Loan & Investment Company, a corporation, of which Jesse H. Jones was president; the consideration recited being one dollar, the deed being one of general warranty and subject to all liens against the property at the time of the delivery of the same. At the time of the execution and delivery of said deed, the Southern Loan & Investment Company delivered to the Central Bank & Trust Company its note for \$5,000, which said note the Central Bank & Trust Company discounted to some other institution, receiving the sum of \$5,000 in cash, which was placed to the credit of F. E. Pye, and was used in paying and reducing his indebtedness to the Central Bank & Trust Company. Thereafter, on May 18, 1910, before the maturity of said note, it was paid by the Southern Loan & Investment Company; and thereafter said Southern Loan & Investment Company held whatever title had been conveyed to it by the deed above mentioned, as security for the repayment to it by said Central Bank & Trust Company of said sum of \$5,000.

"In the latter part of May, 1910, the Central Bank & Trust Company went into liquidation, and F. W. Vaughan, its president, remained in charge of its affairs as liquidating agent; but said bank liquidated through the Lumbermen's National Bank of Houston, Tex., and transferred to said last-named bank all of its valuable assets.

"On July 2, 1910, the Southern Loan & Investment Company was demanding that it be repaid the \$5,000 that it had paid out in the manner above stated, but offered to reconvey the land that had been transferred to it on May 6, 1910; and on July 2, 1910, the Central Bank & Trust Company, acting or purporting to act, through F. W. Vaughan, its president, executed its note for the sum of \$5,000, payable to its own order, due October 1, 1910, bearing 10 per cent. interest from date, and procured Richard Rodgers, John G. Tod, and M. E. Foster, plaintiffs in this suit, who were also directors and stockholders of said corporation, to become indorsers on the same. This note was discounted by the Lumbermen's

National Bank for the sum of \$5,000, and same was paid to the Southern Loan & Investment Company to cover the advance or payment that it had theretofore made in the manner as above stated, and to obtain a reconveyance of the property which had theretofore been conveyed to it by the Central Bank & Trust Company. Said note was not paid by the Central Bank & Trust Company at its maturity, and these indorsers were compelled to pay the same, and they have filed this suit against the Central Bank & Trust Company to be reimbursed for the amount that they have so paid as indorsers.

"By deed dated January 21, 1911, the Southern Loan & Investment Company, for a recited consideration of one dollar, reconveyed the property above described to the Central Bank & Trust Company, but said deed was not placed of record; and thereafter, by deed dated August 25, 1911, which was placed of record, the Southern Loan & Investment Company, for a recited consideration of one dollar, conveyed said premises to M. E. Foster and H. L. Mitchell, said deed being in the nature of a quitclaim deed.

"At the time of the conveyance of said property by Pye to Tod, there was a vendor's lien upon said property in favor of C. Schwartz; and on September 6, 1910, there was a judgment of foreclosure in the district court of Harris county in favor of Conrad Schwartz against Pye and others, for the principal sum of \$40,506. The judgment recites that at a sale of the property the proceeds of the property should be applied: First, to the payment and satisfaction of all costs; second, to the payment and satisfaction of Schwartz's judgment; third, to the payment and satisfaction of the indebtedness of Pye to interveners, M. E. Foster, F. W. Vaughan, H. L. Mitchell, and John G. Tod, in the sum of \$10,000, with interest at 8 per cent; fourth, to the payment and satisfaction of the indebtedness due by Pye to the Central Bank & Trust Company; and, fifth, any balance remaining to be paid to defendant Pye, his heirs or assigns.

"There was a sale under the decree described in the foregoing paragraph on June 6, 1911, and the sheriff, acting under an order of sale issued under that judgment, conveyed the property to Norman G. Kittrell, Jr. On the same day Norman G. Kittrell, Jr., conveyed said property to M. E. Foster and H. L. Mitchell for a recited consideration of \$45,500, paid as follows: \$5,500 cash, and the balance of \$40,000 evidenced by the note of the vendees, of even date with said deed, payable to the order of the said Norman G. Kittrell, Jr., five years after date, with interest at the rate of 7 per cent. per annum, to secure which the vendor's lien was retained in said deed.

"By deed dated August 23, 1911, M. E. Foster and H. L. Mitchell conveyed said property to William A. Wilson, for a recited consideration of \$58,000, in the following manner: \$40,000 by the assumption of the note of Foster and Mitchell above referred to, which is recited to have been transferred and assigned to Conrad Schwartz, and \$18,000 represented by the three promissory notes of said Wilson, two for \$5,000 each, and one for \$8,000, payable June 1, 1912, bearing interest at 7 per cent., to secure all of which the vendor's lien was retained in said deed.

"The evidence does not show that there was any equity in said property over and above the amounts named in the judgment of September 6, 1910, which were superior or prior to the judgment therein rendered for the defendant herein; but we find that the said Vaughan and the plaintiffs herein believed, at the time of the execution and delivery of the note herein sued upon, that there was an equity in said property which would be beneficial to the Central Bank & Trust Company.

"I find that there was no meeting of the

board of directors of said Central Bank & Trust Company, nor do the minutes show any such meeting, at which any of these transactions were ever discussed or authorized. I find that the board of directors, as such, never discussed, authorized, or ratified the act of F. W. Vaughan, as president, in executing the note of July 2, 1910, upon which this suit is predicated, or in procuring the indorsements of the plaintiffs thereon.

"After May 6, 1910, the Central Bank & Trust Company ceased to do business in the usual course of business, and thereafter its doors were closed; but there were, after that time, frequent meetings of the directors of said bank in reference to its business."

[1] Appellants have grouped their several assignments of error and submit thereunder but one proposition, which is as follows:

"When a bank, while a going concern, makes a note in the ordinary course of business as a means of raising money, which note is secured by what is believed by the president and directors to be a valuable equity in real estate, and before the maturity of the note the bank goes into liquidation and turns over to another bank its readily convertible assets to pay its depositors, but the president is appointed 'liquidating agent,' and the directors continue to hold meetings, and the holder of the note given to borrow money demands payment, and the bank is unable to pay it, but the money can be raised if the president and 'liquidating agent' will give the note of the bank indorsed by three parties, and the note is given indorsed by three parties (the appellants), which note is received by the creditor of the bank, and converted into cash, and the first note is paid and the real estate released and reconveyed to the bank, the indorsers who are compelled to pay the note last given are entitled to recover the amount from the bank, being subrogated to all the rights of the holder of the first note, and the bank is estopped to deny its liability."

We do not think this proposition can be sustained. It assumes that the transaction between Jones and the appellee bank was one which arose in the usual course of business of the bank, and by such transaction the bank became bound to pay Jones upon demand the sum of \$5,000. It seems to us that it was an extraordinary and unusual proceeding for a bank to borrow money for the purpose of discharging an obligation to itself of one of its debtors. If by the conveyance of the property to Jones in consideration of the \$5,000 note executed by him the president of the bank only intended to bind the property received by the bank from Pye as security for his indebtedness, such an agreement might have been permissible and the amount received from Jones credited on Pye's indebtedness. This was all that the instrument before set out signed by 7 of the 15 directors of the bank authorized, and we do not think the bank was bound by any understanding that it would become liable to Jones for the \$5,000. The statute under which appellee bank was organized and operated contains the following provision:

"The board of directors of each and every bank organized under this act shall meet at least once per month and pass upon the business of the bank back to the previous meeting of the board, and shall keep a written record of its approval or disapproval of each and every loan, * * * and no bills payable shall

made and no bills shall be rediscounted by bank except with the consent of the board of directors." Section 6, c. 10, Acts 1st Called Session 29th Leg.; article 378, Rev. Stat. 1911. It seems clear to us that the instrument here set out, executed by less than a majority of the board of directors, cannot be regarded as a written record of the consent of the board of directors that the president should borrow from Jones the \$5,000 and bind the bank to repay the loan.

[In this view of the matter, Jones had no enforceable claim against the bank. If he conceded, however, that Jones had an enforceable claim against the bank for the \$5,000, the president, after the bank had gone into liquidation, had no authority to execute the note of the bank for said amount, notwithstanding the fact that he was acting as "liquidating agent" for the bank. *White v. Tudor*, 24 Tex. 639, 76 Am. Ct. 126; *Richmond v. Irons*, 121 U. S. 27, 7 Ct. 788, 30 L. Ed. 864; *Schrader v. Manufacturers' Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564. We think the note of July 2, 1910, for the payment of which the appellants seek reimbursement from the bank, was not an obligation of the bank, and therefore it cannot be held liable to reimburse the appellants for the payment of said note. We also agree with the trial judge that there is no question of estoppel or substitution in the case.

It follows that the judgment of the trial court should be affirmed, and it has been so affirmed.

JAMES et al. v. DOSS et al. (No. 936.)
Part of Civil Appeals of Texas. Amarillo,
March 1, 1916.)

PARTNERSHIP § 203 — DISSOLUTION — STATEMENT AND REVIVAL.

An action by plaintiffs individually to recover certain property purchased by defendant as a firm composed of the plaintiffs would not be sustained, as the fact that there was no partnership when the suit was brought was a matter of evidence to be shown at the trial.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 375; Dec. Dig. § 203.]

EVIDENCE § 461(3) — PAROL EVIDENCE — CONTRACT—SALE.

Parol testimony was inadmissible to show the subject-matter of a contract of sale of personal property was other than that designated by the contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2129; Dec. Dig. § 461(3).]

SALES § 38(8) — CONTRACT — FRAUD — KNOWLEDGE OF BUYER.

The purchaser under a contract for the sale of personal property signing the contract without fraud inducing him thereto, and after reading it and having it read to him, and declaring it was correct and was the contract, knowing that it did not convey certain personal property, was not deceived in respect to the property described and conveyed by the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 77; Dec. Dig. § 38(8).]

4. SALES § 38(7)—FRAUD—CONCEALMENT.

Where a fact lies open equally to both parties with full opportunity for examination, and the buyer undertakes to examine for himself without relying on the seller's statements, it is no evidence of fraud that the seller knew facts not known to the buyer, and concealed them from him.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 75; Dec. Dig. § 38(7).]

5. EVIDENCE § 461(3) — PAROL EVIDENCE — CONTRACT OF SALE.

In the absence of fraud, accident, or mistake, it is not permissible to prove by parol that other property than that described in a contract for the sale of personal property was intended to be conveyed, and thereby add to or contradict the contract, as it is the best evidence of the intention of the parties.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2131; Dec. Dig. § 461(3).]

6. EVIDENCE § 441(1) — PAROL EVIDENCE — CONTRACT PARTLY IN WRITING.

The rule that where there is a verbal contract and part of it is reduced to writing, parol evidence may be offered to show that which was not contained in the writing, applies only when it is collateral and relates to a subject distinct from that to which the written contract applies, and which is not so closely connected with the principal transaction as to form a part of it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1745, 1756-1763, 1765, 1825, 2080; Dec. Dig. § 441(1).]

7. EVIDENCE § 397(2) — WRITTEN OR ORAL CONTRACT—PRESUMPTION.

Where a writing is couched in such terms as to be plain and without any uncertainty as to the object or extent of the agreement, it is conclusively presumed that the whole agreement of the parties was reduced to writing.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 397(2).]

8. TRIAL § 252(5) — INSTRUCTIONS — ISSUES — EVIDENCE.

In an action for personal property consisting of furniture and fixtures claimed not to have been included in the contract of sale, a charge that defendant, in reconvention, might recover a stove, was properly refused, where the uncontradicted evidence was that it was not a part of the furniture and fixtures.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 600; Dec. Dig. § 252(5).]

9. SALES § 69 — DESCRIPTION — CONSTRUCTION.

A contract for the sale of personal property, describing "store and office furniture and fixtures, now in the one-story building on lot," etc., and "merchandise" in the grocery line, without reference to an invoice except to fix the price of merchandise, did not cover two horses, a delivery wagon, and a set of double harness.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 183; Dec. Dig. § 69.]

Appeal from Donley County Court; J. C. Killough, Judge.

Action by W. M. and A. S. Doss against W. H. James and another with plea in reconvention by defendant James. Judgment for plaintiffs, and defendants appeal. Affirmed.

Simpson & Steed, of Clarendon, for appellants. W. T. Link, of Clarendon, for appellees.

HUFF, C. J. The appellees, W. M. and A. S. Doss, sued appellants, W. H. James and

Luther Skelton, for two horses, one delivery wagon, and a set of double harness. The appellants answered at length and appellees replied by supplemental petition at length. The property belongs to the appellees, if it did not pass by a certain contract of sale, and a bill of sale to the appellant James, of a certain grocery business and the furniture and fixtures of the office and store.

At the end of the testimony the trial court instructed the jury that the property sued for did not pass under the contract of sale and the bill of sale, and that they would find for the appellees; which the jury did, affixing the value of each article, and judgment was rendered accordingly. There is no assignment that the court erred in so instructing a verdict, or that there was an issue raised by the evidence for the jury to decide. The assignments presented by the brief of appellants relate to the refusal of the court to give certain requested instructions, and to his action in sustaining an exception to the appellants' plea of abatement.

[1] The eleventh assignment, which is the last briefed, asserts error in the action of the court in sustaining the exceptions of appellees to the plea in abatement. The appellees sued, as individuals, to recover the property. It is asserted the property was purchased by appellant James from Doss Bros., and not as individuals, and that the appellees make no allegation that they compose the firm of Doss Bros. or were members of such firm. If the property did not belong to the individuals, but to some partnership, it might, under certain circumstances, defeat a recovery; but we do not see how this should abate the suit. If, when the suit was brought, there was no partnership, the property would belong to the individual members of the former partnership. This was a matter of evidence, to be produced upon the trial. We see no material error committed by the trial court in sustaining the exception. This assignment will be overruled.

[2] The first three assignments, the eighth, and the ninth assignments assert there was error in refusing the specially requested charges of appellants, requested by them therein. Under each of the assignments the following proposition, or one similar, is made:

"Matters of consideration may be shown by parol testimony where such testimony shows that certain articles of property were a part of the consideration for a written contract. The person claiming said articles of property, as a part of the consideration for said contract, is entitled to have the jury instructed to find in favor of his claim, provided they believed such testimony."

In this case the appellees owned a grocery store in the town of Clarendon, and through the assistance of one Moore, a contract of sale was effected with appellant James. A contract was reduced to writing, which the parties signed on the 6th day of August, 1915. The clause bearing on the question at issue is as follows:

"Doss Bros. sell to W. H. James their store and office furniture and fixtures, now in their store building on lot 3, block 1, in Clarendon, Texas, for an agreed consideration of \$1,350.00; also their stock of merchandise in same building at the inventory price of same, of all merchandise as invoiced to them recently by M. W. Headrick, and all other merchandise at the wholesale cost of same with freight and drayage added, and inventory of same will begin as soon after the signing of this contract as it is convenient to do so, to both parties hereto.

"Party of the second part agrees to accept said fixtures at the price named and the merchandise as invoiced in accordance with this contract, as soon as same is invoiced and the aggregate value thereof computed, and to pay for the same in accordance with agreement by and between parties," etc.

On the day following a bill of sale was executed by appellees to James, which described the property as follows:

"All of the goods, wares and merchandise, as per the inventory made this date of same, also of the store and office furniture and fixtures, all while in the one-story composition roofed brick building located on lot 3, block 1, in Clarendon, Texas, being the store building now occupied by us as a grocery store," etc.

When James went to the store to look at it, he was shown the Headrick invoice, which was in a book and which showed a complete inventory of the groceries. After totaling the amount of groceries and leaving some blank pages, following it on a page headed "Fixtures," the items were entered showing the fixtures and total for fixtures, \$1,585. A line was then drawn under this total. Following on the same page are the items, "One delivery wagon and harness, \$158.35; two horses, \$140.00." These two last items, it is admitted by the parties hereto, are the property in question. James claims this property was to have gone to him under the \$1,350 consideration for furniture and fixtures.

The appellees testify to the contrary. We do not think the propositions of appellants applicable to this character of contracts, and the facts of this case. The consideration in this case received for the \$1,350 agreed to be paid was contractual in its nature. It was not, in its nature, a receipt for money, which may be explained. The appellants sought to have the written contract with reference to the subject-matter therein conveyed shown to be other than the writing designated, and thereby contradict the writing by parol. This is not permissible. *Matheson v. C-B Live Stock Co.*, 176 S. W. 734, in which this court, through Judge Hall, discussed this question and reviews various authorities. *McCullough v. Bank*, 58 Tex. Civ. App. 160, 123 S. W. 439; *Rapid Transit Co. v. Smith*, 98 Tex. 553, 86 S. W. 322; 17 Cyc. 659 (g).

The fourth, fifth, and seventh assignments urge that the trial court erred in refusing to charge the jury in effect if the verbal contract was that the property sued for was agreed to pass by the transfer, and that through the fraud of the appellees it was omitted from the writing, the jury should find for appellants.

The appellant James contends that the

property sued for was so to pass, while before, the agent who brought about the trade, the appellees contend it was not to be the trade. James contends that one Beville, who drafted the contract at the instance of Moore, left out this particular property.

Beville testified that Mr. Moore came to him to draw the contract and told him to write just like the contract from Headrick and Doss Bros., when they purchased from Moore, except he said the wagon, team, and harness were not in the trade, and should not be included in the contract, and also some things that figured in the Headrick contract. Beville testified:

"That he and Doss went to Beville's office to sign up the contract, and Beville said Moore had already told him to draw the contract, and then said to come back in 30 minutes and he would have it ready, and that they went back and signed the contract. 'Before we signed it, Beville handed me a copy and W. M. Doss a copy, and he kept a copy and read it all aloud to me and I read it myself, and when he finished he said, 'Now is that correct—is that your contract?' I said it was and then signed up the contract."

Beville also testified, after Beville told him he had asked him to draw the contract: "Beville (James and Doss) told him what to put in, but I did not know then that he had been deceived."

[4] The appellant James was not induced to sign the contract without knowing its contents. He read the contract and it was shown to him. He then declared the writing correct and that it was the contract. There was no fraud inducing him to sign a contract that was not the contract. He knew the contract did not convey the horses, wagon, and harness. If the agreement was that they would be conveyed, he then knew the contract did not convey them, and did not induce them, and he should not have signed the contract. We cannot conceive of a fair method to all parties than was used in this case in getting before them the exact contents of the writing. There was not the slightest deception that we can perceive in getting James to sign a contract which was not the contract. James did not rely on representations made to him as to its contents, but read and had it read to him. Before he signed he knew as much about it as he ever knew. If he had not known the contents of the contract he signed it, and relied upon representations as to its contents, the law would require of him diligence to learn the contents. This case does not fall under the rule announced in *Labbe v. Corbett*, 69 Tex. 6 S. W. 808; *Taber v. Eyler*, 162 S. W. 100.

Where a fact lies open, equally to both parties, with equal opportunities for examination, and the vendee undertakes to examine for himself without relying on statements of the vendor, it is not evidence of fraud in such case that the vendor knew the fact was not known to the vendee, and conceals it from him. In this case there was no misrepresentation made as to the contents of the

writing upon which James claims to have relied, and to have been deceived thereby. *Hawkins v. Wells*, 17 Tex. Civ. App. 860, 43 S. W. 816; *Stith v. Graham*, 146 S. W. 661; *Carson v. Housels*, 51 S. W. 291, and cases by this court; *Wright v. Bott*, 163 S. W. 360; *Parker v. Shrimsher*, 172 S. W. 170 (10 and 11). The court properly refused the charges requested as to fraud.

[5] By some of the above assignments and the propositions thereunder, it appears that the appellant contends that the intention of the parties to a written contract may be shown by parol. The written contract is the best evidence of the intention of the parties to the agreement. All previous negotiations and agreements are, as a rule, merged in the writing. In the absence of fraud, accident, or mistake, it is not permissible to prove that other property than that described in the writing was intended to be conveyed, and thereby add to or contradict the writing.

[6] It is also contended that, when there is a verbal contract and part of it is reduced to writing, parol may be offered to show that which was not contained in the writing. This rule applies only when it is collateral. It must relate to a subject distinct from that to which the written contract applies. It must not be so closely connected with the principal transaction as to form part of it.

[7] When the writing is couched in such terms as to be plain and without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties was reduced to writing. *Seitz v. Brewer*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

"To allow a party to lay the foundation for such parol evidence by oral testimony that only part of the agreement was reduced to writing, and then prove by parol the part omitted, would be to work in a circle, and to permit the very evil which the rule was designed to prevent." *Thompson v. Libby*, 34 Minn. 374, 28 N. W. 1; *Sunderland v. Hackney* (Mo.) 181 S. W. 1192; *Fuqua v. Pabst*, etc., 36 S. W. 479.

[8] In addition to what has been said under the assignments first herein mentioned, we notice the charge under the ninth assignment sought the recovery of an oil stove, which it is contended was on the Headrick invoice, and part of the fixtures, and valued at \$5, for which appellants sue in reconvention. If the charge had been so framed as to submit the issue whether the stove was in the store, and part of its fixtures, when the contract was drawn, it would have been proper to have given it, if the facts would support a finding that it was part of the fixtures at the time of the contract; but the evidence is uncontroverted that it was not a part of the furniture or fixtures at the time of the trade, but was then in the possession of Moore and not part of the store. Even if the charge had been otherwise correct, under the facts of this case the court properly refused the charge.

[9] The tenth assignment is a complaint lodged on the ground that the trial court refused to instruct the jury as follows:

"You are instructed that a fair and reasonable interpretation of the contract introduced in evidence shows that the property sued for by the plaintiff is included in the terms thereof, and that said written contract does cover and convey all the property listed on the original Headrick inventory. You are therefore charged that if you find and believe from the evidence that the property sued for by the plaintiff was included on the said Headrick inventory, then it will be your duty to find for the defendant and against the plaintiff."

The horses, wagon, and harness cannot be said to fall under the description of "store and office furniture and fixtures, now in the one-story building on lot," etc., for the consideration of \$1,350. Certainly they were not included under the term "merchandise" in the grocery line. It will be noted that the Headrick invoice was not referred to except to get the price of the merchandise invoiced by Headrick. Furniture and fixtures were purchased in a lump sale and at an agreed price, \$1,350. The Headrick invoice had nothing to do with that part of the contract. The property sued for did not fall under store and office fixtures then in the building. The court was correct in refusing the charge as requested. If there was ambiguity in the contract, which we do not find, as applied to the facts of this case, it may be that it should have been submitted as a question whether the property was included in the contract and whether it was intended that the Headrick inventory was intended to describe the property conveyed; but the court, under this contract as we view it, was not authorized to instruct that under the written contract the property sued for was conveyed, and that all property in the original Headrick invoice was covered by it. We believe the trial court took the correct view of this case and properly refused the charges requested. There is, as stated by us in the outset, no complaint that the trial court instructed a verdict for the appellees, and we think the requested charges were properly refused.

The case will be affirmed.

JOYCE v. CITY OF MT. VERNON. (No. 1578.)

(Court of Civil Appeals of Texas. Texarkana.
Feb. 24, 1916.)

1. DEEDS \S 155 — CONDITIONS — CONSTRUCTION OF DEED.

A deed donating land to the trustees of a town for the purpose of building an academy and providing that if such trustees laid off the land into lots and sold them and applied the proceeds to the building of an academy, then the grantors relinquished their right, title, and interest, did not show an intention to make the application of the proceeds to the construction of the academy a condition precedent to the vesting of title in the trustees and the title vested when the

land was subdivided into lots, as otherwise the trustees would have no title which they could convey upon contemplated sales.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 488-495; Dec. Dig. \S 155.]

2. MUNICIPAL CORPORATIONS \S 42 — TOWN SITES—EVIDENCE—PLATS.

A copy of a plat claimed to be a plat of a town site showed that the blocks east of R. street were numbered consecutively from 1 to 15, that those west of R. street were numbered from 15 to 24, that those between R. street and T. street, one block west, were numbered 15, 18, 19, 22, and 23, while those west of T. street were numbered 16, 17, 20, 21, and 24. Another plat claimed to be a plat of the town site showed the west side of T. street as the boundary line of the town site, thus omitting the blocks west of T. street and showing the other blocks to be numbered as shown on the first plat. Held, that the numbering indicated that the blocks were all a part of one subdivision, and that if those shown on the second plat were a part of the original town site, those west of T. street were also a part of it, and hence a judgment based upon a finding that the west line of T. street was the west line of the town site was unsupported by and contrary to the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 118, 119; Dec. Dig. \S 42.]

3. EVIDENCE \S 379 — DOCUMENTARY EVIDENCE—MAPS AND PLATS.

A plat claimed to be a plat of a town site which was either copied from another plat, the authenticity of which was not proved and the absence of which was not accounted for, or was based on a survey not made in conformity to the subdivision of the land made by the town trustees and made from no data except the old plat mentioned and the field notes set out in the deed of the town site to the town trustees, was inadmissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1656; Dec. Dig. \S 379.]

4. EVIDENCE \S 379 — DOCUMENTARY EVIDENCE—MAPS AND PLATS.

A plat copied from an alleged plat of a town site which was not shown to be the original or correct plat of the town site or to be lost or destroyed or for other reasons not to be producible, was not admissible, except to show that the land had been laid off into lots, as required by a conveyance of the town site to the town trustees.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1656; Dec. Dig. \S 379.]

Appeal from District Court, Franklin County; J. A. Ward, Judge.

Suit by the City of Mt. Vernon against J. W. Joyce. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. T. Wilkinson, of Mt. Vernon, for appellant. L. W. Davidson and B. O. Shurtleff, both of Mt. Vernon, for appellee.

WILLSON, C. J. The suit was by appellee to recover the title and possession of a strip of land claimed by appellant to be a part of block 21 (according to the plat of the town of Mt. Vernon); owned by him, but which appellee claimed to be a part of Taylor street in said town. The trial court found in favor of appellee's contention, and rendered judgment accordingly.

It appeared from the evidence admitted at

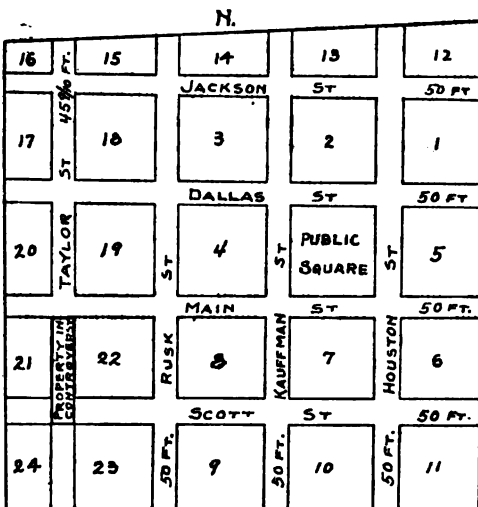
al that in April, 1849, one Keith and wife, by a quitclaim deed, donated and conveyed to certain parties as trustees of the town of Mt. Vernon a tract of land 362 varas by 383 varas long, describing same by its corners and bounds, on conditions stated in the deed as follows:

"That the said Stephen Keith and Rebecca Keith have donated to the trustees of the town of Mt. Vernon, and their successors in office, the above-described tract of land for the purpose of building an academy for the purpose of giving education. Now if the said trustees should lay off said land into lots and sell same and apply the proceeds to the building of an academy, then we, the said Stephen Keith and Rebecca Keith his wife, do relinquish all right, title and interest, and forever quitclaim said land."

Appellant insisted in the court below, and insists here, that the testimony was not sufficient to show an acceptance of the donation and that the deed therefore was inadmissible as evidence; and, further, if the deed was admissible, notwithstanding the absence of proof that the donation had been accepted, that the judgment nevertheless was warranted because it was not shown, he contended, that the land was laid off into lots, and that the proceeds applied to the building of an academy. It is true, we think, that it was not shown that the proceeds of the sale of the lots were devoted to the building of an academy. But if the deed should be construed as requiring the trustees to take a condition precedent to the vesting of the title in them, to not only subdivide the land into lots, but also to sell same and use the proceeds in building an academy, the title did never thereby vest in them, for if the deed should be so construed, the trustees, in the absence of being such for the town of Mt. Vernon, as they were declared therein to be, would be mere agents for the grantors, with authority to subdivide and then negotiate sales of the land and use the proceeds in building an academy. That such was not the intention of the grantors is clear from the language of the instrument. Evidently their purpose was to pass the title to the trustees, and when they laid off the land into lots for the grantors, it is plain, contemplating a sale, and conveyances of the title to the trustees to purchasers, when the land was subdivided into lots. This could not have been done if the title did not vest in the trustees when they had laid the land off into lots, for they could not have passed to purchasers a title they did not have. The purpose and intent of the parties as evidenced by the language used in the instrument is, of course, control in construing its effect. That purpose and intent as so disclosed, we think, to vest the title to the land in the trustees when they subdivided it into lots. If the deed should be so construed, then the question to be determined to sustain the appellant's contention with reference to this phase of the case is this: Was

there testimony to support a finding that the trustees had the land laid off into lots? If there was such testimony, then, of course, appellant's objection to the admissibility of the deed on the ground that there was not, as well as his contention that the judgment was not warranted because of the absence of such testimony, was without merit. We are of opinion there was testimony to support such a finding, but, as the cause is to be remanded for a new trial, will not discuss it, further than to say that it appeared that as long ago as 1871, at least, the land had been subdivided into lots and streets, and had become and is yet the site of the city of Mt. Vernon. There was no direct testimony that the subdivision was made by the trustees, but the circumstances were such, we think, as to warrant the inference that it was made by them.

The witness Weaver identified a map or plat offered by appellee as evidence as a copy made by him in 1870 or 1871 of a plat of the town of Mt. Vernon, then in the possession of one John A. Brooks. The court admitted the plat over appellant's objection thereto on the grounds: (1) That it was irrelevant, immaterial, and hearsay; and (2) that it had not been shown that the Brooks plat was the original nor a correct plat of the town; and over appellant's objection, on the ground that same was hearsay and immaterial, permitted Weaver to testify that "the people who sold property in Mt. Vernon and who owned property in said town recognized the Brooks plat as a true and correct plat of the town." The plat in question was as follows:



It was shown that in 1897 the commissioners' court of Franklin county employed J. H. King and G. E. Cowan to resurvey the Mt. Vernon site tract of land, and so established the location of the streets and blocks in the town, and that King and Cowan in 1898 reported the result of a survey they had made

to that court, attaching thereto a plat as follows:

N.				
PROPERTY IN CONTROVERSY	15	14	13	12
	JACKSON ST.			50 FT.
	18	3	2	1
	DALLAS ST.			50 FT.
	19	4	PUBLIC SQUARE	5
TAYLOR ST.	MAIN ST.			50 FT.
	22	8	7	6
	SCOTT ST.			50 FT.
RUSK ST.	23	9	10	11
	50 FT.	50 FT.	50 FT.	
KAUFFMAN ST.				
HOUSTON ST.				

Cowan testified that in making the survey he and King used a plat which King obtained from Charlie Vaughan, and which purported to be a copy of the original plat. The Vaughan plat was not offered in evidence and we do not know from the record whether it was like either the King and Cowan plat or the Weaver plat or not. The court admitted as evidence the report, including the plat attached thereto copied above, made by King and Cowan, over appellant's objection thereto on the grounds: (1) That same was immaterial, irrelevant, and hearsay; and (2) that the original plat of the town was the best evidence.

[2-4] The court by his judgment determined that Taylor street was located where it is shown on the King and Cowan plat to be. If his determination is correct, then it is plain that the fractional lots or blocks marked "16," "17," "20," "21," and "24," on the Weaver plat are not a part of the town site. And yet the numbering of those lots or blocks, when looked to in connection with the numbering of the blocks lying immediately east of Taylor street, if it does not show, tends strongly to, that they were a part of that site. The blocks east of Rusk street it will be observed, are numbered consecutively from 1 to 14, inclusive, on each of the plats; and west of Rusk street, consecutively from 15 to 24, inclusive, on the Weaver plat; while on the King and Cowan plat the blocks west of that street, instead of being numbered consecutively, are numbered, respectively, 15, 18, 19, 22, and 23. To our minds the numbering indicates that the lots and blocks numbered from 1 to 24, inclusive, were all a part of one and the same subdivision made of a tract of land, and that if those shown

on the King and Cowan plat were a part of the original town site those numbered 17, 20, 21, and 24 also were a part of it. If they were, then it is plain that the western boundary line of Taylor street is not the western boundary line of the town site tract as shown by the King and Cowan plat determined by the court, but that same is east of that line the width, as it may be determined to be, of said lots or blocks numbered 16, 17, 20, 21, and 24. If therefore, we thought the King and Cowan map was admissible as evidence to show the location of Taylor street, we would feel bound to reverse the judgment because unsupported and contrary to the evidence. But we do not think the plat was admissible. If it were not a copy of the Vaughan plat, the authenticity of which as the original plat was proven, nor the absence of which was accounted for, it appeared to have been based on a survey not shown to be in conformity with the subdivision of the Keith land made by the trustees; for the only data, except the Vaughan plat, the testimony showed that King and Cowan to have had when they resurveyed the land was the field notes of the survey as set out in the deed of the Keiths to the trustees. Nor do we think, in the absence of any other evidence, that the plat as was the case, of a proper predicate for its introduction as evidence, the Weaver plat was admissible. It was, admittedly, a copy of the Brooks plat, and it was not shown that the Brooks plat had been lost or destroyed, or for other reason was not producible. We know of no rule of evidence which authorized the admission of the Weaver plat for any other purpose than to show that the land had been "laid off in lots," in the absence of proof, showing either directly or circumstantially, that the Brooks plat, of which it was a copy, was the original or a correct plat of the town site tract, and in the absence of further proof showing that it could not be produced as evidence.

If, treating the plats as a part of the evidence, it nevertheless was not sufficient to support the judgment rendered, of course if they should not be considered as a part of it, as we think they should not, the testimony was not sufficient. On that ground therefore, the judgment will be reversed and the cause will be remanded for a new trial.

ÆTNA LIFE INS. CO. v. EL PASO ELECTRIC TRIC RY. CO. (No. 528.)*

(Court of Civil Appeals of Texas. El Paso. March 10, 1916. Rehearing Denied March 30, 1916.)

1. INSURANCE — §435 — CASUALTY INSURANCE — CONSTRUCTION OF CONTRACT — RISK. Under an employer's liability policy issued to an engineering corporation and to plant and electric railway company, including under a

scription of the business "track and overhead construction work, including the operation of work cars," where an employé, while engaged in repair work for the engineering company under an agreement between the two companies, was injured when a tower car, standing on or near the street car tracks, was run into by a street car as the result of the motorman's negligence, and had recovered of the street railway on the theory that he was its employé at the time of his injury, the loss sustained by the injury was within the terms of the policy; as the risk was not limited to injury "by reason of" overhead construction work, but extended to perils necessarily incident to such work.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.]

2. INSURANCE §146(3) — CONSTRUCTION OF CONTRACT.

A contract of insurance will be construed strictly against the insurer and liberally in favor of the insured, and, if the words admit of two constructions, the one most favorable to the insured will be adopted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146(3).]

3. INSURANCE §435 — EMPLOYER'S LIABILITY INSURANCE — CONSTRUCTION.

Under a provision in an employer's liability policy issued to a street railway and to an engineering company, providing that claims arising by reason of injury to or the death of persons whose compensation is excluded were not covered, it was immaterial whether an injured employé was in the employ of the railway or the engineering company at the time of his injury, and that the compensation of the negligent motorman was not included in the policy, as the clause is not limited to cases in which injury is caused "by" persons included in the policy, but covers injury "to" such persons.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.]

4. INSURANCE §640(1) — DEFENSES — PLEADING.

In such case, any defense available under such provision was an affirmative defense which it was necessary to plead.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614, 1616, 1622-1624; Dec. Dig. § 640(1).]

5. INSURANCE §598 — AMOUNT OF RECOVERY — INTEREST.

Under an employer's liability policy, not providing for the payment of interest, the insured, recovering for a loss sustained by payment of a judgment for an injury to its employé, was entitled to interest on its judgment from the date of the employé's judgment against it, rather than from the date of its payment thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1494; Dec. Dig. § 598.]

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by the El Paso Electric Railway Company against the Aetna Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Beall & Kemp and C. W. Croom, all of El Paso, for appellant. Baker, Botts, Parker & Garwood, of Houston, and Davis & Goggin, of El Paso, for appellee.

HIGGINS, J. Appellant issued an "employer's liability policy" of insurance, where-

by, with certain exceptions not necessary here to mention, it agreed—

"to indemnify the assured described in the warranties hereof, within the amounts so expressed herein, against loss and/or expense arising or resulting from claims upon the assured for damages on account of bodily injuries and/or death accidentally suffered, or alleged to have been suffered, by an employé or employees of the assured as provided in said warranties, by reason of the business as described and conducted at the location named therein, whether said injuries and/or death are accidentally suffered, or alleged to have been suffered, at the locations named or elsewhere."

Warranties 1 and 4 read:

"1. Name of assured: Stone & Webster Engineering Corp. or El Paso Electric Railway Co."

"4. Classified description of the business: All operations incidental to the following business, in and during the continuance hereof. Track and overhead construction work including the operation of work cars."

The policy also contains these provisions:

"It is hereby understood and agreed that from noon, October 5, 1900, this policy, subject to its terms, conditions and agreements, covers the interests of the Stone & Webster Engineering Corporation and or El Paso Electric Railway Company and Petrolithic and Construction Company and El Paso & Juarez Traction Company.

"Upon the occurrence of an accident covered by this policy the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company or its duly authorized agent. If a claim is made on account of such accident the assured shall give like notice thereof in full particulars. The assured shall at all times render to the company all co-operation and assistance in his power.

"If suit is brought against the assured to enforce a claim for damages covered by this policy, he shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured.

"The assured, whenever requested by the company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given, except that the assured may provide at the company's expense such immediate surgical relief as is imperative at the time of the accident.

"N. The company's liability for loss on account of an accident resulting in bodily injuries to or in the death of one person is limited to ten thousand (\$10,000.00) dollars, and, subject to the same limit for each person, the company's total liability for loss on account of any one accident resulting in bodily injuries to or in the death of more than one person is limited to twenty thousand (\$20,000.00) dollars. The company, will, however, as provided in conditions 'D' and 'E' hereof, pay the expense of litigation in addition to the sum herein limited, provided that if the company shall elect to pay the assured the sum as herein limited, it shall not be liable for further expense of litigation after such payment shall have been made.

"D. No action shall lie against the company to recover for any loss and/or expense under this policy unless it shall be brought by the as-

sured for loss and/or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss and/or expense."

During the life of the policy, one Shaklee and a fellow workman named Judia, while engaged in overhead construction work upon appellees' electric railway line in the city of El Paso, sustained severe bodily injuries. Shaklee filed suit against appellee to recover damages resulting from such injuries. A judgment in his favor was rendered on September 26, 1910, in sum of \$12,500, which, upon appeal, was affirmed. On November 6, 1911, appellee paid the sum of \$13,345 in settlement of the principal and interest due on such judgment, and the further sum of \$72.35 costs of court. Appellant, having failed to indemnify appellee for any loss and expense incurred incident to the injuries sustained by Shaklee, filed this suit to recover upon aforementioned policy of insurance.

Under the view which we have of this case, it becomes unnecessary to discuss in detail appellant's assignments, and for the same reason it is unnecessary to in detail state the issues raised by the pleadings and findings of the jury upon the special issues submitted to them. The facts, only, will be stated pertinent to what is considered to be the controlling issue in the case.

The evidence shows that, upon the happening of the accident, written notice was immediately given the insurance company of the accident, with all the information obtainable at the time, and, upon the filing of the suit by Shaklee, the street railway company gave notice of that fact with full particulars, sending the citation to the representatives of the insurance company as soon as the same was served, and demanded of the insurance company that it perform its obligations under the policy, and defend at its own cost, the suit which had been instituted against the assured. Some time after the receipt of these notices, the insurance company denied its liability, claiming the policy did not cover accidents of this character, because the accident was not one incident to or arising out of "overhead construction and reconstruction work," but arose from a distinct and independent cause, that is, from the negligence of the street car company's motorman, operating a street car, which accident was not contemplated or covered by the policy, not being in any way due to the work being carried on. In reply to this contention, the street car company insisted the policy did in fact cover the accident, and that the insurance company should comply with its terms. The insurance company thereafter sent its representative from Dallas to El Paso, who, on reaching El Paso, made investigation, consulted with the attorneys for the insurance company, and also with the officials of the street railway company, and the Stone & Webster Engineering Corporation, and, while

at El Paso, compromised and settled with Judia his claim growing out of the same accident. Thereafter, the papers in the Shaklee case were placed in the hands of the attorneys for the insurance company, who took charge of the case, carried on negotiations with Shaklee and his attorneys, seeking a compromise and settlement for \$6,000. This proposed settlement, however, was rejected by the home office of the insurance company, and later, some time in June or July, 1910, the insurance company took the position that the policy did not cover, and the papers were returned. The street car company, though still insisting that the policy covered and the insurance company was liable, had its attorneys take charge of and defend the Shaklee case.

It appears that the El Paso Electric Railway Company and Stone & Webster Engineering Corporation are separate corporate entities, but with close business relations. The former owns and operates an electric street railway line in El Paso. The latter is a repairing and construction company. The Stone & Webster Corporation did all, or nearly all, of the construction work for the railway company. Shaklee was a regular employé of the railway company, but at the time of the injury to him was on the pay roll of the construction company. His status at such time towards the two corporations is disclosed by the testimony which we now quote. Mr. Potter, the general manager of appellee, testified:

"I know how this overhead construction work is done, and how we pay our men. The men engaged in overhead construction work are paid by Stone & Webster Engineering Corporation. Whenever our employés work for the Stone & Webster Engineering Corporation, they are paid by them and it is charged up to us in the whole charge, charged up plus a percentage for doing the work. They pay the men, then we repay them for the work done. We pay them the whole charge plus a percentage, which includes the wages of the men. That was the method of doing business at the time Shaklee was injured, and is still. * * * Shaklee was working for the Stone & Webster Engineering Corporation at that time. He was sent out by the Stone & Webster Corporation to do certain repair work on the El Paso Electric Railway Company's trolley, and he was mounted up there on a wagon doing repair work when a passenger car of the El Paso Electric Railway Company struck the wagon. * * * We would pay the Stone & Webster Engineering Corporation for doing any work the cost of the job plus a certain percentage as profit. * * * So far as the work that Shaklee and Judia were doing at that time, they were serving Stone & Webster people and were being paid by them. They were working for the Stone & Webster Engineering Corporation at the time of the accident and on its pay roll. At that time Mr. Shaklee was not drawing double pay from the Stone & Webster Engineering Corporation and the El Paso Electric Railway Company. We were not paying on behalf of the El Paso Electric Railway Company at that time for the days he was working for the Stone & Webster Engineering Company. Shaklee might have been working for the El Paso Electric Railway Company in the morning of the day he was hurt, but

at the time he was doing this work he was working for the Stone & Webster Engineering Corporation. * * * The labor or help used by the Stone & Webster Engineering Corporation was furnished to them by the El Paso Electric Railway Company, and the labor was paid for out of funds furnished to Stone & Webster Corporation by the El Paso Electric Railway Company."

Mr. Judd, the assistant treasurer of appellee, testified:

"I was acting in this capacity during the month of February, 1910, at the time of the accident and injury to Shaklee and Judia. I am acquainted with Mr. J. E. Wilson. He is the line foreman for the El Paso Electric Railway Company, and was serving as line foreman for the El Paso Electric Railway Company in 1910. On February 3, 1910, Mr. Wilson was working for the El Paso Electric Railway Company, and the El Paso Electric Railway Company paid him for his services for that time. This time sheet is the information on which I issued his time check, of his pay for that day. I was acquainted with the Stone & Webster Engineering Corporation. The Stone & Webster Engineering Corporation handled the construction for the El Paso Electric Railway Company, nearly all of it; I would say nearly all of the construction of the El Paso Electric Railway Company. They do general construction work, but not small construction jobs that might be performed by the local operating company. In reference to how that matter is handled with Stone & Webster Company, a contract with them to perform certain work for us, they are to have charge of the work, we are to advance them money to carry on this work, and they render us a daily statement of the actual expenditures, plus 10 per cent., or whatever the contract calls for, as compensation to them for carrying on the work. The money is advanced to them out of the funds of the El Paso Electric Railway Company. Generally, Stone & Webster Engineering Corporation have their own employes to do their work, but in this particular case, inasmuch as we have an organization for overhead work and they had none, they called upon us to supply them men to do that work. The El Paso Electric Railway Company furnished them with help for overhead work, and they supervise the work, and pay for the work out of the funds advanced them by the El Paso Electric Railway Company, and they receive from the El Paso Electric Railway Company a compensation or profit of 10 per cent. for handling the job."

Mr. Wilson, line foreman for appellee on February 3, 1910, testified:

"As I recollect it, Stone & Webster Engineering Corporation was doing some double-tracking that day on West Rio Grande street just north of Oregon. Whether the other bunch was working I don't know. They generally had two or three. I don't recollect where they were working. Judia and Shaklee were working on West Rio Grande street just off of Oregon. They were using the tower wagon belonging to the El Paso Electric Railway Company on this double track just off of Oregon street. I think that the injury occurred to Shaklee and Judia about 5 o'clock in the afternoon. I believe somebody called my attention to seeing an ear off up there. It was about two blocks from where this ear was off to where Shaklee and Judia were engaged in the double-track work. It was my duty to look after the repair work such as replacing of that ear at that time. When I heard that this ear was off, I told Judia and Shaklee to go up there and fix it. I did not see them go up there, I went back down town."

[1, 2] Shaklee and Judia were injured under the following circumstances: The parties mentioned, at the time, were on a "tower wagon" owned by appellee, standing on or near the street car track. They were engaged in repairing or replacing an "ear" which had been torn from one of the overhead trolley lines of appellee. While so doing, a street car of appellee ran into the wagon and precipitated Shaklee and Judia to the ground, in consequence whereof their injuries resulted. The motorman of the car, an employe of appellee, was guilty of negligence in running into the wagon, and the accident was caused by his negligence. In Shaklee's suit he recovered of appellee upon the theory that he was an employe of appellee at the time of his injury.

Under the facts detailed, we are of opinion that the loss sustained by appellee through the Shaklee injury was clearly covered by and within the terms of the policy sued upon. No judgment could properly have been rendered except in favor of appellee, and a peremptory instruction to that effect would have been appropriate.

Appellant insists that under the terms of its contract the peril insured against was an accident occurring by reason of overhead construction work, and, since the accident was the direct and proximate result of the motorman's negligence, it is not liable. In our judgment, this is a narrow and strained construction to place upon the language of the contract. In construing a contract of insurance, it will be construed strictly against the insurer and liberally in favor of the assured, and if the words admit of two constructions, that will be adopted most favorable to the insured. *Brown v. Insurance Co.*, 89 Tex. 590, 35 S. W. 1060; *Goddard v. Insurance Co.*, 67 Tex. 71, 1 S. W. 908, 60 Am. Rep. 1; *Insurance Co. v. Dyche*, 163 Ky. 271, 173 S. W. 785; *Insurance Co. v. Gordon*, 68 Tex. 144, 3 S. W. 718; *Fireman's Fund v. Shearman*, 20 Tex. Civ. App. 344, 50 S. W. 598; *Hoven v. Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

The peril to those engaged in overhead construction work, arising from the negligent operation of cars by employes of appellee, was necessarily incident to such work. To limit the liability of appellant to those accidents which occurred exclusively and solely by reason of overhead construction work would narrow its application so as to exempt the insurer from liability in practically every case where a cause of action would arise in favor of the injured one and would render the contract well nigh meaningless. A cause of action would never arise except in cases where the negligence of the company, its agents or employes, was a direct and proximate cause of the injury. To permit appellant to escape liability in the case of injury to one engaged in overhead construction, upon the ground alone that such negligence was a

direct and proximate cause of the injury, would completely nullify the contract which it had issued. In the present case, the fact that Shaklee was engaged in overhead construction work was a direct and proximate cause of his injury, equally with that of the motorman's negligence. It was by reason of his engagement in overhead construction work that a combination of circumstances arose that resulted in his injury. If he had not been so engaged at the time the motorman negligently ran into the "tower wagon," the accident would not have occurred. We think the circumstances under which the accident occurred bring the case clearly within the terms of the policy. See *Hoven v. Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. But if it be not clearly within the same, then it must be admitted that it is not incapable of such construction, and, under the rule of interpretation to which allusion has been made, the doubt must be resolved against appellant.

[3] There is a provision in the contract that "claims arising by reason of injuries and/or death to persons whose compensation is excluded herein are not covered," and by virtue of this clause it seems to be contended under the fourth assignment that the policy did not cover the Shaklee injury, because at the time of the accident to Shaklee he was neither employed by nor was he upon the pay roll of appellee. The language of the contract is very peculiar. It is quoted in the first paragraph of this opinion. In effect, it insured appellee and the Stone & Webster Corporation, jointly and severally, against loss arising or resulting from damage claims of those employed by either of the parties, or both of them. Under the contract as drawn, it is of no importance in the employment of which of the two an injured employee might be held to be at the time of the injury. It makes no difference upon whose pay roll Shaklee was at the time of the injury and whose employé he was. It was either appellee or Stone & Webster Corporation, and this was sufficient.

Some point also seems to be made, under the last-quoted provision, of the fact that the compensation of the negligent motorman was not included in the policy. This is of no importance. The cause does not stipulate that it only covers cases in which the injury is caused "by" persons included in the policy, but covers injuries "to" such persons.

[4] Furthermore, if any defense was available, under this clause, based upon any failure to include compensation in the contract, as a basis for the premium paid, it was an affirmative defense which it was necessary to plead. See *Ginners, etc., v. Wiley & House*, 147 S. W. 629, and cases there cited.

[5] Under the sixth assignment, it is asserted the court erred in rendering judgment for an amount in the sum of \$10,000 plus interest from September 25, 1910 (the date of

the Shaklee judgment), until June 10, 1915, the date of the judgment in the instant case. It is contended that, as the policy did not provide for the payment of interest, the assured was not entitled to interest on any sum until the payment was actually made by it on November 6, 1911.

No such assignment was filed in the lower court, and the question is here raised for the first time. It may be doubted whether this presents such an error in law apparent upon the face of the record as would authorize this court to take cognizance thereof in the absence of a proper assignment filed in the court below. *Searcy v. Grant*, 90 Tex. 97, 37 S. W. 320; *Houston Oil Co. v. Kimball*, 103 Tex. 94, 122 S. W. 533, 124 S. W. 85; *Oar v. Davis*, 105 Tex. 479, 151 S. W. 794; *Wilson v. Johnson*, 94 Tex. 272, 60 S. W. 242; *City of San Antonio v. Talerico*, 98 Tex. 151, 81 S. W. 518. But, be this as it may, the assignment should be overruled. The authorities are in conflict as to the propriety under such contracts of allowing interest from the date the injured party recovers his judgment. It will serve no useful purpose to review the cases. The better rule, we think, allows such interest. In the case of *Ætna Life Ins. Co. v. Bowling Green Gas Co.*, 150 Ky. 732, 150 S. W. 994, 43 L. R. A. (N. S.) 1128, a like contract was considered by the Kentucky Court of Appeals, and it was there held that interest was recoverable as an expense of litigation. Our views cannot be better stated than is done by the opinion rendered in that case, from which the following quotation is made:

"The substance of the contract on the point under consideration is that the insurance company will pay \$5,000, and, in addition thereto, all cost and expenses of litigation, unless it elects to pay the \$5,000 and settle without litigation any claim asserted against the assured. If it does so elect, then, in the words of the contract, 'it shall not be liable for further expense of litigation after such payment shall have been made.' This being our construction of the policy, it follows that, if the words 'expense of litigation' fairly include interest, damages, and cost, the insurance company must pay the amounts adjudged against it. Counsel for appellant contends that the words 'expense of litigation' do not include any of the items we have mentioned, and should be confined to the payment of attorney fees, obtaining witnesses, securing bonds, and other like expense incident to this class of suits; but to give the policy this construction would be to ignore, for the benefit of the insurance company, and to the prejudice of the assured, stipulations in the contract that are equally as binding upon it as the one fixing its liability at \$5,000.

"The liability of the company is to be measured by all of the undertakings of the policy, and not alone by one. The policy should be construed as a whole, and effect given to all of its provisions, and, when so construed, the liability of the insurance company is not limited to \$5,000, nor are the words 'expense of litigation' to be confined to the items of expense indicated by counsel. That \$5,000 was not intended by the policy to be the full extent of the liability is made plain by the condition obligating it to pay, in addition to this, 'the expense of litigation,' and, when its agreement to pay the expense of litigation is considered in connection with the unlimited control of the litigation con-

ferred upon it by clauses D and E, its liability for the expense of litigation should be made broad enough to fairly cover all of the expense incurred in the litigation that it compelled the assured to engage in. The insurance company had the undoubted right to compel the assured, against his will, to engage in litigation, or else forfeit the right to any part of the indemnity he had contracted for, and as it could, by electing to insist on litigation, burden the assured, against his consent, with the cost and expense of a lawsuit, the provisions of the policy should be liberally construed for his benefit. We think the words 'expense of litigation' embrace all the expenses that the assured was put to by the litigation, including costs, damages, and interest on \$5,000, and this construction is supported by the cases of *Insurance Co. v. Henderson Cotton Mills*, 120 Ky. 218, 85 S. W. 1090, 117 Am. St. Rep. 585, 9 Ann. Cas. 162; *Southern Ry. News Co. v. Insurance Co.*, 83 S. W. 620, 26 Ky. Law Rep. 1217; *Fidelity, etc., v. Southern Ry. Co.*, 101 S. W. 900, 31 Ky. Law Rep. 55; *Cudahy Packing Co. v. New Amsterdam Casualty Co. (C. O.)* 132 Fed. 623. Although a different conclusion was reached in the construction of somewhat similar policies in *Daivson v. Maryland Cas. Co.*, 197 Mass. 167, 83 N. E. 407; *National & Providence Mills v. Frankfort Marine Ins. Co.*, 28 R. I. 126, 66 Atl. 58; *Maryland Casualty Co. v. Elec. Co.*, 157 Fed. 514, 85 C. C. A. 106. We are unable to perceive upon what reasonable theory the words 'expense of litigation' should be limited to one part of the expense more than another, or why they should be held to include cost incurred in litigation and not interest or damages incurred in it. The damages that the assured incurred in appealing the case and the interest on the \$5,000 that accrued pending the appeal are as much a part of the expense of litigation as the court costs. No sound distinction can be made between these items of expense. Certain it is that the assured was compelled to pay on account of this litigation the court costs, the damages, and the interest on \$5,000 from the date of the judgment in the lower court, no part of which it would have been required to pay except for the litigation.

"An attempt, however, is made to distinguish between the items of damage and cost and the item of interest, and the argument is made that as the assured had the use of the \$5,000 during the appeal, and as this use was worth the interest, therefore this should not be accounted an expense, as the assured did not lose anything by paying the interest. But this argument overlooks the fact that the assured had to pay to the claimant the interest it now demands, and, unless it recovers it from the insurance company, it will be out this item of expense incurred by the litigation. If the insurance company had paid the \$5,000 when the judgment was rendered in the lower court, at which time the claimant first became entitled to interest, that would have ended its liability under the policy. But this it refused to do, and now, unless it pays the interest that accrued on this \$5,000 after that time and pending the appeal, the assured will lose it. The fact that the assured had the use of the \$5,000 pending the appeal has nothing to do with who shall pay this interest; but, if it did, the parties would be on an equal footing, because the insurance company also had the use of the \$5,000 during the appeal. It is simply a question of which one should bear this item of expense, and we think the insurance company should."

See, also, *Cannon, etc., v. Employer's Indemnity Co.*, 161 N. C. 19, 76 S. E. 536, Ann. Cas. 1914D, 1095.

Finding no error, the judgment is affirmed.

MILES v. BODENHEIM et al. (No. 1575.)

(Court of Civil Appeals of Texas, Texarkana.
Feb. 18, 1916. Rehearing Denied
March 2, 1916.)

1. EASEMENTS ⇐61(9) — ACTION TO ENJOIN OBSTRUCTION—EVIDENCE.

Evidence, in an action to restrain defendant from closing an alley or way used by plaintiffs in reaching their residence premises, held to make a case of probable right in plaintiffs to the relief sought.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143; Dec. Dig. ⇐61(9).]

2. INJUNCTION ⇐152 — OBSTRUCTION OF EASEMENT—DISCRETION OF TRIAL COURT.

In such case, it should not be said that the trial court abused his discretion in granting a temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 337, 343; Dec. Dig. ⇐152.]

3. EVIDENCE ⇐317(5)—HEARSAY.

In an action to restrain the closing an alley or way used by plaintiffs to reach their residence premises, where plaintiff had purchased from a former owner of the tract and defendant from his administratrix, testimony of the plaintiff that his grantor at the time of the sale said that there was to be an alley there, and that he wanted it always kept open, was not inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1178; Dec. Dig. ⇐317(5).]

4. FRAUDS, STATUTE OF ⇐60(1)—PAROL EVIDENCE—ESTABLISHMENT OF EASEMENT.

Such testimony was not inadmissible as seeking to establish an easement by parol testimony.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 94; Dec. Dig. ⇐60(1).]

5. WITNESSES ⇐139(1) — COMPETENCY — TRANSACTIONS WITH DECEDENT—"PARTY."

Such evidence was not inadmissible under *Vernon's Sayles' Ann. Civ. St. 1914, art. 3690*, providing that in actions against executors, administrators, etc., where a judgment may be rendered for or against them as such neither party shall be allowed to testify against the others as to any transaction with the testator, etc., unless called to testify thereto by the opposite party, since the administratrix of the plaintiff's grantor, who conveyed to defendant, was not a "party" to the suit on the ground that the judgment for plaintiffs would bind her in defendant's suit on her warranty.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 582; Dec. Dig. ⇐139(1).]

For other definitions, see Words and Phrases, First and Second Series, Party.]

6. JUDGMENT ⇐712 — CONCLUSIVENESS — PERSONS NOT PARTIES—RECORD OF FORMER SUIT.

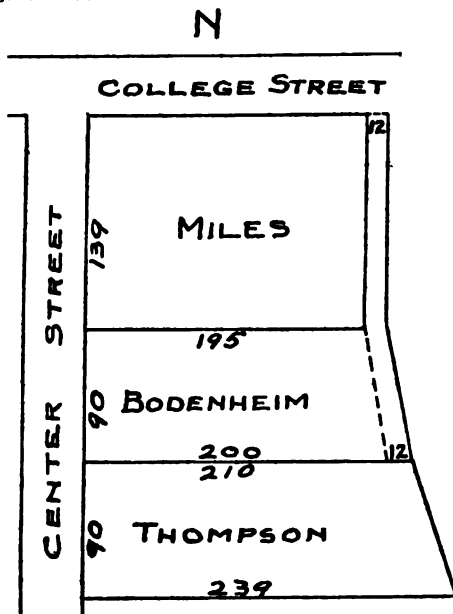
In a suit against a warrantor on his covenant in a deed, the record of a suit between his vendee and a third party involving the title to the land conveyed, to which the warrantor was not a party and of which he was not notified and requested to defend, is not admissible as evidence that the recovery was under a paramount title, but only to show eviction and the assertion of an adverse title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1233; Dec. Dig. ⇐712.]

Appeal from District Court, Gregg County.

Action for injunction by G. A. Bodenheilm and another against C. F. Miles. Temporary injunction granted, and defendant appeals. Affirmed.

This is an appeal, authorized by article 4644 et seq., Vernon's Statutes, from a judgment granting a temporary injunction restraining appellant from closing an alley or way, hereinafter described, used by appellees in reaching parts of the premises on which they, with their families, respectively resided in the city of Longview. It appears from the record that in July, 1905, G. A. Rogers and his wife owned a tract of $1\frac{1}{2}$ acres of land fronting west about 319 feet on Center street and north about 200 feet on College street in said city. A rough plat of the tract, showing it divided into three parts, is given below:



At the time stated, the tract of land was inclosed by fences, except for an opening about 12 feet wide at its northeast corner, indicated by the dotted line on the plat. The parts of the tract were separated by fences constructed at points indicated by the inside straight lines on the plat. Rogers and his wife had lived in a house on the part of the tract marked "Miles," and while living there so constructed the fences as to leave an open way about 12 feet wide between said part and the east line of the tract, which he used in going to and coming from College street to other parts of the tract. But, the house in which he had lived having been destroyed by fire, Rogers had constructed, and in July, 1905, was living in, a house on the part marked "Thompson," and as an outlet from same to College street was using the open way mentioned and the extension of same along the east line of the part marked "Bodenheim," indicated by the dotted line. By a deed dated July 3, 1905, Rogers and his wife conveyed the part (but not including the strip 12 feet wide east of the dotted line) marked "Bodenheim" to appellee G. A. Boden-

heim; by a deed dated June 19, 1907, the conveyed the part marked "Thompson" to S. Thompson, who conveyed same to J. Rainey, who conveyed it to appellee K. Melton; and by a deed dated May 2, 1908, Rogers having died, his widow, as such administratrix of the community estate, conveyed the remainder of the tract, bearing the part marked "Miles," and the open way about 12 feet wide from College street along the east line of the tract to the north line of the part marked "Thompson," to appellee C. F. Miles. Each of the deeds mentioned contained covenants of general warranty. The deed from Rogers and wife to Bodenheim, and the one from Rogers and wife to Thompson, but not the plat attached to them, were of record at the time the one to Melton was made; but in neither of them was any mention made of the alley or way in question.

Appellee Bodenheim, as a witness for himself and Melton, testified, without objection, that he purchased the lot Rogers and wife conveyed to him as stated to build upon and use as his home; that the alley or passway was then "where it is now and had no construction in it," and was being used "for purposes" by Rogers, who lived on the part of the tract marked "Thompson"; that it was "a plain roadway in there"; that after he purchased the lot he built a fence along its east line, separating the lot from the alley or way in question, providing in the fence gates from his lot to the alley, and constructed a concrete curbing about 2 feet high along the line thereof on Center street; that he built a barn on the east end of the lot with reference to the way to it from College street furnished by the alley, and without reference to a way to it from Center street; that he constructed on the west part of the lot, fronting Center street, a dwelling house about 75 feet wide, including a concrete walk 2 or 3 feet wide on each side of it; that he built cross-fences separating the front and rear parts of the lot, and planted and grew shrubbery and shade trees on said front part; that after improving the lot as stated he lived upon it and used the alley in question as a way for his employes, vehicles, cows, etc., to the east part thereof; and that to provide a way to that part of his lot from Center street it would be necessary for him to tear down and remove the concrete curbing along the west end of the lot and the cross-fences he had constructed, and to tear down and remove some of his shrubbery and shade trees. Over appellant's objection to the ground that it "was hearsay, was a conversation with a dead man and warranted to the title, and the defendant, Miles, had notice of the conversation," and "that it was seeking an easement by parol testimony which could only be conveyed by writing," the court permitted Bodenheim to further testify as follows:

"At the time I traded and got my deed from Mr. Rogers, I had a conversation with him v

reference to that strip of ground. He very specifically stated that it was to be an alley in the first place. That he intended to live there, and did not have any idea at the time of making a change, and that he always wanted the alley kept open so that anybody he should sell to should always have egress to the place; and I told him that I intended to build my home predicated on that alley entrance because I built it very wide as anybody can see, and every improvement I made clearly showed that I anticipated the alley being kept open on his say-so."

Bodenheim then further testified, without objection:

"I did not understand that I was buying the alley. The understanding was that I was to have a right of way through there. Mr. Rogers said that strip was to be kept open, and there has never been any obstruction in it since that time."

And, cross-examined by appellant, he further testified:

"One thing that prompted him (Rogers) to state specifically that the alley would be kept open was that he wanted access to his own property on the south side of me, and it was not for my convenience any more than it was for his own, as it was to protect himself and his property next door to me, that he left the alley open, and said it would remain open for the convenience of whoever he might sell his place to. If he hadn't done that, however, I would not have gone ahead and built my house like I did, and I made, in fact, every improvement with the idea that the alley would remain open. I think that Mr. Rogers told me at the time that he wanted to sell that property next to me and that he wanted the alley left open so he could get to it. * * * When the deal was consummated, I had bought a lot between two lots owned by Mr. Rogers, and he retained a neck or little strip of land linking his two lots together at the rear of my lot, and he drove up pins and showed me where my lot came to. He retained that strip for the purpose of an alley for his use and my use also. I understand that he was reserving it for his own use and for my use also as an alley. It was my understanding that he wanted to make an alley out of it."

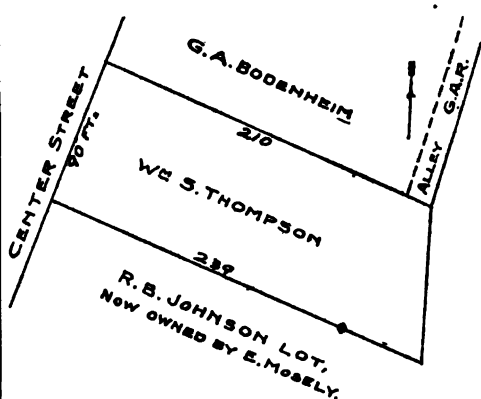
With reference to the use made of the alley, Bodenheim testified:

"There are about three houses behind me that use it. Mr. Gans has two residences on his property, and they use it, and Mr. Melton and I use it; that is four; and Mr. Cox, over on the east side, uses it."

Wm. S. Thompson, as a witness for appellees, testified that Rogers was living on the part of the tract marked "Thompson" at the time he (witness) purchased it. Over appellant's objection, on grounds similar to those made by him, as stated above, to testimony of appellee Bodenheim, the court permitted Thompson to further testify as follows:

"Mr. Rogers showed me the place. There was an alley leading from this place, at the time I looked at it, out to College street, or the street that runs from the High School building west. I had a conversation with Mr. Rogers with reference to that, and the understanding was that it was to remain an alley there. Mr. Rogers stated to me that the alley should be kept open. He stated that to me at the time I was trading for the property, in connection with the sale of the property to me. I knew at that time that Mr. Rogers owned the other ground there between the place I was getting and College street, along which the alley ran."

Attached to, but not mentioned in, the deed to Thompson, as it was delivered to him, was a plat as follows:



—with reference to which, without objection, he testified:

"There is a pencil sketch attached to the deed, and Rogers evidently made it, as it is in his handwriting. * * * Mr. Rogers gave me the sketch attached to the deed because I requested it of him. My purpose in requesting it was to see the exact size of the lot, and I wanted to see that an alley would be shown on the sketch, and that it would be kept open, and that was his promise. * * * I don't know that the plat is on record with the deed, but it was on then when the deed was recorded. * * * He (Rogers) gave me the sketch at the time he gave me the deed."

Thompson further testified, without objection, as follows:

"I certainly bought the property with the understanding that the alley was to be kept open and not closed. There was no understanding that there would be a gate across it, or any obstruction of any kind. There were outhouses, barns, on the back of this place when I bought it, and they were built and situated so as to be used in connection with this alley. Though the alley was the only access for a buggy. * * * The place would not have suited me at all unless it had an alley, as I kept a horse and buggy, which was necessary in my business. I guess I would have made a difference of about \$200 in the value of the place if it hadn't had the alley."

Appellant testified that for two or three months, while Thompson and Bodenheim were living on the parts of the land respectively purchased by them, he lived on Center street; that his usual route from his home to town during that time carried him by the end of the alley, and that he knew it was there; that he "supposed that was an alley," and "did not see any front entrance to Bodenheim's property nor to Melton's property"; that, when he built a dwelling house on the land he purchased of Mrs. Rogers, he constructed his east fence at the place where the old fence was, "in such a way as to leave that alley open"; that he made no inquiry about the alley when he purchased; and that it was from an "inspection of the deeds" that he "ascertained that the alley," quoting, "would be mine by purchase."

Beard & Davidson, of Marshall, and McCord & Campbell, of Longview, for appellant. Young & Stinchcomb and Lacy & Bramlette, all of Longview, for appellees.

WILLSON, C. J. (after stating the facts as above). [1-8] As the cause is yet to be tried on its merits, we will not discuss the testimony, further than to say that the part of it set out in the statement made at least a case of probable right in appellees to the relief they sought. *Harrison v. Boring*, 44 Tex. 255; *Smith v. Allen*, 40 S. W. 204; *Weynand v. Lutz*, 29 S. W. 1097; *Howell v. Estes*, 71 Tex. 690, 12 S. W. 62; *Mattes v. Frankel*, 157 N. Y. 603, 52 N. E. 585, 68 Am. St. Rep. 804; *Insurance Co. v. Patterson*, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550; *Ellis v. Bassett*, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; *Irvine v. McCreary* (Ky.) 56 S. W. 966, 49 L. R. A. 417; *Loan Co. v. Gordon*, 54 Or. 147, 102 Pac. 736, 26 L. R. A. (N. S.) 331; *Phillips v. Phillips*, 48 Pa. 178, 86 Am. Dec. 577; *Zell v. Society*, 119 Pa. 390, 13 Atl. 447, 4 Am. St. Rep. 654; *Rollo v. Nelson*, 34 Utah, 116, 96 Pac. 263, 26 L. R. A. (N. S.) 315; *City v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; 14 Cyc. 1166 et seq.; 9 Ruling Case Law, 746 and 754, et seq. As it did, it should not be said that the judge abused the discretion he possessed when he granted the temporary injunction. *Whitaker v. Hill*, 179 S. W. 539. Whether the testimony, exclusive of the part thereof given by Bodenhelm and Thompson, shown in the statement to have been admitted over appellant's objection, made such a case or not, need not be determined, as we are of opinion that part should not have been excluded on any of the grounds urged to it. Of those grounds we think only the one based on the contention that the testimony objected to was inhibited by article 3690, Vernon's Statutes, needs to be noticed. That article of the statutes is as follows:

"In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

The theory on which appellant argues in support of his contention is that Mrs. Rogers, who conveyed to him, was a party to the suit within the meaning of the statute, because, he asserts, a judgment in appellees' favor against him would bind her in a suit by him against her on her warranty. As we understand the law, the judgment in this suit, if against appellant, would not bind Mrs. Rogers. As said by the court in *Sachse v. Loeb*, 45 Tex. Civ. App. 536, 101 S. W. 450:

"It is well-settled law that, in a suit against the warrantor on his covenant in a deed, the record of a suit between him, vendee, and a third party involving the title to the land conveyed to which the warrantor was not a party, and of which he was not notified and requested to defend, is not admissible as evidence to prove, and does not establish, that the recovery therein was under a paramount title. In such case the record is only admissible to show eviction and the assertion of an adverse title."

Bennett v. Virginia Ranch, Land & Cattle Co., 1 Tex. Civ. App. 321, 21 S. W. 127, relied on by appellant, does not support his contention, and does not announce a rule contrary to the one stated above. In that case the warrantor, not merely because of interest in the result, but because named as such, was a party to the suit. For that reason the court held he would be concluded by the judgment rendered. In this one, Mrs. Rogers was not named as a party, and a judgment against appellant would establish nothing as against her, except the fact that appellees had asserted and established as against appellant a right to use the alley as a way to their premises. It would not operate to prevent her from showing, if she could, if sued by appellant on her warranty, that there had been no breach of the covenant.

The judgment is affirmed.

YEATTS v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS. (No. 7433).*

(Court of Civil Appeals of Texas. Dallas. Feb. 5, 1916. On Rehearing, March 25, 1916.)

1. EVIDENCE \S 477(2)—OPINION EVIDENCE—NONEXPERTS—APPARENT SICKNESS.

Where a witness had testified that he had known the injured person for a long time, and had seen her during the trial, and that he was unable to see any difference in her health since the alleged injury, a question asked on cross-examination whether there was anything about her the day before that suggested that she was sick was not objectionable as calling for a conclusion, since a witness may state the apparent physical condition of a person or the existing state of apparent sickness or health.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2238; Dec. Dig. \S 477(2).]

2. APPEAL AND ERROR \S 1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CURE BY SUBSEQUENT TESTIMONY.

The error in excluding the answer to such question was rendered harmless where the same witness on recross-examination, in answer to a question whether the woman not only looked frail, but looked sick, stated that he had made no close examination; that he only saw her for a few seconds the day before.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4201; Dec. Dig. \S 1058(2).]

3. APPEAL AND ERROR \S 692(1)—QUESTIONS PRESENTED FOR REVIEW—BILLS OF EXCEPTIONS—EXCLUSION OF EVIDENCE.

Assignments of error to the sustaining of objections to questions propounded to witnesses on direct examination will not be considered where the bills of exceptions supporting them

do not show what testimony appellant expected to elicit by the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2906, 2906; Dec. Dig. ¶ 692(1).]

4. APPEAL AND ERROR ¶692(1)—QUESTIONS PRESENTED FOR REVIEW—BILLS OF EXCEPTIONS—EXCLUSION OF EVIDENCE.

The rule that bills of exceptions to the exclusion of evidence must show the testimony expected to be elicited does not apply where questions were asked on cross-examination or where the motion to strike testimony was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2906, 2906; Dec. Dig. ¶ 692(1).]

5. WITNESSES ¶358—IMPEACHMENT OF PARTY—REPUTATION—SPECIFIC ACTS.

A witness who had testified to plaintiff's poor reputation for truth cannot be cross-examined as to whether plaintiff's personal dealings with witness were fair, whether he knew of a single dishonest act by plaintiff, or whether so far as the witness' personal knowledge was concerned, plaintiff was fair and square, since such questions are attempts to establish general reputation by proof of specific acts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1159, 1160; Dec. Dig. ¶ 358.]

6. WITNESSES ¶360—IMPEACHMENT—REPUTATION—REBUTTAL—SOURCES OF REPORTS.

Where witnesses who impeached plaintiff's reputation for veracity had mentioned certain reports that plaintiff had burned buildings, plaintiff could not testify in rebuttal that those reports were circulated by persons who were his bitter enemies, though such enmity could be shown by other proof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1165, 1166; Dec. Dig. ¶ 360.]

On Rehearing.

7. APPEAL AND ERROR ¶882(9)—REVIEW—INVITED ERROR.

Where plaintiff on cross-examination of witnesses who had impeached his reputation, elicited testimony as to particular incidents, he cannot complain that the court permitted the witnesses on redirect examination to give the details of those incidents.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3599; Dec. Dig. ¶ 882(9).]

8. WITNESSES ¶358 — REDIRECT EXAMINATION—SCOPE—IMPEACHING WITNESSES.

Under the right of a party on redirect examination of his witnesses to have matters brought out by cross-examination, but which the witness was not given an opportunity to explain fully detailed, an impeaching witness who was asked on cross-examination as to certain incidents effecting an adverse witness' reputation may be re-examined as to details of those incidents.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1159, 1160; Dec. Dig. ¶ 358.]

Appeal from District Court, Collin County; M. H. Garnett, Judge.

Action by Ed Yeatts against the St. Louis Southwestern Railway Company of Texas. Judgment for the defendant, and plaintiff appeals. Affirmed, and motion for rehearing denied.

B. Q. Evans and H. L. Carpenter, both of Greenville, and L. C. Clifton, of McKinney, for appellant. E. B. Perkins, of Dallas, and Head, Dillard, Smith, Maxey & Head, of Sherman, for appellee.

RASBURY, J. Appellant sued appellee for damages for personal injuries to his wife. There was jury trial, resulting in verdict for appellee, followed by similar judgment, from which this appeal is prosecuted. Briefly stated, appellant's testimony tended to show that prior to the time his wife was injured there was in the town of Josephine a concrete sidewalk maintained by the citizens extending north and south to appellee's side and main tracks, which extended east and west through the town. From the junction of the concrete walk with appellee's tracks appellee built and maintained a sand and gravel walk across the tracks to a junction with its passenger platform. The height of the concrete walk, the gravel and sand extension, and the platform was uniform. This way was customarily used by the citizens of Josephine in going to and from appellee's station to the south portion of the town. Prior to the time appellant's wife was injured appellee removed the sand and gravel constituting the portion of the walk between its main tracks, which were the tracks nearest its platform, and raised its tracks, which left its rails six or seven inches above the earth's surface and the cross-ties one or two inches above such surface. Subsequent to all the foregoing, and on April 22, 1914, at 3:40 a. m., appellant and wife alighted from one of appellee's passenger trains upon the unlighted platform and started in the usual way for their home south of the station. Appellant's wife had no knowledge of the changed condition of the walk, and when she reached the rails she stepped between them placing her foot upon the edge of one of the exposed cross-ties, with the result that her foot turned, and she fell and was seriously injured.

Appellee's testimony tended to sharply contradict appellant's claims, and to show that appellant's wife's injuries were due to other causes. Appellee's testimony also tended to show that the general reputation of the appellant, who was a witness to all the facts material to his recovery, for truth and veracity and honesty and fair dealing, was bad.

We deem the foregoing brief statement of the facts which the evidence will support sufficient, since all issues on appeal arise upon the admission or exclusion of testimony.

[1] It is first urged that the court erred in refusing to permit the witness Abbott to answer a question propounded by appellant. Abbott was a witness for appellee, and on direct examination testified, in substance, that he had known appellant's wife for 12 years prior to the trial, and had seen her during the trial, and that he was unable to see any difference in her appearance as to health or strength since the injury. On cross-examination the witness testified that, while appellant's wife walked and got about

"lively," he never did regard her as a robust, healthy woman, but that there was nothing in her appearance to suggest that she was "sick at all."

Question: "Now, you saw her yesterday, and will you tell that jury that there was not anything about her that suggest[s] that she was sick yesterday?"

Had the witness been permitted to answer, appellant expected to prove by him that on the day inquired about appellant's wife appeared pale, emaciated, weak, and debilitated, with a loss of 20 or 25 pounds of flesh. However, upon objections by counsel that the question called for the opinion and conclusion of a nonexpert witness, the court excluded the answer, explaining in his qualification of the bill that the answer was not excluded on the ground that the witness could not testify as to the appearance of appellant's wife, but because the question did not call for an answer concerning the appearance of appellant's wife. The oft-stated rule under which it is urged the answer should have been admitted is that:

A nonexpert witness "may state the apparent physical condition of a man, * * * or as to what are more distinctly inferences from animate bodily phenomena, as the existence of a state of apparent sickness or disease. Such an observer may also state a change in apparent condition, whether the change is from sickness to health, or from health to sickness, or from bad to worse, or from worse to better. He may also infer and state that a person's ability to help himself, or his faculties or the use of his limbs or other parts of his body, or his earning capacity has or has not been impaired." 17 Cyc. 87.

To the same effect is *Cunningham v. Neal*, 49 Tex. Civ. App. 613, 109 S. W. 455, and cases cited, wherein the reasons for the rule are discussed. Consequently, under the broad and flexible rule stated, we are not prepared to say that the question was improper, or not pertinent, as indicated by the court's qualification. Certainly it was not improper, because the witness was a nonexpert. Nor can it be said that the question was objectionable because it sought to elicit a conclusion or the opinion of the witness, since, based on the preceding testimony of the witness that he had seen appellant's wife before and after the accident and had observed her condition on both occasions, he was qualified to state his conclusion or his opinion concerning her illness.

[2] We conclude, however, that the court's action was harmless, because the witness on recross-examination answered substantially the same question. The record discloses that after the court sustained the objection to the question the witness was again examined by appellee's counsel, and in turn again examined by appellant's counsel, when he, in substance, testified that appellant's wife appeared to be physically weak and looked frail.

Question: "I will ask you if she not only looks frail, but looks sick?" Answer: "I haven't made any very close observation, I was just in

her presence a few seconds yesterday evening in the judge's room."

The question excluded was whether he looked sick yesterday. The question finally answered was that he did not know whether she looked sick or not because when he saw her "yesterday" in the judge's office it was only for a few moments, during which he did not observe her closely. The answer of the witness to the last question was evidently the extent of his knowledge of the subject, since counsel did not pursue the examination further. That being true, and the question being so substantially similar to one excluded, we are constrained to believe the court's action was not reversible error.

[3] The second, third, fourth, fifth, sixth and seventh assignments of error relate to the exclusion of certain testimony tendered by appellant in rebuttal of certain facts attempted to be proven by appellee. To the consideration of the assignments appellee objects on the ground that the bills of exception supporting the assignments fail in one instance to state what the answer of the witness would have been to the questions propounded. The ground of the objection as relates to the second, third, fifth and sixth assignments is sustained by the record and the objection will be sustained for that reason. *Beeks v. Odom*, 70 Tex. 186, 10 W. 702; *Cunningham v. Austin & N. W. Co.*, 88 Tex. 534, 31 S. W. 629.

[4] As to the fourth and sixth assignments the objection is overruled, since said assignments relate in the one instance to the refusal of the court to permit the witness to answer questions propounded on cross-examination and in the other to the exclusion of testimony. In such cases a different rule applies. *Cunningham v. Austin*, etc., supra; *Long v. Red River Ry. Co.*, 85 S. W. 1045.

[5] The next issue is the action of the court in refusing to permit the witness Reece to answer questions propounded by counsel for appellant. Reece was a witness for appellee, and had testified that he had known appellant for more than 20 years, had no personal difference with him, and was friendly terms with him, but that the general reputation of appellant for truth, veracity and honesty and fair dealing was bad. Upon cross-examination, after proffering the facts upon which the witness based his conclusion and eliciting from the witness that he could recall but one circumstance, counsel for appellant inquired:

"His dealings with you were fair and square were they not?"

The witness was not permitted to answer whereupon counsel for appellant further inquired:

"Do you know of a single dishonest act he ever performed or committed?"

Again permission to answer was denied whereupon counsel inquired:

"Now, Mr. Reece, is it not true that in all your personal dealings with him for the last

of time you have known him he always acted fair and square with you; so far as your personal knowledge is concerned, he is a square, honest man?"

Objection to this question was also sustained. The action of the court in all the matters stated was excepted to and is assigned as error.

We conclude that the court did not err in the respect stated. Appellee, in examining the witness, complied with the long-settled rule by proving appellant's general reputation in the community where he was known for truth and honesty. 16 Cyc. 1275; *Boon v. Weathered*, 23 Tex. 678, a ruling case in this jurisdiction; *M., K. & T. Ry. Co. of Texas v. Creason*, 101 Tex. 335, 107 S. W. 527; *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523.

The generally approved method for meeting the attack upon his character was for the appellant, under the same rules that the testimony of appellee was admitted, to introduce evidence in rebuttal to sustain his general reputation. 16 Cyc. 1276. Some authorities go a step further, and hold that the person whose reputation is attacked may, on cross-examination, call for the particular charges made against the one sought to be impeached and for the persons who made them. 16 Cyc. 1280; *Chamberlayne*, Mod. Law Evidence, vol. 4, § 3314. Such cross-examination, however, according to the authority cited, is admitted for the purpose of testing the credibility and knowledge of the witness, and is justified on the ground that it may disclose both a lack of knowledge and fair-mindedness on the part of the impeaching witness. The latter authority, however, declares that the practice borders dangerously near the forbidden practice of proving reputation by specific acts, and by indirection at least disapproves the rule. It will thus be seen that the evidence that was sought to be elicited from the witness Reece was under the rules stated properly excluded, since its effect was to establish by specific acts general good reputation.

[6] The next issue reviews the action of the court in excluding from the consideration of the jury a question propounded to appellant and his answer thereto. By certain of appellee's witnesses it was shown that there were reports in circulation in Josephine that appellant had caused the burning of certain buildings, and while appellant was testifying in rebuttal of said charges his counsel inquired, "I will ask if the men in Josephine talking about you burning these buildings were not your bitter enemies in that community?" to which appellant answered, "Yes," and which question and answer on motion of appellee were excluded. Appellant urges that such testimony was proper for the purpose of showing that those who circulated the reports were his bitter enemies. It is correct to say that animosity, enmity, or unfriendliness and consequent bias and hostility of witnesses may be shown when rel-

evant; but not, however, by the naked declaration of the witness that animosity or enmity or unfriendliness in fact exists. Such was the effect of the excluded testimony, since it was unaccompanied by proof of any conduct or declarations of those so charged, upon which the jury could base a finding that such animosity, enmity, or unfriendliness in fact existed. Accordingly we conclude there was no error in the respect stated.

The eighth assignment of error complains of the refusal of the court to exclude certain testimony. Morrison, a witness, was sworn and examined by counsel for appellee ostensibly to prove that appellant's reputation for truth and veracity and honesty and fair dealing was bad, but who, after much urging, testified it was reasonably good. Counsel for appellant, on cross-examination, drew from the witness that he had based his opinion concerning appellant's reputation upon several incidents, among which were a "falling out" with a school-teacher, a cotton-weighing incident, a personal affray with a man named Coffman whom he whipped, and a report that he had set fire to a lumber yard, and also to the home of one Coffman. Appellant went into particulars or merits of most of the foregoing incidents, proving by the witness in reference to the "whipping" incident that appellant "gave Coffman a good thrashing." On redirect examination counsel for appellee asked the witness if it was not a fact "that Yeatts went up to Coffman with a brick or rock when Coffman was not looking, * * * when he was not expecting anything," to which the witness replied, "That is what Coffman said when he came out of the house," which answer counsel requested the court to strike out because it was improper to permit appellee "to go into the details of the difficulty." The lower court declined the request as stated. We incline to the opinion that none of the specific acts upon which the witness based his opinion was admissible, save, perhaps, as stated by the authorities cited, for the purpose of testing the knowledge and fairness of the impeaching witness. In the particular instance we are discussing the appellant alone had the right to exercise the privilege of inquiring into the matter he did inquire into, and, having gone into the merits of the specific acts upon which the witness based his opinion, we think he is not in a position to complain. It was, in effect, so ruled in *Freedman v. Bonner*, 40 S. W. 47.

The tenth assignment raises a similar question, and it is overruled for the reasons just stated.

Finding no reversible error in the record, the judgment is affirmed.

On Rehearing.

[7] Counsel for appellant earnestly insists that we erred in our disposition of every issue raised on appeal and ignored the

most important thereof. We have carefully considered the motion for rehearing, and, while the record, as is often the case, presents some difficulties, we conclude our former disposition of the case should stand. We will, however, discuss the ninth assignment of error, erroneously designated as "tenth" in our opinion, which was overruled, because it raised, in our opinion, issues similar to those discussed in disposing of the eighth assignment. As will appear from our original opinion, appellee sought on direct examination to impeach appellant by its witness Morrison, but the witness finally testified that appellant's general reputation for truth and veracity and honesty and fair dealing was reasonably good. On cross-examination counsel for appellant drew from the witness the several incidents recited in our discussion of the eighth assignment, and upon which the witness based his opinion that appellant's general reputation was reasonably good. Among other questions asked was the following:

"There was one circumstance where he had a falling out with the teacher of the school? A. Yes; that was one."

Following such answer counsel for appellant also drew from the witness the admission that he based his opinion concerning appellant's general reputation upon four other separate and distinct incidents, inquiring into the details of some of them. On re-examination counsel for appellee interrogated the witness upon the incidents so introduced, and was permitted to propound to and receive from the witness the following question and answer, to wit:

"Now, the falling out there was something he had told—that he could have that woman meet him out at any time that he wanted to—some report that he had made reflecting on her character? A. Yes."

The objection made before the witness answered, and afterwards on motion to strike out, was that, while it was proper to prove the incidents forming the basis of the opinion, the details could not be gone into, for the reason that it would necessitate the securing of other witnesses to prove justification of the acts disclosed, and because immaterial, irrelevant, hearsay, and self-serving. Following the objection the witness further testified that it had been three or four years since the incident occurred, and that the young lady was still teaching there. We held in our original opinion that appellant only had the right to examine the witness concerning the facts upon which he based his conclusion concerning the general reputation of appellant, and having chosen to do so, and having drawn from the witness the incident detailed, he was not in a position to complain of the court in permitting appellee to develop the particulars thereof. We then conceived, and do now, that such

was the ruling in *Freedman v. Bonner*, 40 W. 47. In that case it is said by this court:

"The defendants, on the original examination only asked the witnesses Roberson and G... about the general reputation of McKinsey truth and veracity in the neighborhood in which he lived or was best known; that the matters complained of were drawn out by plaintiff's counsel; and that defendants' counsel on cross-examination the witnesses on the points drawn out. In such a case, while such matters were improper, and perhaps injurious, yet appellants have no ground of complaint."

[8] Aside from the fact that the error, any, was initially introduced into the case by appellant, there is eminent authority holding that such testimony was properly admitted. Mr. Jones, in his work on Evidence (section 864), declares it is the right of the one sought to be impeached to have truth known, and for that reason he is entitled on cross-examination to demand of the witness fully the source of his information, and it was in the exercise of that right that counsel for appellant required Morrison to state the incident concerning the teacher. The same author on the same subject declares in section 871 that:

"After a witness has been cross-examined the next stage in the proceeding is his re-examination by the party calling him. The object of re-examination is to allow the witness to explain or qualify his statements made in the cross-examination, and to give the details of transactions concerning which he has been cross-examined, but which, during such cross-examination he had no opportunity to explain. 'The court has a right, upon such re-examination, to ask all questions which may be proper to draw from the witness an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, also of the motive by which the witness was induced to use those expressions; but he has no right to go further and introduce matter, in itself, and not suited to the purpose of explaining either the expressions or the motive of the witness.' Within its proper scope re-examination is a right, and not merely discretionary."

Thus, when appellant surrendered to the witness to appellee, he had an admission from him that his opinion in part had been based upon a certain incident, and under the authority cited appellee was entitled to inquire into the details of that particular incident.

The motion for rehearing is overruled.

BARCUS v. PARLIN-ORENDORF IMPROVEMENT CO. et al. (No. 901.)

(Court of Civil Appeals of Texas. Amarillo, March 1, 1916. Rehearing Denied March 29, 1916.)

1. VENUE — 22(1)—PRIVILEGES OF DEFENDANTS—CODEFENDANTS.

The W. Hardware Company sold its stock of merchandise to W. and P., receiving as part of the consideration a note for \$4,000, agreed to pay all indebtedness and claims against the merchandise, the contract further providing that the proceeds of the note must be applied to the payment of all such claims as they were fully liquidated. A creditor of

hardware company brought a suit in which other creditors joined, against B. and the members of the firm of W. and P., alleging that the note was executed and delivered to the members of the W. Co., to be held by them in trust for creditors; that it was transferred to B. for the fraudulent purpose of enabling his father-in-law, a member of the W. Co., to hinder, delay, and defeat his creditors, and that he held it under an express trust for the benefit of creditors. Judgment was asked against W. and P. for the amount of the note, and the court was asked to order the amount recovered prorated among the creditors. Only one member of the W. Co. was made a party and he was not cited. *Held*, that where B. filed a plea of privilege presenting a special exception to sustain which no evidence was introduced, the overruling of the exception was not error, as the cause of action asserted against him was not severable from that urged against his codefendants.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 35; Dec. Dig. ¶22(1).]

2. JUDGMENT ¶243—PERSONS NOT PARTIES TO ACTION.

Where some of the creditors had never recovered judgment against the W. Co., the court could not adjudicate the amount of their claims, as judgment cannot be rendered against one not a party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 428; Dec. Dig. ¶243.]

3. FRAUDULENT CONVEYANCES ¶255(1)—ACTIONS TO SET ASIDE—NECESSARY PARTIES.

There was a defect of parties, as in suits to enforce a trust all persons to be affected by the decree should be made parties, and the trustees as well as the purchaser of the trust property were necessary parties.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 741; Dec. Dig. ¶255(1).]

4. FRAUDULENT CONVEYANCES ¶182(5) — SALES IN BULK—LIABILITY OF PURCHASERS.

Vernon's Sayles' Ann. Civ. St. 1914, art. 3971, provides that any sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade, or sale of an entire stock in bulk shall be void as against creditors, unless the purchaser makes inquiry of the seller as to creditors and notifies them. Article 3972 provides that any purchaser conforming to article 3971 shall not be accountable to creditors for any of the merchandise coming into possession of such purchaser. *Held*, that where the sale of a stock of merchandise was made in violation of the statute, the members of the purchasing firm were constructive trustees to the extent of the value of the goods for the benefit of the creditors of the sellers.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 575, 576; Dec. Dig. ¶182(5).]

Appeal from District Court, Deaf Smith County; D. B. Hill, Judge.

Suit by the Parlin-Orendorf Implement Company and others against G. W. Barcus and others. From an adverse judgment, the defendant named appeals. Reversed and remanded.

Turner & Rollins, of Amarillo, and G. W. Barcus, of Waco, for appellant. Knight & Slaton and Carl Gilliland, all of Hereford, and Madden, Trulove, Ryburn & Pipkin and Crudgington & Works, all of Amarillo, for appellees.

HALL, J. During the year 1912, and for several years prior thereto, the Warren Hardware Company, a firm composed of M. W. Warren, C. W. Warren, and Marvin Cross, were engaged in the hardware business at Hereford, Tex., and about January 14, 1913, C. W. Warren, acting for his firm, entered into a written contract with J. I. Walker, acting for the firm of Walker & Perkins, of which he was a member, for the sale of the stock of hardware to Walker & Perkins. A part of the consideration for the sale was that Walker & Perkins would execute and deliver to Warren their note for \$4,000, payable 90 days after date, with 8 per cent. interest. According to the terms of the contract, the goods were sold at their invoice price, plus the cost of carriage. It was further provided that as part payment for the stock J. J. Perkins, of the firm of Walker & Perkins, should, by warranty deed, convey to the members of the firm composing the Hardware Company, 1,062 acres of land in Bailey county, at \$15 per acre, less certain indebtedness due Roberts county upon said land. The third paragraph of the written contract is as follows:

"Second parties [Warren Hardware Company] guarantee to the first parties [Walker & Perkins] that they, the second parties, will pay, or cause to be paid, any, every and all indebtedness or claims of whatsoever nature, kind or amount, which may be due or owing upon or for any and all the property described in the first paragraph; and that second parties will make a good and sufficient bill of sale, conveying and warranting the title to all of said property to first parties, against any and all persons whomsoever, and deliver all of said property to first parties, clear and free from all claims and debts, except such as the second parties will hereafter fully satisfy, pay off and discharge themselves. The proceeds of the note above mentioned [for \$4,000] which first parties are to make and pay to second parties, being intended and agreed to be applied to the payment of any and all debts or claims, which may be owing for or against any of the property mentioned in paragraph first; and the proceeds of said note must be applied to the payment of any and all claims for or against said property until all such claims and debts are fully liquidated; and in event the proceeds of said note are insufficient to fully pay off and discharge all of such indebtedness, then nevertheless the second parties undertake and agree to fully pay off and discharge any and all such claims."

This suit was instituted by the appellee, Parlin-Orendorf Implement Company, against J. I. Walker, J. J. Perkins, and G. W. Barcus, seeking judgment against Walker & Perkins, on the note for \$4,000, claiming that G. W. Barcus held the same for the Warren Hardware Company, and should be adjudged to be the holder thereof for the benefit of the creditors of said company.

The petition alleges the insolvency and non-residence of C. W. Warren and Marvin Cross, but makes M. W. Warren a party. It appears that M. W. Warren was never served with citation, and before the trial a nonsuit was taken as to him. It is alleged that the

\$4,000 note was executed and delivered to the members of the Warren Hardware Company, to be held by them in trust and to be collected, and the proceeds thereof paid to the creditors named in the petition.

The allegation with reference to the possession of the note by G. W. Barcus is as follows:

"That after the execution and delivery of said note for \$4,000, the defendant G. W. Barcus, after its maturity, and with full knowledge of the purposes for which it was executed, did, with knowledge of such facts as would and should have put him upon inquiry, and without paying any consideration therefor, for the sole purpose of assisting his father-in-law, M. W. Warren, in hindering, delaying, and defeating the creditors of the said Warren Hardware Company, above mentioned, in the collection of their respective debts, and their equitable rights and interests in said \$4,000 note, acquired possession of said note and now claims to be the rightful and legal owner and holder of said note, but in truth and in fact is only holding it fraudulently and for the purpose of defeating this plaintiff, and the other creditors particularly mentioned in this petition, of the Warren Hardware Company, out of their debts and demands and out of their equitable interests and rights in said note, and for said purpose the said M. W. Warren and O. W. Warren, and each of them, transferred and delivered and caused to be delivered to the said defendant Barcus said note, and refused to exercise and perform the duties of trust provided in said contract for them to perform in the collection of said note, and the payment of the proceeds thereof, to the plaintiff and the other creditors hereinabove mentioned, all to plaintiff's damage."

The Wyeth Hardware & Mfg. Company, Hibbard, Spencer, Bartlett & Co., the Texas Harvester Company, and Morrow-Thomas Hardware Company intervened and adopted the pleadings of the plaintiff. The prayer in plaintiff's petition is that it have judgment against the defendant M. W. Warren for the full amount of its debt, evidenced by a note, in the sum of \$1,610.99; that it have judgment against the defendants J. J. Perkins and J. I. Walker, and as to and against defendant G. W. Barcus it have judgment for the full amount of the note for \$4,000, together with all accrued interest that may be due thereon, for costs of suit and a decree for a recovery on the said \$4,000; that the court order the amount of said recovery to be prorated amongst the various creditors, and according to the amount of indebtedness due each from the Warren Hardware Company, and for general relief.

Upon a trial before the court, judgment was entered dismissing the cause of action against M. W. Warren, continuing as follows:

"The court is of the opinion that on the 16th day of January, 1913, the Warren Hardware Company, a copartnership, was duly indebted to the plaintiff and intervenor, in the respective sums hereinafter decreed to be due and owing to the said plaintiff and said intervenors, respectively, and that said indebtedness due the said plaintiff and the said intervenors, respectively, by the said Warren Hardware Company, is all past due and no part paid save and except as hereinafter stated; and it further appearing to

the court that the said plaintiff Parlin-Orendorf Implement Company, and the said intervenors, Morrow-Thomas Hardware Company, Hibbard, Spencer, Bartlett & Co., and Wyeth Hardware & Manufacturing Company, should have and recover of and from the defendants J. I. Walker and J. J. Perkins, and as to the defendant G. W. Barcus, on the \$4,000 note sued on, the sum of \$4,762.65, less an amount of \$177.38, or a total of \$4,585.27. It is therefore ordered, adjudged, and decreed by the court that the plaintiff's debt due and owing to it, by the said Warren Hardware Company, is hereby decreed to be \$2,012.53, principal and interest, together with \$201.25 attorney's fees; that the intervenor Morrow-Thomas Hardware Company's debt, due and owing to it, by the said Warren Hardware Company, is hereby decreed to be \$1,123.34, together with \$113.33 additional as attorney's fees. * * * That the intervenor the Texas Harvester Company's debt, due and owing to it by the said Warren Hardware Company, is hereby decreed to be \$1,855.50. * * * That the Wyeth Hardware & Manufacturing Company's debt, due and owing to it by the said Warren Hardware Company, is hereby decreed to be \$355.90. * * * That the intervenor, Hibbard Spencer, Bartlett & Co.'s debt, due and owing to it by the said Warren Hardware Company, is hereby decreed to be \$429.80. * * * It is therefore ordered, adjudged, and decreed by the court that the plaintiff, Parlin & Orendorf Implement Company, and the intervenors, * * * do have and recover of and from the defendants J. I. Walker and J. J. Perkins, and as to the defendant G. W. Barcus, the sum of \$4,585.27, said recovery to be prorated among the said plaintiff and intervenors in proportion to their respective indebtedness hereby decreed to be due and owing to them, respectively, from the said Warren Hardware Company. It is further decreed that no personal judgment be taken against the defendant Barcus, except for costs; that the \$4,000 note now held by him be annulled, canceled, and held for naught."

[1] In addition to a plea of ownership of the note, Barcus filed a plea of privilege to be sued in Parker county. The action of the court in overruling this plea is the basis of the first assignment of error. The plea presents first a special exception. The record discloses no evidence introduced to sustain the allegation of facts made in it. Under the allegations of the petition as above set out, Barcus is charged with being in possession of the note, claiming to be the owner thereof, for the fraudulent purpose of enabling his father-in-law to hinder, delay, and defeat his creditors. It is further charged that he holds it under an express trust for the benefit of the creditors of the Warren Hardware Company. The petition further seeks to recover against M. W. Warren and against the makers of the note, Walker & Perkins, who are alleged to reside in Deaf Smith county, where the plea was filed. Such being the pleadings, the cause of action asserted against Barcus was not severable from that urged against his codefendants; and the court did not err in overruling the exception.

[2] By the second assignment it is insisted that the court erred in overruling appellant's plea of a defect of parties defendant, and decreeing the note to be a trust fund without joining the individuals of the Warren Hardware Company, who were necessary parties to the suit. It appears from the rec-

ord before us that Morrow-Thomas Hardware Company and the Texas Harvester Company were judgment creditors of the Warren Hardware Company, but that neither plaintiff nor any of the other interveners had ever obtained a judgment upon their claims against the members of the Warren Hardware Company. It is undisputed that the members of the Warren Hardware Company were still liable for the debts claimed to be due plaintiff and the interveners, and, with the exception of the two interveners above named, the amount of these several debts had never been judicially ascertained until the decree was entered in this action. The effect of the court's judgment is to adjudicate the amount of the respective claims asserted by the plaintiff and interveners against the Warren Hardware Company, when only one member of the firm had ever been made a party to the action and after a nonsuit had been taken as to him. It is fundamental that a court cannot render a judgment against one who is not a party to the suit.

[3] We also agree with appellant that necessary parties have not been brought into the suit. According to the allegations in the petition, the two firms, Warren Hardware Company and Walker & Perkins, jointly created the trust, and by common consent the individuals composing the firm of Warren Hardware Company were made trustees of the property. The \$4,000 note is the property held in trust by the members of the firm of Warren Hardware Company. It is alleged that Barcus is in possession of the note, and claiming it adversely to the trustees. The general rule is that in suits to enforce the trust all persons who are to be affected by the decree should be made parties. *Hall v. Harris*, 11 Tex. 300; *Cotton v. Colt*, 88 Tex. 414, 31 S. W. 1061. The trustees and the purchaser of the trust property in this case are necessary parties. *Williams v. Ft. Worth & Rio Grande Ry.*, 82 Tex. 553, 18 S. W. 206; 39 Cyc. 608; 2 Perry on Trusts & Trustees (6th Ed.) § 877. For this additional reason the appellant's contention, that there was a defect of parties defendant, should have been sustained.

[4] The sale of the stock of hardware was made in violation of the Bulk Sales Law. *Vernon's Sayles' Civil Statutes*, arts. 3971 and 3972. And as held by the Supreme Court in *Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 179 S. W. 259, the members of the firm of Walker & Perkins are constructive trustees to the extent of the value of the goods for the benefit of the creditors of the Warren Hardware Company. It is, however, further intimated in that case that the creditors of an insolvent debtor, who has disposed of his goods in violation of the Bulk Sales Law, if no judgment has been obtained, must pursue his legal remedy and either attach the goods or garnishee the proceeds. This hold-

ing is in accord with the weight of authority. *Bewley v. Sims*, 145 S. W. 1076; *McGreenery v. Murphy*, 76 N. H. 838, 82 Atl. 720, 39 L. R. A. (N. S.) 374, and note.

We have not discussed the numerous propositions under the various assignments in detail, and think what has heretofore been said sufficiently disposes of the issues presented; many of them being immaterial and without merit.

The judgment is reversed, and the cause remanded.

TEXAS & N. O. R. CO. v. MARSHALL & MARSHALL. (No. 71.)

(Court of Civil Appeals of Texas. Beaumont. Feb. 17, 1916. On Motion for Rehearing, March 16, 1916.)

1. COURTS \S 122—JURISDICTION—AMOUNT IN CONTROVERSY.

It is not the evidence, but the pleadings, which determine whether the amount in controversy is within the jurisdiction of a court.

[Ed. Note.—For other cases, see *Courts, Cent. Dig. §§ 418, 427*; *Dec. Dig. § 122.*]

2. APPEAL AND ERROR \S 834(1) — PRESUMPTIONS IN SUPPORT OF JUDGMENT.

On appeal every reasonable intendment will be indulged to support the judgment below.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 3777, 3780, 3781*; *Dec. Dig. § 834(1).*]

On Motion for Rehearing.

3. ATTORNEY AND CLIENT \S 150 — AGREEMENTS FOR CONTINGENT FEE—SETTLEMENT BETWEEN CLIENT AND PARTY LIABLE.

A person injured while a passenger on defendant's railroad employed plaintiffs to represent her in collecting damages, and agreed that they should receive one-half of the net sum collected after deducting necessary costs of collection, and that she would not compromise or settle the claim without authority from plaintiffs. With knowledge of plaintiffs' rights, the railroad claim agent procured a release from the injured party by paying her \$100 and agreeing to pay a doctor's bill of \$22.50 and to settle with plaintiffs. Plaintiffs sued, and the court refused an instruction requested by defendant directing a verdict for plaintiffs for \$61.25 and gave a peremptory instruction for plaintiffs for \$122.50. Held, that plaintiffs were only entitled to recover \$61.25, and the court erred in refusing the requested instruction.

[Ed. Note.—For other cases, see *Attorney and Client, Cent. Dig. § 354*; *Dec. Dig. § 150.*]

Appeal from Nacogdoches County Court; J. F. Perritte, Judge.

Suit by Marshall & Marshall against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Reformed and affirmed on rehearing.

John T. Garrison, of Houston, and King & Seale, of Nacogdoches, for appellant. Marshall & Marshall, of Nacogdoches, for appellee.

BROOKE, J. This is a suit by appellees, brought on the 6th day of July, 1915, against appellant, the petition alleging that Mrs. Mary Coats, the wife of C. C. Coats, while

a passenger on the appellant's line of railroad, was injured, and that later the said Mrs. Coats and her husband entered into a written contract with appellees, which contract is as follows:

"The State of Texas, County of Nacogdoches. Know all men by these presents: That we, Mary P. Coats, joined by her husband, C. C. Coats, Sr., both of the county and state aforesaid, do hereby contract with and employ Marshall & Marshall attorneys to represent us in collecting damages due by the Texas & New Orleans Railroad Company for injury to Mary P. Coats, which injury was occasioned by the negligence of said railroad company to the said Mary P. Coats on or about March 7, 1915, at a station on said railroad company, in Angelina county, Texas. The said attorneys, Marshall & Marshall, are to give their legal services in the collection and settlement of the aforesaid claim for damages, and to sue therefor in the event that said claim is not adjusted without suit, and the said attorneys are to receive one-half of the net sum collected after deducting necessary costs incurred in collecting said claim. The said Mary P. Coats and her husband, C. C. Coats, Sr., bind themselves to pay all costs incurred in the prosecution and collection of this claim, and to make the necessary cost bonds in the prosecution of this claim and appeal bond, if appeal is deemed necessary by attorneys herein. If costs are obtained from defendant railroad company, then the said attorneys herein are to share one-half of the full amount of the claim collected, costs being paid by defendant. In the event that nothing is obtained by virtue of this claim against the said railroad company, then in that event, the said attorneys are not to be paid anything for their services. But we, the said Mary P. Coats and C. C. Coats, Sr., hereby agree and bind ourselves that this claim shall not be compromised or settled by us without authority from our said attorneys, Marshall & Marshall, of Nacogdoches, Texas, but that the said attorneys shall have full authority to settle, adjust and compromise and sue for us and in our behalf, as fully as we ourselves could do. Witness our hands at Nacogdoches, Texas, this 10th day of April, A. D. 1915. [Signed] Mary P. Coats, C. C. Coats, Marshall & Marshall, Attys., by F. P. Marshall."

Plaintiffs allege in their petition as follows:

"Plaintiffs allege that by virtue of the aforesaid contract they immediately began investigation and study of said cause of action, acquainting themselves with the facts and locality of the injury, interviewing witnesses, examining the ground at Shawnee switch, and that plaintiffs have at all times carefully and properly safeguarded the interests of the said Mary P. and C. C. Coats. On June 28, 1915, plaintiffs informed defendant, through C. Emmett, its duly authorized and acting claim agent, that plaintiffs Marshall & Marshall had a written contract with Mary P. Coats and C. C. Coats giving plaintiffs the sole and exclusive right to adjust, settle, compromise, or sue for, damages for negligence of the defendant Texas & New Orleans Railroad Company for injury to Mary P. Coats at Shawnee switch on March 7, 1915; that neither Mary P. Coats nor C. C. Coats had any authority whatever to deal with defendant railroad company nor any of its agents in the adjustment, compromise, or settlement of the aforesaid claim, but that the said Marshall & Marshall had taken said claim for collection or settlement upon a contingent fee of one-half, or 50 per cent., of the entire amount of whatever sums the said defendant railroad company might be liable for or might pay or have to pay in compromise, settlement, or suit of said claim, all of which aforesaid facts defendant well knew.

"Plaintiffs allege that defendant Texas & New

Orleans Railroad Company, through its duly authorized and acting claim agent, C. Emmett, on the evening of July 2, 1915, without the knowledge or authority from plaintiffs Marshall & Marshall, went to the home of Mary P. Coats and C. C. Coats and there paid them \$100 in cash, without any authority and in fraud of plaintiffs' contract and rights, and that defendant well knew the payment of said \$100 was fraudulent and for the purpose of defrauding these plaintiffs and prejudicing their rights in the trial of the aforesaid claim; and defendant on said date and through its said agent as aforesaid assumed the payment, and has since paid, the bill of Dr. J. B. Deal for services and medical treatment of the said Mary P. Coats for the injuries caused her by the negligence of defendant railroad company at Shawnee switch as aforesaid; that said medical bill so assumed and paid by the defendant railroad company was \$22.50 in cash, and said latter sum was part of the consideration of the attempted settlement and compromise of the claim for damages of the said Mary P. and C. C. Coats for the injuries caused Mary P. Coats by defendant railroad company as aforesaid, and that said attempted settlement and compromise of said claim of the said Mary P. Coats and C. C. Coats was without authority of law, was fraudulently made and knowingly so made by defendant railroad company for the purpose of defrauding these plaintiffs Marshall & Marshall in a fair and equitable settlement by compromise or suit of the aforesaid claim; that, in addition to the said \$22.50 in cash assumed and paid by defendant railroad company to the said Dr. J. B. Deal, the further sum of \$5 in cash for a written statement made by the said Dr. J. B. Deal to defendant railroad company as to the nature and extent of the injuries caused by the negligence of defendant railroad company to the said Mary P. Coats at Shawnee switch on March 7, 1915, as aforesaid, and that said payment of said latter sum was for the purpose of prejudicing the rights of these plaintiffs in a fair and equitable adjustment, settlement, or trial of this cause.

"Plaintiffs allege that before defendant on said July 2, 1915, paid to said Mary P. Coats and C. C. Coats the \$100 in cash as aforesaid, and before said defendant assumed to pay and did pay the said Dr. J. B. Deal the said \$22.50 in cash as aforesaid, the said Mary P. Coats and C. C. Coats informed the said C. Emmett, the duly authorized and acting claim agent of defendant Texas & New Orleans Railroad Company, that the said Mary P. Coats and C. C. Coats had entered into a contract in writing with Marshall & Marshall, whereby they had agreed and bound the said Mary P. Coats and C. C. Coats to pay to the said Marshall & Marshall, plaintiffs herein, one-half, or 50 per cent., of the entire claim for damages by the negligence of the Texas & New Orleans Railroad Company to Mary P. Coats for injuries to her at Shawnee switch on March 7, 1915, as aforesaid; and the said Mary P. Coats and C. C. Coats made the condition of their acceptance of the said \$100 in cash to them, and the assumption of the said \$22.50 to Dr. J. B. Deal by the defendant Texas & New Orleans Railroad Company, that the said Texas & New Orleans Railroad Company would assume and would pay and settle with Marshall & Marshall, plaintiffs herein, upon the basis of one-half, or 50 per cent., of the entire claim, as per the terms of their contract, and the said defendant Texas & New Orleans Railroad Company obligated and bound itself to settle with and pay the said Marshall & Marshall, plaintiffs herein, upon said basis of said 50 per cent., or one-half, of the entire claim of the said Mary P. and C. C. Coats inclusive of whatever sums the said defendant had to pay for medical bills and costs of suit, if any. The said defendant railroad company has failed and refused, and still fails and refuses, to comply

with the terms of its contract made and entered into with the said Mary P. Coats and C. C. Coats on said July 2, 1915, and, because of said failure of said defendant to comply with and carry out said agreement as to Mary P. and C. C. Coats, the said contract even with the said Mary P. Coats and C. C. Coats by defendant has been breached, and Mary P. Coats and C. C. Coats are not bound in law nor equity to comply with and respect said agreement and said attempted and fraudulent settlement of their portion of the aforesaid claim for damages.

"By virtue of the contract of plaintiffs herein with the said Mary P. Coats and C. C. Coats, whereby said Marshall & Marshall, under the terms of said contract, were vested with a contingent fee of one-half interest in and to all of the aforesaid claim for damages, which claim is for the sum of \$1,000, as aforesaid, and because by the terms of the aforesaid contract of Marshall & Marshall with the said Mary P. Coats and C. C. Coats, whereby the said Mary P. Coats and C. C. Coats obligated and bound themselves not to settle or compromise the aforesaid claim without authority from the said Marshall & Marshall, plaintiffs herein, who have not given to the said Mary P. Coats or C. C. Coats any authority to compromise any part of said claim for damages as aforesaid, and because the said attempted settlement by defendant with the said Mary P. Coats and C. C. Coats, on July 2, 1915, upon the terms and conditions alleged as aforesaid, are without authority from these plaintiffs, and fraudulently made as to these plaintiffs with full knowledge by defendant at the time that said attempted settlement with Mary P. Coats and C. C. Coats, both as to the \$100 paid and as to the \$22.50 paid, as to these plaintiffs is wholly and totally fraudulently made and knowingly so made by defendant railroad company for the purpose of defeating and prejudicing the rights of plaintiffs herein, plaintiffs ask that said attempted settlement with the said Mary P. Coats and C. C. Coats as aforesaid be held null and void and of no effect as to Mary P. Coats and C. C. Coats, because the said defendant railroad company has failed and refused, and still fails and refuses, to comply with the conditions and terms made and entered into by it and the said Mary P. Coats and C. C. Coats as a condition of said payment of the aforesaid sums of money, and that plaintiffs be allowed to proceed with this cause in their own name for the full amount of damages of \$1,000 as before alleged, and that plaintiffs under the terms of said contract be given one-half, or 50 per cent., of all sums that may be paid or recovered from defendant as the portion rightfully belonging to plaintiffs under the terms of their contract of a contingent fee of one-half of the total claim. But in the event the court should hold that plaintiffs could not recover for the one-half of the claim for Mary P. Coats and C. C. Coats which said Mary P. Coats and C. C. Coats have attempted to compromise, and that said attorneys, Marshall & Marshall, under the terms of their contract of employment, hold said one-half in trust for Mary P. Coats and C. C. Coats to be paid to them when said cause of actions shall have been fully disposed of according to law, then, in such event, plaintiffs ask that they be permitted to prosecute this suit in their names as plaintiffs as herein stated for their full and just portion of one-half of the entire claim, which said half of said claim for damages as aforesaid is \$500 as the portion which plaintiffs are entitled to sue for and recover of defendant, because plaintiffs are in no wise bound or affected by the attempted and fraudulent settlement made by defendant with Mary P. Coats and C. C. Coats on July 2, 1915, as before alleged.

"But if, from any cause, the court should hold that plaintiffs could not proceed with this suit either for the full sum of \$1,000, \$500 of which to be held in trust for Mary P. Coats and C.

C. Coats until said cause shall have been fully and fairly adjusted and settled or until the further orders of the court, or that plaintiffs could not proceed in their names as plaintiffs against the defendant herein for the sum of one-half of the said entire claim, to wit, \$500 as the rightful portion of said claim which these plaintiffs under the terms of their contract are entitled to sue for and recover, but that the attempted settlement by defendant and Mary P. Coats and C. C. Coats on July 2, 1915, for the sum of \$122.50, was binding as to said parties, then plaintiffs allege that plaintiffs herein, Marshall & Marshall, are entitled to \$122.50 as the portion of the entire claim for damages that defendant the Texas & New Orleans Railroad Company bound and obligated itself to pay when it paid said sums of \$100 and \$22.50 as aforesaid on said July 2, 1915, and agreed to comply with its terms of settlement with said Marshall & Marshall as per the contract with said Marshall & Marshall with Mary P. Coats and C. C. Coats.

"Wherefore, premises considered, plaintiffs pray that citation be issued and served upon defendant in terms of law, that upon a final hearing herein plaintiffs have judgment against defendant for the sum of \$1,000, for costs of suit, and for general and special relief, in law and equity, as they may be entitled."

They further allege that, before the appellant paid to the said Mary P. and C. C. Coats the said sum of \$100 and said \$22.50 doctor's bill, they, the said Coats and wife, informed the said C. Emmett that they had entered into a contract in writing with Marshall & Marshall, whereby they agreed to pay the said Marshall & Marshall one-half, or 50 per cent., of the entire claim for damages, and that said Mary P. and C. C. Coats made it a condition of their acceptance of said \$100 in cash and the payment of said \$22.50 doctor's bill by appellant that the appellant would assume and pay and settle with Marshall & Marshall upon the basis of one-half, or 50 per cent., of the entire claim, as per the terms of their contract. And they further alleged that the said appellant bound itself to settle with Marshall & Marshall and pay them upon said basis of said 50 per cent., or one-half, of the entire claim of said Coats and wife, inclusive of whatever sums the said appellant had to pay for medical bills and costs of suit, if any; that the railroad company failed and refused to comply with the terms of the contract made and entered into with the said Coats and wife on said July 2, 1915, and they alleged that by virtue of the contract said covenant by which appellant bound itself to pay, and the consideration of the settlement with the said Coats and wife being that appellant would pay appellees and settle with them, as per said contract, appellees are entitled to said sum of \$122.50.

The appellant pleaded that it had made a complete settlement with Coats and wife for any and all injuries sustained by said Mary Coats while a passenger on defendant's train, and paid her the sum of \$100, which was accepted as full settlement for any and all damages, and she executed a release therefor, and further pleaded that it offered to pay appellees \$50, one-half of the amount paid

to Coats and wife, and now offers to pay and tenders in court the said \$50, which was refused.

The case was tried before a jury, and the court instructed the jury to return a verdict in favor of appellees for the sum of \$122.50.

Appellant filed motion for new trial, which was overruled, to which appellant excepted and gave notice of appeal, in due time filing its appeal bond, perfecting the appeal, and the case is now before this court for consideration.

By its first assignment of error, appellant complains that the court erred in refusing to give defendant's special charge No. 1, which is as follows:

"In this case, you are instructed that the plaintiffs are entitled to recover only the sum of \$50. You will therefore return a verdict for the plaintiffs against the defendant for the sum of \$50."

The proposition under the above assignment urged by appellant is:

"That the contract between Marshall & Marshall and Coats and wife did not assign to Marshall & Marshall the cause of action that Coats and wife had against appellant, but only assigned to Marshall & Marshall one-half of the net amount that was received by settlement, suit, or compromise, and, Coats and wife having settled their cause of action against the railroad company in full, the railroad therefore would only be liable to Marshall & Marshall for one-half of the amount paid to Coats and wife."

The contract has been set out heretofore in full, and all of the testimony that appellant introduced, outside of the contract itself, was as follows:

Mrs. Mary P. Coats testified:

"Yes, I signed the release for my injuries. I did not want to sign it, and I told the claim agent that I had signed a contract with Marshall & Marshall, and couldn't settle with him, and he said I could if I wanted to; that it was just with me. I read the contract, and I asked him why Marshall's name was not in it, and he said it did not belong there."

C. C. Coats testified as follows:

"On July 2, 1915, Mr. Emmett, the claim agent, came to my house late in the evening to settle with us. I told him I couldn't settle with him, that we had given a contract to our attorneys, Marshall & Marshall, and had given them exclusive right to settle our claim against the railroad, and that suit had been already filed. Mr. Emmett said I could settle the claim, that it was with me, and offered me \$100. I told him I couldn't take that; that I would have to pay my attorneys one-half, and after I had paid my attorneys \$50 and paid the doctor I wouldn't have more than \$10 or \$15 left. He asked me what was the best I would do, and I told him \$500. He then said he would give me \$100 in cash and pay Dr. Deal and Marshall & Marshall, and I could settle with Castlebury; that would make it about even. I agreed to do that, and he wrote up the contract and release which we signed. We wouldn't have signed that release if the claim agent hadn't agreed to pay Marshall & Marshall. Yes, I have signed a release to the railroad for the injuries to my wife. They paid me \$100 and agreed to pay Deal and settle with Marshall & Marshall and I was to settle with Castlebury. I tried to get Emmett to wait until next morning, when we would go to Nacogdoches, and I would talk with my attorneys, and he said he would not stay, as he had to go away

that night. The contract was read to us before we signed it."

J. H. Marshall testified:

"On June 28, 1915, Mr. Emmett, the claim agent for the Texas & New Orleans Railroad Company, came to our office to confer with us relative to settlement of the claim of Mrs. Mary P. Coats against the said company for damages to her, and asked whether C. C. Coats was in town; that he would like to talk with him. We told him we had no objection to his talking to Mr. Coats, but Mr. Coats couldn't settle with him; that he and his wife had given us a contract delegating to us exclusive right to compromise, settle, or sue for damages upon a contingent fee of one-half of the entire claim. I did not give C. C. Coats and his wife authority to settle this claim. Yes, it is a fact that I told the claim agent, Mr. C. Emmett, when he left our office on June 28, 1915, that it would be useless to see us in reference to a settlement upon the terms he offered. It is also a fact that Mr. Emmett came to our office on July 3, 1915, and told us he had settled with our client in full for \$100 and had a release therefor. He said the railroad was not to pay the attorneys anything. He afterwards admitted that the railroad had agreed to pay Dr. Deal and our attorneys' fee."

As stated above, the appellant then introduced a release signed by C. C. and Mary P. Coats, which is not of record, but as to which the county judge, in the statement of facts, states as follows:

"No evidence was introduced by defendant, except a release signed by C. C. and Mary P. Coats, stating a cash consideration of \$100 and the assumption by defendant railroad company of the payment of Dr. J. B. Deal, which release was witnessed and acknowledged, but is in possession of defendant's attorneys and has not been furnished to the court for embodiment in the statement of facts. The defendant's voucher showing the payment of said \$100 was offered and introduced, but said voucher has not been furnished to the court for embodiment here."

From the testimony, it is clear that the defendant company, when it settled with Coats and wife, paid them \$122.50, as their part of the claim, and agreed to pay the attorneys, who were appellees herein, their part of the claim for damages, which at that time the appellant knew was to be divided between the parties equally. It is also apparent from the evidence that the money paid to Coats and wife was not included, or attempted to be included, in the amount which was agreed to be paid in settlement of said claim to appellees. In other words, it is clear from the testimony that it was understood by Coats and his wife, and by the agent of appellant, that he only paid the said Coats and wife their part of the claim in settlement, and that the appellant agreed to pay the appellees their part. Therefore we do not believe that the court erred in refusing to charge the jury that the plaintiffs were entitled to recover only the sum of \$50. This assignment, therefore, is overruled.

By the second assignment of error, appellant complains that the court erred in refusing to give appellant's special charge No. 2, which is as follows:

"In this case, you are instructed that the plaintiffs are not entitled to recover but \$61.25. You

will therefore return a verdict in favor of plaintiffs for the sum of \$61.25."

We are sure that this special charge was asked upon the theory that the appellees were entitled to recover only one-half of what was actually paid Coats and wife, for the reason that \$61.25 is one-half of the amount paid Coats and wife, including the doctor's bill. From our view of the case, the court was not in error in refusing to give this special charge, and the assignment is therefore overruled.

The third assignment of error assails the action of the lower court in giving a peremptory instruction in favor of appellees against appellant, in the sum of \$122.50, for the following reasons: That the court erred in withdrawing from the jury the issue of whether or not the settlement made by and between the defendant company and Coats and wife was only a settlement of Coats' interest in and to said cause of action, and not a complete settlement of the entire cause of action; the evidence showing that a release executed by Coats and wife was a full and complete settlement of the entire cause of action. As before stated, the release is not in the record. The only statement with reference to the contents of same is the evidence of the court trying said cause. We do not believe from the testimony that it was error in the court in giving this peremptory instruction, as the testimony conclusively showed, and there was no evidence to the contrary, that, in the settlement appellant made with Coats and wife, it was the understanding and agreement of the parties that the amount paid Coats and wife was their part of the settlement, and appellant agreed, in addition, to pay Marshall & Marshall their additional and equal portion. This assignment is therefore overruled.

By their fourth assignment of error, appellant complains that the court erred in peremptorily instructing a verdict for the defendant, and withdrawing the case from the jury, for the reason that the evidence shows that C. C. Coats and wife had made a full and complete settlement, and they accepted in full the settlement of \$100, etc., etc.

What we have said with respect to the third assignment of error applies here, and this assignment is therefore overruled.

The appellant, in the fifth assignment of error, insists that the court erred in instructing a verdict, for the reason that the undisputed evidence shows that appellees were not entitled to recover in any sum in excess of one-half of the amount paid Coats and wife, and that therefore the court is out of jurisdiction to render judgment.

(1, 2) It is not the evidence, but the pleadings, to which we look to discover whether or not the court has jurisdiction of the amount involved in controversy. We have

set out the pleadings of the plaintiff in full. There was no general or special demurrer to this petition, either filed or urged. It is useless to speculate what would have been the result if this had been done. Every reasonable intendment will be indulged to support the judgment of the court. Such being the case, and the jurisdiction of the court being determined not by the amount recovered, we are of the opinion that the above assignment should be overruled.

Finding no error committed by the trial court, this case is in all things affirmed.

On Motion for Rehearing.

[3] Upon a more thorough consideration, we are of opinion that we were in error in affirming this case, and that the requested charge of appellant, to the effect requesting the jury to bring in a verdict for \$61.25 in favor of the appellees, should have been given, and that there was error in the lower court taking the case from the consideration of the jury. Therefore the motion for rehearing is granted, and the judgment is reformed, and will be that the appellees recover of appellants the sum of \$61.25 and all costs. As reformed, the case will be affirmed.

HOUSTON OIL CO. OF TEXAS et al. v. VOTAW. (No. 72.)*

(Court of Civil Appeals of Texas. Beaumont. Feb. 17, 1916. Rehearing Denied March 23, 1916.)

1. PUBLIC LANDS \S 177—RESULTING TRUST —SCHOOL LANDS.

Where plaintiff, under Rev. St. 1895, arts. 4218j, 4218k, made application to purchase public land, and made oath that he was not purchasing for any other person, and entered into an obligation for the deferred payments, and received a patent reciting purchase and full payment, no trust would arise in favor of one who paid the purchase price, since such result would be a fraud on the state, and since no resulting trust can spring from an act contrary to public policy or to statute.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 576-578; Dec. Dig. \S 177.]

2. PUBLIC LANDS \S 177—RESULTING TRUST —EVIDENCE.

In trespass to try title to land patented to plaintiff and for damages for cutting timber, where defendants claimed under deeds from one alleged to have paid the purchase price, evidence as to whose money was used in the purchase held not so clear and satisfactory as to show any resulting trust in the defendants' grantor.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 576-578; Dec. Dig. \S 177.]

Appeal from District Court, Hardin County; J. Llewellyn, Judge.

Trespass to try title by J. N. Votaw against the Houston Oil Company of Texas and others. Judgment for plaintiff, and defendants appeal. Affirmed.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

H. O. Head, of Sherman, and Parker & Kennerly, of Houston, for appellants. J. F. Lanier and W. D. Gordon, both of Beaumont, for appellee.

BROOKE, J. This is a suit in trespass to try title for H. T. & B. section 4 and H. & T. C. section 224, in Hardin county, Tex., and for damages for timber cut and removed therefrom, brought in the district court of Hardin county, Tex., by appellee, J. N. Votaw, against the appellants, Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company. Two suits were originally filed, one involving H. T. & B. section 4, and the other involving H. & T. C. section 224, in the Ninth district court, but afterwards consolidated by agreement, and transferred to the Seventy-Fifth district court. Appellants filed plea of not guilty and general denial of the allegations of damages for timber cut and removed. W. D. Gordon, of Jefferson county, intervened, claiming an interest in both the land and the claim for damages for timber cut, but this intervention was dismissed by the intervener. The case was tried before the court without a jury, resulting in judgment in favor of appellee against all of the appellants for the two sections of land, and against Houston Oil Company of Texas and Kirby Lumber Company for damages in the sum of \$8,183.70, as the value of the timber cut therefrom. Appellants filed in due time formal motion for new trial, and afterwards amended motion for new trial, which were overruled, exception saved, and notice of appeal given in open court. Supersedeas bond was filed in due time, and this appeal perfected.

The district judge found the timber had been cut in good faith, and with the belief that title was in appellants, and therefore found against appellee on the issue of appellants' liability for the manufactured value of the timber cut, and found for appellee the reasonable market value of such timber. Appellee is complaining of this by cross-assignment.

Appellee offered in evidence certified copy of patent from the state of Texas to J. N. Votaw, assignee of J. B. Wallace, of date March 7, 1912, covering the following described land: 640 acres in Hardin county, known as section 4, H. & T. B. R. R. Co. certificate No. 561, on the headwaters of Pine Island Bayou, a tributary of Neches river, about 12 miles south 82° west from Kountze, said land having been purchased and fully paid for in accordance with an act of 1895 (Acts 24th Leg. c. 47) and the amendment thereto by the act of May 19, 1897 (Acts 25th Leg. c. 129) (describing the land). The above patent was recorded on the 23d day of October on volume 60, page 97, Deed Records of Hardin County, Tex.

Plaintiff offered and read in evidence cer-

tified copy of patent from the state of Texas to J. N. Votaw, of date May 7, 1902, for the following described land: 640 acres of land, situated and described as follows: In Hardin county, known as section No. 224, H. & T. C. R. R. Co. certificate No. 508 on the waters of Cypress creek, a tributary of Big Sandy creek, about 16 miles N. 68° W. from Kountze, said land having been purchased and fully paid for in accordance with an act of 1895 and the amendment thereto by the act of May 19, 1897 (setting out the description). The above patent was recorded on the 23d day of October, 1914, in volume 65, page 98, of the Deed Records of Hardin County, Tex.

The following agreement was entered into by counsel: It is agreed that between the 1st of August, 1913, and the last day of December, 1913, that the Kirby Lumber Company cut from H. & T. C. section No. 224 in Hardin county, Texas, under the contract between the Kirby Lumber Company and the Houston Oil Company, 2,950,926 feet of pine timber. It is also agreed that in September, 1912, the Kirby Lumber Company cut from section 4, H. & T. B., 238 ties, which they purchased from the Houston Oil Company, of the value of and for which they paid the Houston Oil Company \$22.88.

Plaintiff rested, and the depositions of Clark M. Votaw were offered in evidence. It is necessary that this testimony be set out practically in full, same being as follows:

"My name is Clark M. Votaw; age, 44; residence, Dominican Republic, West Indies. I am a son of J. N. Votaw, the plaintiff in this cause. I have been a resident of the state of Texas from some time in the year 1875 up to and including the early part of the year 1907. My business during said years and since has always been connected with the timber and lumber business, and during the years 1898, 1899, 1900, 1901, 1902, 1903, and a portion of 1904 I was employed by Mr. John H. Kirby and some of his allied interests. My duties in connection with said employment were with reference to handling and looking after his lands. I am acquainted with John H. Kirby of Houston, Harris county, Tex., and have been acquainted with him a little over 20 years. Yes, sir; I had business relations with John H. Kirby during the years 1893, 1899, 1900, 1901, 1902, 1903, and a portion of 1904; my relations and duties being the purchase of lands and the handling of the same after purchase, and generally my duties were in connection with Mr. Kirby's large landholdings in Hardin and other counties in East Texas.

"During the latter part of the year 1899, or the early part of the year 1900 I was employed by Mr. Kirby in the manner described in my preceding answer. The general terms of my employment and business relations with Mr. Kirby were that I was to purchase and handle his large landholdings, and the details and terms of my employment and arrangement with him were to the effect that he paid me a salary for my time, and when I made a certain class of extra good and cheap purchases of land he divided with me the profits of such transactions. There never was any written contract between us as to the division of such profits; each transaction standing on its own basis. Purchases made by me for Mr. Kirby in the ordinary run of business and

at current prices I did not participate in any of the profits thereof, but, as above stated, when some extraordinary bargains were made, he often gave me a portion of the profits, and said arrangements began in, as I have previously stated, some time about the year 1898, and terminated some time in the year 1904.

"Yes; during the period embraced in the years 1898, 1899, 1900, 1901, 1902, 1903, and a portion of 1904 I was engaged in the purchase of lands in Hardin county, Tex., for Mr. John H. Kirby. During such period I also purchased on my own account quite a few tracts of land. The details and arrangements between myself and Mr. Kirby for the purchase of said lands have been fully set out in my answer to the preceding interrogatory, No. 7.

"During the years 1898, 1899, 1900, 1901, 1902, 1903, and a portion of 1904 I had arrangements with Mr. Kirby by which I purchased for his account many tracts of land in Hardin and other counties in the state of Texas, the general terms of which said acquisitions were made with the funds of and for the account of Mr. Kirby; but, as I have stated in a previous answer, in some exceptional cases Mr. Kirby allowed me to participate in the profits derived from purchases.

"I paid money for all lands purchased in Hardin and other counties in Texas. Said money was furnished to me by Mr. John H. Kirby as in each case was required by the terms of the transaction in question.

"It was our custom, in order to keep prices from going skyward, to take all original purchases in the names of persons other than John H. Kirby, and for that reason purchases were made in the name principally of Charles G. Bruce. However, a number of titles were taken in the names of Messrs. E. J. Eyres, J. N. Votaw, W. W. Willson, and others, whose names I do not now recall, but which will be abundantly shown by reference to the records of Hardin and other counties in Texas, but in all such purchases the title was taken for the benefit of John H. Kirby, and sooner or later were all transferred either to him or to some other person or company designated by him; Mr. Kirby being in each and every case the actual owner and the real party in interest.

"During the period of time embraced within the years 1898, 1899, 1900, 1901, 1902, 1903, and a portion of 1904 I remember of purchasing a number of tracts of land in the name of J. N. Votaw for Mr. John H. Kirby. I would not attempt to give a complete list of such purchases. I do remember, however, that there were purchased within said period of time H. T. & B. R. R. Co. section No. 4, in Hardin county, Tex., and also H. & T. C. Ry. Co. section No. 224, situated also in Hardin county, Tex., and a portion of the Napoleon De Waltz survey of land, situated in Hardin or Liberty counties. There were other purchases of land also embraced under the same condition, the names of which I cannot now recall. The H. T. & B. section above mentioned was purchased from one J. B. Wallace, and the H. & T. C. Ry. Co. section No. 224 was purchased from the state of Texas, and the Napoleon De Waltz survey was purchased from some owner whom I do not now remember, but the records should fully show, and in all instances above mentioned the purchase money was paid by Mr. John H. Kirby, and said purchases made for his benefit, and in the three instances above specifically set forth title was taken in the name of Mr. J. N. Votaw for the benefit of Mr. John H. Kirby.

"I know one J. B. Wallace. I knew him covering a period of about five or six years beginning with about the year 1895 up to the time of his death, which occurred some time about the year 1901.

"Some time during the latter part of the year 1899 I began to negotiate with J. B. Wallace for the purchase of H. T. & B. section No. 4

in Hardin county, and finally consummated the purchase thereof, with the assistance of Mr. W. W. Dies, of Hardin county, paying to Mr. Wallace something over \$1 per acre for his equity therein (to the best of my recollection it was about \$1.25 per acre). Said purchase was made with the money of Mr. John H. Kirby, and the deed taken from said J. B. Wallace to Mr. J. N. Votaw, thus leaving a balance due upon said tract of land to the state of Texas, which said balance also was afterwards paid by said John H. Kirby.

"Some time during the latter part of the year 1899 I purchased H. T. & B. section No. 4, in Hardin county, Tex., from J. B. Wallace, taking the deed therefor in the name of Mr. J. N. Votaw for the use and benefit of Mr. John H. Kirby, paying therefor, to the best of my recollection, \$1.25 per acre; said payment being made in cash; said cash furnished by Mr. John H. Kirby and paid to the said J. B. Wallace by me. I did take a deed from the said J. B. Wallace to the vendee above mentioned, but I cannot positively remember the date of the deed any further than that it was some time in 1899, and that said deed was taken in the name of Mr. J. N. Votaw, but for the use and benefit of Mr. John H. Kirby.

"Some time during the latter part of 1899 I did take a deed from J. B. Wallace to Mr. J. N. Votaw to H. T. & B. section No. 4, situated in Hardin county, Tex.; said deed being taken in the name of J. N. Votaw, as a precaution that other landowners from whom I desired to make additional purchases might not suspect that Mr. John H. Kirby was in the market making extensive land purchases in that territory. Mr. J. N. Votaw did not pay the purchase money of said tract of land covered by the deed from J. B. Wallace, nor any part thereof, but said consideration was wholly paid by Mr. John H. Kirby.

"I knew about the transaction of the purchase of H. T. & B. R. R. Co. section No. 4, in Hardin county, Tex., from J. B. Wallace, because I made said purchase from said J. B. Wallace, taking the deed therefor in the name of Mr. J. N. Votaw, for the use and benefit of Mr. John H. Kirby, who paid the entire consideration; the deed being taken in the name of Mr. J. N. Votaw for the reason heretofore stated that Mr. Kirby's name as the active purchaser of lands in that locality might not be disclosed to the public.

"I know who furnished the money which constituted the consideration paid to J. B. Wallace in the purchase from him of H. T. & B. section No. 4 in Hardin county, Tex.

"Mr. John H. Kirby furnished the money which constituted the consideration for said conveyance.

"The money was furnished by Mr. John H. Kirby because he was purchasing said H. T. & B. section No. 4 from J. B. Wallace, but for convenience the conveyance was taken in the name of Mr. J. N. Votaw.

"Mr. John H. Kirby furnished the money with which said payment of \$37.44 was made to the state of Texas, in the name of Mr. J. N. Votaw, applying as an interest payment on the H. T. & B. Ry. Co. section No. 4, in Hardin county, Tex., originally purchased from the state of Texas in the name of J. B. Wallace.

"Mr. John H. Kirby furnished the said amount of \$37.44 with which to pay said interest payment because he was the owner of the land in question and the real party in interest.

"The balance due the state of Texas by J. B. Wallace and subsequently by Mr. John H. Kirby on H. T. & B. section No. 4 in Hardin county, Tex., was not paid by Mr. J. N. Votaw, but it was paid by Mr. John H. Kirby, the owner of said section of land.

"The interest due the state of Texas on said section of land was always paid by Mr. John H.

Kirby through some agent in Austin before the principal sum itself was paid, and neither said interest nor the principal sum was paid by Mr. J. N. Votaw, but by Mr. John H. Kirby.

"I know who furnished the money to pay the balance due the state of Texas on H. & T. & B. section No. 4, in Hardin county, Tex.; both the interest and principal due the state of Texas were paid by Mr. John H. Kirby.

"I purchased for Mr. John H. Kirby H. & T. O. R. Co. section No. 224, Hardin county, Tex., some time during the year 1900, making the purchase thereof in the name of Mr. J. N. Votaw and paying therefor with the money of Mr. John H. Kirby.

"Some time during the year 1900 I purchased for the use and benefit of Mr. John H. Kirby H. & T. O. section No. 224, situated in Hardin county, Tex., making the purchase thereof for the use and benefit of Mr. John H. Kirby, and paying therefor with his money.

"Some time during the year 1900, I caused Mr. J. N. Votaw to purchase H. & T. O. section No. 224, situated in Hardin county, Tex., he making the application therefor for the use and benefit of Mr. John H. Kirby, I paying the state of Texas the required payment out of money belonging to Mr. John H. Kirby. I made said purchase in the name of Mr. J. N. Votaw for reasons heretofore set out in preceding answers, in order that the public might not know that Mr. Kirby was in the market actively buying lands in said vicinity.

"Mr. J. N. Votaw did not pay anything to the state of Texas on account of the purchase of H. & T. O. section No. 224, in Hardin county, Tex., but all payments therefor were made by Mr. John H. Kirby.

"Mr. J. N. Votaw was not purchasing said land for himself, but purchased the same for the use and benefit of Mr. John H. Kirby, who paid all considerations for said lands to the state.

"Mr. John H. Kirby paid the various sums, principal and interest, paid to the state of Texas in the purchase of H. & T. O. section No. 224, Hardin county, Tex.

"Mr. J. N. Votaw made the application in his own name for the purchase of H. & T. O. section No. 224, in Hardin county, Tex.; but he made it for the use and benefit of Mr. John H. Kirby. Mr. J. N. Votaw did not pay the principal nor the interest required in the purchase of said tract of land; said money being all paid by Mr. John H. Kirby.

"I know who furnished the money with which to pay the \$16, being the first payment due the state of Texas in the purchase of H. & T. O. Ry. Co. section No. 224, public free school lands, in Hardin county, Tex. Mr. John H. Kirby furnished the said \$16.

"Mr. John H. Kirby furnished the said \$16 payment to the state of Texas because he was the owner of said H. & T. O. Ry. Co. section No. 224.

"Interrogatory No. 36: Receipt No. 4-10954 from the treasurer's office of the state of Texas, signed by John W. Robbins, treasurer, and bearing date January 2, 1901, recites that the state of Texas received from M. E. Groos, on account of J. N. Votaw, the sum of \$3.64, the same being interest to November 1, 1900, on account of the purchase of H. & T. O. Railway section No. 224, Hardin county, Tex. Please state whether or not you know who furnished the money with which said payment of \$3.64 was made.

"A. I know who furnished the said \$3.64. Mr. John H. Kirby furnished the \$3.64 with which said payment was made.

"Mr. John H. Kirby furnished the \$3.64 aforesaid simply because he was the owner of the tract of land upon which it was required and paid.

"Mr. John H. Kirby furnished the \$18.72 which was paid to the state of Texas on ac-

count of interest to November 1, 1901, upon said H. & T. O. No. 224. Mr. Kirby furnished said money simply because he was the owner of the land upon which it was required and paid by him.

"Mr. John H. Kirby made the final payment of the entire balance due the state of Texas, required to patent out H. & T. O. Ry. Co. section No. 224, situated in Hardin county; Mr. Kirby paying therefor with his own money. Said payment was not made with money belonging to Mr. J. N. Votaw, or to any other person other than said John H. Kirby.

"Mr. John H. Kirby furnished the money with which to pay the final payment due the state of Texas as principal and interest on H. & T. O. section No. 224, situated in Hardin county, Tex."

Cross-Interrogatories by Kirby Lumber Company:

"I am a son of J. N. Votaw, the plaintiff in this cause. It is true that I resided in Texas until about January 1, 1907. I think I left Texas in the month of May or June, 1907.

"It is a fact that beginning with about the year 1898, and terminating some time in the year 1904, I had an agreement with Mr. John H. Kirby by which I purchased for him many tracts of land situated in Hardin and other counties in Texas, he furnishing the money to pay for said lands.

"It is true that between January 1, 1898, and February 1, 1904, I was engaged in purchasing lands in Hardin county and other counties in Texas for John H. Kirby, and in some instances for John H. Kirby and myself jointly, during which period I also made many purchases on my own account.

"It is a fact that during the year 1900 I purchased for Mr. John H. Kirby H. & T. O. section No. 224, in Hardin county, from the state of Texas, and caused the application therefor to the state of Texas to be made by and in the name of Mr. J. N. Votaw, who I understand is the plaintiff in this case, and that said land was awarded to the said J. N. Votaw, and that the preliminary payment of purchase money to the state of Texas, as well as all other subsequent payments, both principal and interest, were made by me out of funds belonging to the said Mr. John H. Kirby.

"It is true that Mr. J. N. Votaw did apply to the state of Texas to purchase H. & T. O. section 224 nominally for himself, but actually for the use and benefit of John H. Kirby, and that all sums of money paid in this connection—both principal and interest—for the purchase of said land were paid by me out of money belonging to Mr. John H. Kirby, and not out of money belonging to Mr. J. N. Votaw.

"It is true that I purchased for Mr. John H. Kirby from J. B. Wallace, of Hardin county, Tex., H. T. & B. section No. 4, situated in said county, and that the purchase price therefor was paid to said Wallace out of money belonging to Mr. John H. Kirby, and that the title thereto from said Wallace was taken in the name of Mr. John N. Votaw, by my direction.

"It is true that Mr. J. N. Votaw did not purchase, for himself H. T. & B. section No. 4, in Hardin county, Tex., but that I caused the deed therefor to be taken in his name, but for the use and benefit of Mr. John H. Kirby, and that I paid the consideration to said Wallace out of money furnished me by Mr. John H. Kirby for said purpose; and according to my request said Wallace conveyed the land to Mr. J. N. Votaw.

"It is a fact that each and every sum of money which was paid to the state of Texas and to J. B. Wallace as part or all of the purchase price of H. T. & B. section No. 4 was paid by me out of funds furnished me by Mr. John H. Kirby for said purpose.

"It is not true that Mr. J. N. Votaw purchased for himself H. T. & B. section No. 4, but it is true that the deed thereto was taken in his name, but for the use and benefit of Mr. John H. Kirby, and that he purchased the same at my request for Mr. John H. Kirby.

"It is not true that Mr. J. N. Votaw purchased for himself H. & T. C. section No. 224, situated in Hardin county, Tex., but it is true that the title thereto was taken in the name of said Mr. J. N. Votaw, but for the use and benefit of John H. Kirby, and that all payments made on account of said section of land were made out of funds belonging to John H. Kirby.

"It is a fact that I purchased a number of tracts of land for John H. Kirby and took deeds therefor in the name of J. N. Votaw, and that he afterwards conveyed all of those tracts of land requested by me to the person whom I designated.

"In a number of cases, in purchasing lands for John H. Kirby, I took conveyances in the name of J. N. Votaw, and he, the said J. N. Votaw, afterwards executed conveyances therefor, embracing all of the tracts of land which I requested him so to do.

"J. N. Votaw is a lawyer by profession. I employed J. N. Votaw, on behalf of John H. Kirby, to pass upon the titles to certain lands which were being acquired by John H. Kirby, and on his behalf, and as an incident thereto certain of said titles were taken in the name of J. N. Votaw.

"J. N. Votaw did examine a number of titles to lands which I purchased for John H. Kirby (I do not now recall any titles examined by him which were purchased for John H. Kirby and myself jointly), and I think, perhaps, he may have and very likely did represent Mr. John H. Kirby or some of his companies in certain land litigation in Hardin county, Tex.; but he never officiated, at my request, in the negotiation for the purchase of any lands whatsoever. For all of his services I can state that Mr. J. N. Votaw was paid most liberally. I know that he received for his services over \$15,000, and that the same was paid in cash by me.

"I do know that John H. Kirby never employed Mr. J. N. Votaw to pass upon the titles to the lands which I acquired for Mr. Kirby; that employment was effected by myself. Mr. J. N. Votaw only passed upon certain titles and had nothing to do with the acquisition of any lands for Mr. Kirby that I know anything about, and for his services the said J. N. Votaw was compensated as more fully explained by me in my preceding answer.

"J. N. Votaw did not purchase any lands for John H. Kirby, but titles were taken in his name to a number of tracts of land in Hardin county, Tex. (and perhaps in other counties I do not now remember), for the use and benefit of Mr. John H. Kirby, but with the exception of H. T. & B. section No. 4, and H. & T. C. section No. 224, and a portion of the Napoleon De Waltz survey, which I now recall to memory, it would be manifestly impossible for me at this late date to give further details.

"I have no deed or deeds in my possession from J. N. Votaw to any person conveying H. & T. C. section No. 225, and H. T. & B. section No. 4, situated in Hardin county, Tex., or either of them; consequently am unable to attach said deed and unable to say whether or not I have ever seen such deed or deeds.

"Cross-interrogatory No. 19: Is it not a fact that, when John H. Kirby and C. M. Votaw jointly and individually sold said lands to the Houston Oil Company of Texas, J. N. Votaw conveyed H. & T. C. section 224 or H. T. & B. section 4, or both of them, to the said Houston Oil Company of Texas, or to yourself, or John H. Kirby? Please answer fully and in detail. If you say that you have seen such a deed,

please state where such deed is now, before whom acknowledged, the date thereof, giving full description thereof.

"A. I cannot answer this interrogatory positively either in the affirmative or negative, but, to the best of my knowledge and belief, Mr. J. N. Votaw did execute deeds covering both H. & T. C. section No. 224 and H. T. & B. section No. 4, situated in Hardin county, Tex.

"I was land commissioner for the Houston Oil Company of Texas from the date of its incorporation up to and for some time subsequent to the date it went into the hands of receivers.

"I do not know positively whether I have ever seen a deed from Mr. J. N. Votaw to any person for either H. & T. C. section No. 224, or H. T. & B. section No. 4, in Hardin county, Tex.

"I did write a letter to Mr. John H. Kirby (directed, however, to his cashier, Mr. E. J. Eyres), said letter bearing date of August 18, 1900, with reference to H. T. & B. section No. 4, in Hardin county, Tex., and the purchase thereof from Mr. J. B. Wallace. I do not know where the original of said letter is at the present time, but I have a true and perfect copy thereof in my possession, which I attach to my answers hereto, and on the back of which I have placed the following notation: 'Identified by me and referred to in my answers to depositions in the two cases of J. N. Votaw v. Houston Oil Company of Texas et al. in the district court of Hardin county.'

Cross-interrogatory by plaintiff:

"I went to San Domingo in the year 1907, and my business has been continually that of lumber and timber."

The following receipts from the treasurer's office were offered in evidence:

"Treasurer's office receipt No. D-10941, dated January 2, 1901, showing payment of \$32.50 as interest money on H. & T. B. section No. 4, in Hardin county, Tex., said receipt being issued to M. E. Groos for account J. B. Wallace, January 2, 1901.

"Treasurer's office receipt No. D-4026 to J. T. Smith for account J. N. Votaw, dated November 8, 1901, showing payment of \$37.44 as interest money on H. T. & B. section No. 4, in Hardin county, Tex.

"Treasurer's office receipt No. D-22199, dated February 19, 1902, to H. G. King for account J. N. Votaw, same being full interest and principal on account of purchase of section 4, H. T. & B. section, in Hardin county, Tex.

"Treasurer's office receipt No. 20448 to M. E. Groos for account J. N. Votaw, dated October 10, 1900, same being first payment on section 224, H. & T. C. public free school lands, situated in Hardin county, Tex. Said receipt is for the sum of \$16.

"Treasurer's office receipt No. D-10954, dated January 2, 1901, to M. E. Groos for account of J. N. Votaw, showing payment of \$3.64 as interest money on H. & T. C. section No. 224, situated in Hardin county, Tex."

"Treasurer's office receipt No. D-13783, dated December 19, 1901, to M. E. Groos for account of J. N. Votaw, showing payment of \$18.72 as interest money on H. & T. C. section 224, situated in Hardin county, Tex.

"Treasurer's office receipt No. D-22194, dated February 19, 1902, to H. G. King, for account of J. N. Votaw, showing payment of full interest and principal due the state of Texas on account of purchase of section 224, H. & T. C., in Hardin county, Tex.

"Original award card, dated March 7, 1900, showing that J. D. Wallace was awarded section 4, H. & T. C. Ry. Co. in Hardin county, Tex., signed by Charles Rogan, commissioner of the general land office.

"Original card, dated June 10, 1901, from Charles Rogan, Commissioner of the General Land Office, acknowledging receipt of transfer from J. B. Wallace to J. N. Votaw of H. T. & B. section 4, certificate 561, in Hardin county, Tex.

"Original award card, dated September 20, 1900, showing that J. N. Votaw was awarded section 224, H. & T. C. Ry. Co. in Hardin county, Tex., signed by Charles Rogan, commissioner of the general land office"

—also deed from John H. Kirby to W. W. Willson, dated May 10, 1901, filed for record and recorded on May 11, 1901, conveying said two sections of land, and deed from W. W. Willson to John H. Kirby, dated July 8, 1901, and acknowledged and filed for record on October 8, 1909, to both of said sections, were read in evidence; also deed from John H. Kirby to Houston Oil Company of Texas, dated March 25, 1902, filed for record October 9, 1903, to both of said sections, and deed from John H. Kirby to Houston Oil Company of Texas, dated September 29, 1903, and acknowledged and filed for record March 1, 1906, conveying both sections, were read in evidence.

Defendants read in evidence certificate from the office of the comptroller of the state of Texas as follows:

"Comptroller's Office, Austin, Texas.

"I, H. B. Terrell, comptroller of public accounts of the state of Texas, do hereby certify that the following is a true and correct statement of the assessments for taxation of the Abst. 800, cert. 508, Sur. 224, J. N. Votaw (H. & T. C.), survey of land, situated in Hardin county, Tex., for the years, in the manner and quantity herein stated, as shown for the records of this office:

Year	To Whom Assessed	Acres	Where Assessed.
1902	Houston Oil Co.	640	Hardin Co.
1903	" " "	640	" "
1904	" " "	640	" "
1905	" " "	640	" "
1906	" " "	640	" "
1907	" " "	640	" "
1908	" " "	640	" "
1909	" " "	640	" "
1910	" " "	640	" "
1911	" " "	640	" "
1912	" " "	640	" "
1913	" " "	640	" "
1914	" " "	640	" "

"In testimony whereof I hereunto sign my name officially and cause the seal of this office to be impressed hereon on this the 8th day of July, A. D. 1915.

"L. W. Little, Acting Comptroller."

—also the following certificate:

"Comptroller's Office, Austin, Texas.

"I, H. B. Terrell, comptroller of public accounts of the state of Texas, do hereby certify that the following is a true and correct statement of the assessments for taxation of the Abst. 751, Cert. 561, Sur. 4, J. B. Wallace (H. T. & B.) survey of land, situated in Hardin county, Tex., for the years, in the manner and quantity

herein stated, as shown for the records of this office:

Year	To Whom Assessed	Acres	Where Assessed.
1903	Houston Oil Co.	640	
1903	" " "	640	
1904	" " "	640	
1905	" " "	640	
1906	" " "	640	
1907	" " "	640	
1908	Unknown Owner	640	
1909	Houston Oil Co.	640	
1910	" " "	640	
1911	" " "	640	
1912	" " "	640	
1913	" " "	640	
1914	" " "	640	

"In testimony whereof I hereunto sign my name officially and cause the seal of this office to be impressed hereon on this the 8th day of July, A. D. 1915.

"L. W. Little, Acting Comptroller."

Defendants also offered the following tax receipts: Tax receipt for the year 1901, showing payment by W. W. Willson of the taxes on both tracts of land involved in this suit; tax receipt for the years 1902 and 1903, showing payment by the Houston Oil Company of the taxes on both surveys involved in this suit; tax receipt for the year 1904, showing payment of taxes on both surveys in this suit by Charles Dillingham and F. A. Reichardt, receivers for the Houston Oil Company of Texas; tax receipt for the year 1905, showing payment of taxes on both surveys in this suit by Charles Dillingham and F. A. Reichardt, receivers for the Houston Oil Company of Texas; tax receipts for the years 1906 and 1907 and 1908 showing payment of taxes on both surveys in this suit by Charles Dillingham and F. A. Reichardt, receivers for the Houston Oil Company of Texas; tax receipts for the years 1909, 1910, 1911, 1912, 1913, and 1914, showing payment of taxes on both surveys in this suit, by the Houston Oil Company of Texas.

The testimony of W. W. Dies is as follows:

"My name is W. W. Dies. * * * I knew J. B. Wallace very well. He is dead now. During the time I knew him he lived here in Kountze, and he was the agent for the Texas & New Orleans Railroad Company. I remember the transaction wherein I took his acknowledgment to a deed conveying H. T. & B. section No. 4, in this county; remember it very well. What I did in that transaction was at the instance of Mr. C. M. Votaw. I negotiated the trade, and I don't know whether Mr. Votaw ever saw Mr. Wallace personally or not. I know there are two Votaws, and my testimony refers to C. M. Votaw. I talked with Mr. Wallace several times with reference to the purchase of the land, and he didn't want to sell it. He was somewhat of a dreamer, and he had an idea that this land would be worth a great deal more than it will be, but he needed some money, and I talked to his wife about it. She had more sense than he had and better judgment in business, too, and she thought he ought to sell it, and finally he agreed to sell it, and did sell it. I know who was the real purchaser of the land; know just what Clark Votaw told me about it.

I had had considerable business transactions with Clark Votaw along about that time, and I assisted in the purchase of a great many tracts of land over the country, and in this transaction particularly. Clark Votaw asked me to see Wallace about it, knowing that we were good friends. Clark Votaw was acting for Mr. Kirby—John H. Kirby. Clark Votaw told me that he was acting for Kirby, and Mr. Kirby also told me, but I don't think either was present when the other told me that; neither was J. N. Votaw present when I was told that. Clark told me why he bought it that way. He said, 'If I buy it for Kirby, some fellow will want more for his land.' Kirby was reputed to be very wealthy. That was the reason for taking the title in various parties. Votaw was a pretty sharp fellow, and knew how to do most anything along that line. I don't know just how Mr. Wallace was paid for section 4, but my recollection is that Clark Votaw sent me a draft to make the payment with; don't know whether he paid all at one time, but it seems like he paid part at one time and part another time. The draft he sent me was drawn on E. J. Eyres, of Houston. Clark used to draw drafts on him all the time, and I drew a few on him myself. Mr. Eyres was Mr. Kirby's man Friday or handy man; am not saying that in disparagement of Mr. Eyres, but in a spirit of fun. I don't remember now whether I sent the deed that Wallace executed with draft attached, or whether I sent it direct to Mr. Eyres or to Mr. Votaw; one or the other. To my knowledge, Mr. J. N. Votaw, the father of Clark Votaw, and the plaintiff in this case, had nothing to do with the purchase of this land from Wallace. I did not know J. N. Votaw in the transaction. My understanding was that Mr. Votaw passed on titles for Mr. Kirby. I got that understanding from Clark; don't know whether I ever talked to Judge Votaw about it or not."

On cross-examination:

"I was not particularly representing C. M. Votaw when I made the purchase, but he came to me and wanted my assistance. I don't remember whether he paid me a fee for making the purchase or not. We used to be good friends. It was not a very easy thing to buy the land from Mr. Wallace, because he had his ideas about what the future value of the land would be. I could not be sure whether C. M. Votaw paid a part of the consideration for the land or not. I think when I got the deed that I sent it to C. M. Votaw. I don't remember how much I paid an acre for the land. He had bought it from the state, and he owed the state some on it, and I presume the part that he owed the state was a part of the consideration for the deed. I don't know whether he owed the state $\$9/40$ of the total consideration or not; don't remember exactly what he owed the state. He bought the land on 40 years I think, and when Votaw bought the land from Wallace I presume he assumed the balance due the state. I don't remember exactly how much cash was paid to Wallace at the time he executed the deed. It has been fifteen years ago, and I have no interest in the case. I don't think that I was employed as the agent of Clark M. Votaw, nor did he pay me a fee; don't think he did. I had a pretty hard time making the trade with Wallace; had to go to his wife about it, but I didn't persuade her to make the sale. I was very intimate with the family. Mr. Votaw couldn't make the trade himself, and he got me to make it. I told Wallace that it was a good sale. I thought so at the time, and think so yet. I didn't try to exercise any undue influence over them. I just wanted to buy the stuff for Mr. Votaw, or rather Mr. Kirby. If you say that Wallace was getting \$1.25 per acre, I presume that is so, but I don't remember exactly the amount involved; that is my best recollection. I couldn't say from my own recollection I agreed to pay Wallace for the land, nor

how much was due to the state. I presume what Wallace owed the state was a part of the consideration, but don't know about it. I suppose that is so."

Defendants also introduced in evidence the following letter:

"Mr. E. J. Eyres, Houston, Texas—My dear Mr. Eyres: Yours of yesterday, inclosing copies of, and memoranda of contracts, just received, and I beg to thank you for your kindness and trouble in the matter but was sorry to know that you were not feeling well; trust you will take a rest to-morrow and feel better Monday.

"I return you the abstract and deed to the C. C. Lund 320 acres, which you sent me from which I get descriptions, as we have a duplicate abstract in this office, having made them all that way.

"I was just on the point of letting you know what I was doing when your request came in, viz:

"To-day I closed for the John Jiances undivided 500 acres in a 640 shown on map, near center of the county (this is properly John Iiams) at \$1.00 per acre, but with a little extra in the way of trimmings, and of such a nature that I will have to explain them in a personal interview only. I also made a payment of \$79 on 306 acres of the Wiley G. Powell 640 at \$1.50 per acre, plus a bonus of \$72.95 to Will Cruse, which made it cheap notwithstanding at a little less than \$1.75 per acre.

"I also closed a contract with J. B. Wallace for H. T. & B. section No. 4, 640 acres, which you will find located adjoining the N. W. corner of the James Scott league, at a net price of \$672.00, plus a small commission I will have to pay Will Dies, as this man wanted \$5 per acre when I first went to him. Please see if the P. & M. Bank has his deed made to J. N. V. or C. G. Bruce, and with instructions to hold until October 5th for balance of money, which should be \$552, and I will ask you to wire me about this Monday morning so that I will know it is safe to pay the \$150.00 draft I told him to draw on me, and which is at the bank here, and which I want to do Monday.

"Mr. Bruce has bought the John W. Clayton 640, and 700 acres of the Adelia Yocum league from George W. Davis estate at \$2.00 per acre, and which will necessitate a payment of \$260, and which are good tracts of land, and quite cheap at that price.

"Mr. Bruce has been working for a long time on the James Scott league, and can now buy the north $\frac{3}{4}$ of it (the S. $\frac{1}{4}$ is no good) at \$2.62 $\frac{1}{4}$ per acre. We have bought better land at half, but there is a good profit even at this price, and you can see at a glance its advantageous position on the map, in the way of making connections between purchases made.

"It will take a payment of about \$700 to manage it, but we will get about the 1st of November to close the balance in. I hope you can manage the down payment.

"J. C. League has two sections of B. B. B. & C. lands (sections No. 43 and No. 44) which are extra good, having about 5,000 feet per acre on them, which Mr. Bruce can buy at \$2.25, and I would be glad that you could manage the $\frac{1}{10}$ payment on them in a few days also, as they are cheap, and it has taken much hard work to get him to the point we now have him.

"I inclose you herewith receipt or contract from W. W. Cruse to the 306 acres of the W. G. Powell, and I also inclose you the recorded will of R. F. Clements, deed from Clements heirs to J. B. Hooks, and deed J. B. Hooks to J. N. Votaw, who will deed to Mr. Kirby Monday, thanks for the blank deeds you sent us today, and of which we were not only out, but none in town.

"Very sincerely yours, C. M. Votaw.

"Yes; I drew on you to-day in these matters \$250.00 and \$100.00; total \$350.00."

Said E. J. Eyres testified as follows:

"At the time I received that letter Mr. Kirby was not in the state of Texas; he was in Boston at that time. I don't know how long he remained in Boston on that occasion, haven't looked that up, but think he left here some time in May of that year. He left some time in May, I think, and got back some time in September, I think, of that year. I can look at my letter book, and it will probably refresh my memory on that point. (Witness then examines his letter book.) This book shows that he left Houston on May 29, 1900, and returned—was in Houston—on September 1, 1900. During the year 1900 Mr. Kirby's time was just about equally divided in and out of the state; that is usually the case. During the times that Mr. Kirby would be out of the state Mr. C. M. Votaw would take up with me the matter of purchasing the lands, their desirability and price, and so forth. And when he would buy a piece of land he would draw on me for the money; he would draw on me indiscriminately. Some of the times he would report to me when he would buy the land, and sometimes he would just draw and then tell me about it afterwards. I did not have a thing to do with the details of the purchase; that is, the manner in which the purchase was made. I know that it has developed in the testimony that Mr. C. M. Votaw caused the application for section 224, H. & T. C., to be made by Mr. J. N. Votaw, but I don't think I knew anything about that. I had a general knowledge that titles were taken in the name of four or five different people, but don't think I knew anything about that particular transaction. Some titles were taken in the name of C. M. Votaw, and in the name of J. N. Votaw and Charles G. Bruce, and probably one or two others. I know, generally speaking, that it was Mr. Clark Votaw's practice to take titles in other people's names. Whenever any land was bought from parties that had bought from the state, and payments were to be made to the state, those matters were generally handled through Mr. H. G. King, of Austin, Tex. The majority of them were handled by him. However, that was all attended to by Mr. Clark Votaw. I know that the two sections of land involved in this suit have been handled by me and carried by as Mr. Kirby's land."

On cross-examination:

"I don't think I could give you any estimate of the amount of land acquired in the manner I have described in the year 1901, but during the year 1900 I think Mr. Kirby acquired something like 50,000 acres in that manner. I couldn't state what proportion of that was Texas school land. I didn't testify in the recent suit at Austin, never testified in any suit at Austin, wherein the state was suing to recover certain sections of land. I didn't go there in person, but I think that I testified by deposition; I don't remember; there are so many details in the office that I don't try to keep up with them. I think my depositions were verbal, and were taken in the courthouse at Houston, when I come to think about it. I presume they were reduced to writing and signed by me and sent to Austin and used in that case. Don't remember what I swore in that case; can't remember if I swore that each of the purchases that were made by individuals were made in good faith by those people, and then afterwards acquired by Mr. Kirby; don't remember if I swore it, but, if I swore it, I did not know it to be a fact. I don't remember that I denied that the land was bought in the name of other people for the benefit of Mr. Kirby. I don't remember how long ago it has been since I gave my testimony in that case, but think it was last year some time. The land that Votaw bought was taken in the name of various people, but it was for the use and benefit of John H. Kirby. Some was taken in the name of J. N. Votaw, and some in C. M. Votaw and Charles G. Bruce, and probably one

or two others. I don't remember whether a large proportion of those lands were school lands or not; I had no information about that, because all the details were handled by Mr. Votaw. I didn't pass on that part of it. I passed on the price and the desirability of it. I don't think that I passed on each tract—not all of them, but on most of them. I couldn't tell anything about the land, and the way I passed on it I had to rely on Mr. Votaw for my information. I am strictly an office man. I also passed on the situation of the land and the amount of timber on it. I didn't know at the time we were buying from whom we were buying. I didn't know whether the land was being bought from the state through dummies, or from individuals through dummies. I kept myself in the dark on those subjects because had no reason to do anything else.

"Q. I will ask you this direct question: Isn't it a fact that a very large proportion of those lands purchased in 1900 were bought from the land commissioner at Austin, as state school land? A. I don't remember; I don't know anything about that.

"I don't remember what my testimony was on that point when I was testifying at Houston by deposition to be used in the state case at Austin. I couldn't testify to anything I didn't know, so I guess I testified then that I didn't know anything about it.

"I know that the two tracts of land in litigation here were carried on Mr. Kirby's books as belonging to him. Those books are in Houston, and the reason I didn't bring the books with me was because I had no call for them.

"I have owned some land in this section of the country and own some now. I own some of the Mary Hopkins survey in this county—4 or 5 acres in that. It is supposed to be oil land, and I own 21 acres in section —; don't remember the number; either 341 or 348 W. C. Ry. I think. That is in Hardin county. I think that is all I own in Hardin county.

"I own a bunch of land in Shelby county, but I don't know what they are, though I have bought land from the state for myself, but couldn't say; don't remember. I don't remember the year, I made application for so many tracts of land. Some I have got, and some I haven't got. I don't know whether I ever got any land awarded to me in behalf of John H. Kirby. I have got a very bad memory; have to write everything down. All of our land records were burned up in the federal court fire in Houston, so there is no way to refresh my memory. It is a blank as to how many sections I bought from the state for myself and how many I bought from the state for Kirby, if I ever bought any for him.

"If I bought section 210, certificate 502, for 640 acres in Hardin county, I don't remember it. I never put on the list of assets; don't think I ever made a list of assets. I never did render it for taxes either. If I ever owned it, I don't remember it. If I ever bought section 212, certificate 504, 640 acres in Hardin county, I don't remember either. I couldn't say how far back I can remember anything; some things I remember a good while, and other things I forget right away. I have an awful memory, and have to write everything down. I don't call that a convenient memory; I call it a darn bad memory, if the court will excuse the expression.

"I don't remember anything about section 220, certificate 505, Hardin county, either; don't remember anything about it. I couldn't say how much I paid for those three sections in Hardin county, because I don't remember anything about them. If I filed on section 248, certificate 820, 640 acres of land, I don't remember anything about that either; remember absolutely nothing about it. In applying for the purchase of those lands, if the form is that I swore that I was the sole party interested in the purchase thereof; I guess I swore to it, if I applied for the purchase of them. If that is

the form used, and if I applied for the land, I guess I used that form and swore to it. I couldn't say as a matter of fact that I was the only party interested in the purchase of that land, because I don't remember anything about it.

"I did not state that land that was worth \$3,400 would be such a small matter that it wouldn't impress me; but my memory is so bad that I can't remember a thing unless I have something to remember it by.

"I am a married man, but I couldn't tell you the year I got married. I married in Shreveport, but I don't remember what year. I remember my wife's name, and remember what her father's name was. I remember that I have no children. I don't remember the name of the preacher that married us, but I remember that it was done in Shreveport. Remember that it was in some church, but don't remember what church. I remember that when we went away that night she slept in one end of the Pullman and I slept in the other.

"I don't know anything about section 2, certificate 492; don't know whether it was originally applied for in the name of W. W. Dies or not. I don't remember whether I purchased section 50, certificate 34/87, which was originally purchased by W. W. Dies and patented to me—don't remember whether that was purchased for Mr. Kirby or for me.

"Q. If you had, in fact, purchased for yourself approximately 4,000 acres of land in this county and acquired the patents on the 6th and 7th of March and paid the state the consideration therefor in cash, you think you wouldn't remember it? A. I couldn't say. I have had so many deals that I can't remember anything about any of them. I have to write them down, and if I haven't a record I am lost. I don't know whether I bought every one of the tracts of land which have been enumerated here for the benefit of John H. Kirby and paid his money for them; can't remember about that.

"I knew a man in New York named James Irvine during his lifetime. He is now dead. I do not remember of buying a piece of land in San Augustine county known as the Kellogg survey, and immediately thereafter transferring it to said James Irvine; don't remember anything about it. I don't think that James Irvine was one of the men that sometimes took title in his name for the benefit of Kirby. If he did, I don't remember it. If James Irvine shortly after the time you speak of transferred the land to Kirby, I don't remember it; I may have prepared the deed, but, if I did, I don't remember it.

"I am 51 years of age; I remember that. I believe I have been interested with Clark Votaw in some of his land deals, but I don't remember just what it was. I was not interested with him, to my knowledge, when he, as land commissioner for the Houston Oil Company, conveyed approximately 14,000 acres of land to the Houston Oil Company, and they did not record the deeds, and subsequently conveyed that same land, with the deeds not recorded, to the Thompson-Ford Lumber Company and the Kelley Lumber Company. I know nothing about that, and never heard about it that I know of. I don't know anything about any litigation between the Thompson-Ford Lumber Company and the Kelley Lumber Company recently over that land; I am not connected with either of them, and know nothing about it.

"Q. The case is a case styled Houston Oil Company of Texas v. Thompson-Ford Lumber Company et al. It was originally tried before the special master in Houston; heard by Judge Burns on an issue as to whether the Thompson-Ford Lumber Company was a purchaser in good faith for value from Clark M. Votaw of about 14,000 acres of land which he had previously sold when land commissioner to the Houston Oil Company, and wherein the judgment of the

court at Houston was against the Thompson-Ford Company, and that company appealed to the United States Circuit Court of Appeals at New Orleans, and about two or three months ago that judgment was affirmed, the effect of which was to declare the title in the Houston Oil Company to these lands which Clark Votaw had sold a second time to the Kelley Lumber Company. Do you know anything about that?

"A. Don't remember anything about it, but may have heard the case mentioned; that is all. It may have affected the Kirby Lumber Company, but I am not with the Kirby Lumber Company, I am with John H. Kirby. As his chief clerk, I do not handle any of the business of the Kirby Lumber Company; have nothing to do with that. They have got a manager and assistant general manager, and heads for every department, and, if I would butt in, I would be very promptly called down by the head of the department. The only information I get about the company drifts to me in conversations I have with them. It is a fact that Mr. Kirby devotes a large part of his time to the business of the lumber company—to the finances of it. But I, as chief clerk, do not handle any of the business of the lumber company.

"I said awhile ago that I might have heard of some such suit as you mentioned, but I don't remember any of the details, just the style of the case. Don't know anything of the transaction by which Clark Votaw sold that land the second time. Don't remember whether I was interested in or got any of the proceeds of the sale. Clark Votaw and I were very close about that time; just about as close as two men working on the same thing get together; we were very intimate. I didn't know anything about him holding those deeds off the records while he was the land commissioner for the Houston Oil Company; didn't ask him anything about it, it was his business. I don't know anything about him holding them off, except your statement here that he did it.

"I remember what salary Mr. Kirby pays me, but don't remember what salary he has been paying me for all these years. It has been raised from time to time, but couldn't tell you when or how much. I remember that I started in at \$50 a month, but don't remember how long I worked for that much. I remember what street I live on. It is Mt. Vernon avenue, No. 3618. Remember my telephone number is Hadley 584. Don't remember the size of my shoes, and think I wear either 7 or 7½ hat. I am wearing a Panama hat; bought it from Kiam about 30 days ago; paid something like \$5 or \$6 for it. I remember what bank I do business with—the Union National. My office is on the top floor of the First National; has no number, because we have all the offices on the top floor.

"I think Mr. Kirby has been president of the Kirby Lumber Company ever since it was first organized; think he has been president continuously. I am sure that he knew this case was set for to-day, because Mr. Logue is his lawyer and he keeps him posted. He left Houston last Friday night. He is frequently in Beaumont. He was in Beaumont on the 4th and 5th of July. Don't know whether he frequently sees Judge Votaw there or not. You will have to ask him that. He never mentions it to me."

Defendants read in evidence certificate from the land office showing that H. & T. C. section 224 was detached land at the time it was sold, as follows:

"Austin, July 9, 1915.

"I, J. H. Walker, chief clerk and acting commissioner of the general land office of the state of Texas, do hereby certify that the papers, documents, and records of said office show:

"That on August 21, 1900, J. N. Votaw filed in said office his application and obligation to purchase section 224, certificate 508, H. & T. C.

Ry. Co., 640 acres, in Hardin county, as detached land, and said land was awarded the said J. N. Votaw August 21, 1900, on said application and obligation.

"That at the date of the filing of said application and obligation the said section 224, certificate 508, H. & T. C. Ry. Co., in said county, was shown by the records of said office to be isolated and detached from other public lands, and that same was then upon the market for sale as such.

"In testimony whereof I hereunto set my hand and affix the impress of the seal of said office on the day and date first above written.

"[Signed] J. H. Walker,
"Acting Commissioner."

Defendants read in evidence the same character of certificate in reference to H. T. & B. section 4, as follows:

"Austin, July 9, 1915.

"I, J. H. Walker, chief clerk and acting commissioner of the general land office of the state of Texas, do hereby certify that the papers, documents, and records of said office show:

"That on December 13, 1899, J. B. Wallace filed in said office his application and obligation to purchase section 4, certificate 561, H. T. & B. Ry. Co., 640 acres, in Hardin county, as detached land.

"That at the date of filing of said application and obligation said section 4, according to the records of said office, was isolated and detached from other public lands, and same was then upon the market for sale as such.

"In testimony whereof I hereunto set my hand and affix the impress of the seal of said office on the day and date first above written.

"[Signed] J. H. Walker,
"Acting Commissioner."

Defendants read in evidence the depositions of John H. Kirby, as follows:

"I reside in Houston, Harris county, Tex. I hold the position of president of the Kirby Lumber Company at the present time, and have held such position since the organization of the company in 1901.

"I am acquainted with the market value of merchantable pine timber or trees, also lumber manufactured therefrom at the present time and during the year 1913 in the vicinity of section 224, in Hardin county, as inquired about. During the year 1913 the market value of pine timber in that neighborhood was probably about \$2 per 1,000 feet, though the condition of the lumber market in that period probably made it doubtful whether pine stumpage had any value at all; that is, there was no profit in manufacturing it, even though the stumpage were donated or obtained without cost. The value of the manufactured product of trees growing in the neighborhood inquired about and of the character which grew on section 224 averaged around \$10 per 1,000 feet. The upper grades of lumber sold for more and the lower grades for less; the average being about \$10 for that character of timber. The average logging cost at our mill in that territory was \$6.64, and the average manufacturing cost was \$4.32, so that there was an actual loss in operations without allowing anything for stumpage.

"The Kirby Lumber Company has a contract with the Houston Oil Company of Texas to purchase merchantable pine timber or trees on all the land owned by the Houston Oil Company of Texas in Texas and Louisiana. Said contract has been in existence since 1901, and the prices range from \$3 per thousand to \$5 per thousand flat, without interest, taxes, or other charges. The contract provides that the Kirby Lumber Company shall pay certain fixed semiannual installments in case, and during the year 1913 these installments were paid, though the timber cut by the Kirby Lumber Company

at \$5 per 1,000 was less than the total amount of the payments made. For bookkeeping purposes the timber is valued as scaled at \$5 per 1,000 during the entire cutting period, and the price will be the same in 1920 as in 1913. The contract does not specifically mention section 224. * * * Permission was extended the Kirby Lumber Company to cut the timber, and the Kirby Lumber Company, as I am informed, did so cut the timber.

"I am informed that the Kirby Lumber Company did cause the merchantable pine trees standing on section 224 here inquired about to be cut, that permission to make such cutting was granted by the Houston Oil Company, and that the timber was cut for account of the Houston Oil Company and as the property of the Houston Oil Company. The Houston Oil Company rendered to the Kirby Lumber Company a statement showing that there had been cut from section 224 a total of 2,950,033 feet.

"I have already answered that the market value of timber in this neighborhood in 1913 was about \$2 per M feet, notwithstanding the fact that there was no profit in the manufacture of it at any price for stumpage. Sawmill men are an optimistic lot of jackasses who, in order to keep their mills going and their men employed, will lose money in the hope that the future market for their product will enable them to recover the loss.

"I have already answered that the market value of lumber manufactured from the kind of trees that grew upon this land in the year 1913 was about an average of \$10 per thousand.

"I have already answered that I had no personal knowledge of the quantity of timber cut from this section of land or the actual cutting, but that the records of the Kirby Lumber Company show that the timber was cut, and that the Houston Oil Company, which scales the logs, presented an itemized scale of same showing the amount heretofore testified about.

"There was no specific payment for this timber. It was cut under the general contract, and the average amount received by the Houston Oil Company under that contract and paid by us is \$2.61½ per thousand. This would be the cash value of present payments at \$5 per M during the cutting period specified under the contract. This price \$2.61½ is the average price of all timber involved in the contract, whereas most of the timber covered by the contract is much superior to section 224 located in the flat lands of Hardin county, and where the timber is inferior and the product, that is, the lumber made therefrom, of low grade.

"I have already testified that the average value of lumber made from timber of this character in 1913 was about \$10 per M feet which was the average amount realized therefor by the Kirby Lumber Company, and I think the Kirby Lumber Company got all that the lumber would sell for in the market. It was our effort to do so, and I think we did so.

"It is not a fact that the Kirby Lumber Company will not sell any of its timber holdings at \$5 per M feet; on the contrary, the Kirby Lumber Company owns timber that it would be glad to sell at \$2 per M feet, whereas it owns other timber needed for the operation of its mills that it could not afford to sell at \$5 per M or even more, unless the purchaser would take the mill."

The testimony showed that appellants' attorneys advised the Kirby Lumber Company to cut the timber. Said counsel testified:

"I think that Clark Votaw and John H. Kirby are on friendly terms. I only know what Mr. Kirby said with reference to whether or not he had any stock in Clark Votaw's San Domingo corporation; think somebody asked him if he didn't have some stock in Votaw's company down there, and my recollection is that he said

he did. At the present time Mr. H. M. Richter is the land commissioner of the Houston Oil Company and keeps the title papers of the company. When I was land commissioner, I think I had charge of them. I got them after Mr. Votaw went out; think I went in there probably two years after he did."

It was agreed by counsel that the two sections in controversy were inventoried by the receivers of the Houston Oil Company of Texas, by the United States Circuit Court at Houston, as part of the assets of the Houston Oil Company. This is limited to the question of good faith in cutting the timber.

The appellee, in rebuttal, offered in evidence a certified copy of the original application to purchase section 224, H. & T. Co., in Hardin county, Tex., dated August 20, 1900, which said application is as follows:

"Beaumont, Texas, Aug. 20, 1900.

"To Hon. Charles Rogan, Commissioner General Land Office:

"I hereby apply to purchase, under the provisions of 'An act to provide for the sale of all lands, heretofore or hereafter surveyed and set apart for the public free schools, and the several asylums, and the lease of such lands and of the public lands of the state, and the patenting of any of said lands for church, cemetery or schoolhouse sites, and to prevent the free use, occupancy, unlawful inclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor,' as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1885, and the amendments thereto by the act of May 19, 1897, the following lands situated in Hardin county, Tex., about _____ miles (give course) _____ from county site, agreeing to pay for same at price specified below.

Section.	Township.	Certificate.	Grantee.	Acres.	Price Per A.	Classification.
224		508	H. & T. C. Ry. Co.	640		Grazing

"For the purpose of securing the said land and complying with the law regulating the sale of the same, I hereby make and subscribe to the following oath, to wit:

"I, J. N. Votaw, do solemnly swear that I am buying this said land for my own use, and not for any other person or corporation, and that said land is not occupied by any one; that my post office address is Beaumont, in Jefferson county, state of Texas.

"[Signed] J. N. Votaw, Applicant.

"Subscribed and sworn to before me, this 20 day of Aug. A. D. 1900. F. N. Votaw, Notary Public in and for Jefferson County, Texas. [Seal.]

"Obligation.

"\$624.00. School Lands.

"For value received, I, the undersigned, do promise to pay to the state of Texas the sum of six hundred and twenty-four dollars, with interest thereon as hereinafter specified, the same being for the balance of the purchase money for the following described tract of land purchased by me this day of the state of Texas in accordance with the provisions of 'An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, and the several asylums, and the lease of said lands and of the public lands of the state, and the patenting of any part of said lands for church, cemetery or

schoolhouse sites, and to prevent the free use, occupancy, unlawful inclosure or unlawful appropriation of such lands, and to prescribe adequate penalties therefor,' as provided for in title LXXXVII, chapter twelve A, of the Revised Civil Statutes of 1895, and the amendments thereto by the act of May 19, 1897, to wit: All of section 224, block _____, township _____, in Hardin county, surveyed for the school fund by virtue of certificate No. 508, issued to the H. & T. Co. Ry. Co.

"The annual interest of 8 per cent. upon all unpaid principal, together with one-fortieth of the original principal, I am to pay or cause to be paid to the state treasurer at Austin, Travis county, Tex., on or before the first day of each November thereafter until the whole purchase money is paid. And it is expressly understood that I am to comply strictly with all the conditions, limitations, and requirements, and am subject to, and accept all the penalties contained and prescribed in the above-recited act.

"Witness my hand this 20th day of August, A. D. 1900. J. N. Votaw."

The appellee testified for himself as follows:

"I didn't hear what Judge Dies testified to, but I was told that he testified as to having purchased this land, and my son also, by deposition, testified to having purchased it, and I want to say this: Of course, two facts can't disagree, and, as a matter of fact, I went to Wallace when he was living just across the railroad from the hotel, early in the morning. I remember that he had been gathering up fertilizer that had been left by the cattle, and throwing it in his garden. My attention has been called to this land being a detached section and to the character of it by my son, C. M. Votaw. We were filing on quite considerable land along about that time, both individually and for him and myself jointly, and it was our understanding— He had a great many thousand dollars in his possession that belonged to me, and this land was bought for my benefit—this section 4, as well as section 224. But I am now speaking of the purchase of this section 4 from Mr. Wallace, and my son's purpose was to make the payments out of the funds that he had in his possession, quite a number of thousands of dollars.

"Q. Do you mean funds that he had of yours? A. Yes, sir. I say that he had a good many of thousands of dollars that belonged to me, and still has, for that matter. I made the purchase from Mr. Wallace while he was engaged as I have stated, and I think it was before he had breakfast that morning, and I bargained with him there for the land. Then I reported that to my son, who by virtue of a partnership that existed between he and I beginning on the 1st of January, 1899—he had all of the title papers, and he was to look after the details of everything, both personally and jointly, while I was confined in the office. I made the purchase in that way though I wasn't present when the deed was made. That was what he did, anyway, in the purchase of the land. As a rule, he attended to the details and I attended to the legal matters entirely, and this land was purchased as usual, but it was purchased absolutely for me. Kirby's name was never mentioned, and it was never the intention at the time of the purchase on the part of my son; don't believe he had Kirby in his mind at all. And I know that I had no suspicion in the world at that time that anybody would ever claim the land but me prior to me having made a sale of it. Those are the facts, and by a little investigation it could be found by the existence of other facts. They all harmonize, because they are the facts.

"This paper you hand me is the application I made to purchase section 224, and that is my affidavit thereon, and that affidavit is true. I

never have sworn what wasn't true, and I am not going to begin now. I purchased the land on that blank application. I was going to say we had written up in our office a lot of applications on the typewriter, but I am quite sure these were purchased by regular blanks furnished me by the land office. They required me to make that affidavit before they would award the land to me.

"C. M. Votaw had possession of all my title papers and my private land papers; that was when he was living at Houston.

"There was a card introduced in evidence yesterday in which it was shown that the patent to one or both of these sections was delivered to Mr. King. I remember very distinctly that I met him in Clark's [C. M. Votaw] office in Houston, and I then requested Mr. King to receive the patent from the land office, and my son was to send the money to take up the patents, and I suppose he did it, because that was customary between him and I, and I no more doubted him than I did the course of the planets. I mean C. M. Votaw. I had all the confidence in the world in him. I was in the land office some time myself last year. I personally signed the authority to King to receive the patents, and that authority is on file there in the land office.

"I never did consent to act as trustee for John H. Kirby for either of these tracts of land; they were bought for me absolutely. I supposed my son was looking after these tracts, as well as my other land, for me, in my interest. He had all of my title papers, and acted as my agent absolutely. He was authorized to do it, and I expected him to do it."

The court, after hearing the above evidence, filed his findings of fact and conclusions of law as follows:

"(1) On the 17th day of August, 1900, on a written form furnished to him by the commissioner of the general land office of Texas, the plaintiff, J. N. Votaw, made his application to purchase detached school section No. 224, certificate No. 508, issued to H. & T. C. Ry. Co., abstract No. 800, and located in Hardin county. That said application was made on the blank printed form furnished by said commissioner of the general land office, and it had a blank printed form of affidavit and a blank printed form of obligation to the state as a part of the application to purchase. These blanks were all filled out in writing and the affidavit required signed and sworn to by applicant, the plaintiff, before a notary public of Jefferson county, on the day of its date. The affidavit made by applicant (plaintiff) stated that he applied to purchase said section of school land for himself, and for no other person nor for any corporation.

"(2) This affidavit was a regulation previously made and existing at the time by the commissioner of the general land office for the sale of detached school sections under the Revised Statutes of 1895, as amended by the act of 1897, and plaintiff had been previous to this informed by said commissioner of the general land office that sales of detached school lands would not be made without the making of said affidavit by the applicants. That plaintiff, J. N. Votaw, executed the blank obligation attached as a part of the application by properly filling in the blanks for the sum of \$624, payable to the state in 40 equal annual payments, and bearing 3 per cent. interest per annum. Said application, affidavit, and obligation, together with the first payment at \$1 per acre, which was \$16, was all mailed on the same day by plaintiff to the commissioner of the general land office as provided by law, who in a few days duly accepted same and duly awarded said tract of land to the applicant, J. N. Votaw.

"(3) That, all deferred payments having been made by Jno. H. Kirby, the state of Texas,

acting by the commissioner of the general land office and the Governor of Texas, did on the 7th day of March, 1902, issue a patent to plaintiff, J. N. Votaw, for said section 224, certificate 508, H. & T. C. Ry. Co. survey.

"(4) That on the day of the 7th of March, 1900, J. B. Wallace, on the same kind of printed blank as used by J. N. Votaw, applied to the commissioner of the general land office to purchase under the same law and regulations detached school section No. 4, certificate 800, issued to H. T. & B. Ry. Co., abstract No. 751, at \$2 per acre, accompanying his application with the first payment \$32, first having properly filled out the blank affidavit and the blank obligation to the state of Texas for the sum of \$1,248, payable in 40 equal annual installments, and bearing 3 per cent. interest per annum. The form of application and affidavit being the same as that of J. N. Votaw for section 224, mentioned in paragraph 3 hereof. That said affidavit was duly sworn to by the said J. B. Wallace, and the commissioner of the general land office duly awarded said section to the said J. B. Wallace, the applicant, to purchase same.

"(4) That by deed of conveyance dated August 17, 1900, which was executed and duly acknowledged by the grantor, J. B. Wallace, the latter conveyed to said J. N. Votaw plaintiff herein, said section 4, certificate No. 800, abstract 751, H. T. & B. Ry. Co. survey.

"(5) That said deed of conveyance was forthwith recorded in Volume Y, page 387, of the Deed Records of Hardin County, and thereafter during the year 1900 the said deed was duly filed in the office of the commissioner of the general land office of Texas.

"(6) That on March 7, 1902, the state of Texas, acting by and through the commissioner of the general land office and the Governor of Texas, issued to J. N. Votaw, plaintiff, assignee of J. B. Wallace (all deferred payments having been made, by John H. Kirby), a patent bearing said date for said section 4, certificate 800, issued to H. T. & B. Ry. Co.

"(7) The defendants, except the Maryland Trust Company, have a consecutive chain of transfers from John H. Kirby to W. W. Willson (the former having conveyed both of said sections, No. 224 and No. 4, to W. W. Willson on May 10, 1901, who on August 10, 1901, re-conveyed to John H. Kirby) down to and in the Houston Oil Company of Texas, the date of Mr. Kirby's deed to the Houston Oil Company of Texas section 224 being dated March 25, 1902, and Kirby's deed to the same corporation for section 4 being dated September 29, 1901. These deeds were duly recorded in 1902 in the Deed Records of Hardin County, but neither of defendants connects itself by conveyance or title to either of the tracts of land sued for with the state of Texas nor from or out of plaintiff, J. N. Votaw.

"(8) The evidence shows that John H. Kirby's money was used in paying for both sections, and not plaintiff's money, which was a fraud on plaintiff, all of which was unknown to plaintiff and never ratified by him.

"(9) He also shows by his evidence that whenever he made an extra good trade Kirby paid him a part of the profits.

"(10) That at the time of the purchase from the state of section 224, and from J. B. Wallace of section 4, for several years thereafter C. M. Votaw was the partner of John H. Kirby in the purchase and sale of lands. That Kirby paid him a salary and also gave him a part of the profits when he made an extra good trade. That the purchaser of both sections of land sued for got an extra good trade at the time of their purchase in 1900.

"(11) That from the year 1899 and for years thereafter C. M. Votaw had custody of all the deeds and other instruments affecting title to

lands of his father, J. N. Votaw, plaintiff, who relied on him to look after his land matters.

"(12) That at the time of the purchase of section 224 from the state, and section 4 from J. B. Wallace by J. N. Votaw, but claimed by C. M. Votaw to be for John H. Kirby, C. M. Votaw was the agent for J. N. Votaw in the purchase of lands, and he relied on him to protect his interests.

"(13) That several days previous to purchase of section 4 J. N. Votaw had a conversation with J. B. Wallace in which the latter agreed to sell to him section 4, and a day or so later C. M. Votaw, who had several thousand dollars of plaintiff's money on hand for use in the purchase for plaintiff of lands, was instructed by plaintiff to buy for him section 4 from Wallace. That Wallace did convey this section to plaintiff. That, if C. M. Votaw did not use plaintiff's money to buy both sections, including the deferred payments on each, he has never returned any of it to plaintiff.

"(14) That J. B. Wallace died in 1901. That both of the sections of land herein sued for with the timber thereon were worth in 1913 from \$16 to \$25 per acre, and were worth the same when this suit was filed less the value of the timber cut from the sections.

"(15) That neither John H. Kirby nor any one else ever obligated himself or themselves in writing or otherwise to pay the state of Texas the sums of money for which J. N. Votaw and J. B. Wallace obligated themselves to pay the state of Texas for the two sections of land sued for, but it was understood as a part of the consideration for section 4 that J. N. Votaw, to whom he made a deed, was to pay the sum owing by Wallace to the state.

"(16) The two sections of land are and always have been wild, uncultivated, and unused lands, except for about six weeks when defendants were occupying it cutting timber. The Kirby Tie & Timber Company occupied 224 a part of the time in 1902 in cutting several thousand ties.

"(17) That at the time of nor previous to the cutting of the timber from section 224 and the ties from section 4 did either of the defendants examine the deed records of Hardin county nor the records of the general land office to ascertain that the title to both or seek his consent to do the cutting. They relied only on the statement of Kirby to the effect that J. N. Votaw was holding the land in trust for him. Kirby's depositions were taken in the case, but he did not testify that J. N. Votaw held the land in trust for him. He was silent on the point.

"(18) I find that plaintiff, J. N. Votaw, never agreed or consented to hold either of said tracts of land in trust for John H. Kirby or any other or any corporation.

"(19) I find that John H. Kirby nor any person for him ever made either in writing or orally any contract or agreement to pay the state of Texas or J. B. Wallace any obligation or debt of the latter or of J. N. Votaw.

"(20) I find all the purported evidence attempting to show that J. N. Votaw purchased or held the two sections of land sued for or either of them in trust is not clear, nor satisfactory, but is insufficient, and that the purported trust is too remote, as it could have, if valid, existed for 40 years.

"(21) I find that the plaintiff has and owns the legal and equitable title to both the sections of land sued for; that the Kirby Lumber Company and the Houston Oil Company of Texas, beginning in September, 1913, and ending December 31, 1913, wrongfully and illegally cut and removed from said section 224 merchantable pine trees or timber, aggregating 2,950,000 feet, log measure of the market value of \$2.50 per 1,000 feet, and from section 4 238 hardwood ties of the admitted value of 10 cents per tie at the time of the removal, and that plaintiff has been damaged by the said acts of the defendants, in-

cluding 6 per cent. interest thereon from January 1, 1914, \$8,080.70.

"(22) That the trees after they were made into logs from section 224, and delivered at the mill of the Kirby Lumber Company at Fuqua, were of the market and cost value of \$8.00 per 1,000 feet, and that said logs were made into merchantable lumber, containing the same number of feet at the same place and time, which was worth \$10 per 1,000 feet.

Conclusions of Law.

"(1) The defendants showed no title to either of the tracts of land sued for; the evidence being insufficient to establish that plaintiff held either of said tracts of land in trust for John H. Kirby or any other person or any corporation.

"(2) The plaintiff having shown both a legal and equitable title in himself, and while so owning it, the defendants wrongfully cut and removed timber therefrom from September, 1913, to the 31st day of December, 1913, of the value as stated in the foregoing statement of facts, which, with 6 per cent. interest from January 1, 1915, to the present time, makes \$8,083.70, plaintiff is entitled to a judgment for the title and possession of both tracts of land sued for against all these defendants and all costs incurred, and for judgment against the Houston Oil Company of Texas and the Kirby Lumber Company for the sum of \$8,083.70, and that plaintiff have his writ of possession for said land, and execution for the sums mentioned against defendants liable therefor. Judgment has been entered accordingly."

Appellants by the first assignment of error challenge the judgment of the lower court, and say that the same is contrary to law and the undisputed facts in the case, for that, regardless of any other fact, it was established beyond cavil that the funds of John H. Kirby, the immediate vendor of the defendant Houston Oil Company of Texas, were appropriated and used to pay, and did pay, the total and entire consideration which was paid for each and every conveyance and title to the plaintiff, J. N. Votaw, of H. & T. C. section 224, in Hardin county, Tex., and that the said J. N. Votaw never at any time paid any consideration whatever for said land, from which naked fact alone resulting there arose and existed in favor of said John H. Kirby to said land an equitable title to said land, and thereby became vested in John H. Kirby and passed to and was and is vested in defendant Houston Oil Company of Texas, for which reason the judgment should have been that plaintiff take nothing as to said defendant Houston Oil Company of Texas as to said land, and that he take nothing against defendants for damages for timber cut therefrom.

Revised Statutes 1895, arts. 4218J, 4218K, provide:

"Art. 4218j. All sales shall be made by the commissioner of the general land office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the commissioner of the general land office within two years next after the ex-

piration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein. Any person desiring to purchase land in accordance with the provisions of this chapter shall forward his application to the commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. Any owner of land heretofore purchased, and which land has been or may be forfeited for nonpayment of interest, shall have ninety days prior right after this chapter goes into effect, or after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years: Provided, that when any forfeiture has been made the commissioner of the general land office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. Any original purchaser or his vendee of any of the lands the sale of which is provided for in this chapter, who has improved such land as a home, and who has been forced to temporarily abandon the same on account of drouth, and who shall in good faith reoccupy the same, either by themselves or vendees, within six months after this chapter goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for nonoccupancy: Provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have reoccupied the land as a home in good faith, and that they had abandoned the same since their purchase on account of the drouth and not otherwise; and such absence shall not be deducted from the three years occupancy required by law in making final proof of occupancy: And provided further, that any purchasers or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases shall have six months after this chapter shall take effect to make such proof of occupancy as required by the provisions of this chapter. The purchaser shall transmit to the treasurer of the state one-fortieth of the aggregate purchase money for the particular tract of land, and send to the commissioner his obligation to the state, duly executed, binding the purchaser to pay to the state on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the treas-

urer, and the affidavit and obligation aforesaid by the commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the general land office. Provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase.

"Art. 4218k. Purchasers shall have the option of paying the purchase money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land for three consecutive years, they shall receive patents for the same upon payment of the patent fee prescribed by law. Purchasers may sell their lands, or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this chapter, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the commissioner of the general land office, together with the authenticated conveyance or transfer from the original purchaser and the intermediate vendee, or conveyance or transfer, if any there be, recorded in the county where the land lies on which said county may be attached for judicial purposes, together with his affidavit, in which three years residence has not already been upon said land and proof made of that fact, stating that he desires to purchase the land as a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser directly from the state, and be subject to all the obligations and penalties prescribed by this chapter, and the original purchaser shall be absolved whole or in part, as the case may be, from his liability thereon: Provided, that when a town shall be located and established upon any lands sold under this or any former chapter, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the state upon such land and obtain patent therefor at any time, but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the general land office a certified plat of a town, made by a surveyor, which shall be accompanied by the affidavit of the owner of the land, corroborated by the affidavit of five interested and credible citizens of the county to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected thereon, and is now being occupied by bona fide citizens, two business and residence houses, or either, both."

This statute was unchanged by the act of 1897, excepting that the latter act authorizes the commissioner to sell detached lands at not less than \$1 per acre, without the condition of settlement.

[1] J. N. Votaw made the application provided under the statute, and also the oath provided therein, and the court found that he forwarded with the application to purchase section 224 the initial payment of the same.

J. N. Votaw executed an obligation for deferred payments in compliance with the law. J. B. Wallace, as to section 4, did likewise. Wallace then, by deed duly executed, conveyed to Votaw, which deed in com-

ance with the law, was first recorded in Hardin county, and then duly refiled in the general land office. Votaw received a patent as assignee of J. B. Wallace. There is no evidence in the record to show that John H. Kirby paid the initial payment for section 4, and neither did he obligate himself in writing, or otherwise, to pay the state of Texas the sums of money which J. N. Votaw and J. B. Wallace had obligated themselves to pay the state for said two sections, or agree in writing or orally to assume the said obligations to the state.

There are two theories with reference to the purchase of this land. Upon one theory it was purchased under an agreement made by C. M. Votaw as the agent or partner of John H. Kirby, with his father, J. N. Votaw, to the effect that his said father was to purchase, and did contract to purchase, this land from the state of Texas in his own name; that the funds of John H. Kirby were to be used in the purchase, and were, in fact, so used, but that the said purchase was to be made in reality for John H. Kirby; that, while the patents were issued to J. N. Votaw, the title was really to be held in trust for John H. Kirby. The other theory arises under the testimony of appellee himself, who testified that the purchase of the land and obligations entered into by him for said purchase to the state, and with reference to the J. B. Wallace land, were made by him in his own behalf, made in good faith, believed that his own money was paying for the land, and did not know or hear anything to the contrary until about the time this suit was filed, and that C. M. Votaw, his son, was his agent in the purchase of these two tracts of land, and that his said son had in his hands funds belonging to the said J. N. Votaw, money to the amount of many thousands of dollars, and that he believed the same was used in the purchase of the lands, and had no reason to think otherwise until, as above stated, about the time this suit was filed, and that a fraud was perpetrated by the said C. M. Votaw on his father and principal. We will examine whether under either of these two theories a trust would arise in favor of John H. Kirby.

First, with reference to the theory that C. M. Votaw obtained these lands by connivance with his father, and with his help, and using the said J. N. Votaw to make a false affidavit, and to do the other acts and things necessary to consummate the purchase from the state of Texas; also that the said C. M. Votaw used his said father to purchase from Wallace, and as such substitute purchaser obtained a patent from the state of Texas to himself for the use and benefit of John H. Kirby.

We have examined the multitude of authorities presented to us by appellants covering every conceivable branch of the case, and they have, indeed, exhausted the subject

of resulting trusts, and we have also examined with care the authorities presented by the appellee.

In the case of Eastham v. Roundtree, 56 Tex. 110, Judge Stayton uses the following language:

"If this suit was between J. M. Roundtree and the administrator of Carothers' estate, and it appeared that the purchase was made with the money of J. M. Roundtree, and that the deed was taken in the name of Carothers with intent thereby to secrete the property, and thereby to hinder, delay, and defraud the creditors of J. M. Roundtree, there is no question that the deed would have to stand, not only because the statute makes such illegal acts binding between the parties, but for the further reason that the courts would not interfere to relieve a party from his own fraud. The main question in this case is: Do the same rules apply as between Irene Roundtree, the intended beneficiary, and the representative of the estate of Carothers, that would be applicable in a controversy about the property between such representative and J. M. Roundtree, notwithstanding that Irene Roundtree is, so far as the pleadings and proof show, entirely free from participation in any fraud whatever? We are of the opinion that the same rules must apply. The deed to the property was made to Carothers, and the title must be held to have passed, as appears upon the face of the deed, unless the intervenor can show a resulting trust in her favor arising upon the fact that her father paid one-half of the purchase money therefor for her benefit, under circumstances which make the transaction lawful. [Italics ours.] If one-half of the purchase money was paid by the father under such circumstances as made such investment for the benefit of intervenor fraudulent as to his creditors, then it is certainly true that all the claim she has is based upon a transaction illegal, because made to hinder, delay, and defraud creditors, and from which no resulting trust can spring in her favor, although she may not have participated in the fraud and may not have had any knowledge thereof; for in such case she appears as the intended donee of her father, through a transaction forbidden by law. To permit a man's children to recover property which he had fraudulently placed in the name of another for the purpose of placing it beyond the reach of his creditors, upon the ground that it was intended for their benefit, would be to contravene a well-settled public policy, and to offer a premium to dishonesty. *It is a universal rule that no one can claim a right through the fraud of himself or another. Ex turpi causa non oritur actio. No resulting trust can spring from an act contrary to public policy or a statute.* [Italics ours.]"

Continuing, the court says:

"In the case of Murphy v. Hubert, 16 Pa. (4 Harris) 56, which was much like the present in its facts, it was decided that no resulting trust could be raised through an act forbidden by law; that to raise such a trust the transaction upon which it was based must be honest. The rule and reasons for the same are well stated in the case above referred to. The rule is thus stated by an elementary writer: 'As a general rule, a contract or agreement cannot be made the subject of an action if it be impeachable on the ground of dishonesty, or as being opposed to public policy. If it be either contra bonos mores, or forbidden by the law. In answer to an action founded on such an agreement the maxim may be urged, *Ex maleficio non oritur actio.*' A contract cannot arise out of an act radically vicious and illegal; those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law; and it is quite clear that a court of justice can give no susto-

nance to the enforcement of contracts which the law of the land has interdicted.' * * * Such being the principles applied to contracts, the rule loses nothing of its force when applied to a case in which a party seeks to base a right upon a presumption founded upon an act forbidden alike by good morals and the law of the land. The proposition contended for by the appellee, and sanctioned by the court below in the charges given and refused, is, in effect, that if J. M. Roundtree, with his own funds, paid one-half of the purchase money and had the deed made to Carothers with intent to defraud his creditors, that the courts of the country will permit proof of these facts to be made, and then presume and enforce a right growing out of the same in favor of the daughter. Such a proposition cannot be maintained."

A great elementary writer has the following to say:

"If a voluntary conveyance is made for some illegal or fraudulent purpose, whether it is common-law or a modern conveyance, no trust will result to the grantor, for the reason that the rules of law cannot be used, controlled or avoided by parties with the fraudulent intent to do that, indirectly, which they cannot do directly." 1 Perry on Trusts (6th Ed.) § 165, p. 257.

In the case of Miller et al. v. Davis, 50 Mo. 573, the court says:

"The facts stated in this petition are, substantially, that the defendant's father, under the laws of Congress, had entered all the 40-acre tracts of land, he was entitled to enter, and, not being able to enter the 40 acres in dispute in his own name, made the entry in the name of his infant son, the defendant. The petition then alleges that the father sold and conveyed this 40 acres to the plaintiff, and" asked that the title be "divested out of the infant and invested in the plaintiffs."

Continuing, the court says:

"It is a well-settled principle of equity jurisprudence that in general, when one person pays the purchase money for land, and the title is conveyed to another, a trust results in favor of the party who paid for the land. But, where such purchase is made in fraud of an existing statute and in evasion of its express provisions [italics ours], no trust can result in favor of the party, who is guilty of the fraud. There is no pretense here that the plaintiffs are innocent purchasers. They make no such allegation in the petition. They occupy the precise relation to the defendant that was held by their assignor, and boldly assert that he, in order to obtain this tract of land from the United States, used the name of his infant son, because he could not make the entry in his own name, having already entered as many 40-acre tracts as he was entitled to by the laws of the United States. His act in making this entry was against public policy. Under the facts as stated in the petition, no trust resulted to the father; and as between him and his assignees and the son a court of equity cannot disturb the title."

In the case of Rogers v. Blackshear, 128 S. W. 938, it is said:

"The legal title was in A. C. Rogers by virtue of the patent. Appellee seeks to ingraft upon the legal title an equitable title in himself, arising out of agreements between himself and Mrs. Christian, and between himself and A. C. Rogers, whereby they were, for him, to settle upon and occupy the land for the three years required by law, and thus enable him to acquire a title as an actual settler. This he could not do, and no title would have ever issued to appellee upon the true facts as found and as shown by the undisputed evidence. It was only by perpetration of a fraud upon the state, by false swearing [italics ours], that appellee could have ever

expected to procure a title to the land. The offer by the state was of a donation of 160 acres of land to every married man or head of a family who should settle upon it and actually occupy it for a home for the time required by law. It did not admit vicarious occupancy by any person other than the occupant or his assignee of the right acquired"—citing Cravens v. Brooke, 17 Tex. 273; Turner v. Ferguson, 58 Tex. 10; De Montel v. Speed, 53 Tex. 343; Burleson v. Durham, 46 Tex. 156; Calvert v. Ramsey, 59 Tex. 492.

In the case of Brown v. Brown, reported in 132 S. W. 887, it is said:

"Appellant, in assigning error to the court's peremptory charge, presents two contentions: First, that by virtue of the premises he had an equitable title to an undivided one-half interest in the land sued for; or, if not, that he was entitled to the specific performance of the contract sued upon. We think both contentions must be overruled. While ordinarily a bond for title, as appellant urges the contract to be, is such equitable title, as in this state will authorize a recovery for lands, the only way by which title to school lands can be secured is by an original or substitute purchase from the state, accompanied with actual settlement and continued occupancy. It is not contended that appellant at any time ever settled upon or occupied the lands in controversy as his home. His occupancy, if any, was merely incidental to his business as a member of a ranching firm with his brother, and to give the contract the legal effect insisted upon is, we think, to violate the spirit, if not the letter, of our school land law. Joe Brown, under the statute, was authorized to accept the transfer and make settlement and occupancy of the lands in controversy, but his only standing or right was that of a substitute purchaser. As such, he was required under the law to make, not only the familiar affidavit of settlement and occupancy, but also to swear that he was buying the land for his home, and that he was not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no persons or corporations were interested in the purchase save himself. [Italics ours.] Revised Statutes 1895, art. 4292. The contract therefore, assuming it to have been delivered and to have been made for the purpose insisted upon by appellant, contemplated, not only the acquisition of title by Charley Brown without the required settlement and occupancy, but also perjury on the part of his brother, Joe Brown, and falls within that class of contracts that the courts uniformly refuse to enforce. [Italics ours.] See Anderson v. Carkins, 135 U. S. 483 [10 Sup. Ct. 905, 34 L. Ed. 272]. * * *

"Appellant insists that no one but the state can raise the question of fraud, and that this court has upheld bonds for title, citing, among others, the leading cases of Logan v. Curry [95 Tex. 664] 69 S. W. 129; Underwood v. King [102 Tex. 561] 119 S. W. 298; Witcher v. Wiles [33 Tex. Civ. App. 69] 75 S. W. 889. We think the present case, however, distinguishable from those mentioned, in that the bond for title upheld in Witcher v. Wiles was executed after, and not, as here, at the time or before, the title had vested in the party sought to be charged. Its performance required nothing inconsistent with the affidavits necessary to be made under the school land law, and the decision in Logan v. Curry, we think, is without application. In the case last referred to an independent party sought to destroy the title of Logan because of alleged collusion between Logan and his vendor; but here a party is seeking the aid of the courts to enforce a collusive contract, which presents an altogether different question."

In the case of Perry v. Martin, 180 S. W. 1148, the court says:

"This testimony would show that whatever title was acquired by Martin to the land in controversy was acquired under an agreement to hold the same in trust for Perry, but the objection interposed was to the effect that the agreement throughout was illegal, and therefore the court should not give effect to it. It is clear that the agreement between Harper and Perry, assuming it to have been made as alleged, contemplated the acquisition by Perry of the title to school land without the required settlement and occupancy, and that, in violation of law, Harper should purchase land for the benefit of Perry and make affidavit that he was not purchasing the same for any other person. [Italics ours.] * * * The contracts alleged to have been made by the substitute purchasers succeeding said Harper are based upon the original illegal contract, and provide for carrying the same out in further disregard of the laws of the state. The courts will leave such parties to such collusive contracts in the position it finds them, and it must therefore be held that no error was committed in refusing to permit evidence of such contracts to be adduced."

We believe that the doctrine announced in the above cases is sound doctrine, and should be followed. We believe that equity follows the law, and that in a case like the present, if C. M. Votaw testified the truth with reference to these matters, no trust would arise and follow, even though the money of John H. Kirby was entirely used in the purchase of the land, under the circumstances as related by him.

[2] On the other hand, if J. N. Votaw speaks the truth, and the court found he did, the purchase was made by him, the affidavit was made in good faith by him, the money was in the hands of his son and his agent to pay for same, he says he knew nothing of John H. Kirby in the transaction, and had no reason to believe that the said Kirby had any interest in the transaction, but that both of these purchases were made by him for himself, and the court found that the first payment on section 224 accompanied the affidavit, and was made by the said J. N. Votaw. The said J. N. Votaw further testified that he himself bought section No. 4 H. T. & B. from Wallace; that he bought it for himself; that the remaining payments to the state of Texas were, as he believed, made with his money; at least that his said son, C. M. Votaw, had the funds necessary to make said payment in his hands and was acting as his agent in the matter, and looking after the same.

If, therefore, it can be said with any reasonable degree of certainty whose particular money was used in the purchase of Wallace land, whether J. N. Votaw's or John H. Kirby's, we do not believe that a trust would result from the facts as above given with reference to said section No. 4. There are reasons in the record more or less plausible from which it may be inferred that the testimony of C. M. Votaw on account of the friendly relations which seem to exist and which have existed between him and John H. Kirby, and the unfriendly relations which seem to exist between him and his father,

he being the only person perhaps that definitely knows whose money was used to make said purchases, which indicate that possibly he might be tempted to favor the one and be against the other in his statements with reference to said matter. At least the testimony which has been set out for that purpose shows uncertainty with reference to the matter of whose funds were used in both of said purchases, but, in view of the fact that the court found that J. N. Votaw was not a party to any connivance or illegal transaction or agreement by which he was to acquire said lands for John H. Kirby, and further found that the said J. N. Votaw forwarded the initial payment for section 224, H. & T. C., and that in the purchase of the Wallace land C. M. Votaw was the agent of J. N. Votaw, and that he relied on him to protect his interests, and that J. N. Votaw in fact and in truth bought the land himself from the said Wallace, and that his said son was instructed by him, said J. N. Votaw, to finish said purchase of said section 4, and in view of the further fact that Wallace did convey this section to plaintiff, all of which is amply sustained by the evidence, it would be reasonable to infer, inasmuch as C. M. Votaw did not return any of appellee's money, which he had on hand, that he used a part of same in the purchase of said land.

At any rate, as said before, the testimony is not clear, as it should be, in order to create a resulting trust, and is far from satisfactory to this court, as it seems to have been unsatisfactory to the court below. We are persuaded to believe that the court below was justified in his findings of fact, except with reference to John H. Kirby's money being used for the purchase of these two sections of land. To our minds, as above indicated, this is an exceedingly doubtful proposition.

Therefore we conclude that the action of the court below is correct in finding that the appellants showed no title to either of the trusts of land sued for, and that the evidence was insufficient to establish that appellee held either of said tracts in trust for John H. Kirby, or for any other person or corporation, and is correct in the further finding that the plaintiff showed both the legal and equitable title in himself, and, while so owning, the appellants wrongfully cut and removed the timber therefrom to the value of \$8,083.70. We agree with appellants that under the facts in this case the judgment of the court below with reference to the value of the timber was correct, and the cross-assignments of appellee are overruled.

What has been said with reference to the first assignment covers, in our opinion, the entire case. Therefore the said first assignment of error and all the remaining assignments of appellants are overruled. It is the opinion of this court that there was no error in the judgment of the lower court, and that the same should be in all things affirmed.

It is so ordered.

TEXAS & P. RY. CO. v. BAKER. (No. 1535.)*

(Court of Civil Appeals of Texas. Texarkana.
Dec. 30, 1915. On Motion for Re-
hearing, Jan. 27, 1916.)

1. CARRIERS ⇨283(2)—CARRIAGE OF PASSENGERS—VIOLATION OF SEPARATE COACH LAW—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 6753, providing that conductors shall have authority to refuse any passenger admittance to any coach or compartment in which he is not entitled to ride under the provisions of the separate coach law (Vernon's Sayles' Ann. Civ. St. 1914, arts. 6746-6753), that it shall be his duty to remove from a car any passenger not entitled to ride therein, and that, upon his refusal to do so knowingly, he shall be punished, a railroad is not relieved of liability for the consequences to a passenger of its conductor's failure to separate white and negro passengers; the duty being imposed upon the conductor as such.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1121, 1122; Dec. Dig. ⇨283(2).]

2. CARRIERS ⇨283(2)—CARRIAGE OF PASSENGERS—VIOLATION OF SEPARATE COACH LAW—LIABILITY OF ROAD—STATUTE.

Where the servants of a railroad knew, or by the exercise of due care might have known, that a white man was in a negro coach, in violation of the separate coach law, and was negligent in not removing such white person from the coach, the road was liable for injuries inflicted by him upon a negro passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1121, 1122; Dec. Dig. ⇨283(2).]

3. APPEAL AND ERROR ⇨548(5)—PRESERVATION OF EXCEPTIONS—RULING ON EVIDENCE.

To take advantage on appeal of the wrongful admission of evidence over objection, a bill of exceptions, duly approved by the trial court, must have been preserved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2436; Dec. Dig. ⇨548(5).]

On Motion for Rehearing.**4. CARRIERS ⇨284(1)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGER—LIABILITY OF ROAD.**

A railroad whose white passenger assaulted plaintiff's negro wife was not liable therefor, aside from the separate coach law, unless the road should have reasonably foreseen, in time to have prevented the assault, that the white person would commit it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127; Dec. Dig. ⇨284(1).]

5. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTION.

In an action against a railroad for injuries to a negro, passenger in a coach for blacks, when a white passenger therein assaulted her, where it conclusively appeared that one of the road's employes knew that white men were in the coaches for blacks, error in an instruction that under the separate coach law, the road owed the duty to exercise a high degree of care to discover that white passengers were in the negro coach was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⇨1064(1).]

6. CARRIERS ⇨321(4)—CARRIAGE OF PASSENGERS—VIOLATION OF SEPARATE COACH LAW—INSTRUCTION.

In an action against a railroad under the separate coach law for injuries suffered by plaintiff's wife, a negro, riding in a coach for blacks, when assaulted by a white person therein, instructions authorizing a finding against the road

if "its agents and servants" knew that a white passenger was in the negro coach, were not erroneous because of testimony that an employee of the road in no way connected with the operation of the train was on it at the time of the assault, where such employee's testimony was that he had been an employee, but was not working the day of the assault, and at the time of trial, three years later, was still an employee.

[Ed. Note.—For other cases see Carriers, Dec. Dig. ⇨321(4).]

Hodges, J., dissenting.

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Suit by Archie Baker against the Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 158 S. W. 263.

Appellee's wife, a negro, while a passenger on a coach assigned to negroes in one of appellant's trains, was assaulted with a whiskey bottle and severely injured by a white passenger named Melton then in said coach in violation of the "separate coach law" Articles 6746 to 6753, Vernon's Statutes.

On a former appeal of the case a judgment in favor of appellant was reversed because of error of the trial court in excluding certain testimony offered by appellee. On that appeal the court below, in effect, as stated in its opinion reversing the judgment, instructed the jury to find for appellee—

"if they believed his wife was assaulted and injured as alleged in his petition and further believed that such assault might reasonably have been anticipated and guarded against by appellee's (appellant's) employees in charge of the train by the exercise of a high degree of care on their part, unless they believe that appellee's (appellee's) wife used insulting words to Melton which were calculated to and did provoke his assault her, and that in using such words she was guilty of negligence, in which event they should find for appellee (appellant)."

With reference to such instruction the court, in remanding the case, said:

"In view of the allegations in the petition referred to, the testimony, and the statute under which we have quoted, we think the court instead of instructing the jury as he did, should have told them, in effect, to find for appellee (appellee) if they believed appellee (appellee) knew, or in the exercise of the high degree of care it owed to his wife should have known, that Melton and his companions were in the coach assigned to negroes, unless they also believed that appellee's (appellee's) wife by her own wrongful conduct towards Melton provoked him to assault her, and that but for such conduct on her part he would have not assaulted her."

On the trial resulting in the judgment in appellee's favor for the sum of \$500 as damages he was entitled to recover of appellant, from which this appeal is prosecuted. The pleadings and testimony were not materially different from what they were on the other trial, and, having been sufficiently covered in the opinion disposing of the former appeal, which will be found in 158 S. W. 263, will not be restated here.

On the last trial the court instructed the jury as follows:

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

"If you believe from the evidence that plaintiff's wife, while she was a passenger on one of defendant's passenger trains at the time and place alleged in plaintiff's petition, was assaulted by a fellow passenger and injured as substantially set out in plaintiff's petition, and if you further believe that such assault was committed by a white passenger which defendant, its agents and servants, knew, or in the exercise of that high degree of care required by law might have known, was in the coach assigned to negroes, then, if you so find, you will find a verdict for the plaintiff and assess his damages in accordance with instructions hereinafter given you, unless you find for the defendant upon subsequent instructions contained in this charge.

"(4) On the other hand, if you find from the evidence that the defendant, its agents and employes, did not know of the presence of such white passengers in the coach assigned to negroes, and that by the exercise of the high degree of care required by law they could not know it, then you will return a verdict for the defendant."

The testimony was sufficient to support findings involved in the verdict and judgment, and therefore we find: (1) That appellee's wife was a negress; (2) that without fault on her part, while she was a passenger in a coach assigned to negroes in one of appellant's trains, she was wrongfully assaulted and severely injured by one Melton, a white man, who was then unlawfully in said coach; (3) that appellant's agents and employes in charge of the train knew, or, if they did not, had they exercised due care would have known, that said Melton was in said coach; (4) that, knowing, or being chargeable with knowledge, that said Melton was in said coach, appellant's said agents and employes were guilty of negligence in failing to remove him therefrom; and (5) that appellee, as the result of such injury to his wife, suffered damages in the sum found by the jury.

Geo. Thompson, of Dallas, and Head, Dillard, Smith, Maxey & Head, of Sherman, for appellant. Chambers & Black, of Clarksville, for appellee.

WILLSON, C. J. (after stating the facts as above). It is insisted that the third and fourth paragraphs (set out in the statement above) of the trial court's charge to the jury were erroneous—

"in that in said charge liability is imposed upon the defendant if it knew, or in the exercise of a high degree of care could have known, of the presence of white passengers in the colored coach, in that said charge makes a violation of the separate coach law as applied to a case of this kind negligence per se, and makes a violation of the separate coach law the proximate cause of plaintiff's wife's injuries without reference to whether or not defendant could have anticipated and prevented the assault."

It was not contended by appellee that appellant had failed to comply with the provision in the "separate coach law" which required it to provide separate coaches and compartments for the accommodation of white and negro passengers. The contention was that appellant, having complied with the requirement of the law in that respect, failed

to comply with the provision thereof in article 6753, Vernon's Statutes, which required it to remove therefrom white passengers it unlawfully permitted to enter the coach it had provided for negro passengers. Said article 6753 is as follows:

"Conductors of passenger trains, street cars, or interurban lines, provided with separate coaches, shall have authority to refuse any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this law; and the conductor in charge of the train or street car, or interurban car, shall have authority, and it shall be his duty, to remove from a coach or street car, or interurban car, any passenger not entitled to ride therein under the provisions of this chapter, and upon his refusal to do so knowingly shall be punished as provided in the Penal Code of this state."

[1] The fact that the duty of enforcing a compliance with the requirement of the law was imposed upon its conductor did not relieve appellant of liability for the consequences to a passenger of a failure to separate white and negro passengers. The duty was imposed upon the conductor as such and not otherwise. *Railway Co. v. Ritchel*, 148 Ky. 701, 147 S. W. 418, 41 L. R. A. (N. S.) 958, Ann. Cas. 1913E, 517. In the case cited the Supreme Court of Kentucky, with reference to a statute not materially different from our own, said:

"The whole purpose of the separate coach law is to require a carrier not only to provide separate coaches for colored and white passengers, but to see that the law is made effective by assigning the passengers to the coaches to which they belong. While it is true that the statute imposes a penalty on the conductor for a failure of duty in this respect, this in no wise relieves the carrier of its responsibility under the law. In making the conductor liable to a fine for failure of duty, the purpose of the lawmakers was to render the act more effective. The duty of assigning passengers to the proper coaches is not imposed upon the conductor individually, but is imposed upon him as the conductor of the train. In other words, it is only because of the position that he occupies that the statute imposes upon him a penalty for a failure of duty. In executing the statute, or in failing to execute it, he acts as the agent or the representative of the railroad company, and the doctrine of respondeat superior necessarily applies."

[2] If, as unquestionably was true under the circumstances shown by the testimony, it was a violation of law for Melton and his companions to be in the negro coach, and if, as seems to us to be true, appellant owed to appellee's wife the duty to see to it that the law was not so violated, then it follows, we think, that appellant was guilty of negligence in not removing Melton from the coach, if its agents and servants in charge of the train knew, or by the exercise of the care it owed to appellee's wife as a passenger they might have known, he was in the coach. Therefore we are of opinion the trial court did not err when he instructed the jury to that effect. It is clear Melton would not have been in the negro coach had appellant, in compliance with the requirement of the law, refused to admit him thereto, or, having unlawfully admitted, had removed him there-

from; and it is clear if Melton had not been in the coach appellee's wife would not have suffered the injury inflicted upon her. When it is remembered that the main object the Legislature had in view in enacting the separate coach law was to prevent "the frequent disturbances [upon railroad trains] arising between the two races, resulting often in serious injuries being inflicted by the one or the other" (Quinn v. Railway Co., 98 Ky. 231, 32 S. W. 742), we think it should be held that the trial court had a right to tell the jury, as he did in effect in the instructions complained of, that appellant should have anticipated the consequences which resulted to appellee's wife from its failure to comply with the law.

"Where the conductor or those managing the train," said the court in the case cited above, "knows that one is in the wrong car, it is his duty to expel him, and, by consenting to his remaining, the company becomes responsible for his conduct so long as he does remain."

We do not think the conclusions we have reached are in conflict with those reached in the cases cited by appellant. The point decided in *Railway Co. v. Brown*, 158 S. W. 259, was that it was not a violation of the separate coach law for a city marshal in the discharge of his official duties to go into a negro coach within the city limits. The point decided in *Norwood v. Railway Co.*, 12 Tex. Civ. App. 560, 34 S. W. 180, was that a negro passenger who failed to show that he was thereby damaged was not entitled to recover against a railroad company because of its failure to provide for his color a coach "equal in all points of comforts and convenience" to the one provided for the white passengers. In *Segal v. Railway Co.*, 35 Tex. Civ. App. 517, 80 S. W. 233, the plaintiff, a white woman, while a passenger in a coach provided for white persons, was assaulted by a negro. The negro was not a passenger, and the court properly, we think, held that the separate coach law was inapplicable to the case. In *Prokop v. Railway Co.*, 34 Tex. Civ. App. 520, 79 S. W. 101, the plaintiff, a white woman and a passenger, while in the waiting room of the defendant's depot, was assaulted by a negro. The point decided was that the failure of the railway company to have the waiting room lighted was not the proximate cause of the injury to the plaintiff. In *Railway Co. v. Smith*, 133 S. W. 695, where the plaintiff, a woman, while in the waiting room of the defendant's depot was injured by boys engaged in a scuffle, it was held, on the authority of the *Prokop* and *Segal* Cases, that the absence of the defendant's station agent from the depot at the time the accident occurred was not the proximate cause of the injury to the plaintiff.

[3] What has been said disposes of all the assignments in appellant's brief, except the fourth, in which complaint is made of the action of the trial court in overruling an objection thereto and in admitting as evidence

certain testimony of the witness John Jackson. As the bill of exceptions taken to the ruling made does not appear to have been approved by the court, his action cannot be reviewed here. *Railway Co. v. Crump*, 110 S. W. 1013.

The judgment is affirmed.

Associate Justice HODGES thinks the charge complained of was erroneous and dissents from the conclusion reached. He is of the opinion the judgment should be reversed.

On Motion for Rehearing.

WILLSON, C. J. [4, 5] If, as appellant insists is true, its liability should have been determined without reference to the "separate coach statute," the view this court has heretofore taken of the law applicable to the case was erroneous, and the instructions to the jury in accordance with that view were wrong. For the rule applicable, if that statute should have been ignored, would have relieved it of liability, unless it appeared that appellant reasonably should have foreseen in time to have prevented it that Melton would assault appellee's wife; and the jury should have been so advised. 4 *Elliott on Railroads*, § 1639. We are still of opinion, after further consideration, that the statute was a part of the law of the case; and a majority of the court are still of opinion that, because it was applicable, the instructions to the jury were not erroneous. 8 *Thompson on Negligence*, § 3098. As we construe the statute, it imposed on appellant duties it did not before its enactment owe to its passengers, to wit, to provide separate coaches for the races and to see to it that white and negro passengers were separated into the coaches provided for them respectively. If by force of the statute appellant owed the duty to see that passengers were so separated, then it was bound to use a high degree of care to discharge it, and became liable for the consequences proximately following to appellee's wife from its failure to exercise that degree of care. If, in the exercise of that degree of care, it would have ascertained that Melton was in the negro coach and have removed him therefrom, and did not, then it seems to us it necessarily follows that its failure to discharge the duty must have been the proximate cause of the injury to appellee's wife, if she was herself without fault. For, when the purpose of the Legislature in enacting the statute is kept in mind, we think appellant should not have been heard to say that it reasonably could not have foreseen that Melton would assault appellee's wife as he did. It was mainly to prevent such outrages as the one perpetrated upon appellee's wife that the statute was enacted, and appellant should be held to have known it. It is plain that had it discharged the duty and not permitted white passengers to enter the negro coach, or

had it promptly removed them when its employé Stanley found them in that coach, appellee's wife would not have been assaulted as she was. The injury to her, therefore, was the direct result of a failure on the part of appellant to discharge a duty it owed to her, and the most it could contend for in the circumstances was that it should not be held liable for the consequences of its omission, because it could not reasonably have anticipated that such consequences would follow. As stated above, we think it should be held to have anticipated consequences the statute was enacted to prevent. If, however, the conclusion reached by us that it was not error to tell the jury that appellant owed to appellee's wife the duty to exercise a high degree of care to discover that white passengers were in the negro coach is wrong, we nevertheless would be of opinion the judgment should not be reversed for the error in the instructions; for it conclusively appeared that at least one of its employés (the witness Stanley) assisting as porter in the operation of the train knew that white men were in the negro coach before the assault on appellee's wife was committed. Stanley, testifying as a witness for defendant, said: "I left some white men in the colored coaches, and went on back to the end of the train."

[6] The contention in the motion that the instructions were erroneous because same authorized a finding against appellant if "its agents and servants" knew that a white passenger was in the negro coach is based on a claim that the testimony showed that its employé John Harris, in no way connected with its operation, was on the train. As we understand the record, it did not show that. Harris testified that he had been an employé of appellant, but was not working that day, and that at the time of the trial, more than three years later, he was still an employé of appellant. If there is any other testimony in the record with reference to his being an employé, we have not found it.

The motion is overruled.

HODGES, J. (dissenting). The court gave as a part of his main charge the following:

"If you believe from the evidence that the plaintiff's wife, while she was a passenger on one of defendant's passenger trains, at the time and place alleged in plaintiff's petition, was assaulted by a fellow passenger and injured as substantially set out in plaintiff's petition, and if you further believe that such assault was committed by a white passenger which defendant, its agents and servants, knew, or in the exercise of that high degree of care required by law might have known, was in the coach assigned to negroes, then if you so find you will find a verdict for the plaintiff and assess his damage in accordance with instructions hereinafter given you, unless you find for the defendant upon subsequent instructions contained in this charge."

I cannot agree to the unqualified approval of this charge which is given by the majority of this court. It is true that on the former appeal language was used in the

opinion reversing the case which justified the trial court in so instructing the jury, and I accept the full share of my responsibility for what was there said. The language which authorized this charge was dicta, and not binding on the trial court had he felt inclined to disregard it. However, he had the right to assume that this court would adhere to that holding on another appeal. The best time to correct an error is at the first opportunity, and it is for that reason that I now express my dissent from the holding of the majority on this appeal.

The vice of the charge consists in making the railroad company liable if "its agents and servants * * * in the exercise of that high degree of care required by law might have known" that the white passenger who committed the assault complained of was in the coach assigned to negroes. The liability of the appellant in this case rests solely upon the ground that its conductor violated the provisions of the separate coach law. For it cannot be said that the employés in charge of the train had any notice of conditions which would have made the appellant liable for the assault committed in the absence of this statute. Article 1523 of the Penal Code 1911 (Vernon's Ann. Pen. Code 1916, art. 1523) requires railroad companies to provide separate coaches for white and negro passengers, and prescribes a penalty for a failure to make such provision. Subdivision 9, which is section 9 of the original act (Acts 22d Leg. c. 41), is as follows:

"Conductors of passenger trains, street cars or interurban lines, provided with separate coaches, shall have the authority to refuse any passenger admittance to any coach or compartment, in which they are not entitled to ride under the provisions of this law; and the conductor in charge of the train or street car or interurban car shall have authority and it shall be his duty, to remove from a coach or street car, or interurban car, any passenger not entitled to ride therein, under the provisions of this law, and, upon his refusal to do so knowingly, shall be guilty of a misdemeanor, and, upon conviction shall be fined in any sum not less than five or more than twenty-five dollars."

When the separate coach law was enacted in 1891 the word "knowingly" was not in the section quoted. It was added by an amendment in 1907. See Acts of 1907, p. 59. This amendment was evidently made for the purpose of restricting the penal liability of conductors for a failure to remove passengers from railway coaches set apart for the opposite race to those instances where the conductors knew, or at least had good reason for believing, that a passenger was in the wrong coach. If the amendment does not authorize that construction, it fails to make any material modification of the law. This is a penal statute, and until it is violated by the conductor there can be no civil liability on the part of the railway company responsible for his conduct; or, to state it differently, a failure to remove a passenger, under circumstances which do not expose

the conductor to a criminal prosecution, cannot form the basis of a civil suit for damages against his principal. It is only that which the statute condemns as a crime that can be treated as a civil wrong. The court cannot, as a matter of law, denounce that as negligence which the statute does not denounce as criminal. The question then is: Does the conductor subject himself to a criminal prosecution for failing to remove a passenger when he does not know that such passenger is in the wrong coach? An indictment or a complaint under this law which merely charged that the conductor might have known that the passenger was in the wrong coach would be defective because of the failure to state the essential facts required to constitute an offense. If such facts are insufficient to support an indictment against the agent, for the same reason they create no civil liability on the part of the principal. To say that failure to protect a passenger against an assault is the breach of the contract of carriage does not alter the situation. It is the statute which imposes the duty to take the precaution for keeping passengers separated; and the court cannot declare as a matter of law that the contract is breached, except upon facts which show that the statute is violated.

The cases cited in support of the charge are Kentucky decisions, and are based upon a statute very similar to ours. But those decisions do not sustain the legal proposition embodied in this charge. In those cases where the railway company was held liable for the failure to remove the passenger the conductor knew of the passenger's presence in the wrong car, and knowingly permitted him to remain. *Quinn v. L. & N. Ry. Co.*, 98 Ky. 231, 32 S. W. 742, was a suit by a negro woman against the railroad company for damages sustained by her by reason of a drunken white man being permitted to remain in the coach set apart for colored passengers. The court in that case said:

"If, as we shall assume was the case, each one of the passengers had been assigned the coach required by the statute, and the white passenger had left his coach and gone into the coach with these colored people without the knowledge of the conductor while he was attending to his duties in the other cars, and had there abused and insulted the appellant, it is plain no action could be maintained against the company, but when the white passenger is assigned to the car set apart for those of another race the company will be held responsible for his bad conduct affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring, and, where the conductor or those managing the train know that one is in the wrong car, it is his duty to expel him, and by consenting to his remaining the company becomes responsible for his conduct so long as he does remain. If a contrary rule is applied, and no liability exists on the part of the corporation to the passenger, the separate coach law becomes a dead letter, and those who are entitled to its protection have no means of enforcing its provisions but by indictment, where a penalty may be adjudged in favor of the state. It is made the

duty of conductors, under heavy penalties, to execute this law, and, where there is a neglect of duty for which a penalty is imposed, and private injury results from this neglect, a cause of action arises in favor of the person injured. This is the universal rule applicable to such cases, and should be made to apply to the facts of this case. It may be contended that the white passenger having been assigned to his proper coach, and then leaving it without the knowledge of the conductor, exempts the company from liability unless the conductor knows of the wrongs being committed or the purpose of the passenger, by reason of his conduct, to mistreat passengers. This would, perhaps, be a rational conclusion, unless it further appeared the conductor, or those controlling the train, knew of the white passenger's presence in the colored compartment, and took no steps to require him to leave. Here the conductor assented to his remaining in the car until he dispatched his business with the old negro, and the company should be held responsible for his conduct so long as he remained."

Here the court made the civil liability of the railway company depend upon the failure of the conductor to act after an actual knowledge of the situation. I know of no case which holds to the contrary.

The testimony is undisputed that Melton, the assailant of the appellee's wife, when he boarded the train, went with a companion into the coach assigned to white passengers, and that they afterwards went forward into the negro coach. While the porter testified that there were some white men still in the negro coach as he passed through going to the rear of the train, he does not identify them as Melton and his party. The evidence shows that the train on that occasion carried seven coaches, four of which were assigned to white people, and three to negroes, and that all of them were full. The conductor testified that he took up 756 tickets from those who got on at Paris, and that he was unable to go through the train before reaching the next station without having the engineer to slacken its speed. The testimony also indicates, but does not clearly show, that it was during that time that Melton and his party went into the negro coach. Some of the witnesses say that Melton and his companions were in the negro coach as the conductor went through taking up tickets. This is, in effect, denied by the conductor, who said that he did not notice any white people in the negro coaches. I am inclined to think that the great preponderance of the testimony tended to show that the conductor saw Melton in the negro coach, but it is not entirely satisfactory to say that the court could have assumed that fact as conclusively established. Yet it is very improbable that a different verdict would have been returned had the court omitted the language I have objected to. I am not therefore disposed to protest as much against the result of the decision of law upon which they rest their conclusion. I do not believe that ruling should stand as a precedent to be followed by other trial courts in the future.

HOUSTON CHRONICLE PUB. CO. v.
QUINN. (No. 66.)*

(Court of Civil Appeals of Texas. Beaumont.
Feb. 10, 1916. Rehearing Denied
March 18, 1916.)

1. APPEAL AND ERROR ⇨882(8)—REVIEW—
ESTOPPEL TO ALLEGE ERROR.

In an action for libel, defendant cannot complain of error in permitting plaintiff to testify that he was shot through his lung and shoulder and confined in the hospital, where defendant introduced in evidence a newspaper published by it stating substantially the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3597, 3598; Dec. Dig. ⇨882(8).]

2. LIBEL AND SLANDER ⇨100(6)—ACTIONS—
EVIDENCE—ADMISSIBILITY.

In an action for libel, where the petition alleged that prior to the publication of the libelous article plaintiff had always enjoyed the reputation of a peaceable and law-abiding and worthy citizen, and the answer denied sufficient information on which to base a belief, testimony as to the good reputation of plaintiff was admissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 256; Dec. Dig. ⇨100(6).]

3. TRIAL ⇨296(1)—INSTRUCTIONS—CURE BY
OTHER INSTRUCTIONS.

In an action for publication of a libelous charge that plaintiff had murdered another, where it was stipulated that the charge was false except as to the fact of the killing, and that plaintiff's act was in self-defense, a charge that the article complained of was libelous and was false, untrue, and unauthorized, was not objectionable as stating that the whole article was untrue, where the court also charged that the undisputed fact was that plaintiff killed the other person and defendant had the legal right to publish that fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-707; Dec. Dig. ⇨296(1).]

4. LIBEL AND SLANDER ⇨7(6)—WORDS ACTION-
ABLE—CHARGE OF CRIME.

A charge published in a newspaper that plaintiff assassinated another is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 31, 33, 36, 43, 66; Dec. Dig. ⇨7(6).]

5. LIBEL AND SLANDER ⇨120(2)—ACTIONS—
EXEMPLARY DAMAGES.

On publication of a letter from the sons of a decedent referring to the decedent as their father, and accusing plaintiff of assassinating him, where the newspaper had already published an account showing that it had in its possession facts showing that the killing was in self-defense, malice may be inferred authorizing an award of exemplary damages, though the publisher was not actuated by a feeling of ill will.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 351; Dec. Dig. ⇨120(2).]

6. LIBEL AND SLANDER ⇨120(2)—ACTIONS—
EXEMPLARY DAMAGES—"GROSS NEGLIGENCE"—"MALICE"—"ACTUAL MALICE."

If the publication and circulation of an article was done in such manner and under such circumstances as to show a reckless disregard of the rights of plaintiff and of the consequences to plaintiff, the jury were authorized to infer "malice," since reckless disregard and want of care would amount to "gross negligence," which

is equivalent to "actual malice," and exemplary damages might be allowed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 351; Dec. Dig. ⇨120(2).]

For other definitions, see Words and Phrases, First and Second Series, Actual Malice; Gross Negligence; Malice.]

7. LIBEL AND SLANDER ⇨124(3)—ACTIONS—
INSTRUCTIONS—ACTUAL MALICE.

In an action for libel, it was not error to refuse a special charge defining actual malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 369; Dec. Dig. ⇨124(3).]

8. LIBEL AND SLANDER ⇨121(1)—ACTIONS—
DAMAGES—AMOUNT AWARDED.

An award of \$4,000 actual damages for publication of a charge that plaintiff assassinated another was not so excessive as to show that it was the result of improper motive or of passion or prejudice of the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 353; Dec. Dig. ⇨121(1).]

Conley, C. J., dissenting.

Appeal from District Court, Liberty County; J. Llewellyn, Judge.

Action by B. E. Quinn against the Houston Chronicle Publishing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hunt, Myer & Teagle, of Houston, and E. B. Pickett, Jr., of Liberty, for appellant. Hightower, Orgain & Butler, of Beaumont, and Stevens & Stevens, of Liberty, for appellee.

BROOKE, J. This is an action brought for libel by B. E. Quinn against Houston Chronicle Publishing Company. Plaintiff resided in Beaumont, Tex.; defendant is a corporation, domiciled in Harris county, Tex.; and the action was instituted in the district court of Liberty county, Tex. The cause was tried before a jury on the 11th day of June, 1915, and verdict was returned for the plaintiff in the sum of \$4,000 actual and \$1,000 exemplary damages. Defendant filed its amended motion for new trial on the 16th day of June, 1915, and same was overruled on the 17th day of June, 1915. Exception was duly taken, and 60 days allowed within which to file bills of exception and statement of facts. Appeal bond was filed on the 3d day of July, 1915, and appellant now presents its cause in this court.

At the outset this agreement was made:

"It is admitted by the parties to the cause that the letter of Dudley and David O'Fiel, set out in the plaintiff's original petition herein, was in fact published by the defendant in its paper, the Houston Chronicle, and circulated, as claimed by the plaintiff in his petition. It is further admitted that the statements and matters of fact set out and contained in said letter, as published by the defendant, in so far as the same are complained of by the plaintiff in this case, were and are false and untrue, save and except the fact that plaintiff did kill the said John J. O'Fiel. It is furthermore admitted that the killing of said John J. O'Fiel by the

plaintiff, B. E. Quinn, was done in perfect self-defense."

The libelous article complained of reads as follows:

"An Explanation.

"To the Editor of the Chronicle:

"In your issue of August 13, 1914, or immediately subsequent to said date, in publishing the account of the tragedy at Beaumont, Texas, by which my father, John J. O'Fiel, lost his life at the hands of P. A. Quinn, it seemed from the wording of the article that my father was made the aggressor in the affair. The article, while in many particulars correct, was, in recital of action, wholly incorrect, and the affair did not happen as the article stated.

"On the occasion of the tragedy, John J. O'Fiel was walking on the east side of a street which runs almost due north and south, going south alongside of a building in which his office was located, evidently with the intention of going to the office, the entrance to which building was made from this street Pearl, which runs north and south. As he passed along the street and on the sidewalk, and arrived parallel with the entrance, this party, Quinn, who was concealed behind a door, or some fitting in the entrance of the office building, fired from the direction of my father's O'Fiel's side, the bullet going into the side of the left arm near the shoulder, straight across and entering the heart, inflicting a fatal wound. While Quinn fired other shots afterwards from the vantage point of the store, no others took effect, all going wild. After he was fired upon, which was at close range, my father wheeled and fired three shots at Quinn, all of which took effect, during and after which this party, Quinn, turned and fled into a store. They had had a previous difficulty the same day, in which Quinn assumed the aggressive, and knowing him to go continually armed, my father secured the only present available means of defense, a light caliber pistol, for his own protection, and did not use it, until after he had been fired upon, as above stated.

"Because the article as previously published did not state the true facts relating to and concerning the affair, for which, however, we can hardly attach any blame to you, and, as published, did my father and his memory a grave injustice, we ask that you publish this letter, that he may be properly exculpated from any blame or censure in the eyes of the public, and that any reproach or discredit offered his memory in the minds of relatives and friends be removed. [Signed] David O'Fiel, "Dudley O'Fiel."

[1] By its first assignment of error, the appellant challenges the action of the lower court in permitting the appellee, Quinn, to testify, over the objection made by appellant, that the appellee was shot through the lung and shoulder, and then and there permitting him to describe his injuries, and his confinement in the hospital. The testimony complained of is as follows:

Counsel for appellee asked the following question:

"In this suit, Mr. Quinn, you complain of an article or letter that was published in the Houston Chronicle, I believe on the 23d of August, 1914, purporting to have been written by David and Dudley O'Fiel to the Houston Chronicle, relative to the contention of the O'Fiels as to the killing of John J. O'Fiel, their father, by yourself. It has been admitted that the article as published and as alleged and complained of by you, that the same is false and untrue, as alleged by you, save and except the killing of O'Fiel. When was this article first called to your at-

tention? Answer: Several days after it was published, and before I got out of bed. I am not positive whether I was still in the hospital or at the sheriff's residence. I was either in the hospital or at the sheriff's residence. I was in the hospital on account of having been shot by John J. O'Fiel. I was shot through the right lung and across the shoulder, hit in about three places. I think one bullet made two holes."

The defendant excepted, and the exception was overruled by the court. Later appellant introduced in evidence the article which was published on August 30, 1914, relative to the tragedy, in which John J. O'Fiel met his death, containing, among other things, portions of the testimony of the plaintiff relative to the tragedy, which testimony, among other things, showed that plaintiff was wounded by said John J. O'Fiel, and that plaintiff's condition was weakened, and that he suffered from the wounds he received, and that, owing to such weakened condition and suffering on plaintiff's part, he was not able to appear at the preliminary hearing or examining trial where he was charged with the killing of said O'Fiel. A part of this testimony so introduced by the appellant, is as follows:

"An interesting phase of the hearing involved the earlier proceedings in justice court. Owing to the weakened condition of the defendant, suffering from wounds received in the encounter, no testimony was offered at the preliminary hearing."

In the case of Gammel-Statesman Pub. Co. v. Monfort, 81 S. W. page 1032, on this question the court says:

"But, however, it appears from the record that the testimony here objected to was also brought out by the appellant on the cross-examination of the witness Jones. Such being the case, the appellant should not be heard to urge objections to its admissibility."

In T. & N. O. Ry. Co. v. McCoy, 54 Tex. Civ. App. 283, 117 S. W. 448, the court says:

"The court did not err in refusing to strike out the evidence. In this case it may be noted that, after appellant had objected to all the testimony of the witness Hanks, he was again cross-examined by appellant, and all of the evidence objected to again brought out, and it is in no position to object to the evidence."

See, also, on this proposition, Eastham v. Hunter, 98 Tex. 565, 86 S. W. 323; M., K. & T. Ry. Co. of Texas v. Pettit, 54 Tex. Civ. App. 358, 117 S. W. 895; I. & G. N. Ry. Co. v. Brice, 126 S. W. 615; Kincheloe Irrigation Co. v. Hahn Bros. & Co., 132 S. W. 81; Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 522.

If therefore it was error on the part of the trial court to permit this testimony, the appellant, having voluntarily introduced evidence of the same character, cannot complain of such error. The first assignment is therefore overruled.

[2] By the second assignment, appellant complains that the court erred in permitting the witnesses B. E. Quinn, Mike Welker, and Dr. A. A. Bailey, to testify that plaintiff had a good reputation, and they had never heard it questioned, defendant having objected to all such testimony, because plaintiff's repu-

tation had not been attacked, and that the same is irrelevant and immaterial to any issue in the case.

Plaintiff alleged, in substance, in his petition, that prior to the publication and circulation of the libelous article complained of, he had always enjoyed and sustained, among the people in general throughout East Texas, and wherever known, the reputation of a peaceable and law-abiding and worthy citizen, and that at all times prior to said date he bore the reputation of an upright and honest man, and was at all times prior to said publication held in high esteem by his friends, etc.

The appellant, in answer to this allegation, says:

"Answering allegation in paragraph 8 of said petition, wherein plaintiff pleads his general reputation and his standing in general among the people of East Texas, this defendant says it has not sufficient information upon which to base a belief."

In the case of *Houston Chronicle Publishing Company v. Tiernan*, 171 S. W. 544, the court says:

"Plaintiff was permitted to testify, over the objection of the defendant, that many years ago he had held several offices in Galveston, and that: 'Up to the time of the publication complained of, my wife and I were reputed of good name and character and reputation. We were of good reputation as lawyers and persons.' Appellant, by its first assignment of error, complains that the court committed prejudicial error against it by admitting this testimony. The contention advanced by the proposition under this assignment is that: 'In an action for libel, a plaintiff is not permitted to introduce evidence of his good character and general reputation, and the fact that he has been an office holder, unless his reputation has been first attacked by the defendant.' Subject to certain explanations, we can readily agree with this contention. We do not understand that the attack by the defendant upon the character or general reputation of the plaintiff, in order to admit such proof as here complained of, must be made through witnesses placed upon the stand at the trial. It is enough that the publication against which the defendant is called to answer is itself such an attack, or that such an attack is made by the defendant's pleadings, or that the nature of the action involves the general character of a party or goes directly to affect it. *Houston Electric Co. v. Faroux*, 125 S. W. 924; *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658; *Timmony v. Burns*, 42 S. W. 134; *King v. Sassaman*, 64 S. W. 937."

In *King v. Sassaman*, 64 S. W. 937, the court said:

"We are also of the opinion that the court erred in refusing to permit plaintiff to prove her good reputation for chastity. Of course, the general rule is that one cannot put in issue his own character, because it is presumed to be good; but when the nature of the action involves the general character of the party, or goes directly to affect it, such evidence is admissible. * * * We think this case falls within the latter rule."

In the instant case, plaintiff's character and reputation were involved in the nature of the case. It was put in issue by the pleadings in the case. While no direct issue was made in the pleadings, it was affirmatively alleged in the plaintiff's petition, and defend-

ant, in its reply, simply stated it was not advised in the premises. We think there was no error in the admission of this testimony, and said assignment is therefore overruled.

[3] By the third assignment of error, the action of the lower court is assailed in paragraph 2 of its general charge; the claim being made that the same is too general, in that it charges that the article complained of by plaintiff was false and untrue and unauthorized, and does not limit the untruthfulness to the matters complained of by plaintiff, and charges that the whole article was untrue, while many pertinent facts stated in said article were admitted as true by all parties. The portion of the charge complained of is as follows:

"You are instructed that the article complained of by plaintiff is and was libelous, and that the same was false and untrue and unauthorized."

We have heretofore set out in this opinion the agreement of the parties, by which it was admitted that the statements and matters of fact set out and contained in the letter, as published by appellant, in so far as the same are complained of by the plaintiff, were and are false and untrue, save and except the fact that the said plaintiff did kill the said John J. O'Fiel. It was further admitted that the killing of John J. O'Fiel by the plaintiff, B. E. Quinn, was done in perfect self-defense.

In addition to the admission of the appellant, as above, the appellant asked a special instruction, which was given by the court; said instruction being as follows:

"At the instance of the defendant herein, you are further instructed as follows: The undisputed facts in this case show that the plaintiff, Quinn, killed John J. O'Fiel, and, this being true, the defendant had the legal right to publish such fact, and therefore, in arriving at your verdict, and in the event you should assess damages against the defendant, you are instructed that you cannot assess damages against defendant for publishing the fact of such killing."

It being admitted that the article was false and untrue, and it being libelous per se, it was the duty of the court in the charge to tell the jury that the article was libelous within itself. The said assignment is therefore overruled.

[4, 5] It is complained in the fourth assignment of error that the court erred, in paragraph 3 of its general charge, in submitting to the jury the issue of exemplary damages, because there were no facts pleaded or proved which authorized the recovery of exemplary damages.

Keeping in view the admission of appellant that the article, as published, was false, and bearing in mind the testimony of appellant's managing editor that upon the face of the libelous article complained of appellee was charged with the deliberate assassination of O'Fiel, and the further testimony that the paper knew that the article complained of came from the sons of the dead man, because

the article says "my father," we will examine this contention of appellant.

The article upon its face was libelous. There can be no question that the charge of assassination is libelous per se. Therefore malice will be inferred.

As to exemplary damages in cases of this kind, in our state, a brief reference to some of the authorities will be helpful.

An eminent writer says:

"In the jurisdictions where punitive damages are allowed, there is a difference of opinion as to the necessity of actual or express malice to support a finding of such damages. Some courts holding that evidence of express malice is necessary, that the injury must result from a willful wrong or conscious indifference to results. The malice in such cases may be proved directly or indirectly, that is, by direct evidence of evil motive, and intent, or by legitimate inferences to be drawn from other facts and circumstances evidenced by evidence of personal ill will or animosity on the part of the defendant, or may be inferred where the libelous article was recklessly or carelessly published." Newell on Slander and Libel, p. 1020; Davis v. Hearst, 160 Cal. 143, 116 Pac. 530.

In the case of King v. Sassaman, 54 S. W. 305, the court says:

"The malice, to sustain an action for exemplary damages, may be implied malice—implied or inferred from the wrongful acts committed. Am. & Eng. Enc. of Law, 433, Note 1.

"It was held in Cotula v. Kerr [74 Tex. 89] 11 S. W. 1058 [15 Am. St. Rep. 819], that the malice necessary to exemplary damages in a case of libel might be inferred from the absence of probable cause for making the publication, or upon evidence of express malice. It was held in Beloe v. Fuller [84 Tex. 450] 19 S. W. 616 [31 Am. St. Rep. 75], that, if the words published were actionable per se, compensatory damages may be recovered in the absence of malice. It follows that, if the charge be made maliciously, other damages of a punitive character are recoverable.

"In Railroad Co. v. Richmond [73 Tex. 568] 11 S. W. 555 [4 L. R. A. 280, 15 Am. St. Rep. 794], it is stated that exemplary damages may be recovered in libel suits where it is shown that the libel was published upon express malice, but it is not to be inferred that it may not be recovered upon implied malice. The court's charge is correct, as far as it considers authorizing exemplary damages if the words were spoken upon express malice; but it should have allowed damages upon malice, either express or implied. The language alleged to have been used charged plaintiff with a want of chastity, positively or in the negative, and is actionable per se; it being shown that plaintiff did have the disease mentioned, in which case the defendant accused her of having contracted it from some person other than himself. Zelfiff v. Jennings, 61 Tex. 466."

In the case of Fessinger v. El Paso Times Co., 154 S. W. 1175, the court says:

"Exemplary damages are not recoverable unless the libelous language was instituted by malice. This may be shown by evidence of personal ill will or animosity on the part of the defendant, or it may be inferred (italics ours) where the libelous article was recklessly or carelessly published. Cotula v. Kerr [74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819], supra; King v. Sassaman, 54 S. W. 304; 25 Cyc. 538."

Continuing, the court says:

"In the one case it is termed 'express malice,' and in the other 'implied malice.' The distinction, however, is in name rather than in fact, and it is malice whether it be proven by direct

evidence, as in the one case, or inferred from recklessness or carelessness in the other, and, whatever may be its nature, it is the right of the defendant to offer in evidence any fact or circumstance otherwise properly admissible which would tend to rebut any evidence of malice offered by the plaintiff."

In the case of Pennsylvania Iron Works Co. v. Henry Voght Mach. Co. (Ky.) 96 S. W. 553, 8 L. R. A. (N. S.) 1023, the court used the following language:

"In Courier Journal Printing Co. v. Sallee, 104 Ky. 385, 47 S. W. 226, it is said: 'It must be remembered that the law always presumes that, in the publication of an article which is libelous on its face, it was published with malicious intent, and this presumption remains throughout the entire case until it is rebutted by proof of the contrary motive. In this state in all actions for torts, punitive damages are allowed where the injury is a result of a wanton or grossly negligent act. The intention of the person is not a necessary ingredient. This is especially true where the words published are actionable per se.' Newell on Slander & Libel, p. 843. The letter in this case being libelous per se, the presumption is that it was published with malicious intent, and, this question having been submitted to the jury under proper instructions, they had the right in their discretion to find punitive damages against appellant."

We are cited by appellant to the case of Houston Chronicle v. McDavid, 173 S. W. 468, and we are invited to compare the testimony in this case with that in the McDavid Case for the purpose of discovering any distinction between the cases, so far as the issue of exemplary damages are concerned, and we are asked by appellant to examine the record in this case for the purpose of discovering any evidence which shows a wrong done to plaintiff by defendant in such a reckless and wanton manner as to indicate an utter disregard of the consequences.

In the case of Houston Chronicle Co. v. McDavid, the court said:

"On this appeal we have given the entire case a careful reconsideration, and have reached the conclusion that it should be reversed, because the testimony does not support the verdict for exemplary damages. In order to recover such damages, it was necessary for the proof to show actual or express malice. The undisputed testimony clearly shows that the agent of appellant who caused the publication to be made was not acquainted with appellee or his wife, nor with either of the parties to the divorce suit, and had no ill will against either of them. But it is contended on behalf of appellee that the testimony shows such gross indifference to the rights of others on the part of appellant as amounts to a willful or wanton act, and if it does it will support the finding of actual malice; but we have been unable to find any such testimony in the record. The proof shows that the copy or transcript from which the publication was made was submitted by a reporter of the Chronicle to Mr. Gillespie, the managing editor. It seems that the document submitted had the names of the parties to the divorce suit and the specific court in which that suit was pending, and Mr. Gillespie, to use his language, 'edited them out of it.' In support of their contention that evidence was submitted justifying a finding of actual or express malice, counsel for appellee make the following statement in their brief:

"Plaintiff also offered in evidence on this issue the answers of the witness C. B. Gillespie

to cross-interrogatories propounded to him. This witness testified: "I do not remember the publication of any other part of the pleadings in the suit of Fisher v. Fisher." The following question was propounded to the witness: "If, in answer to direct interrogatories propounded to you, you reply to the effect and in substance that, prior to the publication of the matter complained of, you did not know Dock McDavid and wife, or their residence, and that you have had no business dealings with them, or either of them, and that you did not know that they were the parents of Mrs. Allison, formerly Mrs. Fisher, then please state what efforts, if any, you made to acquaint yourself with such matters?" His answer was: "I made no efforts as no names were used in the article. Whether I took into consideration, prior to the publication of the matter complained of, the fact that the matter so published might reflect discredit, shame, and humiliation upon the parties to whom it referred, and that upon the reading thereof it might wound their feelings, and cause them, or any of them, mental distress and anguish. * * * I did not consider the article as one identifying any of the parties. Whether I knew, upon reading the matter complained of, that the paragraph following the words 'an inherited disposition' referred to the parents of Mrs. Fisher, I did not give special consideration or thought to any particular portion of the article, as I considered a story without names entirely general."

"During the course of cross-examination of the witness C. B. Gillespie, it was agreed that in the original answer filed by the defendant in the divorce suit by the defendant in the case of Fisher v. Fisher, in which the plaintiff was the daughter of Dock McDavid, the words 'her mother' were not in there, and that there was no reference to the mother whatever in this answer purporting to be published by the newspaper. The witness C. B. Gillespie, on cross-examination, testified as follows: "I said a while ago that I left the names out as a matter of safety. I mean by that, * * * well, safety to the publishers. It would have been privileged under the law to publish it with the names. Whether that is a matter of opinion, * * * you asked me that, didn't you? As to what I mean by 'safety' in leaving out the names, whether I wanted to protect myself against a possible suit for damages, I cut out the names so that it would not refer to anybody in the world. It might as well have been somebody in South America, Asia, or Africa. I said I cut the names out as a matter of safety to the publishers. As to what I feared might happen to the publishers if the names were connected with the article, * * * a number of things might occur. Ordinary items in the paper, people come to us and telephone us. * * * It requires space given them. People come in and say: 'Well, you published this; now you must publish our side of it.' It takes up columns and columns of space. We do that cheerfully because we do not want to put anybody in the wrong light. We want to treat everybody exactly alike, but by the elimination of the names absolutely I thought it would place the matter beyond anybody ever coming to see if there would be something more about it. That is what I mean. Whether I thought only a question of safety was involved, * * * always a question of safety in connection with liability. I did not say that I left out the names in order to avoid a possible suit, for publishing it, for damages. I say there is always a question of liability. We are always looking out for lawsuits. Whether I realized that at the time, * * * I realized that all the time; yes, sir. Whether under ordinary circumstances, just publishing matters I am privileged to publish, which I am entitled to publish, that I do not have any fears as that, * * * I never passed on an item in my life without applying the golden rule where I feared

a right. Yes, I applied the golden rule to this article. I did. I treated those people like I wanted to be, if I was in their condition. I knew the names referred to by the reporter were in there. I did not know the parties personally. I had no ill will against them in the world. I had no antagonism against them. I had no interest in publishing anything that might injure them. Whether I made an investigation to determine the standing of the plaintiff in this suit, and that of his wife, * * * I did not name the plaintiff in this suit, or his wife. There was no necessity for that. I knew the article referred to the mother of the plaintiff. I could not tell from the article anybody's name. The article published did not refer to any plaintiff, or defendant, or anybody. I did not ascertain who that mother was, and her standing, because we took the names out of it. No, I did not know that anybody would know, from the reading of that article, that it referred to the mother, and that they would know who that mother was, or afterwards find out and ascertain by investigation, and that it might injure them. I did not know that. I did not know that it would injure anybody. As to why I wanted to be safe about it, * * * because there might be a difference of opinion between them and me about that, as to that. Whether I made an investigation to determine who the mother was, * * * I cut the names out. I made no investigation to find who the mother was. I never did; no, sir. At the time I published that article, I took into consideration the fact that the article as it was published might humiliate and shame the parties to whom it actually did refer, and injure them in their good name and reputation. I always take that into consideration—those facts. Whether at this time I took it into consideration, * * * I do not think that I went into the article any more than to revise it, and make it refer to nobody. I do not remember that point. I really do not. Yes; I know as a matter of fact that the records of the courts are open to all parties. I know that. I believe anybody who wishes to do so can go to the courts, notwithstanding no names are mentioned, and find the actual answer, together with the names of the parties to the suit. I believe that would have been the case, whether there was any publication or not. Anybody can go to the courts. If anybody was interested to find out who the parties were after seeing the publication, I think that they could go to the courts and ascertain anything on file at that time. I knew that at the time, undoubtedly. Everybody knows that." Again: "Whether, in my capacity as editor, I published any other of the proceedings, the pleadings in the divorce suit of Fisher v. Fisher, * * * my recollection is that we did not publish anything in connection with the divorce suit of Fisher v. Fisher. We published the answer in the divorce suit, but it was not; * * * it had nothing to say about Fisher v. Fisher; nothing to say about them whatsoever. I knew when we published it and had knowledge that it was in that particular suit." Again: "Ordinarily, and usually, all court news is published under the head of 'Court Routine.' Ordinarily, under that head we have two or three paragraphs in regard to particular suits, which we regard as unusual, calling attention to the nature of the suit. These are called 'leads,' explaining the nature of the suit, especially if the matter is of unusual interest. Whether it is a very rare thing for us to publish the pleadings, * * * we went over that awhile ago, that particular question, I think."

"That statement is as strong in appellee's favor as the record will justify; and, in our opinion, while it might perhaps support a finding of slight negligence, it falls short of showing gross negligence or gross indifference to the rights of others. On the contrary, the proof shows that the managing editor, before authorizing the publication,

attempted to make such changes in it as would prevent identification of any persons therein referred to. This effort, although it may not have been successful, shows clearly that the managing editor was not guilty of gross indifference or willful or wanton wrong. Nor is it any answer to this to say that in exercising the care referred to Mr. Gillespie was merely attempting to avoid a libel suit. A willful or wanton act or gross indifference, as used in the definition of 'malice,' means an act done with the specific intention to injure the person that was injured, or an act done with such utter recklessness as to indicate a disregard of consequences. The act here complained of was done in due course of business. That business was the publication of a daily newspaper; and, no doubt, the duties of the managing editor of such a publication are not only arduous, but the very nature of the business requires them, in many instances, to be performed with great celerity. By a given hour the editorial department must furnish sufficient copy to fill a designated amount of space in each issue of the paper; and therefore it is no doubt true that, on many occasions, that department, and especially the managing editor, is compelled to work in haste. But, notwithstanding these facts, as stated before, the testimony shows that in this case the managing editor made an effort to have the publication in question couched in such language as would prevent identification of the persons therein referred to; and the effort so made, though it may not have been successful, *negatives the charge of gross negligence or indifference.* (Italics ours.) Nor was such wrongful conduct shown by the fact that the editor made no effort to ascertain more than he then knew concerning Mrs. Fisher, the plaintiff in the divorce suit, or Mr. and Mrs. McDavid, her father and mother. The proof that he did not know them and never had any dealings with them was pertinent for the purpose of negating the existence of ill will; and the fact that, if he had waited and attempted to do so, *he might have ascertained* (italics ours) more about them, does not prove gross indifference or a willful purpose to injure them.

"So, our conclusion is that the assignments of error which present the contention that the testimony does not support a finding of actual or express malice must be sustained."

In the instant case, the libelous article complained of having heretofore been set out, and the admission that it was false and untrue, the plaintiff introduced evidence that the appellant, on August 13, 1914, which was ten days prior to the publication of the alleged libelous article, published an article which shows on its face that on said 13th day of August, 1914, the appellant was informed and well knew that appellee acted in his own self-defense at the time he killed John J. O'Fiel, and that appellant was fully aware, even in detail, as to how the homicide occurred, and that appellant was well aware of the fact that appellee was not lying in wait for the said John J. O'Fiel, and that appellee was not in any manner secreted or hidden from the said O'Fiel at the time of the homicide; but, on the contrary, it is claimed said article shows on the date last mentioned appellant was informed and well knew that the said O'Fiel was the aggressor, and brought on the difficulty which resulted in his death, and that he attacked and several times fired his pistol at the appellee before appellee attempted to defend himself against such assault.

Now, as sustaining this contention, we set out the greater portion of said article, which is as follows:

"John J. O'Fiel Shot and Killed at Beaumont. "Special to the Chronicle.

"Beaumont, Texas, August 13.—John J. O'Fiel, a lawyer, 64 years old, was shot and killed late yesterday afternoon in the entrance to the store of Willis G. Blanton on Pearl street. B. E. Quinn, a real estate dealer, was shot through the right lung and received a flesh wound across the back. He is at the Sisters' Hospital and physicians state that he has a fair chance to recover. The duel took place at a time when the street was thronged with people, and created a great deal of excitement. Pistols were used and from six to eight shots were fired. The body of Mr. O'Fiel was sent to Wichita Falls, where the funeral and burial will take place.

"The law offices of the decedent and his son, David O'Fiel, are on the third floor of the Temperance building and Mr. Quinn had his offices on the same floor. The two men had a slight disagreement over some small matter and earlier in the afternoon they had met in the lobby of the Temperance building and after exchanging a few words they became angered.

"Quinn was Standing on Curb.

"When the shooting began, Mr. Quinn was standing on the curb in front of the lobby in the Temperance building, talking to three friends. Mr. O'Fiel was first seen by a number of people to start from the west side of the street in the vicinity of the Caswell-Preston drug store. He crossed at an angle which brought him about opposite the Quinn party. As he reached the middle of the street he drew a pistol and fired.

"Mr. Quinn turned and ran toward the Blanton store, missed the entrance and threw both hands against the wall. In the next instant he ran into the store. Meanwhile Mr. O'Fiel was moving toward Quinn and firing. Quinn passed into the store and went behind a table of clothing, and turned there and began firing. Mr. O'Fiel fell in the entrance of the Blanton store. Mr. Quinn ran out of the store and went into the store next door and was later removed to the hospital.

"A number of physicians came to the assistance of Mr. O'Fiel, but he died within a few minutes and did not speak after he fell. The physicians and others who examined Mr. O'Fiel were unable to find the bullet wound for some time, and eventually could find no other trace of the bullet than in the left arm just below the shoulder. It did not appear that this would cause death and continued examination failed to reveal any other wound. Finally, however, the physicians asserted that life was extinct, and the body was removed to the undertaker's. There a more careful examination of the wound disclosed that the bullet had entered the left arm just below the shoulder and had passed into the body and probably thru the lungs. It is believed that an artery was severed and that internal hemorrhage caused death.

"Twice Hit with Bullets.

"At the hospital it was ascertained that Mr. Quinn had been twice hit with bullets. One bullet had passed across his back and twice cut the flesh just over the shoulder blades. The other bullet passed into the body penetrating the lower part of the right lung. The physicians were unable to make definite answer as to whether this bullet entered the back or the breast, or whether there were two bullets, one entering the breast and the other the back. The wound in the breast might have been caused by something other than a bullet, and if so, the bullet which entered the back is still in the body. It may be that the bullet passed through and through the body, and in that event the

physicians could not say whether it entered from the back or the breast. The wound was not probed and only a thorough examination later will disclose the exact condition of the wound.

"Mr. Quinn withstood the shock well and after the wounds were dressed his condition was reported good and his chances for recovery were pronounced good. There is danger of complications from a wound in the lung, but these can not be forecast or anticipated."

The testimony shows that, at the time appellee killed John J. O'Fiel, appellant had a regular reporter and representative in the city of Beaumont, who regularly gathered and reported news items to appellant. This reporter was in the city of Beaumont on the day of the homicide, and was there also on the day of the habeas corpus hearing, representing the paper as its reporter and agent.

The witnesses to the shooting, it appears from the record, most of them, are residents of the city of Beaumont, and their places of business are on Pearl street, upon which said street the shooting occurred. All of the witnesses, so far as can be ascertained from the record, were easily accessible.

As above shown, appellant's reporter informed appellant, prior to the publication of the alleged libelous article, as to how the killing of O'Fiel came about. It seems that he had talked with a number of witnesses to the shooting, and made up his report of the same. Mr. Gillespie, the managing editor, testified that he did have a reporter and representative in Beaumont at the time of the killing of O'Fiel by plaintiff, whose duty it was to furnish such news to appellant, and such reporter was in a position to learn how the killing occurred, and that is the way the paper gets the news.

Quoting from his testimony further, Mr. Gillespie stated:

"But if the article is false and untrue, then the article is libelous on its face. * * * According to the two boys' version of the trouble, the article does charge Quinn with the deliberate assassination of O'Fiel. It would seem, according to their version of that, it does charge that. My paper published that article, but I didn't know anything about it. The paper knew that the article came from the sons of the dead man, because the article says 'my father.' I know now that the article misstated the facts, but I didn't know it before it was published, because I didn't read the article. The killing occurred 11 days before the publication of the article from the two O'Fiel boys, and during that time we had a representative of the Chronicle in Beaumont. * * * I was in Houston, but we had a reporter and representative there to furnish the news to us, and he was in a position to learn how the thing occurred. I do not admit that the article shows on its face a deliberate assassination of John J. O'Fiel, by Mr. Quinn, but I admit that the two boys make out that kind of statement. The article didn't impress me as being anything important. I did not pass on the article before it was published, and have no idea what the man that took it to the composing room thought about it. I cannot tell what I would have done if I had seen the article before it was published, whether I would have let it go in the paper in that form or not. If that article had been brought to me personally, my objection, if I had made such, would have been that it was controversial in its nature, and calculated to make it nec-

essary for us to publish a reply from Mr. Quinn, and, whenever you publish an article in the paper and somebody challenges it, it goes to discrediting the accuracy of the paper to that extent. I might have found other objections to it, but I can't tell you whether I would have or not; can't say what I would have done."

It will be noted, and the testimony shows, that Mr. Gillespie did not attempt to deny knowledge of the facts connected with the killing of O'Fiel by plaintiff, as published in appellant's paper on August 13, 1914, nor did he testify that he had any reason to doubt the truth of the statements made in said article of August 13, 1914, said statements being sent by the reporter of his paper, and showing that appellee was justified in killing O'Fiel, and contradicted the libelous article of August 23d, following. It will be noted further that Mr. Gillespie stated that the paper knew that the libelous article came from the sons of the dead man; that the statements in said libelous article did not appear to Mr. Gillespie as being important. Nothing in the record appears showing that any effort was made before publishing the libelous article to verify its statements, the paper having doubtless in its own files the statements made by its reporter and representative in Beaumont.

Upon comparison of the instant case and the McDavid Case, it will readily occur, to, perhaps, any one, that there is a vast amount of difference. In the McDavid Case great care and caution was exercised by the newspaper, and, if there was any negligence whatever, the same was very slight.

In the instant case, the true facts, as shown by the preliminary examination, were in possession of the appellant. We do not believe that the fact that the managing editor did not authorize the publication of the article, and that the paper was not actuated by a feeling of ill will, would excuse the inference of implied malice. But no care whatever seems to have been exercised, and the jury in the case were authorized to infer that the appellant was grossly negligent, and showed a reckless disregard of appellee's rights, indicating an entire disregard of the consequences that might follow from the publication of said article. At least, it was a question of fact for the jury trying the case, it was their province to pass upon the credibility of the witnesses, to judge of the weight and value of their evidence, and their province to take into consideration the fact that Mr. Gillespie was an interested witness, and to consider all the facts and circumstances and inferences in passing upon this question.

We believe that the issue of exemplary damages was raised by the evidence, was properly submitted to the jury, and that therefore the above assignment should be overruled.

[8] The appellant complains that the court erred in paragraph 3 of its general charge, in permitting plaintiff to recover exemplary

damages; "if the jury should find that the defendant was guilty of gross negligence toward plaintiff in publishing and circulating said article," thereby wholly ignoring the issue of actual malice as a necessary ingredient to the recovery of exemplary damages.

The charge of the court on this matter was as follows:

"You are instructed that if you shall believe from the evidence that the defendant, in publishing and circulating said article complained of by the plaintiff, was guilty of gross negligence toward the plaintiff, then in addition to such actual damages as you may allow plaintiff, as hereinbefore explained, you may, in addition thereto, allow him such further sum by way of exemplary or punitive damages, as you may deem proper to allow under the facts and circumstances in evidence before you.

"By the expression 'gross negligence,' as herein used, is meant that the publication and circulation of said article by the defendant was done in such manner and under such circumstances as to show a reckless disregard on the part of the defendant towards the rights of the plaintiff, and so wholly without care as to indicate an entire disregard of the consequences to plaintiff that might follow from the publication and circulation of said article."

If the publication and circulation of the article was done in such manner and under such circumstances as to show a reckless disregard on the part of the defendant towards the rights of the plaintiff, and so wholly without care as to indicate an entire disregard of the consequences to plaintiff, then the jury were authorized under the law to infer malice, for in law a reckless disregard and an entire want of care on the part of the plaintiff would amount to gross negligence, which is equivalent in law to actual malice. The said assignment is overruled.

The sixth assignment of error complains of the court's charge as not having given a correct definition of the term "gross negligence." The said assignment is overruled.

Complaint is made by the appellant, in its seventh assignment of error, of the court's action in refusing to give defendant's special charge No. 1, which was a peremptory instruction to find in favor of defendant for exemplary damages, for lack of evidence to sustain such issue.

What we have said heretofore disposes of this assignment. It is therefore overruled.

[7] By the eighth assignment, the action of the lower court is challenged in refusing to give defendant's special charge No. 3, which gave a definition of actual malice; it being complained that the general charge was silent on that issue, and the plaintiff having pleaded that defendant was guilty of actual malice in making the publication.

The said assignment is overruled.

By the ninth assignment, the verdict of the jury is assailed as being contrary to the law and the evidence, for the reason that there was no evidence in the case upon which the jury could properly base a finding against the defendant for exemplary damages.

Under the facts of the case, we believe the

jury were authorized in their finding against appellant for exemplary damages.

[8] By the tenth assignment, complaint is made that the actual damages found were grossly excessive and without sufficient evidence to support it; the facts showing no injury to appellee's business, and showing a prompt retraction and vindication of plaintiff by defendant.

From the record before us, we find nothing to show that the jury was actuated by any improper motive, and, they having found a verdict against the appellant for the sum of \$4,000 actual damages, we are not prepared to say that the same was excessive.

This assignment is therefore overruled.

By the eleventh assignment of error, the verdict of the jury is challenged as being so grossly excessive as to show that it was the result of passion or prejudice superinduced by the injection in the pleadings, in the court's charge, and in argument of plaintiff's counsel.

We find nothing in the record to bear out the contention of appellant. Therefore this assignment is overruled.

Finding no error in the record, this case is in all things affirmed.

It is so ordered.

CONLEY, C. J. (dissenting). I am of the opinion that the verdict of the jury in this case for actual damages is grossly excessive, and without sufficient evidence to support and maintain the amount awarded. The record shows that the appellant made a prompt retraction through its paper, a Sunday edition, of the libelous article, about appellee, and the fact is undisputed that the appellee, by reason of such article, has suffered no injury to his business, nor any substantial damage to his reputation. After the publication of the O'Fiel article, the record shows that the appellee wrote to appellant the following letter:

"Beaumont, Tex., August 28, 1914.

"Mr. Marcellus B. Foster, President Houston Chronicle Publishing Co., Houston, Tex.—Dear Sir: I respectfully call your attention to a publication on page 42 of the Chronicle of Sunday, August 23, 1914, headed 'An Explanation,' and signed 'Dudley O'Fiel,' 'David O'Fiel.'

"Even a cursory perusal of that publication will certainly convince you that it is libelous. Doubtless you would have published a communication from me controverting the statements contained in that, but I depended upon the sworn testimony in the case, taken from the record of the court, to dispute such uncorroborated accusations, based entirely upon hearsay statements. I am somewhat disappointed, however, to read in the Chronicle of August 27, page 12, a very general report of the facts proven in the habeas corpus hearing, after the specific allegations of lying in wait, etc., published against me in the Chronicle of August 23d. The court stenographer took the testimony, and I respectfully refer you to that of the witnesses, Chas. Abbott, John H. Brooks, Officer Bailey and B. E. Quinn, which was corroborated by a number of other witnesses. The publication of which I complain was made in a Sunday Chronicle to give the widest circulation of it in a great

metropolitan journal. I believe that you will correct the injury done me in your paper by publishing in Sunday's issue the testimony of the principal witnesses whom I have named herein. The testimony of the many other witnesses was likewise corroborative.

"Yours very truly, [Signed] B. E. Quinn."

In response to this letter, the following letter was sent by the assistant general manager of the Houston Chronicle Company to Mr. Quinn:

"August 31, 1914.

"Mr. B. E. Quinn, Beaumont, Tex.—Dear Sir: Your letter of August 28th to Mr. M. E. Foster came to hand Saturday afternoon, August 29th. In his absence from the city on receipt of this letter, we immediately called up the Beaumont correspondent and asked him to get us a copy of the evidence which you outline, and which he forwarded to us by special delivery. In the meantime, we ask you to send a copy of the evidence, or a copy of a newspaper in which it appeared. We are, of course, very glad to publish this evidence, and thank you for your cordial letter.

"Yours truly,

"Assistant General Manager,
"Houston Chronicle Publishing Company."

On August 29, 1914, the Houston Chronicle sent Mr. B. E. Quinn the following telegram, the same also being in response to the letter written by Mr. Quinn on the 28th inst.:

"Houston, Texas, August 29, 1914.

"Mr. B. E. Quinn, Beaumont, Texas. Please send under special delivery to-night copy of evidence mentioned in your letter to Mr. Foster. If this evidence appeared in any Beaumont paper, just mail us clipping under special delivery. The Houston Chronicle."

In reply to this telegram, Mr. Quinn sent the following telegram to the Houston Chronicle:

"Beaumont, Texas, August 29, 1914.

"The Houston Chronicle, Houston, Texas. Am sending clipping by special delivery, which gives a part of the evidence. Save half a page for me. B. E. Quinn."

On Sunday, August 30, 1914, the Houston Chronicle Company published Mr. Quinn's testimony, and made a full and complete exoneration of Mr. Quinn. That article was prominently headed "B. E. Quinn Exonerated," and then proceeded as follows:

"District Judge Orders His Discharge After Hearing on Habeas Corpus Writ at Beaumont.

"Beaumont, Texas, Aug. 29.—Testimony exonerating B. E. Quinn charged with the killing of John J. O'Fiel, was offered at a writ of habeas corpus hearing before District Judge W. H. Davidson. As a result of the hearing Judge Davidson held Quinn blameless in the encounter and ordered his complete discharge from custody.

"Quinn was represented by Colonel A. J. Houston, and County Attorney Marvin Scurlock represented the state. No evidence was presented by the state and no argument was made at the conclusion of the testimony. Mr. Scurlock stated that the evidence showed as clear a case of self-defense as could be established, and the court immediately pronounced the verdict: 'The defendant is discharged.'

"The hearing was concluded with the testimony of Quinn in his own behalf. Excepting for questions propounded by his attorney, Quinn began his recital with the incident which caused the first interruption of the friendship between Quinn and Judge O'Fiel and continued with a fairly well connected narrative on down to the

shooting and up to the time he relinquished his pistol to Police Officer Bailey in the Abelman harness store. While there was much detail in Quinn's story not heretofore published, his testimony did not vary in the main facts of the shooting affray, save in one particular, where it was stated that Judge O'Fiel backed into the elevator after their brief encounter in the lobby of the Temperance building early in the afternoon. The testimony shows that Quinn backed through the lobby until he got into the elevator and ran the car up to the third floor himself, leaving Judge O'Fiel in the lobby.

"Start of the Trouble.

"Beginning at what he described as the starting of the bad feeling between himself and Judge O'Fiel, Mr. Quinn said that it was in June that he found a purchaser for a piece of Sour Lake oil land owned by Judge O'Fiel. The deal went to the extent of the prospective purchaser putting up earnest money. Subsequently the deal fell through and Quinn claimed that a commission was due him for finding the purchaser. At the same time the deal fell through, Quinn said, there was a little difficulty in Judge O'Fiel's office, when, he said, Judge O'Fiel threatened to throw an inkstand at him, and pushed him out of the office. From that time on, Quinn said, O'Fiel did not look at him.

"Quinn filed suit on July 29th against Judge O'Fiel for the commission.

"A few days before the tragedy it appeared to Quinn, he said, as though Judge O'Fiel was inclined to speak. On one or two occasions, Quinn said, he had nodded at the judge as they passed.

"Meet in the Lobby.

"Coming to the day of the tragedy Quinn said: "About 1 o'clock on that day I met him as I was going to the post office. I said, 'How do you do Judge?' and he went on and didn't speak. As I returned from the post office he was leaning up against the entrance there of the Temperance building and I came along about the entrance going to my office, and he called me. He was talking to M. A. McKnight, and when I started to go by, he said, 'Say Quinn, come here,' and advanced toward me.

"I walked toward him and he came along and commenced to curse me and said, 'Damn you,' and he stuck his finger right up in my face and told me never to speak to him again. I had already taken all I thought I could take from any man; he had already kicked me out of his office, and when he came up and pointed his finger in my face and commenced cursing me on the street I hit at him, and when he ran at me with his knife, I kicked him. In the meantime I had a little knife—I think I have it now—and when I was getting that little knife out he ran at me with his and I kicked him off. I didn't want to hurt him very bad anyway. About that time McKnight grabbed him, but McKnight was a small fellow and couldn't hold him, and he kind of dragged McKnight on with him and came toward me with the knife. I was going to the elevator and had got pretty near back to the elevator and some fellow shoved me back to the elevator. I don't know who the fellow was. There was no boy there with the elevator. I supposed the power was off. By that time Judge O'Fiel ran back with his knife like he was coming into the elevator, and when he did that I kicked him again. Just then some fellow said, 'Shut the door and go on up,' and I shut the door. I didn't know whether the power was on or off, and I just tried it and went on up to my office.

"I think I hit him a back handed lick with my left hand. That was the hand nearest him. I am pretty sure that's how I struck him, because I had a little skin rubbed off my fist. I stepped back to see what he would do. If he was going to fight I could brace myself and get a good solid lick on him. I was backing away all the time."

"Difficulty with Dave O'Fiel.

"About twenty or thirty minutes after that, Dave O'Fiel came down to the office. I was fixing to arrange some papers and I had my side turned to the door. He rushed in and come after me and hit me before I knew he was in the office at all. Then we had it round and round up there. We clinched and fell and rolled around the office there. Three or four fellows came there and pried us apart. I don't think either one of us was hurt. When they pried us apart and I got up this automatic was laying on the floor. I asked a young fellow—I grabbed it as soon as I saw it—I said, "Whose gun is this?" He said, "I jerked it out of Dave O'Fiel's pocket." Dave O'Fiel was standing right on the inside of the door; V. A. Collins and Fred Jennigan and I think a man named Sessler that works for the Texas Company, and a half dozen were in there.

"A young fellow who was in my office went down on the street and he came back in a little while and said he heard Mr. O'Fiel making some threats down there, and he said he was out trying to get a gun. He said, "You had better look out." I went right straight and put my gun on. I had one lying right there on the desk and I armed myself and I went down on the street. I was fixing to go and see a fellow about selling a lot. I expected to find him at the Weller racket store. I think I had a blue print in my pocket. I started across the street and I happened to notice Abbott and Robichaux standing there and I stopped and shook hands with them. I suppose I was standing there about a minute when O'Fiel advanced with a gun. When I stopped there I stood on the pavement facing Mr. Abbott and Mr. Robichaux. They were standing on the sidewalk. I was facing with my back to the street standing on the pavement in front of the Temperance building. Mr. Abbott looked across the street. I don't know whether he said anything to me or not. I looked around and saw O'Fiel coming across the street. We were just discussing this O'Fiel trouble at the time, and I says—I believe I remarked, Abbott says he thought he remarked, but anyway somebody remarked—"There's O'Fiel now." By that time he had gotten to the middle of the street. He ran his hand into his pocket like that (illustrating) and I says, "Yes, and I believe he has got a gun."

"How Shooting Began.

"I stepped upon the sidewalk and kept thinking somebody—Everybody seemed to be watching him. I thought some one probably would grab him. I had all the opportunity in the world to pull my gun and shoot, but I just stood there until the man got within fifteen feet of me, and he says, "I have got you now," and pulled his gun out of his pocket. When he did that (I suppose that's how came Abbott to lose part of that shirt that he was telling about), I grabbed Abbott loose and made a bee line for the entrance of that store. When I jumped behind Abbott I was expecting all the time that somebody would grab O'Fiel. I thought if I jumped behind Abbott somebody would stop him, and Abbott twisted around there and broke loose from me. I think he was trying to make a get away. Anyway I got loose from him and made a run for that entrance."

"Well, now, Mr. Quinn, did you attempt to fire, or take out your pistol and fire before you entered that building?" asked Colonel Houston.

"I could have fired before the other man got his gun out of his pocket."

"Would it have endangered the life of bystanders on the opposite side of the street?"

"Yes, sir, I thought of all that. The first thing I thought was to get out of the way of O'Fiel. I didn't want to have to kill him. Then the next thought, I didn't want to injure any bystanders. I ran in the building."

"What happened then?"

"He shot me twice before I got in the building."

"You knew you were shot?"

"Yes, sir."

"How did it affect you?"

"Well, it took my breath away."

"Did you come near falling?"

"Yes, sir. I came near falling. I caught the door as I ran in. I started over to the right. I got far enough over south of the door so if I did have to shoot I wouldn't shoot on the door. When he came in he just leveled his gun down at me like that (illustrating) and shot twice just as quick as I could pull trigger. I am pretty sure that he shot about the same time I did. His bullet went wild. It never touched me after he got inside. When he came in the door and leveled his gun at me, I fired, and I thought he was facing me the way you are facing me, but from the way he was hit he must have turned around like that. He hit in the side I think."

"After the Shooting.

"After I shot I stood in my tracks and I came in and held his father's head like that, said, "Oh, father, you are killed," or some mark like that. He looked up and saw me and made a run for me. Well, I didn't feel I could move and started to shoot. I had my gun cocked when about half a dozen fellows rushed right in behind him. I didn't want to shoot him unless I had to as I knew I was in desperate chances of hitting somebody. I thought the best thing to do was to make to the back door and cover him when he came out. When I got out of the back door I thought he was over six feet behind me. I stepped up against the wall and he ran out. I had a bead on him and began to tighten up on trigger. He stopped and I saw he didn't have a thing in his hand. When he scrambled in the door he failed to pick up his father's gun. I was sorry for him. I didn't want to kill him. I thought I was killed myself and didn't want to shoot."

"If you had shot, would you have expected to kill him?" asked Colonel Houston.

"Oh, yes, I am positive I would have killed him."

"What did you say to him?"

"I don't think I said anything. I didn't have time to say anything."

"He stopped when he saw that I had the gun on him. He stopped on the step two or three seconds. I could have shot. I had a lot of time to shoot if I wanted to. He backed up and went on back. Two or three fellows grabbed him and I walked into Abelman's store, where he could watch both doors and sat down."

"Did you see Officer Bailey when you were there?"

"I didn't see him until Dave backed up. I didn't see Bailey until he came into Abelman's store. He followed me in there and asked for my gun."

"Eyewitnesses Corroborate Defendant.

"The testimony given by the defendant was corroborated by other witnesses, including Charles W. Abbott, Willis G. Blanton, John Brooks and W. H. Mattison. Abbott and Mattison were eyewitnesses to the shooting."

"An interesting phase of the hearing involved the earlier proceedings in justice court. Owing to the weakened condition of the defendant, suffering from wounds received in the encounter, no testimony was offered at a preliminary hearing, under the law a justice of the peace not being authorized to discharge defendants in such cases. Accordingly an agreed bond of \$5,000 was granted and furnished and the writ of habeas corpus sought. The point was then made that the defendant not being in actual custody, he was not entitled to the writ. Accordingly his attorney had him surrendered by bondsmen, and

by perfecting the application for writ of habeas corpus."

On the question of damages, the following evidence was introduced:

Mr. Quinn himself testified:

"I don't know that I can tell of any one that thinks any less of me on account of the article, which was printed in the Chronicle, and which was sent to them by the two O'Fiel boys; that would be nearly impossible to say. I have testified by deposition in this case also. I testified that so far as I know I stood just as well in Beaumont since this article was published as I did before; that is, so far as I know; couldn't say anything has occurred to show me different. There has nothing occurred in Beaumont to lead me to believe that my position is any different now than it was before."

Col. Houston, counsel for appellee in habeas corpus proceedings growing out of the killing of John J. O'Fiel, testified in the trial of this cause as follows:

"I have not testified that Mr. Quinn was wronged by that article in the Chronicle. I stated the article was libelous, but I did not say that I thought he had been injured. * * * I could not say that I am acquainted with the sentiment in Beaumont relative to the killing. It would be my opinion, I could state my own opinion, but wouldn't like to state for anybody else. I am not in Beaumont constantly. I have talked with a number of people in Beaumont about it, and they have talked to me, and all the sentiment I have ever met with is in favor of Mr. Quinn—that he was justified. His friends and Judge O'Fiel's friends both lament it, but they didn't hesitate—like myself. I was a good friend of Judge O'Fiel, but when it came to expressing an opinion it was in behalf of Mr. Quinn. * * * As I said a while ago I couldn't say what the sentiment is in Beaumont as to Mr. Quinn, but those I have talked to all acquit Mr. Quinn. I can't recall of one that ever blamed him. But as to the people that lived elsewhere in East Texas, and at other parts, I couldn't say what they thought about it."

Mr. J. H. Hutchinson testified as follows:

"I live in Beaumont, and have lived there for about five years. I know the plaintiff in this case only by sight. I am familiar with the transactions that occurred in Beaumont last August, in which Mr. O'Fiel lost his life. Since that time I have had occasion to hear citizens of Beaumont express themselves with reference to the feeling or sentiment towards Mr. Quinn as to his connection with that. Have heard it several times, and the general impression is that he was justified in killing Mr. O'Fiel."

Mr. Mike Welker testified as follows:

"I live in Beaumont and have lived there for about 26 years. I am acquainted with the plaintiff in this case, and I am acquainted with the transaction in which Mr. O'Fiel lost his life. I have talked with various citizens in Beaumont the facts of the killing, and have heard them express themselves in reference to Quinn's connection with it, and he has been generally exonerated. I haven't heard anybody condemn him for it. That is the sentiment there. I have no connection with either party to this suit."

Dr. A. A. Bailey testified as follows:

"I live in Beaumont and have lived there for about — years. I am acquainted with the plaintiff in this case, and am acquainted with the transaction in which O'Fiel lost his life. I have talked with various citizens in Beaumont the facts of the killing and have heard them express themselves with reference to Quinn's connection

with it, and he has been generally exonerated, and I haven't heard anybody condemn him for it. That is the sentiment there. I have no connection with either party to the suit. * * * Outside of the immediate vicinity where Mr. Quinn lives, I don't know anything about what the sentiment is."

There is no evidence of any kind in the record which was introduced to show that Mr. Quinn suffered any damage to his reputation or business in Beaumont, outside of the immediate vicinity of Beaumont, or elsewhere by reason of the libelous article. All of the witnesses, without exception, including Mr. Quinn himself, specifically testified that Quinn suffered no damages to his reputation in Beaumont or elsewhere to their knowledge. The Chronicle gave prompt retraction to the statements made in the libelous article, and printed the same in the Sunday edition, and the retraction had the same place and prominence as did the libelous article. Yet, notwithstanding these facts, the jury awarded a verdict of \$5,000 against the defendant, \$4,000 actual damages and \$1,000 exemplary. It further appears from the record that the appellee, Quinn, while on the witness stand, was permitted to testify that he was shot through the lungs and shoulder, and suffered much pain and agony and to further disclose his injury and confinement in the hospital.

I agree with the majority opinion of the court in the ruling made on the assignment of error based on the admissibility of this evidence, but still I am firmly convinced that this evidence so played upon the passion, prejudice, and sentiment of the jury that it must have been an actuating factor in the determination of the amount of the verdict. Certainly, the personal injury sustained by plaintiff in the encounter with the decedent O'Fiel, and the consequent suffering and confinement in the hospital, cannot legally be considered as a factor in arriving at the damages sustained by the plaintiff by reason of the printing of the libelous article.

The law, as I understand it, presumes some damages when an article is libelous per se, as in this case; but this presumption does not overshadow the further salutary rule that the damages awarded must be proportionate and in consonance with the injury suffered. While the law presumes damages in such a case, still, if no substantial damages have been suffered, then only nominal damages should be awarded under such presumption. It is permissible in such cases to inquire into the extent of the injury suffered and to negative any substantial injury. The mere fact that damages will be presumed will not justify an award not based on a theory of just compensation.

The record in this case clearly shows that there was no intentional wrong in the publication of the article upon which this suit is based, but through an unfortunate mistake or oversight the article found its way into the paper. For the reasons hereinabove

stated, I am of the opinion that the verdict for actual damages is excessive, and, instead of being \$4,000 for actual damages, that such verdict should be reduced to \$1,000 actual damages, and \$1,000 exemplary damages, making a total of \$2,000, and the appellee required to file a remittitur for \$3,000; and, unless he does so, the case should be reversed and remanded for another trial.

LEWIS et al. v. ROACH MANIGAN PAVING CO. (No. 7814).*

(Court of Civil Appeals of Texas. Ft. Worth. March 4, 1916. Rehearing Denied April 1, 1916.)

MECHANICS' LIENS § 84—IMPROVEMENT IN STREET—CONTRACTS.

Since a deed to a lot fronting on a public street, which shows that the lot abuts upon the street and was laid out with reference thereto, in the absence of some restriction in the deed, carries with it a fee simple to the center of the street, where the plaintiff contracted with the defendant to pave the street in front of a lot held under a warranty deed, the work was an improvement upon the entire lot, and the defendant was entitled to enforce a mechanic's lien upon the lot, under the provisions of Vernon's Sayles' Ann. Civ. St. 1914, art. 5631.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 89; Dec. Dig. § 34.]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by Violet Lewis and another against the Roach Manigan Paving Company. From a judgment for the defendant, plaintiffs appeal. Affirmed.

Hunter & Hunter, of Ft. Worth, for appellants. Bryan, Bartholomew & Stone, of Ft. Worth, for appellee.

DUNKLIN, J. Acting under and by virtue of the special charter granted to the city of Ft. Worth by the Legislature of the state, the mayor and commissioners of said city duly and legally passed an ordinance, whereby it was ordered that Lipscomb street in said city should be paved, and advertisements for bids for such work were duly made. The Metropolitan Construction Company was one of the bidders, and, its bid having been duly accepted, it entered into a contract to do such paving, giving the necessary bond required, and the street was paved in compliance with said contract. At that time Hugh H. Lewis, Jr., and his wife, Violet Lewis, were the owners of lot No. 9 in block No. 3, Page's addition to the city, which abutted on Lipscomb street, and which was then their homestead. The Metropolitan Construction Company was unwilling to do the work in front of said lot to the middle of the street unless Lewis and wife should first execute a contract to pay therefor at the rate of \$2.04 per square yard, which was the price agreed to in the contract with the

city. Thereupon Lewis and wife executed and delivered to the company such a contract. This contract was duly signed and acknowledged by Lewis and wife in the manner required by article 5631, 4 Vernon's Sayles' Texas Civil Statutes, in order to fix a lien for material and labor for improvements upon a homestead. That contract, so executed and acknowledged, was delivered to the Metropolitan Construction Company before the work was begun, and the company would not have paved in front of said lot if said contract on the part of Lewis and wife had not been first made. The value of the paving in front of said lot from its curb line to the center of the street and the width of the lot was \$169.96, and by reason of the pavement the market value of the lot was enhanced in that sum. Some two years later Lewis and wife were divorced. This suit was instituted by Violet Lewis alone, whose title to the property at the time of the institution of the suit seems not to have been questioned, for a cancellation of the apparent lien so fixed upon said lot. E. P. White had purchased all claims of the Metropolitan Construction Company for such paving, and he intervened in the suit, and, in addition to a resistance of plaintiff's demand, by way of cross-action he asked for a foreclosure of the lien for the value of the improvements, independent of the contract price therefor. Pending the litigation, S. King purchased the property from Mrs. Lewis, and he was made a party defendant by E. P. White to answer the latter's cross-action for foreclosure. Judgment was rendered, denying a cancellation of the lien and decreeing a foreclosure thereof in favor of White against Mrs. Lewis and S. King for the value of the improvements, and also in favor of King on his cross-action against Mrs. Lewis, his vendor, for any sum that he might be compelled to pay by reason of such foreclosure. Mrs. Lewis and King have prosecuted this appeal, from the judgment denying a cancellation of the lien and foreclosing the same in favor of White. The case was tried upon an agreed statement of facts which included the facts recited above. In addition to those facts, it was further agreed that the property was acquired by H. H. Lewis, Jr., from the Jones Hurt Lumber Company, by warranty deed describing it as "Lot No. 9, block No. 3, of the R. M. Page addition to the city of Fort Worth." It was further agreed—

"that the plat of the R. M. Page addition shows that the front line of the lot in controversy runs along the east line of Lipscomb street, and, according to said plat, does not extend on to any part of said Lipscomb street; that in the deed of dedication from R. M. Page the said Page dedicates the streets and alleys in his addition to the public."

But one question is involved upon this appeal, which is stated by appellants as follows:

⚡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

"Whether or not the deed conveying the lot in controversy to H. H. Lewis, Jr., operated to convey a fee to the middle of Lipscomb street, and whether paving Lipscomb street was an improvement on appellant's homestead."

The case of *Waples Painter Co. v. Ross*, reported in 141 S. W. 1027, was a suit to enforce the statutory lien for labor and material furnished in the construction of a sidewalk in front of a lot, and in that case this court affirmed the judgment, decreeing a foreclosure of the lien so claimed, and in the course of the opinion the following was said:

"The rule in this state is that the owner of a lot fronting on the street owns the fee to the center of the street, subject only to the easement of the public. *Bond v. T. & P. Ry. Co.*, 15 Tex. Civ. App. 281, 39 S. W. 978; *Emerson v. Bedford*, 21 Tex. Civ. App. 262, 51 S. W. 889. It would follow, therefore, that a sidewalk placed in the street is none the less an improvement of the lot on which it is placed."

See, also, 13 Cyc. 629, in which the same rule is announced, and decisions of several states cited to support the text.

In *Mitchell v. Bass*, 26 Tex. 372, our Supreme Court said:

"The established doctrine of the common law is that a conveyance of land, bounded on a public highway, carries with it the fee to the center of the road, as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land."

To the same effect are *Bond v. T. & P. Ry. Co.*, supra, in which a writ of error was denied by our Supreme Court; and also *Emerson v. Bedford*, supra.

Appellants have cited several decisions of other states, some of which seem to announce a different rule from that announced by our Texas courts and shown above. One of those cases is *Coenen v. Staub*, 74 Iowa, 34, 36 N. W. 877, 7 Am. St. Rep. 470, in which the Supreme Court of Iowa refused to enforce a lien upon a lot for a sidewalk placed in front of it under contract with the owner, and in that case the following was said:

"The sidewalk is not situated upon the lot sought to be charged, but in the street on which it fronts. It is not an improvement upon or of

the lot, nor was it made for the benefit of the owner, but of the public, and was constructed by the owner, as we presume, in obedience to some requirement of the town government. Under provisions of the statute many street improvements in incorporated towns and cities may be made at the cost of the owners of the abutting property. Streets may be reduced or filled to grade and paved, and sewers and sidewalks may be constructed therein, and, when the work is done by the city, the cost may be taxed by special assessment upon the abutting property, or the property owners may be required to do the work in front of their respective properties. But, however it may be done, the work is a public, rather than private, improvement; and the law does not afford the mechanic or materialman who does such work, or furnishes material therefor, under contract with the owner of the abutting property, a lien therefor upon the property."

Several other decisions of other states seem to be practically to the same effect, some of which are cited in the note to section 1348 of 2 Jones on Liens (3d Ed.) while in section 1349 the same author says:

"A lien may be properly acquired for the expense of constructing a sidewalk on the street adjoining a building, inasmuch as the sidewalk is an appurtenance to the building within the meaning of the Mechanic's Lien Act. It is immaterial that the owner's title extends only to the side and not to the center of the street."

But whatever the rule may be in other states, we are of the opinion that, as it is settled in this state that a deed to a lot fronting on a public street and calling for such street, or else describing the lot by reference to a plat which shows that the lot abuts upon the street and was laid out with reference thereto, carries with it a fee-simple title to the center of the street, in the absence of some restriction in the deed, it follows inevitably that an improvement, such as the one in controversy in the present suit, was an improvement upon the entire lot, including that part which fronts upon the street and upon which buildings are erected. It having been agreed that the contract for paving was executed by Lewis and wife prior to the beginning of the work, and all of the statutory requirements necessary to fix a mechanic's lien upon the lot, as required by article 5631, Vernon's Sayles' Texas Civil Statutes, were complied with, it follows that the judgment of the trial court must be affirmed.

Affirmed.

REEVES v. FUQUA. (No. 937).*

(Court of Civil Appeals of Texas. Amarillo. March 8, 1916. On Motion for Rehearing, April 5, 1916.)

1. COURTS — 36 — JURISDICTION — PROBATE COURT.

Probate courts are courts of general jurisdiction as to all matters within the scope of their powers, and all presumptions will be indulged as to their jurisdiction over such matters the same as in favor of the jurisdiction of any other court of record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 142-144; Dec. Dig. — 36.]

2. JUDGMENT — 5 — ATTACK.

Where a domestic judgment is attacked, it is necessary, in order to ascertain the rules applicable, to determine whether it was rendered by a court of general jurisdiction over the subject-matter, whether the attack is direct or collateral, whether the evidence is apparent on the face of the record, and, if not, whether outside evidence is competent, and whether the ground of the attack is one which goes to the power of the court or is a matter of procedure.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. — 5.]

3. EXECUTORS AND ADMINISTRATORS — 13 — APPOINTMENT—VALIDITY—ADJOURNMENT OF COURT.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3218, requiring all orders of the county court in probate matters to be rendered in open court and at a regular term, the fact that an order appointing a permanent administratrix was entered after the court had adjourned for the day, and without a formal reopening of the court, does not invalidate the appointment, especially as against attack in proceedings to sell property under a trust deed to satisfy a claim allowed against the estate on the approval of the administratrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 26; Dec. Dig. — 13.]

4. EXECUTORS AND ADMINISTRATORS — 234 — ALLOWANCE OF CLAIMS—APPROVAL BY ADMINISTRATRIX.

Where the probate court allowed claims against the estate on the approval of a duly appointed permanent administratrix, the allowance was valid, though the same claims had been previously allowed on approval by the same person as temporary administratrix under a void appointment, and the same verification of claim was presented to the permanent administratrix as to her as temporary administratrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 832-836½, 842, 842½; Dec. Dig. — 234.]

On Motion for Rehearing.

5. EXECUTORS AND ADMINISTRATORS — 234 — ALLOWANCE OF CLAIMS—RECORD.

A record of claims allowed against an estate which showed an itemized list of the claims allowed to a certain creditor during the temporary administration under a void appointment, followed by an entry showing an allowance of the total amount of those claims during the permanent administration, sufficiently shows that the claims were allowed during the valid permanent administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 832-836½, 842, 842½; Dec. Dig. — 234.]

Appeal from District Court, Hale County; R. C. Joiner, Judge.

Action by W. H. Fuqua against Mrs. Minnie Reeves, as administratrix, to foreclose a deed of trust. Judgment for the plaintiff, and defendant appeals. Affirmed.

See, also, 183 S. W. 34.

W. W. Kirk, R. M. Ellerd, and Mathes & Williams, all of Plainview, and Speer & Brown, of Ft. Worth, for appellant. Graham & Graham, of Plainview, and W. H. Kimbrough and Madden, Trulove, Ryburn & Pipkin, all of Amarillo, for appellee.

HENDRICKS, J. On November 7, 1914, the appellee, W. H. Fuqua, filed his petition in the county court of Hale county, Tex., against Minnie Reeves, as administratrix of the estate of Oscar Reeves, seeking the enforcement and foreclosure, through the medium of the administratrix, of a deed of trust and the application of the proceeds of sale to certain indebtedness alleged to have been approved by the administratrix and allowed by the probate court in a permanent, as well as a temporary, administration of said estate.

Mrs. Reeves, for herself, and as "next friend" of her minor children, attempted to resist appellee's petition by virtue of allegations attacking the appointment of Mrs. Reeves as temporary administratrix, the approval of appellee's claim by her in such capacity, and the allowance by the court during said temporary administration, likewise attacking the appointment of Mrs. Reeves as permanent administratrix, and the approval by her as such, and the further allowance by the county court of said claims. The county court sustained general and special exceptions to the answer, and upon appeal the district court likewise sustained exceptions to an amended answer. We do not doubt but what appellant's resistance to the enforcement of appellee's petition is a collateral attack. The object of plaintiff's petition is to obtain a sale of the land on account of the administration and the allowance of said claims as a judgment; and defendant, in resisting the character of relief prayed for by appellee, by alleging that the two appointments of Mrs. Reeves as administratrix are void, and that the allowance and approval of the claims during both administrations are null, could not be considered as making a direct attack.

"If an appeal is taken from a judgment or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct; the sole object of the proceeding being to deny and disapprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important, or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule." Black on Judgments, vol. 1, § 252.

The rule so clearly enunciated above in different language is, in substance, announced by the Supreme Court in the case of *Crawford v. McDonald*, 88 Tex. 630, 33 S. W. 325. In that cause a probate order of confirmation of the sale of property could not be attacked by allunde evidence that the sale was not, in fact, made at the courthouse door, as required by law. A bond of a survivor in community is required to equal the appraised value of the community estate; a bond approved for less than the appraised value is not valid nor the qualification of the administrator void on collateral attack. *Jordan v. Imthurn*, 51 Tex. 287. If the record on collateral attack is silent as to the bond, it will be presumed the administrator gave one. *Moody v. Butler*, 63 Tex. 212. It has been the law of this state since 10 Tex. 467 (*Moore v. Hardison*), that an approval by an administrator of a claim barred by the statute of limitation does not bind the estate, but, once approved by the county court, "the quasi judgment so created can be treated as a nullity." *Howard v. Johnson*, 69 Tex. 657, 7 S. W. 523. Such a judgment has to be set aside in a direct proceeding brought solely for that purpose, showing that the bar was complete when approved, and even then it is not sufficient to show that the claim is barred on its face, but it must be shown that no fact nor exception existed suspending the statute. *Howard v. Johnson*, supra, and authorities cited. The fraudulent representations of the holder of a barred claim inducing the allowance of the same will not change the rule. *Eccles v. Daniels*, 16 Tex. 136; *Martin v. Robinson*, 67 Tex. 381, 3 S. W. 550. Since the acts of 1876 the approval of a claim by the county court has the force of a final judgment (*Vernon's Sayles' Civil Statutes*, art. 3452), subject, of course, to be revised on appeal. Same article.

[1] It is, of course, the settled law of this state that probate courts, under the Constitution, are courts of general jurisdiction as to all matters within the scope of the power conferred upon them. *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590. It also follows that all presumptions will be indulged as to the jurisdiction of probate courts over subject-matter confided to them the same as in favor of the jurisdiction of any other court of record. Their judgments and decrees cannot be collaterally attacked unless the record shows the want of jurisdiction where the subject-matter comes within that power.

"In the absence of such a showing, it must be presumed that the jurisdiction exercised in a given case was the exercise of lawful power." Same case supra.

It is alleged that the order of the county judge appointing Mrs. Reeves temporary administratrix of the estate never became effective, because the order was not made under the seal of the court nor attested by the clerk thereof, and that the clerk of the court did not indorse on the order by certificate

that the same had been recorded as directed by law, and because said order appointing her temporary administratrix clothed her with full power of a permanent administrator of the estate of a deceased person, instead of limited powers as by law directed. The order of the county judge appointing Mrs. Reeves temporary administratrix was also objected to because it did not appear to be under the seal of the court, nor attested by the clerk, and fails to show that the latter ever entered his certificate upon the original order of appointment as required by law, and because it gives to the temporary administratrix all the authority which could be given by the court to a permanent administrator. The original order bore no seal of the county court and was not attested by the clerk of the court, and bore no certificate of the clerk of that county showing that same had ever been recorded in the probate minutes of Hale county.

Article 3297 provides that:

"Whenever it may appear to the county judge that the interest of an estate requires the immediate appointment of an administrator, he shall, either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some suitable person temporary administrator with such limited powers as the circumstances of the case may require."

Article 3298 prescribes that:

The appointment "shall define the powers conferred, and before being delivered to the person appointed shall be recorded in the minutes of the court, and the clerk shall indorse thereon a certificate that it has been so recorded, and until such record and certificate are made such appointment shall not take effect."

In the case of *Alexander v. Barfield*, 6 Tex. 401, 402, where the Chief Justice of the county, without any particular specification or definition of the powers conferred, broadly empowered the temporary administrator "to transact all business as administrator of said estate, until one may be appointed," Justice Lipscomb held that:

"The court below could not regard the pro tem. appointment of administrator as of any validity, and could only treat the same as a nullity."

There were other reasons which evidently actuated Justice Lipscomb in holding the appointment void, for he said:

"The requisitions of the law have not been regarded in scarcely a single essential particular" as to the particular appointment.

It is true he stresses the plenary authorization of power.

It is noted that appellant's answer is a broad allegation that the temporary administratrix was clothed by the appointment with "full power of a permanent or regular administrator of the estate of the deceased person, under the laws and statutes of Texas, instead of limited powers as by law directed." The actual order of appointment enumerates several specifications of power. However, the order closes with an attempted delegation of the general power of a permanent administrator.

If the case of *Alexander v. Barfield*, supra, has the effect contended, it may be doubted if it were applicable and could control this case. That case merely shows an order which attempted to confer general powers; while the statute says the order "shall define the powers conferred." Here there are several specifications of power defining the powers conferred, and the broad, general power might be considered as mere surplusage. Article 3298, prescribing that the order of appointment shall be recorded, and that the "clerk shall indorse thereon a certificate that it has been so recorded, and until such record and certificate are made such appointment shall not take effect," construed by appellant as mandatory, and that the prerequisites are necessary to make the appointment effective, and void if absent, has this force. Articles 3439 and 3441 prescribe the character of authentication of claims for allowance or approval. Article 3442 prescribes:

"If any such claim is allowed or approved without such affidavit as is required by the preceding articles of this chapter, such allowance or approval shall be of no force or effect."

The San Antonio court held, in the case of *Lanier v. Taylor*, 41 S. W. 516, that a claim with an affidavit which was not signed by the claimant was a nullity. The Supreme Court, in the case of *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29, used language to the same effect. It is true that in those cases the claims were rejected, and were never merged into a quasi judgment in the probate proceedings. Justice Williams, in the case of *Nelson v. Bridge*, 98 Tex. 533, 86 S. W. 7, specifically said, however, though the point was not necessary to the decision of that case, that an allowance by the court of a claim without affidavit is prohibited and will be void and of no effect.

Notwithstanding all this, so insistently urged by appellant, we do not think it is necessary to decide the questions presented as to the temporary administration, on account of the fact of a permanent administration over the same estate.

The petitioner, Fuqua, alleges a regular appointment of Mrs. Reeves as the permanent administratrix, the presentation to, and approval by her, of the notes as such administratrix, and an order of allowance by the county court of the claim. The only two features in connection with the permanent administration alleged by the appellant we think necessary to discuss resisting the enforcement of the deed of trust are as follows:

Paragraph 6: "Respondent denies that part of paragraph 2 of plaintiff's petition wherein the same alleges that she was appointed regular administratrix of said estate on the 16th day of July, 1909, and says that, if such order to that effect was made on that date, same was not made in open court, as directed by law, but was made after court adjourned for that date, and for that reason such order was void," and all her acts thereafter are nullities.

Paragraph 11: It is alleged that the "approval of said claim by the probate court of

said county on July 16, 1909 (during the permanent administration), was an act and an approval by said court of said claim connected with and based upon her alleged allowance of same on June 2, 1909, during said purported temporary administration," etc.

[2] "Where a domestic judgment is sought to be impeached, in order to determine the rules of law governing the particular proceeding, it becomes necessary to consider: (1) Whether such judgment was rendered by a court of general jurisdiction over the subject-matter of the suit or proceeding which same was rendered; * * * (3) whether the attack is direct or collateral; (4) whether the evidence adduced to support the attack is apparent on the face of the record of the proceedings in which said suit was rendered, and, if not, whether evidence aliunde is competent; and (5) whether the ground of the complaint is one which, if true, goes to the power of the court to render the judgment, or is a mere matter of procedure." *Crawford v. McDonald*, 88 Tex. 680, 33 S. W. 327.

We assume the rule to be that every presumption will be indulged on collateral attack to support the action of a probate court having general jurisdiction over the estates of decedents in appointing an administrator in the absence of any facts showing a want of jurisdiction. *State v. Zanco's Heirs*, 18 Tex. Civ. App. 127, 44 S. W. 527; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.

[3] The allegations of appellant to the effect that her appointment as permanent administratrix was not made in open court, but was made after "court adjourned for that date," constitute a collateral attack upon the order of appointment. This does not mean, of course, that court had adjourned for the term, but had merely "adjourned for that date." The probate court had the jurisdiction to make the appointment, and we are entitled to assume from the allegations in the answer that the order of appointment imports verity that the court was acting judicially within its scope and power. Just what is meant that the order was not made in open court is a little hard to construe for this reason: There is no doubt but that courts often adjourn for the day and indulge in loose practice of making orders without formally going to the bench, without literally opening the court, according to the practice governing such matters. To hold that administrations were void upon collateral attack on account of orders informally made, but made, however, apparently judicially, by the county judge, within his jurisdiction, without a formal reopening of court, and not strictly in open court, as understood according to the course of procedure, would, no doubt, disrupt many administrations and invalidate many sales of property. Unless the question is severely and in reality jurisdictional, the rule of judicial verity, unless a direct attack is made,

is based upon the public policy of preventing such results.

Justice Denman, in the case of *Crawford v. McDonald*, 88 Tex. 631, 33 S. W. 328, after discussing the character of judgments void on account of lack of jurisdiction, says:

"There is, however, another rule of law equally well settled upon principles of public policy which precludes inquiry by evidence aliunde the record in a collateral attack upon a judgment of a domestic court of general jurisdiction regular on its face into any fact which the court rendering such judgment must have passed upon in proceeding to its rendition."

We have been unable to find, after rather diligent search, any decision directly affecting the particular question.

We have a statute (article 3218) which prescribes that all decisions, orders, decrees, and judgments of the county court in probate matters shall be rendered in open court and at a regular term of such court for civil and probate business, unless in cases where it is otherwise specially provided.

Article 3219 prescribes that such decisions, orders, and judgments shall be entered on the record of the court during the term at which the same are rendered, and any such "decision, order, decree or judgment, shall be a nullity unless entered of record." This latter article, declaring judgments and orders a nullity unless entered of record, has been several times construed (*Blackwood v. Blackwood*, 92 Tex. 478, 49 S. W. 1045; *De Cordova v. Rogers*, 97 Tex. 60, 76 S. W. 18; *Kelsey v. Trisler*, 32 Tex. Civ. App. 177, 74 S. W. 64), and, if not so entered, are void (same cases). It is noted, however, that neither article—that is, 3218 nor 3219—prescribes that, if an order or judgment is not rendered in open court, the same shall be void. Of course, the commandment in article 3218 requiring the judgment or order to be rendered at a regular term of the court, if violated, might render a probate judgment a nullity. However, this is a mere declaration of the common law upon the subject. *Black on Judgments*, vol. 1, § 179. It is jurisdictional, affecting the power of the court. If an order is entered after a probate court is formally adjourned, without a formal reopening, we are unable to construe that such an act could be considered void, at least in this character of proceeding.

In the case of *Templeton v. Ferguson*, supra, the validity of the administration was attacked on the ground that the record showed that there were no debts due from the estate. The record, however, did not negative the existence of the facts authorizing the court to make the particular order, and the law, said Justice Denman, conclusively presumes that such facts were established by the evidence before the court when the judgment was rendered; the record being silent as to the existence of debts. Justice Bonner said that the question must be tried by the recitals in the record, and, if it does not affirmatively

appear that jurisdiction is lacking, "upon grounds of public policy, the record purports absolute verity and is conclusive." *Murchison v. White*, 54 Tex. 78.

The case of *Nelson v. Bridge*, 98 Tex. 523, 86 S. W. 7 (cited by appellees as one of strong application to this case), in construing the mandatory language of the statute that letters testamentary shall not be issued where a will is probated after the lapse of four years from the death of the testator, is based upon the consideration of several statutes construed in pari materia, and wherein it is asserted that the Legislature, by the particular article, did not intend mandatory force, and the probate void, because other statutes showed to the contrary.

[4] The assertion that the alleged approval of the claim by the probate court during the permanent administration was based upon the approval of the same claim by the court in the temporary administration, and was therefore void, is equally inefficient in this proceeding. The allegations of the whole answer, when considered, show that the court in reality judicially approved Fuqua's claims during the permanent administration. In their very nature such allegations are vague, and one is puzzled what the pleader means on the face of the averments. If the court judicially approved the claim during the permanent administration, unless in some manner it could be said that it was based upon the acts of the temporary administrator as a precedent condition, or as an accompanying prerequisite validity, when the court approved the claim under the statute cited (article 3452), in its very nature the order approving the claims had the force and effect of a final judgment. When we revert to the record actually introduced, we can understand what the pleader means. The same authentication presented to Mrs. Reeves, as the temporary administratrix, as verification of the particular claims, was used and presented to her as permanent administratrix, with reference to the same claim, but, however, shown to have been approved in conformity with the statute by her as such permanent administratrix.

We believe it is wholly unnecessary to go into the question of other alleged irregularities in reality affecting matters of procedure only, but not addressed to the jurisdiction of the court, and also questions of alleged fraud, for the reason that in this character of proceeding it is apparent that the orders during the permanent administration could not possibly be affected. We likewise think the questions of evidence raised by bills of exceptions are wholly immaterial.

The judgment of the trial court is affirmed.

On Motion for Rehearing.

Appellant's counsel, in the presentation of an able motion for rehearing, have shaken

the opinion of this court on the question of collateral attack, citing the following authorities: *Heath v. Layne*, 62 Tex. 687; *Fortson v. Alford*, 62 Tex. 578; *Edwards v. Halbert*, 64 Tex. 667; *Alford v. Halbert*, 74 Tex. 346, 12 S. W. 75; *Ruenbuhl v. Heffron*, 38 S. W. 1030; *Bender v. Damon*, 72 Tex. 92, 9 S. W. 747; *Cruger v. McCracken*, 87 Tex. 586, 30 S. W. 537.

[5] On the question of the approval by the probate court of Fuqua's claims during the permanent administration it is contended that this record does not show that the probate court rendered judgment or an order approving said claim, and that the same was entered of record as prescribed by article 1853 of the Revised Statutes of 1895. The statute provides:

"All such decisions, orders, decrees and judgments shall be entered on the records of the court, * * * and any such decision, order, decree or judgment shall be a nullity unless entered of record."

Appellant says:

"This entry on the record must be found on the minutes of the probate court or upon the claim docket. The question is: Has appellee proven by an entry on said record, that is, on either the minutes of the court or the claim docket, an order, judgment, or decree of the court approving or adjudicating said claim?"

The claim docket presented in this record bearing upon this question presents during the temporary administration all the different claims of appellee involved in this suit, showing the amount, the date of claim, when due, and the date when the interest begins, the rate of interest, and the allowance of same. The first claim presented on said page is the one for \$45,832.66 that is exhibited as a part of the records of the temporary administration. Opposite this item is the following, evidently exhibiting an action upon the claim docket during the permanent administration:

Date of Filing.			Date Approved.			Amount Approved.	
Month.	Day.	Year.	Month.	Day.	Year.	Dollars.	Cts.
June	14	1909	July	16	09	\$2,190	97

On page 43 of the statement of facts we find the following:

"Plaintiff introduced all these reports and orders from the probate minutes as showing the dealings of respondent, Mrs. Reeves, as administratrix, and the probate court of Hale county, with the different claims, the use of the property for the payment of claims, and the claims, that were recognized and approved by her, as follows:

"No. 99. In re Estate of Oscar T. Reeves, Deceased. In the County Court of Hale County, Texas, July Term, 1909.

"Now comes Mrs. Minnie Reeves, administratrix of said estate, and shows to the court

that she has on hands about \$20,000, most of which is available for paying off the claims against said estate, and that the money is lying idle in bank; that one claim for a large amount, about \$90,000, has been proved up and allowed against the estate in favor of W. H. Fuqua; that there are a few, if any, other claims to be presented against said estate, and they will not be for large amounts. She therefore prays that she may be authorized to pay on said Fuqua claim such sums from time to time as she may deem proper.

"Madden, Trulove & Kimbrough and E. Graham, Attorneys for Mrs. Minnie Reeves, Admx.

"No. 99. In re Estate of Oscar T. Reeves, Deceased. In the County Court of Hale County, Texas, July 23, 1909.

"On this day came on the application of the administratrix for authority to make payments on the claims of W. H. Fuqua, and it appearing to the court that said Fuqua has proved up his claim for a large amount, that there are probably few other claims to be presented against said estate, that the administratrix has in her hands idle in bank about \$20,000 and the court being in all things satisfied it is ordered that the administratrix of this estate be authorized to make such payments on said Fuqua claim from time to time as she may deem proper."

If the order of the court approving the claim is sufficiently shown upon the record, as we now view the controversy, it is immaterial whether the resistance to the enforcement of the deed of trust is a direct or collateral attack. The notation upon the claim docket of the approval July 16, 1909, of an amount approved, to wit, \$92,190.97, we are prone to consider, especially if permitted to take it in connection with what is shown upon the docket during the temporary administration as an order of approval of a claim to that amount. The pleading says that to base it upon the memoranda during the temporary administration makes it void, because the temporary administration is a nullity. This argument is specious, in this: If you once assume that the memorandum last quoted was made on the claim docket during the permanent administration, the court evidently intended to approve a claim or claims amounting to \$92,190.97. If the claims on the same page of the docket are of that amount, or approximately so as to make a discrepancy immaterial, it is evident that the probate judge intended to approve those claims during the permanent administration, and the question is not what he based the same upon, but whether there was an actual order of allowance. We think this, taken in connection with the last order quoted, is sufficient to show an order of allowance by the probate court entered of record within the purview of the statute as that the judgment is valid, and not void; it is only the order characterized a nullity, if not of record. Other matters in connection therewith are sufficiently proven.

The motion for rehearing is overruled.

DOWDY v. SOUTHERN TRACTION CO.*
(No. 7461.)

(Court of Civil Appeals of Texas. Dallas.
Feb. 26, 1916. Rehearing Denied April
1, 1916.)

1. CARRIERS — §314(2) — ACTIONS — NEGLIGENCE—PLEADING—SPECIFIC ACTS.

A pleading in a passenger's action for injuries that "as the proximate result of negligence, carelessness and recklessness of defendant in building, erection and maintenance of the road" it was necessary for plaintiff to alight and walk some miles in the rain, contracting illness of serious character, is one of specific acts of negligence, and not general.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275½; Dec. Dig. § 314(2); Negligence, Cent. Dig. § 182.]

2. NEGLIGENCE — §119(4) — PLEADING — SPECIFIC ACTS—BURDEN OF PROOF.

Where specific acts of negligence are relied upon, the plaintiff has the burden of proving such specific acts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 208; Dec. Dig. § 119(4).]

3. CARRIERS — §315(3)—INJURIES TO PASSENGERS—ACTIONS—NEGLECTANCE.

Where the passenger alleged specific acts of negligence and failed to prove them, he could not invoke in his behalf the maxim, "*res ipsa loquitur*," based on the happening of an accident, but he was required to prove the specific negligence alleged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1281; Dec. Dig. § 315(8).]

Appeal from District Court, Dallas County; El. B. Muse, Judge.

Action by J. H. Dowdy against the Southern Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Thos. S. Plowman, of Talladega, Ala., and Parks & Hall, of Dallas, for appellant. Templeton, Beall & Williams, of Dallas, for appellee.

RASBURY, J. Appellant sued appellee for damages for personal injuries charged to have been the result of the negligent acts of appellee's servants. There was a jury trial, resulting in a verdict and judgment for appellee, to review which this appeal is prosecuted.

Appellant advances, under appropriate assignments, several propositions as grounds for reversal. For counter proposition to all issues so raised by appellant, appellee asserts that appellant having alleged in his petition that his injuries were caused by certain specific acts of negligence on the part of appellee, it was necessary, in order for him to recover at all, to prove the negligence alleged; that he failed to do so, and, as a consequence, all other issues are immaterial, and the case should be affirmed.

In connection with the issue thus raised it appears from appellant's petition that on December 2, 1914, he was a passenger upon appellee's car en route from Dallas to Waco. The negligence of appellee, after appellant

became a passenger and which it is alleged resulted in injury to appellant, is disclosed by the following paragraph from his petition:

"That while the plaintiff was en route as a passenger upon the defendant's car as aforesaid and when he reached a point as a passenger thereon, at a distance of about to wit, four miles from the said town of Hillsboro as the said passenger car advanced toward the said town of Hillsboro, the said car as the proximate result of the negligence, carelessness and recklessness of the defendant in the matter of the building, erection and maintenance of its track, roadbed and bridges and the careless and negligent operation of the said car [it] came to a stop at a bridge upon the defendant's line of railroad, the bridge, track and construction being insufficient and out of repair, and the front end of the said car tilted downward and the back end thereof tilted upward to a great angle and the bridge and construction work and the dumps and other general construction of the track, having given way to such an extent that it became extremely dangerous to the life of the plaintiff and other passengers similarly situated, to remain thereon."

Following the pleading quoted were allegations showing that due to the dangerous situation of the car it was necessary for appellant to disembark in the dark in a downpour of rain and walk therein to the town of Hillsboro four miles distant, and as a result of which he was injured in his health by the enforced exposure to the cold and rain. Upon trial and hearing upon the issue we are discussing, appellant and others testified that when the car reached a point about four miles from Hillsboro where the track bridges a ravine and as it was running upon the bridge the forward end of the car sank downward, and the rear end tilted up, due to the washout of the embankments, to an angle of about 45 degrees, where it remained fixed; and that while the car was in a dangerous position all passengers disembarked safely. There was no proof whatever concerning the cause or reason for the track and embankment giving way or to what it was attributable. The allegations of negligence copied about is all the pleading in that respect, and, as stated, no evidence was introduced in support of the same. Accordingly, the inquiry is: Does the petition allege specific acts of negligence, and, if so, was it necessary for appellee to prove same in order to recover at all? We answer both inquiries affirmatively.

[1, 2] A careful examination of the petition narrating appellee's negligence will disclose a general charge of negligence as well as a charge that the injury resulted from specific acts of negligence. It is alleged generally that the injuries proximately resulted from "the negligence, carelessness and recklessness" of appellee in the "building, erection and maintenance of its track, roadbed and bridges." Following such general allegations is the specific charge that appellant's injuries resulted from "the careless and negligent operation of the said car," together with the further allegation that the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

car was caused to tilt and appellant, as a consequence, compelled to alight therefrom and subjected to the injuries detailed because of "the bridge, track and construction being insufficient and out of repair." In short, the specific acts of negligence were averred to be the careless and negligent operation of the car, the insufficient construction of the track and bridge, and the fact that it was out of repair. These allegations speak for themselves, and to assert that they charge specific acts of negligence is but to accord to the language used its ordinary significance. And the rule is that where specific acts of negligence are relied upon, it is incumbent upon the plaintiff, in assuming as he does the burden cast by law, to prove the acts as alleged. The rule is fundamentally correct and uniformly enforced.

[3] Appellant in effect concedes as much, but seeks to avoid the application of the rule in the instant case on the ground that the evidence discloses presumptive negligence as comprehended within the maxim *res ipso loquitur*. Conceding for the purpose of the discussion, but not determining the question, that proof of the mishap which necessitated appellant leaving the car was *res ipsa loquitur*, in the absence of explanation by those in management of the appellee, the precise question has nevertheless been decided adversely to appellant's contention. *M., K. & T. Ry. Co. of Tex. v. Thomas*, 132 S. W. 974. In the case cited the court quotes approvingly from *Gibler v. Quincy, etc., Ry. Co.*, 148 Mo. App. 475, 128 S. W. 791, that:

"The rule permitting a presumption of negligence to suffice for plaintiff proceeds on the

theory that it is easily within the means of defendant to show there was no dereliction on his part, if such be the fact, while the plaintiff would labor under a great disadvantage if the burden to show the particular acts of negligence continued with him. * * * But when the petition contains a general allegation of negligence, and proceeds to aver specific matters of fact as to the manner in which the mishap occurred, the specific averments are preferred and take precedence over the general allegation as to the same subject-matter, and plaintiff is therefore required to prove the specific allegations of fact as laid."

If appellant had alleged that appellee was negligent in permitting the car to run upon the bridge in the manner it did, and as a consequence he was compelled to disembark therefrom and as a result of such enforced disembarkation he was exposed to the inclement weather and injured as alleged, and that he was unable to prove the particular act or omission which brought about the result, the rule could have been invoked and it would have been for the jury, under appropriate instructions by the trial court, to determine whether from all the circumstances, the fact itself bespoke negligence. Having chosen, however, to allege the specific acts and omissions that brought about his injuries, appellant was compelled to prove them, and, having failed to do so, the case should not have been submitted to the jury.

Because of the conclusion reached on the issue we have just discussed, the other issues raised by the brief of appellant have not been considered, and we are not to be understood as having disposed of them in any respect.

The judgment is affirmed.

RIEDEN v. BROTHERHOOD OF RAILROAD TRAINMEN et al. (No. 5615.)*

(Court of Civil Appeals of Texas. San Antonio. March 8, 1916. Rehearing Denied April 5, 1916.)

INSURANCE — §790 — BENEFIT CERTIFICATE — RIGHT OF RECOVERY.

Under the constitution of a brotherhood providing that a member receiving any of enumerated injuries shall be considered totally and permanently disabled and entitled to receive the amount of his beneficiary certificate, and that any other claim for disability is addressed to the benevolence of the brotherhood, and shall not constitute the basis of any legal liability of the brotherhood, but shall be referred to the beneficiary board, and, if approved by it, the member shall be paid the amount of his certificate, a member whose claim for total disability of another nature than enumerated is rejected by such board has no right of recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1960; Dec. Dig. § 790.]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Frank G. Rieden against the Brotherhood of Railroad Trainmen and others. From an adverse judgment, plaintiff appeals. Affirmed.

Geo. Powell, of San Antonio, for appellant.

MOURSUND, J. This is a suit by Frank G. Rieden, seeking to set aside a judgment of dismissal entered in a suit by him against the Brotherhood of Railroad Trainmen. The facts relied upon to excuse the failure of Rieden to file a motion for new trial after the cause was dismissed are fully set out, and are sufficient, and need not be here mentioned. It will also be unnecessary to state the allegations in detail which relate to the merits of the cause of action. The petition discloses that Rieden was a member in good standing of a subordinate lodge of the Brotherhood of Railroad Trainmen, and held a beneficiary certificate entitling him to recover \$1,350 in case of plaintiff's death or his total permanent disability; that he was injured by being struck on the head by a moving freight train; that his skull was fractured, and he is and was totally and permanently disabled from working on the railroad in train service; that he presented his claim as provided by sections 70 and 71 of the constitution of defendant, but his claim was rejected; that his claim, with full proof of his total permanent disability as railroad trainman, was, as required by the constitution of defendant, submitted for decision to the Beneficiary Board of defendant, composed of the Grand Master, Assistant Grand Master, Grand Secretary, and Grand Treasurer of said Supreme Lodge, whose duty it was to decide as to the sufficiency of said proofs, and said Beneficiary Board willfully and fraudulently rejected and disallowed his claim, and falsely and fraudulently reported that plaintiff

had not proven his permanent disability; that, as is required by section 70 of said constitution, the Grand Secretary and Treasurer reported the disapproval of such claim to the Board of Insurance at its next annual meeting, and said board fraudulently and willfully refused to allow such claim. The certificate contained the following provision:

"This certificate is issued on the express condition that the said Frank G. Rieden shall comply with the Constitution, by-laws, rules, and regulations now in force, or which may hereafter be adopted by the within-named Brotherhood, which are printed and published by the Grand Lodge of the said Brotherhood and made a part hereof, and that he pay all dues and assessments imposed upon him within the time specified by the Constitution and by-laws."

The following provisions of the constitution and general rules of the Grand Lodge are disclosed by plaintiff's petition:

"Sec. 68. Any beneficiary member in good standing, who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, to the full amount of his beneficiary certificate, but not otherwise.

"Sec. 69. Proofs of total and permanent disability shall be made as follows: The secretary of the lodge of which the brother is a member and the member shall promptly make statement in writing of such disability on the form prescribed and under the seal of the lodge, which statement shall also be signed by the Master Financier. There shall also be made, signed and sworn to by attending physician, a statement setting forth the nature and extent of the injury and all proofs, including the beneficiary certificate of the member and his receipts for all dues and assessments for the month in which he was injured, shall be forwarded to the Grand Secretary and Treasurer, and if the same are found to be regular and satisfactory by him, the claim shall be assessed for and paid in its regular order, but if the Grand Secretary and Treasurer shall for any reason disallow or reject said claim, it shall be referred to the Beneficiary Board, who may allow or disallow the claim. If allowed, it shall be assessed for and paid in its regular order. If disallowed by the Beneficiary Board, the claimant may appeal to the Board of Insurance, which may allow or disallow the claim, and its decision shall be final. If allowed, it shall be assessed for and paid in its regular order. If the claimant is at a distance from the lodge, the examining physician shall be appointed by the Grand Secretary and Treasurer or Grand Master. Any claimant shall be required at the option of the Grand Master, and as a condition precedent to the right of recovery upon his certificate, to submit himself to examination by one or more reputable physicians or surgeons to be selected by the Grand Master, and the fee of the physician, or surgeon, making such examination shall be borne by the Grand Lodge.

"Sec. 70. All claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood. Every such claim shall be referred to the Beneficiary Board, composed of the Grand Master, Assistant Grand Master, and

Grand Secretary and Treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to benefits hereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims. No appeal shall be allowed from the action of said board in any case; but the Grand Secretary and Treasurer shall report all disapproved claims made under this section to the Board of Insurance at its next annual meeting for such disposition as such Board of Insurance shall deem just and proper.

"Sec. 71. A brother desiring to present a claim under section 70 shall make application to his lodge in writing, accompanying which must be a certificate from a regular practicing physician or surgeon showing the condition of the brother and on which the claim is to be based. If approved by the lodge, the secretary shall forthwith forward them with notice of such approval to the Grand Secretary and Treasurer, who will at once forward to the lodge the necessary blanks and instructions for presenting a claim."

Plaintiff further alleged that certain stipulations in section 70 of the constitution are arbitrary and void, namely, the provision that the rejection of a claim by the Beneficiary Board and Board of Insurance is final, and also the one to the effect that such section 70 may be pleaded in bar of any suit or action at law or in equity which may be commenced in any court to enforce the payment of any such claims. A general demurrer was sustained to the petition.

The question to be decided, as presented by the briefs, is whether under said section 70 Rieden is entitled to recover for total disability of the kind suffered by him. In section 68 the disabilities classed as permanent are defined, and plaintiff's injuries are not such as to bring him within any of those therein set out. In very plain language the contract provides for the payment of a certain sum in the event of the insured's death, or in the event of his suffering any one of the disabilities named in section 68 and therein classified as permanent disabilities. If he suffers other injuries than those named therein, although of equally permanent character and disabling him to an equal extent as one therein named, such injuries are not covered by said section, and no recovery can be had therefor. *Brotherhood of R. R. Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759. There is no provision for payment on account of injuries other than those described in section 68, unless it can be deduced from section 70. That section provides that all claims for disability not coming within the provisions of said section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood, and shall in no case be made the basis of any legal liability on the part of the Brotherhood. This language, tak-

en in connection with the remainder of the section, strongly indicates that the intention was that under no circumstances should a claim not falling within those described in section 68 even become the basis for a cause of action against the Brotherhood; that, even if allowed by the board, it would still address itself merely to the benevolence of the order. However, if it be conceded that the language employed in the subsequent part of the section, when construed most strongly against the Brotherhood, can be said to give the beneficiary a legal right, provided the Beneficiary Board allow the claim, still appellant cannot recover; for he fails to show that such legal right ever came into existence. The contract does not give a cause of action in one provision and undertake to deprive the beneficiary of it in another by providing that no appeal shall be made to the courts, as was the case in *Lewis v. Brotherhood Accident Co.*, 194 Mass. 1, 79 N. E. 802, 17 L. R. A. (N. S.) 714. There is no undertaking to pay for permanent disabilities such as appellant alleged, unless it is stated in the provision that such payment will be made if the Beneficiary Board decides in favor thereof. No duty was imposed by the contract upon the board to allow any such claim. The claim was of a purely benevolent nature. Can it be said that it is contrary to public policy to contract that a benevolent claim will only be paid if allowed by a certain board? Certainly not. But, if it could be held to be contrary to public policy, under what provision would appellant be entitled to recover? Can the courts change the contract so as to make it read that members are entitled to recover for all permanent disabilities, whether mentioned in section 68 or not, leaving the question to be determined by a jury in each case whether the disabilities are permanent? There is nothing in the contract which evidences an intention to so provide, nor from which appellant could contend that he was even led to believe that such was his contract. Such a liability was evidently not contemplated by the Brotherhood, and hence not provided for in fixing assessments. The courts cannot make a contract for the parties. They can hold that contractual rights cannot be taken away by any system of arbitration whereby one of the parties to the contract does the arbitrating, but they cannot hold that the contract gives rights which it expressly negatives.

As was said in the case of *Pool v. Brotherhood of Railroad Trainmen*, 143 Cal. 650, 77 Pac. 661:

"This is not a case of an arbitrary adjudication of the officers of a benevolent association, declaring a forfeiture of property or of vested rights. It is simply the rejection of a claim that the lodge might in its charity have allowed, but it was agreed that such claim should be in the discretion of the lodge and not the basis of legal liability. Plaintiff may have been unfortunate in becoming a member of a brotherhood that is not benevolent, but the court cannot undo his actions in this regard."

In support of the conclusion that appellant is not entitled to recover, we also cite the following cases: *Elghmy v. Brotherhood of R. R. Trainmen*, 113 Iowa, 681, 83 N. W. 1051; *Sanderson v. Brotherhood of R. R. Trainmen*, 204 Pa. 182, 53 Atl. 767.

The judgment is affirmed.

LONE STAR INS. UNION v. BRANNAN.*
(No. 5558.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 5, 1916. On Motion for Rehearing, April 5, 1916.)

1. INSURANCE — 755(2) — LIFE INSURANCE — WAIVER OF FORFEITURE — POWERS OF OFFICERS — MATERIALITY.

Whether the local agent of an insurance company was authorized to waive the forfeiture provisions of the policy is immaterial, where the jury found that the general manager waived such conditions.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1908; Dec. Dig. 755(2).]

On Motion for Rehearing.

2. APPEAL AND ERROR — 1070(2) — FUNDAMENTAL ERROR — REVERSAL.

Where the judgment may be sufficiently supported by three unassailed special findings of the jury, a fourth finding, though it might be erroneous, is not fundamental error and does not require reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4232, 4233; Dec. Dig. 1070(2).]

3. INSURANCE — 755(1) — LIFE INSURANCE — FORFEITURE — ESTOPPEL.

Where the policy or benefit certificate provides for termination on failure to pay premiums or dues, without affirmative act of the insurer, conduct of the insurer misleading the insured to his expense or harm may estop the insurer from asserting forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1907; Dec. Dig. 755(1).]

4. INSURANCE — 755(1) — LIFE INSURANCE — FORFEITURE — ESTOPPEL — EVIDENCE.

Where the insurer's general manager sent duplicate notices of delinquency and treated deceased as a member until five days after her death although she failed to pay, and he failed to furnish blanks for reinstatement, as required by the policy, or to instruct the local agent as to procedure against delinquents, a strong case of estoppel to plead forfeiture was made out, though the forfeiture provisions may have been self-executing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1907; Dec. Dig. 755(1).]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Robert Brannan against the Lone Star Insurance Union. Judgment for plaintiff, and defendant appeals. Affirmed.

Marcus W. Davis and Geo. M. Mayer, both of San Antonio, for appellant. C. A. Keller, of San Antonio, for appellee.

MOURSUND, J. Robert Brannan sued appellant upon an insurance policy for \$1,000, issued to his deceased wife, Marguerite Brannan, alleging that she had in all respects

complied with the conditions and provisions of same, and that due notice of her death had been given, and in the alternative, if it should be found that Mrs. Brannan had not complied with the conditions and provisions of the policy, that such noncompliance was waived by appellant; the acts relied upon as showing waiver being fully pleaded. Appellant put in issue all the material allegations of the petition, and specially pleaded that Mrs. Brannan had not paid assessment No. 103, due by her, within the time prescribed by its constitution and by-laws, and therefore she had forfeited her membership and her policy, and specially denied that it had waived any provisions of the constitution or by-laws.

The case was submitted upon special issues, which, with their answers, are as follows:

"Question No. 1. Was the course of dealing on the part of the defendant with the insured, Marguerite Brannan, with respect to the payment of the assessment on account of the policy sued upon, such as were reasonably calculated to, and did actually, induce the said Marguerite Brannan to believe that the strict performance of the terms of the policy with regard to the prompt payment of assessments would not be insisted upon or required by the defendant, and that payment of delinquent premiums would be received by the defendant within a reasonable time after default and with the understanding between said parties that the contract would not, on such account, lapse or become forfeited? Answer: 'Yes.'"

"Question No. 2. If you answer the foregoing question, 'Yes,' then, was the failure to pay, prior to her death, the premium on said policy, induced and caused by such prior course of dealing, if any, which may have existed between said parties (if any such course of dealing did exist)? Answer: 'Yes.'"

"Question No. 3. Considering such course of conduct, if any, was the tender, shown by the evidence to have been made by the plaintiff to Joe Murray, made within a reasonable time after the notice of assessment for which such tender was made? Answer: 'Yes.'"

"Question No. 4. The policy of insurance sued upon contains the following provision: 'Should a suspended member personally appear and apply for reinstatement within three months from the date of his suspension, and pay all arrearages, if in good health, he shall be restored to membership and his policy again become valid as soon as said payment shall have been received and recorded by the clerk of his division.' Were the delinquent payments which the evidence shows to have been paid by or for the insured and received by Joe Murray received by said Murray (a) as payment of original assessments without reference to the clause above quoted, or (b) were such payments received by Joe Murray for the purpose of reinstatement under the stipulations in said policy, above quoted? Answer: Delinquent payments paid by or for plaintiff were received by Joe Murray (a) as payment of original assessments without reference to the clause quoted."

"Question No. 5. In case you have found, in answer to the preceding question, that said delinquent payments were received by Joe Murray as original payments and not under the authority of the provisions of the policy quoted in the preceding question, then, you will answer whether or not Worth Duncan, general manager of the defendant, knew that said Mur-

ray was so receiving such payments (if you find he did so receive the same). Answer: 'He did.'"

Judgment was entered upon the verdict for plaintiff for \$1,131.15.

[1] Appellant does not question the sufficiency of the evidence to sustain the findings of the jury, but by two assignments presents the sole contention that the evidence shows that Joe Murray was merely its local collector without power to waive any of the provisions or conditions contained in the policy. This proposition may be conceded to be correct, and was doubtless conceded by the trial court, for an issue was submitted whether the general manager of appellant knew of Murray's transactions with regard to receiving payment of delinquent assessments. This issue was decided against appellant, and the finding is not attacked. As the general manager knew of and permitted the business to be conducted by Murray in the manner relied upon as waiving the provisions of the policy, it appears that the question of Murray's authority is not material.

No other question having been raised, the judgment is affirmed.

On Motion for Rehearing.

As stated in our former opinion, there are no assignments which specifically attack any of the findings of the jury as being without evidence to support them.

The first assignment complains of the action of the court in refusing the motion of defendant to peremptorily instruct the jury to return a verdict for defendant, the reason stated being that the undisputed evidence showed that the local secretary and collector of defendant was appointed for the convenience of the members only, and had no power to waive any of the provisions or conditions contained in the policy. No reason was given in the motion for a peremptory instruction as to why defendant considered itself entitled to such action by the court.

The second assignment complains that the verdict and judgment are contrary to the law and the evidence, because the authority of the local collector is limited by the contract, with notice of which the insured and beneficiary were charged.

[2] The issues submitted are copied in our former opinion. No objection was made to the submission of any of the same, and the trial court was therefore not apprised until the motion for new trial was filed, of the reasons relied upon by defendant. Those reasons are set out in the two assignments of error, which, in order to justify us in considering them, have been held to be substantial copies of the paragraphs of the motion for new trial. Appellant has conceived the idea that this court is of the opinion that the entire judgment must rest upon the truth of the finding that Duncan, the gen-

eral manager, knew of the method in which the local collector transacted business. It therefore contends, on motion for rehearing, that the evidence is insufficient to support the fifth finding, and that this is a fundamental error. It is not apparent to us that the judgment cannot be sustained upon the first three findings of the jury. In fact, in order to determine whether or not it can be sustained thereon, we would be required to read all of the evidence. The error, therefore, if error there be, in the answer to the fifth finding, cannot be said to be one going to the foundation of the case. Aside from that, the question whether such answer is supported by the evidence is purely a question of fact, the examination of which requires a careful study and weighing of all the evidence. We conclude that under the authority of the following cases we should hold that no question of fundamental error is presented: *Houston Oil Co. v. Kimball*, 103 Tex. 95, 122 S. W. 533, 124 S. W. 85; *M., K. & T. Ry. v. Maxwell*, 104 Tex. 632, 143 S. W. 1147; *Oar v. Davis*, 105 Tex. 479, 151 S. W. 795.

[3] We believe, however, that, were we authorized to go into the questions argued by appellant, we would not be justified in holding the evidence insufficient to support the verdict and judgment. As we understand the cases, there can be no doubt that, even where the contract or benefit certificate is such that failure to pay premiums or dues within the designated time terminates it without affirmative action on the part of the insurer, there may be an estoppel by reason of conduct on the part of the insurer misleading the insured to his expense or harm.

In the case of *Hawkins v. Lone Star Ins. Union*, 146 S. W. 1041, the same contract as is herein sued upon was construed and the provision relating to forfeiture of membership for nonpayment of assessments held to be self-executing. The decision of such question was perhaps not necessary, as the evidence showed that a letter had been sent to the insured which showed that it would be necessary for her to be reinstated, thus showing that a forfeiture had actually been entered. A very similar provision was held not self-executing in the case of *Northwestern Traveling Men's Ass'n v. Schauss*, 148 Ill. 304, 35 N. E. 747.

[4] The evidence discloses a very strong case of the general manager of the company construing the provision in regard to forfeiture of membership as not self-executing, for he invariably sent second notices just like the first notice, and, although Mrs. Brannan was often delinquent, he never notified her she had forfeited membership, but always treated her as still a member, and in fact, indorsed on the proof of death the words, "Lapsed 10/18," showing that she was treated as a member until five days after her death. But if it be conceded that the provision was self-executing, still the course

of conduct with reference thereto by the general officers is very pertinent upon the issue of estoppel; for it is well calculated to mislead the insured. In addition, we notice that, while the general manager in a general way seeks to repudiate the acts of Murray, he does not contend that he ever instructed Murray to notify members they were suspended or to use any different method with regard to collection of delinquent assessments than those not delinquent. He furnished no blanks for reinstatements, the receipts were general, and neither such receipts nor the reports to him by Murray contained any statement concerning reinstatements.

The motion is overruled.

SWEETEN et al. v. TAYLOR et al.
(No. 5564.)

(Court of Civil Appeals of Texas. San Antonio. Jan. 10, 1916. On Motion for Rehearing, April 5, 1916.)

1. TRESPASS TO TRY TITLE — TITLE FROM SOVEREIGNTY.

Where plaintiffs introduced a patent to the heirs of one deceased and deeds from certain persons of the same name, but made no showing that such persons were the heirs of deceased, and the deeds did not so recite, they failed to deraign title from the sovereignty.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 62; Dec. Dig. ¶ 41(1).]

2. TRESPASS TO TRY TITLE — TITLE FROM COMMON SOURCE—PROOF OF.

Where plaintiffs claimed undar deeds of trust executed by G. and another, while defendants claimed title from G., but their chain did not show the interest of any other person, plaintiffs did not establish the claim of title from a common source; there being no proof of the interest which either of their grantors had.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 62; Dec. Dig. ¶ 41(2).]

3. ADVERSE POSSESSION — RUNNING OF STATUTE—POSSESSION.

Where after conveyance of one-half of the premises the grantee went into possession holding the entire premises for the benefit of himself and his grantor, but failed to record his deed, there can be no reliance on the five-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. ¶ 82.]

4. ADVERSE POSSESSION — RUNNING OF STATUTE—CLAIM UNDER COLOR OF TITLE.

Where there was a delay of over three months in recording a deed, the grantee's possession was not under color of title within the five-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. ¶ 82.]

5. LIMITATION OF ACTIONS — 85(5) — RUNNING OF STATUTE—ABSENCE FROM STATE.

Under Rev. St. 1911, art. 5702, declaring that, if any person against whom there shall be a cause of action shall be without the limits of the state at the time of the accruing of such action or at any time during which it might have been maintained, such absence shall not be taken as a part of the time limited, time

when defendant was without the state must be deducted in determining where plaintiff's action was barred by the five-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 458; Dec. Dig. ¶ 85(5).]

6. TRESPASS TO TRY TITLE — ACTIONS — JUDGMENT.

Mere evidence of prior possession without proof of title from the sovereignty or that the parties claimed under a common source will not warrant judgment for plaintiffs.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 62; Dec. Dig. ¶ 41(1).]

7. APPEAL AND ERROR — 879—NECESSITY OF APPEALING.

A judgment against several will not be disturbed as regards those defendants who did not appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3581-3583; Dec. Dig. ¶ 879.]

Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Action by Mrs. Mollie Taylor and husband against Charles Sweeten, C. W. McFadden, and others. From a judgment for plaintiffs, the named defendants appeal. Reversed and remanded as to them; affirmed as to defendants not appealing.

Love & Ellis, of Uvalde, for appellants. W. O. Linder, of San Antonio, for appellees.

MOURSUND, J. On February 23, 1911, Mrs. Mollie Taylor, joined by her husband, J. S. Taylor, sued G. W. Chant, C. Kruger, Charles Sweeten, D. C. Enloe, L. S. Friday, and W. J. Barker in trespass to try title, seeking to recover survey No. 236 and 210 acres out of survey No. 235, both originally granted to E. B. Franklin, and situated in Edwards county. On June 9, 1913, an amended petition was filed in which W. T. Gardner was made a party defendant and G. W. Chant was omitted. On June 9, 1914, by second amended original petition, C. W. McFadden was also made a defendant. The suit was filed in the district court of Edwards county, and was transferred to the district court of Uvalde county. No citation was issued to Sweeten, and no effort made to obtain service upon him, nor any answer filed by him until the April term, 1915, of the district court of Uvalde county. Defendant Enloe was never served with citation, and did not answer. Kruger disclaimed as to all the land sued for. Friday and Barker alleged that before the suit was filed they had sold and conveyed said lands. Gardner alleged that he had purchased a part of the land on or about July 18, 1910, and had conveyed the same to McFadden on March 27, 1913. He pleaded, however, the three, five, and ten year statutes of limitation in bar of plaintiffs' suit. McFadden answered on March 20, 1915, and alleged the ownership by him of 195 acres out of the east end of said survey No. 236 and a part of survey No. 235. He fur-

ther alleged that he had purchased such lands on March 27, 1913; that his deed was duly recorded on April 17, 1913; and that he had not been made a party defendant until June 9, 1914. He also pleaded the three, five, and ten year statutes of limitation. Sweeten disclaimed as to all except 80 acres out of survey 236, and as to said 80 acres he answered by plea of not guilty and pleas of limitation under the three, five, and ten year statutes.

Judgment was rendered by the court in favor of plaintiffs against Sweeten and McFadden for the portions of survey No. 236 respectively claimed by them and against Friday, Barker, and Gardner for all lands sued for out of survey 236; that plaintiff take nothing by her suit as to any portion of survey 235; that the suit be dismissed as to Enloe, Kruger and Chant. No findings of fact and conclusions of law were filed.

[1] Plaintiffs introduced in evidence the patent to the heirs of Elijah B. Franklin granting survey No. 236, containing 640 acres. They introduced a copy of a power of attorney to Thos. J. Franklin from certain parties, which recited that Elijah B. Franklin was their brother; copy of power of attorney by the same parties, through Thos. J. Franklin, as attorney in fact, and Thos. J. Franklin for himself, to Robert A. Gillespie; copy of a deed by said parties to Wm. F. Gillespie conveying a one half interest in all lands owned by Elijah B. Franklin in Texas, which recites that R. A. Gillespie is to have the other half for locating such lands; copy of deed from W. F. Gillespie and M. A. Gillespie to James H. Gillespie for an undivided half interest in said lands; copy of deed from W. F. Gillespie to Mollie A. Taylor for all of survey No. 236. This deed is dated March 9, 1889, and was filed for record on April 8, 1889. All of these instruments were admitted over the objection of defendants, and the court afterwards concluded that they should not be considered, and that plaintiffs had failed to show title from the sovereignty of the soil. This conclusion was correct. Even if it were conceded that the recitals constitute evidence of the facts stated, such facts fail to show that the grantors were the heirs of Elijah B. Franklin.

[2] Appellants contend that plaintiffs failed to show common source. For the purpose of showing common source plaintiffs introduced in evidence a deed of trust, dated March 25, 1897, by W. F. Gillespie and Charles J. Gillespie to J. H. McLeary, trustee, to secure a note in favor of Mrs. Abigail E. Gillespie for \$1,700, conveying said survey 236 and 193 acres out of survey 235; also probate proceedings in the estate of Abigail E. Gillespie, including the appointment of the ancillary administrator; the appointment by the ancillary administrator of a substitute trustee; deed from the substitute trustee to the administrator; deed from the admin-

istrator to W. D. Sutherland. Defendants introduced in evidence the same instruments, and also deeds showing that defendants McFadden and Sweeten deraign title from said W. D. Sutherland to the portions of survey No. 236 claimed by them.

The deed of trust, as well as the evidence, fails to show what interest in survey No. 236 was claimed by Chas. Gillespie and what interest therein was claimed by W. F. Gillespie at the time of the execution of the deed of trust. They conveyed, "among other lands, 640 acres, the E. B. Franklin survey No. 236, and 193 acres out of the E. B. Franklin survey No. 235." Appellants' contention is that, as the evidence shows that plaintiffs deraign title from W. F. Gillespie, while appellants deraign title from W. F. Gillespie and Chas. Gillespie, such evidence fails to show common source. The leading cases on the question involved are the following: Howard v. Masterson, 77 Tex. 41, 13 S. W. 635; Hendricks v. Huffmeyer, 90 Tex. 577, 40 S. W. 1; Gilmer v. Beauchamp, 40 Tex. Civ. App. 125, 87 S. W. 907 (in which a writ of error was refused). The opinions in the two Supreme Court cases were written by Chief Justice Gaines, and in the second he states what principle was decided in the first, and apparently was of the opinion that common source cannot be shown by plaintiff by the introduction in evidence of a deed by his grantor and another person under which defendant deraigns title, unless the deed itself discloses what interest each of the two grantors undertook to convey. However, by denying a writ in the last-cited case the Supreme Court appears to have approved the holding that, though the interest conveyed by each of two grantors be not shown in their deed it will be sufficient if it is otherwise proven what interest they owned at the time of the conveyance. In that case the evidence showed that the two grantors held under the same title, each claiming a half interest, and the presumption was apparently held justified that each undertook to convey a half interest, and that the grantee by accepting the deed admitted that he claimed title to half under each of them. In this case the parties conveyed several tracts of land, and there is no evidence as to any previous claim of ownership to any of them by Chas. Gillespie, so it is impossible to charge defendants with any admission that they claimed a certain interest under W. F. Gillespie and the remainder under Chas. Gillespie. The evidence shows that D. W. Gillespie executed to Chas. Gillespie as trustee a deed of trust on part of survey 235 to secure Mrs. Abigail Gillespie in the payment of \$1,000, and that Mrs. Mollie Taylor and husband executed to W. F. Gillespie as trustee a deed of trust on survey No. 236 and part of 235 to secure Mrs. Abigail Gillespie in the payment of a note for \$1,400, and the deed of trust from W. F. Gillespie and Chas.

Gillespie to McLeary, under which defendants deraign title, contains the following clause:

"It is expressly understood that the acceptance of this conveyance in trust is a release of any and all claims upon the said lands included therein by virtue of certain trust deeds heretofore executed by D. W. Gillespie and M. A. Taylor and J. Taylor, her husband, to Chas. J. Gillespie, trustee, to secure Abigail E. Gillespie, which said trust deeds are of record in Edwards county, Tex., and that the same or any part thereof shall be hereafter held subject only to the provisions of this trust, and upon faithful compliance with the terms and provisions of this trust the said lands shall be released to the said W. F. Gillespie, or his heirs or assigns, free from any claim or incumbrance created by the aforesaid trust deeds of D. W. Gillespie and M. A. Taylor and J. M. Taylor."

It is impossible to tell whether W. F. Gillespie and Chas. Gillespie claimed to have acquired the lands and to have assumed the payment of a balance of \$1,700 due Mrs. Abigail Gillespie, or whether it was thought the correct thing in renewing the deeds of trust to have the trustees execute the new one. No mention is made of Chas. Gillespie in any of the record evidence introduced, except in the two instances above mentioned. We hold that the court was not authorized to find that plaintiffs had shown the extent to which defendants claimed title under a common source, and therefore plaintiffs could not rely upon common source to recover any part of the land.

[3] Defendants in support of their plea of limitation under the five-year statute introduced in evidence a deed from W. W. Threadgill and wife to W. J. Barker, dated October 1, 1908, to an undivided half interest in the 195-acre tract in controversy, which deed was acknowledged on December 24, 1908, but was not recorded until August 19, 1909. Threadgill went into possession of the land under deed from Sutherland to Threadgill and Brady dated October 12, 1904, acknowledged October 17, 1904, and filed for record August 15, 1905; on June 24, 1907, Brady conveyed to Threadgill his half interest in all of survey 236 not theretofore sold by them. Threadgill lived on the land until he sold to Barker. When Barker bought the half interest he lived on the land "a while." Threadgill and wife conveyed their remaining half interest to Friday by deed dated June 15, 1909, filed for record July 27, 1909. Friday and Barker conveyed to Gardner by deed dated July 16, 1910, and filed for record October 22, 1910. Appellants contend the court erred in holding that the failure to record the Barker deed until August 19, 1909, constituted a fatal break in the period of limitation under the five-year statute. They say that, as Threadgill's deed was recorded, and he owned a half interest and Barker the other half interest, Barker's possession was sufficient without recording his deed. The cases of *Myers v. Frey*, 102 Tex. 527, 119 S. W. 1142, and *Terrell v. Martin*, 64 Tex. 121, are relied upon. These cases hold:

"If one who claims property under a title to himself and another takes possession of the whole of the property for himself and for his cotenant, holding the same adversely to every other person for the period of time required by law, such possession will inure to the benefit of the cotenant not in actual possession and bar any recovery against such cotenant out of possession the same as against him who is in possession."

If Barker held possession for Threadgill, such holding would be sufficient as to Threadgill's half interest, but we fail to see how Barker could be construed as holding his half interest under a deed duly registered when, in fact, he held it under a deed not registered at all during the time in question. The rule announced in the cited cases has no application to the question raised in this case. We notice that appellants assume that the evidence shows that Barker stayed in possession until he sold to Gardner, but the only testimony we find is that of Threadgill to the effect that Barker "lived there for a while." This does not make proof that he was in possession until he sold to Gardner, a period of nearly two years.

[4] By the sixth assignment complaint is made of the ruling that there was a break in the period of limitation because the deed from Friday and Barker to Gardner was not recorded for three months and six days. This court held in the case of *Jacks v. Dillon*, 6 Tex. Civ. App. 192, 25 S. W. 645, that one month and eight days between the date of a deed and date of its filing for record was not an unreasonable time, but the deed was executed in 1886 in California, and the grantee was described as being of the county of McLean, state of Illinois. In the case of *Motley v. Corn* (Sup.) 11 S. W. 851, opinion by Commission of Appeals, it was held that limitation under the five-year statute was proven, although the statement of the evidence shows a failure to record one of the deeds for five months, and no evidence is stated which excused such delay. However, the direct point was not raised, so far as is disclosed by the opinion. Objection was made to the charge because it did not state that the possession should be based upon a deed or deeds duly registered. The court held there was no controversy as to the fact that the deeds had been duly registered; that they were necessarily so construed to be by the court when admitted as a basis for the plea of limitation. The court appears to have taken the view that, no objection having been made in the trial court on the score that the deeds were not duly registered, and no controversy made in the trial court or the appellate court that they were not duly registered, the failure to charge on that feature should be held harmless. We think that a failure to record a deed for three months, under the facts as disclosed by this case, there being no excuse shown for the delay, was unreasonable, and that the trial court did not err in so holding. In this connection we call attention to the

fact that the holding of this court upon a similar question in *Dunn v. Taylor*, 143 S. W. 311, was afterwards held erroneous. *Dunn v. Taylor*, 147 S. W. 287.

The seventh assignment is overruled for the reasons given in overruling the sixth.

[5] The court did not err in holding that the two years' residence of Chas. Sweeten in Oregon should be deducted in estimating the period of his possession. Article 5702, R. S. 1911, has been expressly held applicable to suits for land. *Tate v. Waggoner*, 149 S. W. 737, and cases cited.

[6] By the ninth and eleventh assignments it is contended that the court erred in rendering judgment for plaintiffs against McFadden and Sweeten for the tracts claimed by them. We have already held that no title from the sovereignty of the soil or from a common source was established. Appellees contend that the evidence of prior possession was sufficient to support the judgment, but there is no merit in the contention. The assignments are sustained.

By the tenth assignment it is contended that McFadden proved title by limitation. This assignment is overruled.

[7] The judgment, in so far as it affects appellants, is reversed, and the cause remanded. There being no appeal by the other defendants, the judgment as to them will not be disturbed.

On Motion for Rehearing.

Appellees sought to show common source by introducing in evidence the deed of trust from W. F. Gillespie and Chas. J. Gillespie to J. H. McLeary, trustee, which conveyed, "among other lands," survey No. 236 and 193 acres out of survey No. 235, and was dated March 25, 1897. It is clear, under the decisions cited in our former opinion, that the introduction of said instrument failed to show common source because of the fact that it was executed by two persons, and did not show, nor was there any evidence to show, that W. F. Gillespie alone claimed title to survey No. 236. Appellants introduced in evidence a deed of trust from Mollie A. Taylor and husband to W. F. Gillespie, trustee, to secure a note in favor of Abigail E. Gillespie for \$1,400, dated June 20, 1889, conveying all of survey No. 236 and 210 acres out of survey No. 235, and also a deed of trust from D. W. Gillespie to Chas. J. Gillespie, trustee, to secure a note for \$1,000 in favor of Abigail E. Gillespie, dated December 21, 1891, and conveying part of survey No. 235. Appellees contend in their motion for rehearing that the deed of trust by W. F. Gillespie and Chas. Gillespie to McLeary conveyed the same land and was for the purpose of securing the same debt as the one from Mrs. M. A. Taylor and husband to W. F. Gillespie, trustee. A comparison of the instruments shows that survey 236 is convey-

ed in each of them, but there is a discrepancy in the acreage out of survey No. 235, and, besides, the one given by W. F. Gillespie and Chas. Gillespie conveyed other lands, not described in the statement of facts. We fail to see how appellees can assert that the debt is the same, "plus the accrued interest," for the note for \$1,400 was dated June 20, 1889, and that for \$1,700 was dated March 25, 1897. It is far more probable that the deed of trust by W. F. and Chas. Gillespie to McLeary was given to secure a renewal of the notes secured by both of the other deeds of trust, for it mentions both and provides that its release shall operate as a release of both of them. But even this is a mere guess, for it is not even shown that the lands conveyed therein are the same as those conveyed in the two former deeds of trust, and, even if they were shown to be the same, it is still impossible to say whether W. F. and Chas. Gillespie undertook to represent the grantors in the former deeds of trust and to renew the same, or whether they acquired the titles of said grantors and gave a note for \$1,700, and executed a deed of trust upon such lands or a part thereof, and others, to secure the payment of such note, or whether they acquired some other claim to said lands. We therefore conclude that the evidence fails to show that appellants claim survey No. 236 wholly and entirely by a title acquired through W. F. Gillespie. It is a matter of conjecture whether Chas. Gillespie claimed any interest in survey No. 236, and, if so, what interest. It therefore follows that appellees have failed to show title by common source to survey 236, and have failed to show such a title to any particular interest therein, for the extent of the interest therein held by appellants under W. F. Gillespie is not made to appear.

We are unable to agree with appellees in their contention that the judgment should be affirmed on the theory that prior possession of survey 236 was shown to have been held by W. F. Gillespie prior to 1889 of such character as to support the judgment.

The motion for rehearing is overruled.

CORBIN v. BOOKER. (No. 534.)*

(Court of Civil Appeals of Texas. El Paso. March 16, 1916. Rehearing Denied April 6, 1916.)

1. APPEAL AND ERROR \S 931(3)—REVIEW—PRESUMPTIONS.

Where no findings of fact were filed in the trial court, an appellate court must assume that all issues of fact properly arising were resolved in favor of the appellee.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 8764; Dec. Dig. \S 931(3).]

2. CONTRACTS \S 147(2)—CONSTRUCTION—INTENTION OF PARTIES.

The governing principle in the construction of contracts is that they are to be expounded in accordance with the intention of the parties, to

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Application for writ of error pending in Supreme Court.

be ascertained from the writing itself when its meaning is clear.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. § 147(2).]

3. EVIDENCE § 448 — PAROL EVIDENCE AFFECTING WRITINGS—CONSTRUCTION OF CONTRACT.

Where a written instrument is uncertain in meaning and its language ambiguous, or of doubtful construction, the intention of the parties must be obtained by proof aliunde.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2086-2082, 2084; Dec. Dig. § 448.]

4. CONTRACTS § 170(1) — CONSTRUCTION — PRACTICAL INTERPRETATION.

Practical interpretation placed by the parties themselves on a contract of doubtful meaning is entitled to great, if not controlling, influence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 758; Dec. Dig. § 170(1).]

5. EVIDENCE § 450(4)—PAROL EVIDENCE AFFECTING WRITINGS.

Under a contract of assignment of a lease and option to purchase land, providing that the assignor agrees to proceed at once to survey and establish the exact boundary lines within three years from April 20, 1910, it cannot be determined from the language of the contract itself whether the assignor was obligated to proceed at once or could do so within the three-year period.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2070; Dec. Dig. § 450(4).]

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by W. D. Corbin against L. E. Booker. From a judgment for defendant, plaintiff appeals. Affirmed.

C. L. Galloway and C. L. Vowell, both of El Paso, R. V. Bowden, of Los Angeles, Cal., and J. D. Wendorff, of Kansas City, Mo., for appellants. Turney & Burges and T. A. Falvey, all of El Paso, for appellee.

HIGGINS, J. On April 20, 1910, in Chihuahua, Mexico, certain parties, who will be hereinafter designated as the "Muller heirs," entered into a written contract with L. E. Booker which reads:

"First. The Mesdames Douglas and Dominguez, and the Messieurs Gameros (Manuel, in representation of his daughter) declare that they are the owners of the hacienda named 'Santa Ana del Torreon' situated in the municipality of San Buenaventura, district of Galeana, in this state, and having the following boundaries: North, lands of Luis Terrazas, and the Corralitos Company; south, lands of Francisco A. Prieto and Jose Prieto Varela; east, lands of Luis Terrazas; and west, lands of Colonia Dublan, George Look and Luis Terrazas.

"Second. Mesdames Douglas and Dominguez, and Messieurs Manuel and Enrique Gameros (the former in representation of his minor daughter, and the latter in his own name) have this day leased to Lewis E. Booker the 'hacienda de Santa Ana de Torreon' described in the foregoing clause, for the term of three years in the sum of ten thousand pesos for the first year, thirteen thousand pesos for the second year and sixteen thousand pesos for the third year, payable annually in advance; the lessors hereby acknowledging the receipt of the first year's rent.

"Third. The lessors herein obligate themselves to proceed at once to identify the exact boundary

lines of the before mentioned hacienda de Santa Ana de Torreon, and within the term of three years to establish the correct lines or boundaries of the property in such manner as to leave no question or doubt whatever.

"Fourth. The lessors are herein obligated to sell to L. E. Booker and he, in turn, is obligated to buy the before mentioned hacienda with its extensions which within three years can be so delivered without question, in the sum of fifteen thousand pesos for each one thousand seven hundred and fifty hectares sixty one aras; said sum to be paid in four equal annual payments in cash, interest at six per centum per annum, counting from the date of sale.

"Fifth. In case the boundary lines are established in such a manner that there is no question of their correctness within the life of this contract, the lessors shall give the lessee, L. E. Booker, six months' notice for the first payment which would fall due under a bill of sale for the property.

"Sixth. Mr. L. E. Booker accepts this contract under the conditions herein set forth."

In May, 1910, a preliminary contract was entered into between Booker and W. D. Corbin, whereby it was agreed that Booker would assign to Corbin his rights under above-mentioned contract. It was agreed that Corbin would pay Booker for this assignment the sum of 28 cents per acre on an estimated acreage of 200,000 acres, making a total of approximately \$56,000 and the further sum of \$5,000 as a refund for the 10,000 pesos paid by Booker to the Muller heirs for the first year's rent.

On August 22, 1910, Booker and Corbin reduced their agreement to writing; the same reading:

"That, whereas, said Booker on the 20th day of April, 1910, entered into a certain contract with Mesdames Enriqueta Muller Douglas, Maria Muller Dominguez, with the consent of Eduardo Douglas and Augustin Dominguez, their respective husbands, and Messrs. Manuel Gameros legal representative of his minor daughter, Elisa, and Enrique Gameros, which said contract constituted a lease and an agreement to sell the certain ranch or hacienda named 'Santa Ana de Torreon' to Lewis E. Booker; copy of said contract is hereto attached, marked 'Exhibit A,' and made a part of this contract: Now, therefore, for and in consideration of the sum of five thousand (\$5,000.00) dollars Mexican currency paid said Booker by said Corbin, receipt of which is hereby acknowledged, and the assumption by said Corbin of any and all obligation of the aforesaid contract, said Booker hereby agrees and does hereby assign, sell, set over, transfer and deliver unto the said Corbin all of his right, title and interest in and to said contract, copy of which is hereto attached, marked 'Exhibit A.'

"Said Booker further agrees to proceed at once to survey, establish and identify, or cause to be surveyed, established or identified, the exact boundary lines of the above-mentioned ranch or hacienda de Santa Ana de Torreon within the period of three (3) years from and after the 20th day of April, 1910, to survey, establish and identify or cause to be surveyed, established and identified the correct lines or boundaries in such manner as to leave no question or doubt whatever about the same. Said Booker hereby agrees and guarantees that the east boundary line of said land shall be east of all and every part of the valley land of said tract of land and east of all springs arising upon said land, and the south boundary line of said tract of land shall be south of all springs arising upon

said tract of land above mentioned, as indicated and designated by the ancient monuments marking the east and south boundary lines of said tract of land as pointed out by one Thomas Bailey, acting as agent for the said Booker for the purpose of pointing out said boundary line.

"Said Booker further agrees that in the event any portion of the lands lying within the boundary lines above described and particularly that certain $2\frac{3}{4}$ sitios of land lying adjacent to and within the lands which extend one league north, one league east, one league south and one league west from the church, in the Municipality of Galeana, shall be adjudged to be the property of the parties other than the parties of the first part to the contract with said Booker, copy of which contract is hereto attached marked 'Exhibit A' then and in that event said Booker agrees that he will acquire the title to said $2\frac{3}{4}$ sitios of land and cause the same to be at once transferred to the said Corbin at the same price per acre as specified in said contract of said Booker, copy of which is hereto attached, marked 'Exhibit A'.

"Said Booker hereby further agrees that immediately upon the signing of this contract he will cause to be delivered to said Corbin the free and exclusive possession of the entire tract of land contemplated in this contract, and said Corbin is to have the free and exclusive use, occupancy and possession of the same from and after the signing of this contract.

"Said Booker guarantees that said parties of the first part to said contract, copy of which is hereto attached, marked 'Exhibit A' will faithfully comply with all the terms and conditions of said contract on their part, and upon said Corbin complying with all the terms of said contract upon his part, the said Booker will cause said lands contemplated in this contract to be conveyed to said Corbin by a good, sufficient and legal warranty deed, and said Booker further agrees that the title to said land so conveyed as aforesaid to said Corbin shall be clear and free from all encumbrances whatsoever and that said Booker will warrant and forever defend the title to said Corbin to said lands against all claims and demands of every nature and kind whatsoever, except taxes.

"It is further hereby stipulated and agreed that any suit or suits for the violation of any term or terms of this contract may be instituted and prosecuted by either party to this contract in any court of competent jurisdiction either in the Republic of Mexico or the United States of America."

On August 23, 1910, Booker and Corbin entered into another contract, reading:

"That whereas, on the 22d day of August, A. D. 1910, said parties hereto entered into a contract which, among other things, constituted an assignment of a certain lease and option to purchase a certain tract of land known as ranch or hacienda de Santa Ana de Torreon, situated in the municipality of San Buenaventura, district of Galeana, state of Chihuahua, Republic of Mexico, and that in said contract said Booker agreed that in the event any portion of that certain $2\frac{3}{4}$ sitios of land lying adjacent to the district of Galeana and within the land which extends one league north, one league south, one league east and one league west from the church, in the district of Galeana shall be adjudged to be the property of parties other than the parties of the first part in said contract with said Booker dated the 20th day of April, A. D. 1910, then and in that event, said Booker would cause said lands to be transferred to said Corbin: Now, therefore, in the event that said Booker is compelled to purchase any portion of that certain $2\frac{3}{4}$ sitios of land lying adjacent to the district of Galeana and within the lands which extend one league north, one league south, one league east and one league west from the church, in the district of Galeana from parties

other than those mentioned in his said contract for the purchase of lands dated April the 20th, A. D. 1910, said Corbin will within sixty days after being notified in writing by said Booker that he has a contract of purchase of said lands with the title to the same approved by J. N. Amidor, pay to said Booker twenty per cent. (20%) of the purchase price of said lands as provided in said contract dated April 20th, A. D. 1910, and said Corbin shall have free and absolute possession of said lands from and after the time of payment of said 20% of the purchase price as aforesaid, and the balance of said purchase price shall be paid said Booker within six months from the date of said notification and said Booker hereby guarantees that said land shall be conveyed to said Corbin at the time said Corbin pays the balance of said purchase price as herein provided."

In the contract between Booker and Corbin, dated August 22, 1910, it is recited that the consideration for Booker's assignment to Corbin of his rights under the contract of April 20, 1910, is the sum of \$5,000 Mexican currency. It is admitted this did not truly state the consideration, and that the true consideration was the sum of approximately \$56,000 upon the estimated acreage and \$5,000 to reimburse Booker for the first year's rent paid by him.

Corbin paid a part of the consideration which he contracted to pay to Booker and has failed to pay the balance. He gave a note to cover such balance, which was accepted by Booker, but same has never been paid. On December 21, 1911, Corbin filed this suit against Booker to recover the moneys paid by him to Booker on account of the contract between them and to cancel the note given by him as above stated; also, to recover certain moneys by him expended and for profits which he averred he had lost by reason of Booker's failure to perform his obligations under their contract. In effect, the suit is for a rescission of the contract and to restore to Corbin all moneys which he had expended and profits lost.

It is contended that Booker breached his obligation with reference to surveying, establishing, and identifying the boundaries of the hacienda and delivery of possession.

[1] Upon trial before the court, judgment below was rendered in Booker's favor. There being no findings of fact filed below, this court must assume that all issues of fact properly arising were resolved by the court in Booker's favor.

The vital points raised by this appeal, and upon which all of the questions in the case turn, are well stated by appellant in this language:

"(1) Was the defendant required, under the terms of the contract, to begin surveying immediately after the signing of said contract, and continue until what could then be done was done, and complete the surveys covering the disputed lands as they were adjusted within the three years, or did he have the right at his option to begin the surveys at any time he chose within the said period of three years, provided he completed the same within said period?

"(2) If, under a proper construction of the contract, the defendant had not breached the

provisions relative to surveys at the time suit was filed, then the next question is whether or not he had breached the provision of the contract relating to the giving possession of said ranch to plaintiff at the time suit was filed."

[2-4] Booker's obligation with respect to surveying, establishing, and identifying the boundaries of the hacienda is not clearly stated in the contract of August 22, 1910. In this respect, it is ambiguous and of doubtful construction. The uncertainty of meaning is not relieved by the contract of April 20, 1910, in connection with which it should be construed. The governing principle in the construction of contracts is that they are to be expounded in accordance with the intention of the parties. The intention of parties to a written contract must be ascertained from the writing itself when its meaning is clear. But where the instrument is uncertain in meaning, and its language ambiguous or of doubtful construction, the intention of the parties must be obtained by proof all-unde. Under such circumstances, resort may be had to the surrounding facts and circumstances connected with its execution as would tend, not to contradict the terms of the instrument, but to explain its purpose and meaning, in order to arrive at the true intent of the makers. And the practical interpretation placed by the parties themselves upon a contract of doubtful meaning is entitled to great, if not controlling, influence. In an executory contract of this nature, and where its execution necessarily involves a practical construction, if the minds of both parties concur in a construction, there can be no great danger in the adoption of it by the court as the true one.

[5] In the case at bar, it is admitted that Booker did not at once proceed to survey, establish, and identify the boundaries of the hacienda, or cause the same to be done, and had not done so at the time plaintiff filed his suit. He contends that he could do this at any time within the period of three years from and after April 20, 1910. There seems to be no controversy that there was ample time to do this within the three-year period if Booker's contention is correct. It is impossible to determine from the language itself whether Booker was obligated to at once proceed to survey, establish, and identify the boundaries, or could do so within the period of three years from and after April 20, 1910. Appellant seems to concede the doubtful import of the contract in this respect, as he argues that the surrounding facts and circumstances show it was the intention of the parties that Booker should at once proceed to do so. Under the rules of interpretation to which allusion has been made, the evidence is clearly sufficient to support a finding that the intention of the parties was as contended by Booker.

As to possession, the evidence shows that Corbin was in possession through his tenants and representatives. Rentals were collected

for his account from various tenants. He made several trips to the land. Several parties of prospective purchasers were sent by him to view the land, and he seems to have had as complete possession as he desired.

So, upon both phases of the case, Booker was not in default when the suit was filed, and recovery back of the moneys which Corbin had paid was properly denied. It will serve no purpose to detail the evidence upon the two vital issues in the case. It was abundantly sufficient to warrant the trial court in resolving both issues against appellant. Long subsequent to August 22, 1910, Corbin was expressing to Booker his appreciation of and satisfaction with Mr. Booker's treatment of him. Said he had never done business with a man who seemed to want to be as fair as Booker. He was justifying his failure to make the payment of the \$61,000 which he had agreed to pay by the financial situation and his inability to procure the money. It is plainly inferable from all the testimony that the revolutionary conditions which arose in this portion of Mexico in the year 1911, destroying the value of Corbin's rights under the assignment of the contract of April 20, 1911, coupled with inability to pay the balance due Booker, was an important and probably controlling factor in prompting Corbin to seek a rescission of his contract with Booker, rather than any breach thereof upon Booker's part.

Chief Justice HARPER concurs in the disposition made of this appeal. He is of the opinion that the contract of August 22, 1910, must be construed in connection with the Booker-Muller contract, because it was simply an assignment by Booker of his rights, under his Muller contract, and it so stipulates in unquestioned terms.

The Muller contract only provided that the boundaries were to be identified and established within three years, and the only additional provision, if it is additional, in the Corbin-Booker contract, is that Booker agrees to survey. The only thing of doubtful import in these two contracts is the expression "proceed at once," and when this is read in the light of the Booker-Muller contract, that is, the lands were in no event to be deeded until the expiration of three years, it is apparent that either party, the Mullers or Booker, had the entire three years in which to perform that part of the contract. For, until the time came to pass title by executing deeds, there was no necessity for identification by field notes. At least, there is nothing in the writings themselves to indicate that there was any reason for surveying the lands any sooner than was necessary to have field notes for the end.

But if the contracts are ambiguous, as seems to be conceded in respect to the time when the parties were to begin to survey, identify the boundaries, etc., there is no doubt that both contracts provide that the

grantors shall have the full period of three years in which to do it. Then what value would it be to appellant for the Mullers or Booker to "begin at once" if they have full three years to complete the survey? Clearly, the matter of the time for beginning the survey was of no consequence—so that it was done in time for the deeds.

Finding no error, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. RUTHERFORD. (No. 7445.)*

(Court of Civil Appeals of Texas. Dallas. Feb. 12, 1916. Rehearing Denied March 25, 1916.)

1. CARRIERS ⇨290(1)—CARRIAGE OF PASSENGERS—LIABILITY FOR INJURIES.

Where a carrier failed to keep its car comfortably warm, and plaintiff's wife, who was in a delicate condition, contracted cold, which resulted in an impairment of her health, recovery cannot be denied on the ground that neither plaintiff nor his wife informed the carrier or its servants of the condition of his wife; for a carrier is bound to exercise the highest degree of care practicable for its passengers, and so such notification was not necessary to entitle plaintiff's wife to have the car properly heated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1188; Dec. Dig. ⇨290(1).]

2. CARRIERS ⇨320(11)—CARRIAGE OF PASSENGERS—ACTIONS—EVIDENCE—JURY QUESTION.

In an action for injuries to plaintiff's wife resulting from cold contracted in an insufficiently heated car, evidence held insufficient to raise for the jury the question whether the carrier's servants would have heated the car had they been informed of the wife's delicate condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1190; Dec. Dig. ⇨320(11).]

3. CARRIERS ⇨330—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Though there was fuel and a stove in the car in which plaintiff and his wife were riding, plaintiff's failure to build a fire in the stove, the car becoming cold, and his wife being in a delicate condition, is not contributory negligence precluding recovery for injuries resulting to his wife from exposure.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1370, 1372, 1373; Dec. Dig. ⇨330.]

4. APPEAL AND ERROR ⇨742(5) — ASSIGNMENTS OF ERROR—CONSIDERATION.

An assignment of error complaining of the court's refusal to submit an issue to the jury cannot be considered on appeal, where the accompanying statement merely stated that there was abundant evidence to establish appellant's contention; the statement as to the evidence being a mere conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇨742(5).]

5. APPEAL AND ERROR ⇨1062(2)—REVIEW—HARMLESS ERROR.

In an action for injuries to plaintiff's wife, who contracted cold in an insufficiently heated car, the refusal of the court to submit the question whether plaintiff had exercised due care in furnishing his wife with suitable clothing for the trip was harmless, where the jury answered in the negative a question whether the wife

was negligent in providing herself with suitable clothing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4213; Dec. Dig. ⇨1062(2).]

6. DAMAGES ⇨132(5)—PERSONAL INJURIES—MEASURE.

In an action for injuries to plaintiff's wife, who contracted cold in an insufficiently heated car, an award of \$1,700 damages, one-half of which the jury specified was for damages to the present and the remainder for future damages, cannot be held excessive, where the cold settled in the wife's internal organs, causing her to bloat and affected her menstruation and general health.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 376; Dec. Dig. ⇨132(5).]

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Action by P. M. Rutherford against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Daniel Upthegrove, both of Dallas, and R. S. Neblett, of Corsicana, for appellant. Callicutt & Johnson, of Corsicana, for appellee.

TALBOT, J. The appellee, Rutherford, brought this suit to recover damages alleged to have been sustained on account of sickness and injuries caused his wife, Mrs. Rosie Rutherford, by the negligence of appellant in furnishing her, as a passenger, a cold or insufficiently heated car in which to be transported from Hamilton, Tex., to Stephenville, Tex., about the 14th of November, 1913. The evidence upon the issues raised by the pleadings was conflicting, but sufficient to warrant the following conclusions of fact: On November 14, 1913, the appellee, P. M. Rutherford, and his wife, purchased tickets and boarded one of appellant's trains at Gatesville, Tex., to be carried to Stephenville, Tex. Before purchasing tickets, appellee told the agent of appellant at Gatesville that he had to go to Stephenville and had to arrive there that night. The agent replied, in substance: Go over appellant's line; you can buy a ticket to Hamilton, and there take a train going over appellant's branch road to Stephenville; you will get to Hamilton about 5 o'clock this afternoon and will there be transferred and go right on through. Appellee then bought tickets for himself and wife entitling them to transportation over appellant's roads to Stephenville and boarded the train for that purpose. The train upon which they took passage left Gatesville about 2 o'clock p. m. and arrived at Hamilton about 15 minutes past 5 o'clock of the same afternoon. Just before the train reached Hamilton, the conductor passed through the coach in which appellee and his wife were traveling and told the passengers who were going to Stephenville to remain in that

coach. Appellee then asked the conductor if he would make connection at Hamilton for Stephenville, and informed him that if he would not he would take a train over the Frisco Railway to Comanche. The conductor replied that appellee would be carried over from Hamilton in about 30 minutes. When the train arrived at Hamilton, the coach in which appellee and his wife were riding was put on a side track about 200 or 300 yards from the depot with appellee and his wife and the other passengers bound for Stephenville in it, where the car and passengers remained until about 1 o'clock the next morning. It seems that the car in which appellee and his wife were traveling was to be carried from Hamilton to Stephenville by a freight train which had not arrived at Hamilton when said car was placed on the side track; but of this neither appellee nor his wife was informed, and they remained in the car, thinking it would be pulled out for Stephenville within the time the conductor had informed them they would be carried forward on their journey, until that time had expired. There were no lights and no fire in the car, and after it had remained on the side track for about one hour the appellee went to appellant's depot and told the agent there the condition of the car. The conductor remarked, in effect, that if he (appellee) and his wife expected to be carried to Stephenville they would have to stay in the car, as he (the agent) did not know when the freight train would arrive. This was the first time appellee knew that he and his wife were to be carried from Hamilton to Stephenville by a freight train. There was no porter on the car, and no agent of appellant of any character in charge of it while it remained on the side track. The coach was comfortable when it first arrived at Hamilton and was placed on the side track, but later in the evening the weather became much cooler, and the car got cold. Mrs. Rutherford was suffering from menstruation, and while the car was on the side track she became cold, especially her feet, and very uncomfortable, and other lady passengers complained of being cold. Some time after dark, and while the car was still on the side track, the appellee went out near the railroad track, got some "chunks," and with them and waste paper found in the car made a fire in the stove, and, in the language of the witness, appellee "got the car pretty comfortable, but it didn't last long." The car left Hamilton about 1 o'clock that night and reached Stephenville at about 4 o'clock the next morning. There was no fire made in the stove of the car after it pulled out of Hamilton, and appellee's wife was quite cold and complained of suffering pain from the time the car started until it arrived at Stephenville; and as a result of the unwarmed condition of the car she took a severe cold and was made sick.

Mrs. Rutherford testified:

"I caught a severe cold that night. I was not comfortable while in that car because I was cold and suffering. The cold settled in my back and ovaries. The cold left me in a bad condition, and I suffer all the time. The suffering lasted for over a week at that time. I did not see any railroad man in that car from Hamilton to Stephenville, except the conductor. There wasn't any fire in that stove from Hamilton to Stephenville. I heard Mrs. Richardson, an old lady passenger, complaining that she was cold. No railroad man ever asked or inquired as to the comfort of the passengers from the time that car was set out there (at Hamilton), about 5 o'clock in the evening, until 4 o'clock the next morning, when we got to Stephenville."

The agents of appellant in charge of the coach in which appellee and his wife were being transported to Stephenville were not informed of the condition of Mrs. Rutherford, and neither of them knew she was suffering from her monthly sickness.

The appellant denied the facts alleged in appellee's petition, and charged that appellee and his wife were guilty of contributory negligence, which was the proximate cause of the injury complained of, in that neither of them made known to appellant's agents the sick or delicate condition of Mrs. Rutherford; that appellant's agents were ignorant of her condition, and that no request that additional heat be supplied was made; that had it been made known to appellant's agents in charge of the train, upon which appellee and his wife were traveling, that Mrs. Rutherford was suffering with her menstrual period and needed more warmth in the car, it would have been furnished. Appellant further charges that there was provided in the coach in which appellee and his wife were traveling a stove and an abundance of fuel, and that they could have made a fire and kept the coach heated at such a temperature as they desired; that they failed to do this, and were in that respect guilty of negligence contributing to the injuries complained of; that they were further guilty of such negligence in that they failed to provide themselves suitable wraps or clothing in which to travel. The case was tried before the court and a jury, and resulted in a verdict and judgment for appellee in the sum of \$1,700.

[1] The first assignment of error is that the court erred in refusing to give the following special charge requested by the appellant:

"You are instructed that the evidence does not show that either the agent of the defendant at Hamilton, or the brakeman in charge of the train from Hamilton to Stephenville, knew or had notice of the claim that Mrs. Rutherford was in delicate health and suffering from female trouble, either at Hamilton while the car was there, or while the car was being transported from Hamilton to Stephenville. And in this connection you are further instructed that if you believe from the evidence that the plaintiff's wife, Mrs. Rutherford, was in delicate health and suffering from female trouble and her monthly sickness at the time she was in the coach at Hamilton, or while traveling from Hamilton to Stephenville, and you further be-

lieve from the evidence that a reasonably prudent person would have made known this condition to the agent at Hamilton, and to the conductor and brakeman in charge of the train from Hamilton to Stephenville, and that plaintiff was negligent in not so doing, and that if such fact had been made known the defendant, through its agents and operatives of the train, would have provided coal or fuel and heat, and would have kept the coach at such temperature as would have prevented any suffering or pain to plaintiff's wife, if they did not, then you will find for the defendant, whether you believe from the evidence that defendant failed to keep fire in the coach, or keep it comfortable for her, or not."

The proposition advanced is that:

"It was a question of fact for the jury to determine, under all the circumstances and evidence in the case, what was the proximate cause of the suffering and injury, if any, endured and received by Mrs. Rutherford, appellee's wife, and whether or not appellee, Rutherford, was guilty of negligence in failing to make known the condition of his wife and request that the car be made comfortable and suitable to her condition, and the court should have submitted this issue to the jury."

Notwithstanding the evidence was insufficient to show that either of appellant's agents knew that Mrs. Rutherford was in delicate health and suffering from menstruation while she was in the car at Hamilton or while she was being transported from Hamilton to Stephenville, there was no error in refusing the special charge in question. Neither the appellee, nor his wife, could be charged with contributory negligence in failing to make known the condition of Mrs. Rutherford, even though had it been done the servants of appellant would have heated and made comfortable the car. In strictly actions for a breach of contract, special damages cannot be recovered unless it is alleged and proved that at the time of the making of the contract the defendant had notice of the special conditions or circumstances rendering such damages the natural and probable result of the breach. The instant suit is not such an action. It is one for a tort founded upon contract. The wrongful acts and omissions charged which resulted in Mrs. Rutherford's injury, and which the evidence was sufficient to establish, constituted actionable negligence on the part of the appellant amounting to a tort, and the rule applicable to special damages does not obtain. It was the duty of appellant as a common carrier of passengers to exercise that high degree of care for the personal comfort and safety of Mrs. Rutherford which a very cautious and prudent person would have exercised under the circumstances surrounding her, and it cannot escape liability for the damage done her as a result of the failure to discharge that duty, upon the ground that she nor the appellee, her husband, made known her suffering condition and requested its servants to do those things necessary to prevent injury to her which the law imposed upon them. The question is not whether the damage done Mrs. Rutherford entered into the consideration of the parties with knowledge

of her physical condition before the acts or omissions causing it were done or omitted, but whether such damage was fairly and directly the result of such acts or omissions. *Railway Co. v. Redeker*, 45 Tex. Civ. App. 312, 100 S. W. 362.

In the case of *Railway Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797, the plaintiff sued to recover damages for injuries inflicted upon his wife. His wife was pregnant and a passenger on the railway company's train. Through the negligence of the company's servants an engine or train collided with the car in which Mrs. Ferguson was seated with such force that she was partially knocked from her seat and greatly shocked, jerked, and injured, causing her physical and mental suffering, and resulting in the premature birth of her child. The court instructed the jury to the effect that the railway company owed Mrs. Ferguson the duty to exercise that high degree of care for her reasonable personal safety which a very prudent person would use under the same circumstances about the same matter, and that a failure to exercise such care would be negligence. This charge was objected to, and the proposition contended for by the railway company that, without knowledge of the delicate condition of Mrs. Ferguson, the degree of care imposed by law upon it was that due to all persons in usual and ordinary physical condition, and not such as might have been due to one "in the light of attending circumstances." This proposition was not sustained, and, in discussing the question, the court uses the following language:

"The court gave the proper standard of care: and the degree of care so prescribed, in our judgment, must be exercised by the carrier of passengers in the light of an imputed, if not actual, knowledge that the aged, the infirm, and those in delicate condition may and do constantly travel on the passenger trains of the country. Humanity is heir to many ills and destructive conditions requiring notice and peculiar care, and those commonly and constantly engaged in their transportation for hire ought not to be heard to say in excuse for their negligence, 'We were without notice of the fact.'"

In *Railway v. Rushing*, 69 Tex. 306, 6 S. W. 834, the objection to the court's charge was that the company's liability was made to depend upon whether the force of the engine was sufficient to throw the plaintiff down, and not whether it was sufficient to throw a person of ordinary physical ability. In disposing of the objection, our Supreme Court said:

"The charge as given is correct in law. A railroad company owes a duty to others besides persons of ordinary physical ability. They are presumed to know that persons * * * old or decrepit travel upon their trains, and they must exercise care accordingly."

But again, in the case of *Pecos & N. T. Ry. Co. v. Williams*, 34 Tex. Civ. App. 100, 78 S. W. 5, the appellee was a passenger of the appellant, was carried about a mile beyond her station, and put off the train. She al-

leged, among other things, that she was, and had been for a long time prior to the wrongs complained of, a frail and delicate person, and had been afflicted with an ear trouble since her early childhood; that she was compelled, because of her ejection from appellant's train, to walk back to her station, through snow and storm; and that as a direct result of her exposure therefrom she took a severe cold, which resulted in tonsillitis, excruciating pains in her neck and head, and a pus discharge from her ear. The principal controversy arose from the objection presented by the railway company to the averments that appellee was a person of delicate health, unprotected with sufficient wraps, etc., to withstand the storm or rain, sleet, and snow, and had been afflicted with an ear trouble since her early childhood. It was contended, in effect, that, in the absence of notice of such conditions of the person, appellant was not liable for such injuries as may have resulted to appellee "in excess of what would have resulted to a woman in a natural state of health and clothed as one would naturally be expected to clothe herself to make such a trip in such weather." This contention was held to be not well taken, and, in effect, that the allegations of appellee's physical condition, when ejected from appellant's train, her affliction with an ear trouble, and her suffering on account of the exposure to which she was subjected by reason of appellant's wrongful acts were proper and proof thereof admissible, although the appellant had no notice of such conditions. The remarks made in the foregoing cases were quoted and approved by this court in the case of *Railway Co. v. Redeker*, supra, and the principles of law enunciated therein are applicable to the instant case and make plain the correctness of the court's ruling in declining to give the special charge under consideration.

[2] Again, we are inclined to the opinion that the evidence was insufficient to authorize the submission of the issue sought to be submitted in the charge that appellant's servants, had they known that appellee's wife was suffering from her monthly sickness, would have kept the coach at such temperature as would have prevented any suffering or pain to appellee's wife. The extent of the testimony in relation to that issue is that of the appellant's witness C. E. Main, a brakeman on the train. He testified:

"It is my best remembrance that the fire was kept up and the coach kept warm. I wasn't still keeping up the fire to warm that old lady after she got off at Alexander. If I hadn't thought the coach was warm enough after we left Alexander, I would have put more coal in the stove."

The old lady referred to was a passenger who left the train at the station Alexander on the line of appellant's road between Hamilton and Stephenville, and, according to the testimony of appellee, his wife suffered from the exposure to cold, by reason of being forced to remain and travel in an unheated

coach for several hours before the station Alexander was reached.

What we have already said disposes of appellant's second, third, fourth, fifth, and sixth assignments of error adversely to its contention, and further discussion is unnecessary.

[3] The seventh assignment of error complains that the court erred in refusing to give a special charge requested by appellant to the effect that if the coach in which the appellee and his wife were traveling became cold to such an extent as to inflict pain and suffering upon Mrs. Rutherford, and the defendant was negligent in that it did not exercise such high degree of care as a reasonably prudent person would have exercised under the same or similar conditions to have kept the coach warm, and there was a stove in the coach, and there was coal and fuel provided with which the plaintiff, P. M. Rutherford, in the exercise of ordinary care and prudence, could have made a fire and have kept the coach at such temperature as would have prevented any pain or injury being suffered by plaintiff's wife, and in the exercise of ordinary care a reasonably prudent person would have done so, and his failure to do so, if he did fail, proximately caused or contributed to any pain or suffering which Mrs. Rutherford endured, then to find for defendant, whether the defendant, railroad company, was negligent in the first instance or not. We are of the opinion that, even though there was a stove in the coach in which appellee and his wife were traveling and coal and fuel provided for making a fire in it, the law did not impose the burden or duty upon appellee to make use of them for the purpose of heating the coach, in order to escape the charge of having failed to do what a reasonably prudent person would have done under the circumstances to avoid injury. The duty rests upon railway companies to exercise that high degree of care spoken of in the charge refused, to heat their coaches sufficient to prevent suffering and injury to their passengers from cold, and will not be heard to say, when that duty has not been performed and a passenger is injured thereby, that such passenger was guilty of negligence barring a recovery because he did not do the thing to prevent the injury which was imposed by law upon such companies. The special charge was properly refused.

This disposes also of the eighth and ninth assignments of error and further consideration of them is unnecessary.

[4, 5] The court in its general charge instructed the jury, in substance, that if Mrs. Rutherford was too thinly clad for the condition she was in while traveling over appellant's road and in the then state of the weather, and a person of ordinary care would have provided thicker and warmer clothing for such a journey, and the jury should believe she was guilty of negligence in that regard, and such negligence caused the pain

and injury suffered by her, to find for the appellant. In this connection, the appellant requested the court to give a special charge to the effect that if either Mrs. Rutherford or the appellee was guilty of negligence in this respect, and such negligence caused the pain or injury complained of, to find for the appellant. This requested charge was refused, and the court's action in refusing it and in giving the paragraph of the general charge just referred to is by assignments of error 10 and 11, respectively, asserted to be error. It is claimed that the action of the court in giving the one and refusing the other of these charges constitutes reversible error, because the appellant was entitled to a verdict if either Mrs. Rutherford or the appellee, her husband, was guilty of contributory negligence with respect to the clothing she wore or was provided with. A consideration of the assignments is objected to on the ground that there is not subjoined to either of them such a statement in support thereof as is required by the rules. The objection, we think, is well taken. There is no evidence quoted or stated showing negligence on the part of the appellee with respect to furnishing his wife warm and suitable clothing for the trip she was taking. The only portion of the statement, made under the assignments, that relates to the evidence upon the subject, is simply that "there was abundant evidence to show that he (appellee) was negligent in this regard." This is a mere conclusion and wholly insufficient under the rules. We have, however, looked to the evidence contained in the statement of facts and conclude that it was insufficient to raise the issue sought to be submitted to the jury by the special charge. It is true the trial court submitted such an issue with respect to the conduct of Mrs. Rutherford, but we are of opinion that no error would have been committed had such issue been omitted altogether. But having submitted to the jury the question of whether Mrs. Rutherford was guilty of negligence in failing to provide herself with warm and suitable clothing for the journey she was making, and the jury having found that she was not guilty of negligence in that respect, it is manifest that the court's refusal to give appellant's special charge calling upon the jury to determine whether or not the appellee negligently failed to furnish his wife such clothing did not result in the rendition of an improper verdict and judgment. The refusal of the special charge therefore must be regarded as harmless.

The remarks of counsel for appellee to the witness Walker while interrogating him on cross-examination, and made the basis of the twelfth assignment of error, were doubtless improper; but they were not of such a character as affords any just and sufficient reason for a reversal of the case. The assignment will therefore be overruled.

[8] The verdict rendered by the jury is as follows:

"We, the jury, find for the plaintiff the sum of \$1,700.00, to wit, \$850.00 as damages to the present time, and \$850.00 as future damages. "S. B. Bromley, Foreman."

It is assigned that there is no evidence which shows that the appellee's wife will suffer injury or pain in the future, and that the verdict is excessive and shows that it is the result of ignorance, prejudice, and ill feeling toward the appellant, and is not an expression of the honest opinion of the jury attempting to apply the law as given in the charge of the court to the evidence as detailed by the witnesses.

The testimony bearing upon the nature and extent of Mrs. Rutherford's injuries and suffering is disclosed by the testimony of Mr. and Mrs. Rutherford, and Dr. Langford. Mr. Rutherford, the appellee, testified:

"My wife was suffering from pains from her monthly period. She was suffering before we left Hamilton, and continued to do so for some time. For a month or two I had to take her to her mother's. She caught cold in the car that night, and it settled in her bowels and caused her to bloat. Since then she has had trouble with her menstrual periods every time. First time after that it came on her 12 days early. Before that her periods had been regular. She suffers a great deal with her menstrual periods since; have had to buy medicine, etc., and never had that trouble before then."

Mrs. Rutherford testified, in substance, as follows:

"My menstrual period had just come on me that morning, and I caught cold in that car that night. I was not comfortable while in that car, because I was cold and suffering. The cold settled in my back and ovaries. It left me in a bad condition, and I suffer all the time. Prior to that time, when I was at those periods the suffering lasted from 3 to 5 days. It lasted 9 days that time. The pain I suffered at that time was greater than it was before that time, and has been every time since. Not able to do work now when monthly sickness comes, but could before. Since then pain at periods much greater than formerly. Before then was regular. Since then I come sick too quick all the time, am not regular at all. I never had any trouble like that before that time. My periods are on me much longer now than before. Formerly lasted 3 to 5 days. Now last from 8 to 10 days. Periods come earlier, closer together, last longer, and pain much more intense than formerly. General health affected, and not at all strong now."

Dr. Langford testified:

"It began to get uncomfortable about 7 or 8 o'clock. It was so cold at that time passengers built a fire. I don't know how long fire lasted. The condition of car was such that it would have been very apt to hurt a woman with her menstrual period on. The floor of the car was very cold. When a woman has her menstrual period on, it frequently affects her to get her feet cold. The conditions along that line baffles the doctors; sometimes has one effect and sometimes another. It was pretty cold when we got to Stephenville. It would have done a woman no good to haul her over there that night through that cold. Don't know whether the fire they started went out or not. If a woman has a swelling in her abdomen during her menstrual period, it is caused by congestion of the parts. If this lady had that symptom, she perhaps had congestion of the ovaries."

In view of this undisputed evidence, we do not think we would be warranted in disturbing the verdict. The amount of damages sus-

tained by appellee was a question of fact for determination of the jury, and, while we regard the sum awarded as large, we are not prepared to say that it is unsupported by the evidence, either as to the amount allowed as having been sustained up to the time of the trial, or as would probably be sustained after that time. The testimony is sufficient to show that about 12 months had elapsed from the date Mrs. Rutherford suffered the injuries complained of up to the time of the trial and the delivery of the testimony. During that time, according to her testimony and the testimony of her husband, the irregularity and increased length of her menstrual periods caused by the negligence of appellant continued without abatement, and she suffered as a result thereof intense pain. The result of appellant's negligence and the pain incident thereto having continued for such a length of time without any appreciable abatement thereof, it cannot be said as a matter of law that there was no foundation in the evidence for the award of future damages.

Believing that the evidence supports the verdict and that none of appellant's assignments disclose reversible error, the judgment is affirmed.

CROSBY et al. v. STEVENS et al. (No. 533.)*

(Court of Civil Appeals of Texas. El Paso.

Feb. 24, 1916. Rehearing Denied

March 23, 1916.)

1. TRESPASS TO TRY TITLE \Leftrightarrow 44—QUESTIONS FOR JURY.

Where plaintiffs' title depended on whether a certain early grant included the land claimed, and the boundary of the grant was the north bank of a river, it was not error to submit to the jury the special issue whether, at the time of the grant, the land claimed by plaintiffs was on that side of the river, either in whole or in part.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 66; Dec. Dig. \Leftrightarrow 44.]

2. TRESPASS TO TRY TITLE \Leftrightarrow 44—PROVINCE OF JURY—SUFFICIENCY OF EVIDENCE.

In trespass to try title, the burden being upon the plaintiffs, if their evidence was insufficient, clearly to establish title, the jury might disregard it altogether, and therefore submission of the sufficiency of their evidence was proper, whether defendants introduced any evidence or not.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 66; Dec. Dig. \Leftrightarrow 44.]

3. BOUNDARIES \Leftrightarrow 36(3) — EVIDENCE — MAPS AND PLATS.

Recently made maps and plats of lands are of no value in determining a boundary existing 60 years before; such boundary being the bank of a river shown to have shifted since the grant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 166, 167; Dec. Dig. \Leftrightarrow 36(3).]

4. TRESPASS TO TRY TITLE \Leftrightarrow 41(1) — EVIDENCE—SUFFICIENCY.

Evidence held to support the finding of the jury that plaintiffs, in trespass to try title, had no title to the land in question, since it was not included within the grant under which they claimed.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 62; Dec. Dig. \Leftrightarrow 41(1).]

5. APPEAL AND ERROR \Leftrightarrow 1002—APPEAL—REVIEW OF QUESTIONS OF FACT.

It is not the province of the court on appeal to resolve a conflict in the evidence as to a question of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8835-3937; Dec. Dig. \Leftrightarrow 1002.]

6. TRESPASS TO TRY TITLE \Leftrightarrow 40(4) — LOCATION OF BOUNDARY—EVIDENCE.

The fact that a deed by a town to which land had been granted included only to a certain line is not conclusive that the deed to the town was of the same extent, although it may be evidence to that effect.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. §§ 57, 61; Dec. Dig. \Leftrightarrow 40(4).]

7. TRIAL \Leftrightarrow 194(10)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Instruction, in trespass to try title on issue of mistake in old plat, held not on the weight of evidence, but proper submission of the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 457; Dec. Dig. \Leftrightarrow 194(10).]

8. TRESPASS TO TRY TITLE \Leftrightarrow 45(1)—INSTRUCTIONS—SUBMISSION OF ISSUES.

Refusal of instruction on sufficiency of evidence as to line of old grant held not erroneous, where giving it would have nullified the issues submitted, and would have been contrary to the evidence in the cause.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 67; Dec. Dig. \Leftrightarrow 45(1).]

9. TRESPASS TO TRY TITLE \Leftrightarrow 45(1)—INSTRUCTIONS.

An instruction, trespass to try title to land alleged to be part of an old grant, that the jury should consider only the boundary as it existed at the time of the grant was not erroneous, as it left the jury free to determine where the boundary was.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 67; Dec. Dig. \Leftrightarrow 45(1).]

10. TRESPASS TO TRY TITLE \Leftrightarrow 41(1) — EVIDENCE—SUFFICIENCY.

Evidence held to support a judgment for the defendants in trespass to try title, where there was no evidence that it was physically impossible for the land to have been located as the jury found it was.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 62; Dec. Dig. \Leftrightarrow 41(1).]

11. TRIAL \Leftrightarrow 193(1)—INSTRUCTIONS—OPINION OF JUDGE.

Instruction, in action to quiet title, held not improper on the ground that it indicated what the findings of the jury should be.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 436; Dec. Dig. \Leftrightarrow 193(1).]

12. TRESPASS TO TRY TITLE \Leftrightarrow 45(1) — INSTRUCTIONS.

Requested instructions, in trespass to try title, which would call for a general verdict, held properly refused; a general verdict in such action not being proper in view of the submission of special interrogatories.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 67; Dec. Dig. \Leftrightarrow 45(1).]

13. TRESPASS TO TRY TITLE \Leftrightarrow 7—TITLE BY LIMITATION—EVIDENCE.

In the absence of evidence that one who at one time held title by limitation had assigned it to the plaintiffs specifically as a part of the plaintiffs' grant, his title by limitation would avail plaintiffs nothing, where they claimed only under a specifically named grant.

[Ed. Note.—For other cases, see Trespas to Try Title, Cent. Dig. § 10; Dec. Dig. \Leftrightarrow 7.]

14. TRIAL \hookrightarrow 362 — FINDINGS OF COURT — WHEN ERROR.

Under Rev. St. 1911, art. 1985, providing that on appeal an issue not submitted nor requested shall be deemed as found by the court so as to support the judgment, provided there is evidence to sustain such finding, error cannot be predicated on the insertion of findings by the court in addition to those of the jury, which were necessary to the judgment, though they need not have been expressly found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 865-868; Dec. Dig. \hookrightarrow 362.]

15. APPEAL AND ERROR \hookrightarrow 547(1)—PRESERVATION OF EXCEPTION—SUFFICIENCY.

Error cannot be predicated on the refusal of the court to submit requested issues, not made subject to proper assignment of error nor accompanied by proper bills of exception, showing timely and proper application to the court for the submission of the requested issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429, 2430; Dec. Dig. \hookrightarrow 547(1).]

16. NEW TRIAL \hookrightarrow 157—MOTION—NECESSITY OF ANSWER.

Allegations of fact in a motion for a new trial, supported by affidavit, need not be answered or denied, and will not be taken as confessed, nor need the court grant the motion in the absence of denial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. \hookrightarrow 157.]

17. APPEAL AND ERROR \hookrightarrow 933(5)—PRESUMPTIONS—DECISION OF TRIAL COURT—MOTION FOR NEW TRIAL.

Where, on appeal from a judgment overruling a motion for a new trial, the record shows no testimony taken in relation to facts not supported by affidavits accompanying the motion, it will be presumed that the court was correct in overruling the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3475; Dec. Dig. \hookrightarrow 933(5).]

18. APPEAL AND ERROR \hookrightarrow 933(1)—PRESUMPTIONS—ACTS OF TRIAL JUDGE.

Although it appears that during a trial the trial judge was taken sick, but there is no admission or proof that he was too ill intelligently to pass upon a motion for new trial, it will be presumed that he was, in spite of his illness, still possessed of a fair degree of intelligence, and that he exercised it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3772; Dec. Dig. \hookrightarrow 933(1).]

19. ADVERSE POSSESSION \hookrightarrow 57—EVIDENCE—SUFFICIENCY.

Where plaintiffs claimed title to land by adverse possession under a certain grant and the jury found that that grant did not include the lands sued for, the question of sufficiency of time to establish title by limitations was immaterial.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 655, 667, 687; Dec. Dig. \hookrightarrow 57.]

20. JURY \hookrightarrow 32(2)—NUMBER—AGREEMENT.

Under Rev. St. 1911, art. 5214, requiring a jury to consist of 12 men, but providing that the parties may agree to try with a less number, a jury of 11, obtained by agreement, is a legal and complete jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 222; Dec. Dig. \hookrightarrow 32(2).]

21. TRIAL \hookrightarrow 823—VERDICT—SIGNATURE—SUFFICIENCY.

Where a jury of 11 is agreed upon, it is not necessary that each of the 11 sign the verdict,

but the signature of the foreman alone is sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 759; Dec. Dig. \hookrightarrow 323.]

22. APPEAL AND ERROR \hookrightarrow 218(1)—PRESENTATION OF OBJECTIONS—SUFFICIENCY OF VERDICT.

Where a party failed, on rendition of a verdict by 11 jurors, to object to their failure to sign the verdict, it could not, for the first time on appeal, complain thereof, if it was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1319, 1321, 1323; Dec. Dig. \hookrightarrow 218(1); Trial, Cent. Dig. §§ 818, 875.]

23. TRIAL \hookrightarrow 323—VERDICT—SIGNATURE—SUFFICIENCY.

Where all the members of the jury in open court acknowledged that the verdict returned was their verdict, signature by all of them was unnecessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 759; Dec. Dig. \hookrightarrow 323.]

24. JURY \hookrightarrow 149 — INTERLOCUTORY ORDERS — POWERS OF COURT.

Where there is no judicial determination that a juror is ill, but the parties merely agree, on information that he is ill, to go to trial with 11 jurors, the court properly refused to enter a formal order, finding that the juror was ill.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 635-637; Dec. Dig. \hookrightarrow 149.]

25. JURY \hookrightarrow 149 — INTERLOCUTORY ORDERS — POWERS OF COURT.

Since a court has control over its orders during the term, though an order declaring a juror ill was filed, it could be withdrawn at any time during the term of the court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 635-637; Dec. Dig. \hookrightarrow 149.]

26. MOTIONS \hookrightarrow 53(1) — ORDERS — POWERS OF COURT.

In the absence of evidence that the facts stated in a proposed order are true, it cannot be held that the court was in error in refusing to file it.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 67; Dec. Dig. \hookrightarrow 53(1).]

27. TRIAL \hookrightarrow 304 — CONDUCT OF JURY — IMPROPER CONDUCT—SECRET BALLOT.

It is not improper conduct for a jurymen to remark to the jury that he had friends on both sides, and therefore wanted the ballot to be secret, where it did not appear that the verdict was in any way improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 725-727; Dec. Dig. \hookrightarrow 304.]

28. APPEAL AND ERROR \hookrightarrow 837(7) — MATTERS REVIEWABLE—SPECULATION.

Where error is assigned to the refusal of a new trial because the jury received material communications, the exact character of which was unknown to the appellants, the court on appeal could not review the order, since review would necessarily be based on speculation.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \hookrightarrow 837(7).]

29. TRIAL \hookrightarrow 844—IMPEACHMENT OF VERDICT—EVIDENCE OF JURORS.

The verdict of the jury cannot be impeached by affidavits or evidence of the jurors that there was a mistake of fact entering into the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 813; Dec. Dig. \hookrightarrow 844.]

Appeal from District Court, El Paso County; Dan M. Jackson, Judge.

Action by Josephine Crosby and others against H. B. Stevens and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 166 S. W. 62.

M. W. Stanton, D. Storma, and McBroom & Scott, all of El Paso, for appellants. T. A. Falvey, Millard Patterson, J. A. Buckler, and V. C. Moore, all of El Paso, for appellees.

HARPER, C. J. Appellants instituted this suit in the form of trespass to try title to the lands described in their trial petitions; also pleaded that they have title by the statutes of limitations of 3, 5, and 10 years. Appellees answered by pleas of not guilty, general denial, and by cross-action and plea in reconviction, interpose the statutory form of trespass to try title, and also assert title by virtue of the 5 and 10 year statutes of limitation. In other words, appellants seek to establish the boundary line between that portion, described by metes and bounds, of a tract of land known as the Ascarate grant claimed by them and that portion of a tract, also described by metes and bounds, known as the Ysleta grant, claimed by appellees, and it was agreed that the record title to the lands was in the parties asserting it, if, in fact, shown to be situated within the limits of said grants.

In order that we may definitely define the question to be determined in this suit, it is thought advisable to, in a way, detail the history of the two tracts of land. The Legislature of Texas in 1854 (Sp. Acts 5th Leg. c. 30) passed the following act:

"An act to relinquish to the inhabitants of Ysleta, in El Paso county, a certain tract of land adjoining the town tract now held and owned by said inhabitants.

"Whereas, by a change in the channel of the Rio Grande, in the year eighteen hundred and thirty-one or thirty-two, the citizens of the town of Ysleta were deprived of a large portion of the grant of land made to them by the government of Spain, and a portion of the town tract belonging to the inhabitants of Cinecua was left on the east side of the Rio Grande, therefore,

"Section 1. Be it enacted by the Legislature of the state of Texas, that the state of Texas hereby relinquishes to the inhabitants of the town of Ysleta, in the county of El Paso, all the right which is now vested in the state to the tract of land lying on the east side of the Rio Grande, above the town tract of Ysleta, which formerly belonged to the said inhabitants of Cinecua, commencing at the northwest corner of the town tract of Ysleta on the Rio Grande; thence up said river with its meanders to the point where the Rio Grande and the Rio Viejo separate; thence down the east bank of the Rio Viejo, to the southwest corner of survey number twelve, located in the name of T. H. Dugan; thence north with the east line of said survey to where it crosses the northern line of the Cinecua tract; thence east with the north line of the Cinecua tract, to the northwest corner of the Ysleta tract; thence along said line to the place of beginning, supposed to contain about two leagues.

"Sec. 2. This act shall not be construed so as to affect any vested right now held to said tract by any person whatever.

"Sec. 3. The Commissioner of the General Land Office is hereby required to issue a patent,

in the name of the inhabitants of Ysleta, to the tract of land described in the first section of this act, provided there is no evidence of conflicting claims on record in the General Land Office.

"Sec. 4. This act shall take effect and be in force from and after its passage.

"Approved, January 31, 1854."

In 1858 the following act was passed (Acts 7th Leg. c. 120):

"An act to relinquish the right of the state to certain lands therein named.

"Section 1. Be it enacted by the Legislature of the state of Texas, that the state of Texas hereby relinquishes all right and interest in the following described lands, to the original grantees thereof, their heirs, and legal assigns, to wit: In the county of El Paso * * * 4. To Juan and Jacinto Ascarate, three leagues of land, called 'El Rancho de Ascarate.'

"Sec. 2. That it shall be the duty of the several claimants to the lands named in this act, to have the same surveyed by the district or county surveyor of said county, which survey shall in all respects conform to the metes and bounds designated in the original grant, and upon the return of the field notes thereof to the General Land Office, the Commissioner of the General Land Office is hereby authorized and required to have the same plotted on the proper map in his office, and issue patents for the same in accordance with existing laws.

"Sec. 3. That the confirmation herein extended to the lands named in this act, shall in no way be construed to interfere with any rights which may have accrued to other parties before the passage of this act. Provided, that nothing in this act shall be so construed as to relinquish the right of the state to any of the islands or salt lakes situated in the county named in this act.

"Sec. 4. That this act take effect and be in force from and after its passage.

"Approved, February 11, 1858."

These acts fix the boundary line between the two grants to be the east (more properly north) bank of the Rio Viejo, as it was in 1854, the date that the first, the Ysleta grant, was relinquished or confirmed. The case was tried by jury, submitted upon special issues, and resulted in a verdict and judgment for defendants, from which this appeal is perfected.

The opinion in a former appeal of this case is reported in 166 S. W. 62, and to which we refer for matters of detail in the statement of the case not contained herein. We take up the assignments in the order which seems most appropriate.

Appellants' ninth assignment raises the following questions:

"(a) The judgment and verdict are erroneous, because without evidence to support them; (b) are against the weight and overwhelming preponderance of the evidence; (c) and is the result of prejudice and passion; (d) or other improper motive of the jury; (e) and in any event the result of a total disregard by the jury of the evidence introduced in the cause; (f) that the banks of the Rio Viejo were fixed by original surveys; (g) established by resurveys made by engineers acting for both plaintiffs and defendants; (h) that the northerly and easterly line or boundary of the survey of defendants, as described in the pleadings, could not have been located at the north bank of the Rio Viejo, as it was located in 1854; (i) the effect and probative force of maps, plats, field notes and elevations attached to pleadings; (j) that the line was established by unambiguous calls for certain known and established natural and artificial objects;

(k) the probative value of the testimony of non-expert witnesses, etc. Rule 29."

But after mature deliberation, we have concluded that it was intended to simply raise the question presented in the next two assignments.

[1, 2] The tenth is that the court erred in submitting special issue No. 1, because there is no evidence to warrant the court in giving it. The eleventh is that the finding of the jury in response to issue No. 2 is wholly without evidence to support it. Issues 1 and 2, as submitted by the court and the answers thereto, are as follows:

"First. Do you find from the preponderance of the evidence that all of the land described in the plaintiffs' third amended original petition filed herein on May 3, 1915, in connection with their trial amendment is northerly of the north bank of the Rio Viejo, as it was in 1854? Answer yes or no. Answer: No.

"If you have answered the foregoing question No. 1 in the negative, then, but not otherwise, the court submits for your determination this additional question:

"Second. Do you find from the preponderance of the evidence that any part of the land sued for and described in the plaintiffs' third amended original petition, filed herein on May 3, 1915, in connection with their trial amendment, lies northerly of the north bank of the Rio Viejo, as it was in 1854? Answer: No."

These issues do not require the jury to determine and fix the exact location of the east or northerly bank of the Rio Viejo, as it was in 1854, except in a negative way, that is, by the findings, they have determined that the lands sued for, being described by metes and bounds in plaintiffs' petition, are not north of the said bank; therefore it amounts to a finding that the lands described are not in the Ascarate grant, and, not being in the said grant, must of necessity be in the Ysleta grant. The plaintiff had the burden of establishing that the lands described by them were in the Ascarate grant by a preponderance of the evidence, for by so doing alone could they obtain a verdict and judgment as against the defendants, so necessarily this question had to be submitted, even though the defendants introduced no evidence, for it was within the province of the jury to discard all of plaintiff's evidence, if from it they could not determine that the lands sued for were in the Ascarate; so it follows that the court did not err in submitting the issues.

[8] This, then, brings us to the question raised by the eleventh: "Is there any evidence to support the finding?" And we answer in the affirmative. The mass of maps and plats in the record are of no value in determining the exact location of the east or northerly bank of the Rio Viejo upon the ground, except in so far as it be proven by witness who run the lines, or who were present and witnessed the work of running the lines, that the calls for course and distance, which are the basis of the maps or plats, actually on the ground, reached the bank in dispute. And since all these maps are (com-

pared with 1854) of recent make, they are only of value to the extent that they may be verified by witnesses as correctly locating the bank of the Rio Viejo at the time fixed by the Legislature, 1854. Especially is this true in view of the fact that many witnesses testified (and it seems to be conceded) that there were many old river beds across the land in controversy. As we understand the contentions of the parties, the lands described by the plaintiffs lie south of the points of the foothills, and that described by the defendants between the south line fixed by plaintiffs and the points of the foothills, which (points) defendants claim compose the east or northerly bank of the Rio Viejo as it was in 1854. And these points of foothills are found to be the dividing line between the surveys by the verdict of the jury. Is there, then, any evidence to support this finding?

[4] The surveyors who made the maps and plats introduced in evidence by defendants testified that they made the surveys upon the ground in accordance with the field notes contained in defendants' cross-action; that the calls for course and distance reached the points of these foothills as shown upon the maps, and that there was a well-defined old river bed there of which the points of foothills formed the north bank. And other witnesses testified that they were present when some of these surveys were made and substantially corroborated the surveyors. Again, several witnesses testified to being 80 to 85 years of age; that they were born in Ysleta or Socorro; that they remembered the time the river changed; and that it ran against the foothills, beginning at about the northwest corner of the lands contended for by defendants.

Parker Burnham, who testified that he came to El Paso in 1859, a stage driver for the Butterfield Overland route, described in detail the point where the river first ran against the foothills, and how it ran, etc. It could serve no good purpose to quote this evidence at length, so we refrain from doing so, but from what has been quoted, it shows that there is abundant evidence in the record to support the finding by the jury.

[5] Appellants contend that the verdict is not based upon the evidence, because, by the field notes of defendants, acres of land are upon the mesa. This may be so, but witnesses have testified both ways, and we are not here authorized to determine the question.

[6] If we understand, appellants contend further that, by the Tays' survey and map of Ysleta tract, Eubank's survey, and map and deeds made to different parties by the town of Ysleta, the line has been fixed. The answer is that Eubank and Tays and the mayor and other officials of Ysleta could have made a mistake as well as any other, as to the exact location of the bank of the Rio Viejo, contended for, and if the town deed did not extend the lines in the Harris tract, for in-

stance, to the north line of the grant, it might be evidence of the location of the boundary line, but not conclusive proof, and there is no attempt by appellants to invoke the rule of estoppel.

[7] We adopt the last above observations in overruling the eighteenth assignment, which urges that the trial court erred in giving special charge No. 2, at the request of defendants, which reads:

"That though you may believe from the evidence that when Tays' deed, introduced in evidence, and the Tays' map, was made, the town of Ysleta and J. W. Tays believed that the Rio Viejo was along the line called for in the Tays' deed, if you further believe from the evidence that the Rio Viejo was in fact north of said course mentioned in the Tays deed, you are charged that such mistake should not affect you in your findings as to the location of the north bank of the Rio Viejo."

This charge was not upon the weight of the evidence, but left the jury to find from the evidence adduced upon the instant trial whether, in fact, there had been a mistake, and, if so, it could not change the location of the Rio Viejo.

[8] The twelfth is that the court erred in refusing to submit for plaintiff the following special instruction:

"In determining issues 1, 2, and 3, you would not be warranted by the evidence in this cause in finding that the north bank of the Rio Viejo as it existed on the ground in the year 1854 was located on the north line of the property in controversy and above the bank or foothills, as shown by the undisputed evidence in this cause."

It is apparent that the submission of such a charge would have nullified the issues submitted. As held above, the undisputed evidence does not show that any lands upon top of the foothills were included in the description contained in appellees' answer.

[9] The trial court did not err in giving special charge No. 3, as urged in the thirteenth, fourteenth, sixteenth, and seventeenth assignments. The charge is:

"You are charged that if you believe from the evidence that in the year 1854, and prior to that time the east bank or northeast bank of the Rio Viejo was at the north line of the tract claimed by defendants in this cause, any change that may have occurred in the line of the north bank of the Rio Viejo after that time, or after the time of its separation from the Rio Viejo, would be entirely immaterial."

Because it simply directed the minds of the jury to the issue in the case—the location of the river in 1854—and left them free to determine it.

[10] The fifteenth assignment is:

"The court erred in entering said judgment upon the motion of defendants and finding of the jury, as set forth in that portion of the judgment describing the land as in the Ysleta grant No. 2: (a) For the reason that same is not based upon the findings of the jury; (b) because the court is not warranted in making said recitals or findings of fact; (c) and because it is a physical impossibility that all of the land in the description set forth in the judgment is in fact situated within the boundary of Ysleta grant No. 2; (d) that said findings and judgment are not supported by the evidence, for the reasons stated in the motion for new trial heretofore adopted."

The proposition urged is that it appears that it was a physical impossibility for all of the lands described in the pleadings of plaintiffs to be within the Ysleta grant No. 2. This proposition is disposed of by the observations under the tenth and eleventh assignments. It was the duty of the court under the findings, to enter a final judgment.

[11] The nineteenth assignment is:

"The court erred in giving to the jury, upon request of defendants, special instruction No. 4, of defendants, whereby the court instructed the jury that, 'You are instructed that the land in controversy in this cause is the parcel lying between the line described in plaintiffs' third amended original petition, in connection with their trial amendment filed in this cause on May 28, 1915, and the north line of the land described and claimed by defendants in their third amended original answer in this cause,' for the reason that same is a repetition of the general charge of the court, as, to the land in controversy, and tends to place undue stress upon the fact as to what is the land in controversy, and thus lead the jury to believe, under contentions of the defendants made in this cause, and evidence introduced, that it is necessary that plaintiffs prove what is known as the 'red line' to be the north bank of the old river, and the exact location of same, in order to recover in said cause."

We fail to see how the court could, by any number of repetitions, lay undue stress upon the fact of what the land in controversy is, so as to in any way influence the jury in their findings as to a boundary line. It says nothing about a "red line," or any line, in fact. The instructions left the jury to find that the boundary line was where plaintiffs claimed it to be, or anywhere north of there; therefore left the jury to determine whether plaintiff should recover all, or a part; or none, of the lands sued for, and the charge in no way indicates what their findings should be. But suppose it did give undue prominence to the red line; that is the line to which plaintiffs claim and the defendants repudiate; for that reason it could in no way affect the plaintiffs' cause.

[12] By assignments 20, 21, 22, and 23, the appellants urge that the court erred in refusing to submit the special issues requested by appellants, upon the question of the 10-year statute of limitations. The only special issue requested by plaintiffs to support the assignments is as follows:

"You are further instructed that article 5675 of the Revised Statutes of Texas provides that: 'Any person who has the right of action for the recovery of any lands, tenements, or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years after his cause of action accrues and not thereafter.' You are also further instructed that the possession of a cotenant in law inures to the benefit of and is in law the possession of his cotenant or cotenants."

"You are further instructed in this connection that if you find from the preponderance of the evidence that C. S. Babbett, for himself and cotenants of the Ascarate grant, was in peaceable, continuous, and adverse possession of the land in controversy, claiming to the boundaries of the said grant, as shown by the patent introduced in evidence before you, cultivating, using, and enjoying the said land and claiming to own

the same for the period of 10 years before the 6th day of July, 1909, the date of filing suit, and that the land in controversy is situated in the boundaries of the Ascarate grant, as shown by the patent, then and in that event the plaintiff would be entitled to recover the said land, even though you may have found, under the issues submitted to you in the general charge, that the defendants had theretofore acquired title by limitations to the land in controversy, prior to 1898, and in this connection the court submits for your determination the following additional special issue:

"Do you find from the preponderance of the evidence that the said C. S. Babbett was in possession of the land as hereinbefore instructed for a period of 10 years after the year 1897, and prior to the 6th day of July, 1908?"

This constitutes a general special charge, and calls for a general verdict. As such, it would have been improper to give it. *H., T. C. Ry. v. Kincheloe*, 56 Tex. Civ. App. 123, 119 S. W. 905. *Moore v. Pierson*, 100 Tex. 114, 94 S. W. 1132; *Id.*, 93 S. W. 1007.

[13] But if the latter portion of the charge is a proper special issue in form, there is no positive evidence in this record that we can find, and counsel have cited none, that Babbitt was occupying the land for the joint owners of the Ascarate, and if he were not, any limitation that may have accrued to him would not inure to the benefit of such, unless he, by deed, conveyed his right so acquired to them. This has not been done, so far as this record discloses. The pleadings of the substituted plaintiffs recite that they have acquired all of Babbitt's interest in the Ascarate grant, but says nothing of any interest in the Ysleta grant, where the jury now find the land sought to be recovered by limitation is situated; so, if it was not in the Ascarate grant, Babbitt and the other plaintiffs were not joint tenants.

Assignments 21, 22, and 23, being to the same effect, are overruled for the same reasons.

[14] The twenty-fourth is that the court erred in inserting in the judgment—

"that it was the conclusion of the court, not only from the findings of the jury, but from all the evidence, that defendants were entitled to recover."

This assignment is followed by several propositions, but they all seem to be directed to the same point, viz., that article 1965, Rev. Civ. Stat. 1911, does not authorize the trial court to make findings of fact in addition to those made by the jury. This statute provides that:

"Upon appeal * * * an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such a finding."

So it is apparent that it was not necessary for the court to enter the words complained of in its judgment, for it (the judgment) to be a final disposition of the issues not submitted, unless same were requested; but in this connection, appellants urge that the issue of limitation of 10 years was requested to be submitted; therefore the court was not

authorized to make this finding in its judgment. As held under the next preceding assignments, the trial court did not err in refusing the charge requested, because: First, it was not in proper form for submission of a special issue; and, second, the facts did not justify the submission of the issue.

[15] By one of the propositions under this assignment, it is suggested that other issues were not submitted, though requested. If so, the refusal of the court to submit these other issues should be presented to this court by proper assignments of error, complaining of such refusal, accompanied by proper bills of exception, showing timely and proper application to the court for the submission of such issues. *Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 43 S. W. 930; *Moore v. Pierson*, 100 Tex. 113, 94 S. W. 1132.

[16, 17] The twenty-fifth:

"The trial court erred in overruling the amended motion for a new trial and in arrest of judgment presenting issues of fact as to misconduct of the jury, and other issues of fact, and by holding that it was not necessary in law for defendants by contest or answer to tender issues upon said motion."

It is news to us that allegations of fact in a motion for a new trial, supported by affidavit, must be answered and denied, or be taken as confessed, and require the court to grant the motion. Anyway, we have carefully read the motion for a new trial, and conclude that if all the matters alleged and supported by affidavits were admitted to be true, the trial court did not err in overruling the motion upon those grounds. And counsel have not referred us to any testimony taken by the court in relation to the facts alleged not supported by affidavit. Therefore, it will be presumed that the court did not err in overruling motion.

[18] The twenty-sixth is as follows:

"It appearing from the undisputed evidence that the trial judge became exceedingly ill before completing the hearing and passing upon the amended motions for a new trial, filed in said cause by plaintiffs, and that such illness constitutes in law an unavoidable accident or casualty, for which plaintiffs were not responsible and could not avoid in the exercise of the highest diligence; that by reason of such illness the trial judge or court was unable to consider intelligently and pass upon the motions of plaintiffs for a new trial and in arrest of judgment, by hearing a full presentation of same—the appellate court should therefore reverse and remand said cause for a new trial, as fully appears from plaintiffs' bills of exceptions, approved and filed in said cause."

The record shows that the motion was considered and overruled; that by the judge's bill of exceptions he admits he was taken ill, but there is no admission or proof that he was too ill to intelligently pass upon the motion. In the absence of both we will presume that the trial judge was, even though sick, still possessed of a fair degree of intelligence, and that he exercised it in this instance.

[19] The twenty-seventh, twenty-eighth, and twenty-ninth assignments charge error in

excluding the testimony of certain witnesses concerning the possession of the lands claimed by defendants, in fact, upon the issue as to whether the defendants had title to the lands claimed by them by virtue of the 10 years' occupancy. Since the jury have found that the lands claimed by defendants were not on the Ascarate grant, the question of the limitation title of defendants is immaterial.

The thirtieth assigns as error the fact that the court submitted charges upon the question of limitation in favor of defendants, and is overruled for the reason given next above.

[20, 21] The first and second assignments charge that the verdict and judgment are void because one juror was excused by the court, and the verdict was not signed by all of the remaining jurors. The court's bill of exceptions recites that during the trial of the case between the adjournment on Saturday and time to convene on Monday morning, he had been informed that the juror in question was sick and unable to further sit in the case; that he told the counsel for both sides what he had heard before resuming trial on Monday morning. Different remarks by counsel for both sides are recited as having been made in the presence of the court, but finally one counsel for each plaintiff and defendant said, "We'll leave it to the court." The court then remarked that, if left to him, he would excuse the juror, which was done, and the trial proceeded with 11 jurors for several days. The cause was submitted upon special issues. The verdict was returned into court signed only by the foreman. It was read aloud in open court. Appellants' counsel then and there stated that he would then make no statement with reference to the verdict. The court then asked the jury, "So say you all of you?" to which inquiry they assented, and thereupon the verdict of the jury was received and the 11 jurors discharged. The record further reveals that the first time any objection was made to the fact that all the jurors had not signed the verdict was upon written objection to appellees' motion to enter judgment for them upon the verdict rendered. This constitutes consent upon the part of appellants for the verdict to be returned signed as it was.

Article 5214, Revised Statutes of 1911, reads:

"The jury in the district courts shall be composed of twelve men; but the parties may by consent agree, in a particular case, to try with a less number."

Since the parties agreed to try the case with less than 12 jurymen, the 11 agreed upon constitutes a legal and complete jury. In such cases, all that is required is that the verdict be signed by the foreman. *Lumber Co. v. Hancock*, 70 Tex. 315, 7 S. W. 724; *Gray v. Freeman*, 37 Tex. Civ. App. 556, 84 S. W. 1110.

[22] But if we are in error in holding that the acts and statements of appellants in open court amount to an agreement to excuse the jurymen, no exception was taken to the fact that only one had signed it, before they were discharged, when, if there had been, the court could have had them all sign it. The appellant is not now in a position to complain. *Quanah Ry. Co. v. Jones Lbr. Co.*, 178 S. W. 861; *Danlap v. Raywood C. & M. Co.*, 43 Tex. Civ. App. 269, 95 S. W. 44.

[23] Besides, all the members of the jury declared the verdict to be the one agreed to by them, and in such case, the formality of signing is waived. *Northern Pacific Ry. Co. v. Ulin*, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977.

[24, 25] The third and fourth are that the court erred in refusing to enter up an order which was prepared by appellants, following his act in excusing the juror, which recites that the juror was excused on account of illness—the proposition being that the order was approved by the court, placed in the hands of the clerk, and afterwards withdrawn by the court; that it had, by the act of approval and placing in the hands of the clerk, become a part of the record, and could not be set aside except upon motion filed for that purpose. The facts enumerated in the observations under the foregoing assignments copied from the bill of exceptions prepared by the court in relation to the same matter show that there was no judicial determination of the question of illness of the juror; that there was no evidence taken to determine whether the juror was sick or not, but, as stated above, the facts show that he was excused by consent of the counsel for the parties plaintiffs and defendants, without any investigation in open court. This being true, the court could not properly enter an order determining that the juror was sick, and if the order had been entered, the court having control over his orders during the term, could revoke same upon his own motion. *Raley v. Sweeney*, 24 Tex. Civ. App. 620, 60 S. W. 573.

[26] There is no contention upon the part of appellants that the facts stated in the order were true, but on the other hand, the statements of fact contained in the bill of exceptions—not controverted by appellants—above quoted, show that the court did not excuse the juror on account of illness judicially determined, but because of the agreement of the parties, expressed in open court in the presence of the court. It was therefore not error to direct the clerk not to enter the order. The record does not show that the fact recited in the proposed order, "The witness was excused on account of sickness," was true, and appellants do not cite us to any evidence.

[27] Fifth and sixth:

"The court erred in not granting motion for new trial on account of misconduct of the jury."

The acts charged to be misconduct are that one of the jurors, after they had retired to consider their verdict, stated to the others that he had friends among the plaintiffs and friends among the defendants, and thereupon suggested and obtained an agreement from all the other 10 jurors that none of them should state how any of the jurors had voted, nor how they had obtained a verdict; should keep the proceeding secret, etc. There is no attempt to show that the jury arrived at a verdict in any way improper, and, as to keeping secret the vote taken, this must necessarily be disclosed when the verdict was rendered.

[28] The seventh is that the court should have granted a new trial because the jury, after retiring to consider their verdict, received material communications and evidence, the exact character of which is unknown to plaintiffs, "etc." If the plaintiffs do not know the exact character of the communications, how do they know that they were material, and how could we tell whether communications were made, and, if made, that they were material and likely influenced the verdict, unless we bring to bear upon the question our telepathic powers? The telepathic powers of the members of this court are wonderfully and fearfully developed, and no doubt we could, had we been informed that the jury were out, at the proper time, so that we could have had direct mental communication with them, have reached them and have made the discovery, but at this late date, it taxes our powers too greatly to undertake it, and we refuse.

[29] The eighth complains that in support of their motion for a new trial they offered to prove by the jurors that there had been a mistake of fact by the jurors in rendering their verdict. Verdicts of juries in civil cases cannot be impeached by affidavits or testimony of the jurors themselves. *Railway Co. v. Ricketts*, 96 Tex. 71, 70 S. W. 315. Especially must this rule apply to instances such as presented here. After the jurymen had been discharged from service, so counsel would have them testify, they discovered that a mistake of fact had been made—how was it discovered? From evidence or argument of counsel heard out of court? It must have been by reason of one or the other or both, for by propositions and argument it is revealed that the matter sought to be proven by them was that they did not intend to find the line to be upon top of the mesa. That was a disputed question of fact, evidenced both ways; and, as we view the record, there is ample evidence to support the finding of the jury, as made. If jurymen were permitted to impeach their verdicts in this way, few cases would be ended with one verdict of a jury.

Finding no error in the record, the assignments of error are overruled, and the cause affirmed.

SPENCER et al. v. TRIPPLETT. (No. 949.)

(Court of Civil Appeals of Texas. Amarillo. March 22, 1916.)

ALTERATION OF INSTRUMENTS 69 — BILLS AND NOTES 378 — DETACHING ANNEXED NOTE—"ALTERATION."

Where a note as made was attached without line or perforation to a conditional contract for the sale of certain goods, its subsequent detachment and negotiation was such an alteration as to make it absolutely void, even in the hands of an innocent purchaser for value.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 47-53; Dec. Dig. 69; *Bills and Notes*, Cent. Dig. §§ 935-992; Dec. Dig. 378.

For other definitions, see *Words and Phrases*, First and Second Series, *Alteration*.]

Appeal from Floyd County Court; E. P. Thompson, Judge.

Action by A. G. Spencer and others against T. B. Triplett. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. P. McKinnon, of Floydada, for appellants. T. F. Houghton, of Floydada, for appellee.

HALL, J. October 2, 1914, appellee gave the Acme Sales Company an order for certain merchandise to be shipped to him at Floydada, Tex. These goods were to be sold under certain conditions and in a certain manner. The Acme Sales Company guaranteed to ship 60 days prior to the close of the contract 165 fountain pens to appellee, to be sold in accordance with the terms of a certain contest for a piano. The Acme Company agreed to take back, at the end of the 60-day contest, all of the pens remaining unsold, and to refund appellee at the amount of \$1.50 for each pen remaining unsold. This order and the undertaking on the part of the Acme Company were printed upon the same sheet of paper, with a note, signed by appellee, for \$265. These instruments were not separated by a perforated or other line. Before the maturity of the note or any installment thereof the note was detached from the contract and transferred to one E. E. Pinter, who in turn sold and transferred it for a valuable consideration to the appellants, before maturity, and without notice of any defense. The note, when construed in connection with the remainder of the contract, was not negotiable. This suit was filed to collect the note.

Among other defenses, appellant set up a failure of consideration in that the pens were never shipped by the Acme Company nor received by him, to which appellants replied that they had no knowledge of any such agreement on the part of the Acme Company or any other person. The order and guaranty were at the time of their execution a part of the note, and the detachment of the note from the other instruments was such an alteration as changed the liability of appellee in a material respect and rendered the note invalid in the hands of

even an innocent purchaser. When the note was separated from the contract and guaranty, it was no longer the undertaking of appellee, and the authorities are practically unanimous in holding the note under such circumstances absolutely void. *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382; *Law v. Crawford*, 67 Mo. App. 150; *Price v. Tallman*, 1 N. J. Law, 447; *Scofield v. Ford*, 56 Iowa, 370, 9 N. W. 309; *Tate v. Fletcher*, 77 Ind. 102; *Rockford v. McGee*, 16 S. D. 606, 94 N. W. 695, 61 L. R. A. 335, 102 Am. St. Rep. 719.

The judgment is affirmed.

PRIDGEN v. COOK et al. (No. 8345.)*
(Court of Civil Appeals of Texas. Ft. Worth.
March 11, 1916 Rehearing Denied
April 8, 1916.)

1. TRIAL \Leftrightarrow 311—CONDUCT OF JURY—MISCONDUCT OF JUROR.

During deliberations as to alleged false representations the statement of one juror to the others of his knowledge of a "bogus check law," as bearing upon the deliberations, which statement probably influenced the jury, is conduct necessitating reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 739; Dec. Dig. \Leftrightarrow 311.]

2. DEEDS \Leftrightarrow 25—"QUITCLAIM."

Whether a deed is a quitclaim or not depends upon the intent of the parties appearing from the face of the instrument, the use of the word "quitclaim" not being absolutely decisive.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 49; Dec. Dig. \Leftrightarrow 25.]

3. DEEDS \Leftrightarrow 25—"QUITCLAIM"—INTENTION OF PARTIES.

If it appears from the language of a deed that it was intended to convey the land itself, rather than such title as the grantor had, it is not a "quitclaim" deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 49; Dec. Dig. \Leftrightarrow 25.]

For other definitions, see Words and Phrases, First and Second Series, Quitclaim.]

4. DEEDS \Leftrightarrow 109—QUITCLAIM—EVIDENCE.

The terms of the deed, the adequacy of the price or other circumstances, are admissible to show whether the purchaser bought the land or merely the chance of title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 289, 290, 598-600; Dec. Dig. \Leftrightarrow 109.]

5. DEEDS \Leftrightarrow 120—TITLE CONVEYED.

A deed conveying "just such title as was received from the said trustees" by a certain deed, held to bind the grantor to convey the same character of title as that possessed by the trustees.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375-393, 401, 407-412, 416-454; Dec. Dig. \Leftrightarrow 120.]

6. APPEAL AND ERROR \Leftrightarrow 1069(1)—HARMLESS ERROR—NOT AFFECTING RESULT.

Where the case is one calling for a peremptory instruction in favor of appellee, misconduct of a juror is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4136; Dec. Dig. \Leftrightarrow 1069(1).]

Appeal from District Court, Wichita County; E. W. Nicholson, Judge.

Action by Mrs. Anne Andrews and others

against R. H. Cook and others. From a judgment for R. H. Cook and another against a codefendant, Charles Pridgen, he appeals. Affirmed.

T. R. Boone, of Wichita Falls, for appellant. Carrigan, Montgomery & Britain, of Wichita Falls, for appellees.

BUCK, J. On February 16, 1914, Mrs. Anne Andrews and her two children, W. E. Andrews and Mary Andrews, the latter a minor, all of McLennan county, filed suit in the district court of Wichita county in the form of trespass to try title against R. H. Cook, W. J. Sheldon, Charles Pridgen, J. E. Meadows, and D. T. Cross, all of whom were alleged to reside in Wichita county, alleging that plaintiffs, Mrs. Andrews as the surviving wife, and the other plaintiffs, as the children, were the sole heirs at law of J. B. Andrews, deceased. That on or about July 7, 1910, plaintiffs were lawfully seised, and holding and claiming the same in fee simple, of lot 21, block 64, in the town of Electra, Wichita county. The petition contained the usual allegations in trespass to try title suits of unlawful entry, etc., on the part of defendants.

Defendants R. H. Cook and W. J. Sheldon in their answer alleged that they bought the lot from defendant Pridgen and that Pridgen represented to them that he owned and held same under a perfect title. That pending the negotiation of sale, Cook and Sheldon discovered that the record disclosed that the title to said lot had been conveyed by W. H. Wiseman et al., trustees, to one J. B. Andrews, and that Pridgen had purchased the lot from one J. B. Anderson. That they inquired of Pridgen how it happened that they held title to the lot through a deed from J. B. Anderson, while the record disclosed that the deed from the trustees had been made to J. B. Andrews. That Pridgen explained such apparent discrepancy by saying that he had talked to one Sol Williams who, as the promoter of the sale by the trustees afore-said, was more familiar than any other person with all the details of said sale, and that said Williams stated to him (Pridgen) that the recording by the county clerk of Wichita county of the name of the vendee to said lot was the mistake of the trustees and that said record should have shown the name of said vendee as J. B. Anderson, who was really the man who had bought said lot and was entitled to own the same. That these two defendants had no reason to doubt the accuracy and truthfulness of the statement alleged to have been made by Pridgen to them, but accepted and relied upon it as true. He further agreed to convey to said Cook and Sheldon a good title, such a title as was received from the trustees of the town of Electra, to wit, W. H. Wiseman, Geo. McDaniel, and G. P. Brunton. They further al-

leged that at the time this representation was made by Pridgen to them they knew that the three trustees had owned a good title to the lot in controversy and that they (Cook and Sheldon) relied upon the representations made by Pridgen, paid to said Pridgen the sum of \$500 in cash, and agreed to convey and deliver to him an undivided one-half interest in a brick wall which they agreed to build on the south line of said lot. Defendants further pleaded that since the filing of this suit they had become satisfied that plaintiffs owned and were entitled to the exclusive possession of said lot, and that they felt constrained to purchase the same from plaintiffs at whatever price they might be able to secure it. They further alleged that the representations made by Pridgen were untrue at the time they were made and were falsely and fraudulently made by said Pridgen for the sole purpose of inducing the defendants Cook and Sheldon to purchase said lot, and that at the time said Pridgen made said statements he knew that he did not own a good, or even merchantable, title to said lot, and also knew that said Sol Williams had never made to him the statements claimed.

Charles Pridgen, in answer to Cook's and Sheldon's plea over, denied the several allegations as to fraud and as to representation made, and alleged that in good faith he had bought the lot from one J. B. Anderson and wife and paid a valuable consideration therefor on or about July 1, 1910. That Cook and Sheldon were fully aware of all the facts and circumstances relative to his (Pridgen's) title, but in spite of said facts they accepted same, and therefore were estopped to claim any right over and against him (Pridgen).

The case was submitted to a jury on special issues, and the jury found as follows: (1) That Charles F. Pridgen did make false representations to defendant Cook and Sheldon in regard to the title of the lot in controversy; (2) that Cook and Sheldon did not purchase the lot in controversy from C. F. Pridgen, taking the risk of the title; (3) that the reasonable value of the undivided one-half interest in the wall mentioned in defendants Cook's and Sheldon's pleading was \$175.

It having been admitted by all parties defendant, who were in court, that plaintiffs were entitled to judgment for the title and possession of the lot involved, judgment was rendered on the verdict of the jury in favor of the plaintiffs against all parties defendant for the land sued for, and for costs, and judgment was rendered in favor of Cook and Sheldon and against Charles F. Pridgen for the sum of \$675. Defendant Pridgen appeals.

The evidence shows that the title to the lots in Electra was vested in the three trustees hereinbefore named, and that a public sale was conducted by Sol Williams, and that the lots, some 1,800, were sold to various persons. One was purchased by J. B. Andrews, who lived near the town of La-

grange on a farm. Pridgen testified that some three or four years before the trial he examined the record and found that title to this lot was in J. B. Andrews, and that he addressed a letter to J. B. Andrews at Lagrange, Tex., offering to buy the lot at a stated price; that in about three weeks he received a letter from J. B. Anderson, or rather from his wife, Mrs. Eva Anderson, at Spokane, Wash., saying that her husband was out on a cattle ranch some distance from Spokane, and that when he came in she was satisfied he would take the price offered for the lot. That later he (Pridgen) sent a deed to Anderson, which was duly executed by Anderson and his wife and returned with draft attached for some \$57. Pridgen denied making any false representations to defendants Cook and Sheldon, and testified that at the time of the sale he told them, or rather told Cook, with whom he claims to have had all the conversations relating to the lot, nothing as to the character of his title; that Cook offered to give him \$500 for the lot and a one-half interest in the brick wall, and that he accepted said offer, furnishing an abstract of title. He further testified:

"I never did mention that lot to Sheldon in any shape or form, nor he to me at no time nor place, and the first time that Bob Cook ever said anything to me about it it seems that he borrowed some money on that lot. If I remember aright it was about a year after this trade was made he struck me in town. He said, 'That lot belonged to J. B. Andrews,' I said, 'You had an abstract,' he said, 'Yes.' He asked me what I knew about it. I told him all that I knew about it was what Sol Williams told me. After I got this deed, I brought it up here to put on record and Walter Reed called my attention to the discrepancy in it and I called Sol Williams up at Ft. Worth and asked him about it; there were records of those deeds up there in bad shape. I called Sol up. I asked him who it belonged to. When he answered the phone he was in the Elks' poolroom, so he said. So I said, 'The records here show that it belonged to Mr. Andrews, and I have a deed from Anderson.' He said, 'It is a technical error; I have got an interesting game of pool on here and after this game of pool is over I will look it up and write you.'"

Pridgen claimed that he never received any further communication from Sol Williams, but that some eight or ten months after this conversation he went down to Sol Williams' office and with the stenographer looked over the books.

The testimony of other witnesses discloses the fact that J. B. Anderson was the railroad agent at Lagrange some time prior to 1910, and that, perhaps on account of bad health, he left Lagrange and went to Washington, where, after the execution of this deed, he died; that J. B. Andrews was a farmer living some miles out of Lagrange, but that at the time of the Pridgen letter he was dead, and that Anderson had moved to Washington. This situation explains perhaps how the letter, if addressed to Andrews, was forwarded and delivered to Anderson.

[1] Appellant's first assignment of error complains that the verdict of the jury was

influenced by their considering matter out of the record and by their receiving in the jury room and from other sources than the court, instructions as to the law of the case. It appears that during the deliberation of the jury and after they had inquired of the court as to whether or not they could assume that a false act of conveyance was a false representation, and while the jury were divided as to whether or not Pridgen had made any false representations to Cook and Sheldon, one of the jurors stated to the others that he had read what is known as "the bogus check law," and that from the terms of said law, as interpreted by him, he was satisfied and had become convinced that the defendant Pridgen should be held to have made the false representation in regard to the title to the lot. Without going into further details as to this matter, it may be said in passing that the investigation made while the motion for new trial was pending, and under the direction of the court, to our minds discloses the fact that in all probability the jury were improperly influenced and misled by the injection of this foreign matter, and unless the admitted facts would have justified the trial court in giving peremptory instructions in favor of Cook and Sheldon as against Pridgen, the conduct of the jury aforementioned would require a reversal. But inasmuch as we have concluded that the case is one that calls for a peremptory instruction, the error becomes harmless.

The deed from Pridgen to Cook and Sheldon is as follows:

"Chas. Pridgen et ux. to R. H. Cook. Dated—Oct. 5, 1911. Filed—Oct. 26, 1911, at 8:37 a. m. Recorded—Dec. 14, 1911, at 9:00 a. m. in Book 59, page 118. Deed Records of Wichita County, Texas. Consideration—\$500.00 and one-half interest in a brick wall to be built on the south line of said lot by R. H. Cook and W. J. Sheldon to us paid in cash, the receipt of which is hereby acknowledged.

"Conveys unto R. H. Cook and W. J. Sheldon of the county of Wichita, state of Texas, said lot more particularly described as follows, to wit: Lot 21 in block 64 of the town of Electra, Wichita county, Texas, according to the recorded plat of said town, together with all the rights and appurtenances thereto belonging or in any wise appertaining, said lot hereby conveyed being the same conveyed by H. W. Wiseman, Geo. McDaniel and J. P. Brunton, trustees of the town of Electra, said deed being recorded in the deed records of Wichita county, Texas, to which deed and its record reference is made for a more accurate description.

"To have and to hold the above-described premises together with all the rights and appurtenances thereto in any wise belonging unto the said R. H. Cook and W. J. Sheldon just such title as was received from the said trustees of the town of Electra as aforesaid.

"Witness our hands this 5th day of October, A. D. 1911. Chas. Pridgen,
"Maude Pridgen."

The deed was acknowledged in due form.

[2, 3] In his pleadings Pridgen alleged that Cook and Sheldon were fully aware of all the facts and circumstances relative to his title to said lot, but that in spite of said facts they accepted said title, and therefore

were estopped from claiming any right under and against him (Pridgen). While perhaps the pleader did not happily express himself so as to convey his intended meaning, yet it seems from the oral argument, as well as that contained in appellant's brief, that the claim intended to be presented by Pridgen was that the deed from him to Cook and Sheldon was, and was intended to be, only a quitclaim deed conveying such title as he (Pridgen) had, and that Cook and Sheldon knew the facts with reference to the title held by him (Pridgen), and accepted the deed as conveying only Pridgen's chance of title. We cannot so construe the deed. Whether a deed is a quitclaim or not depends upon the intent of the parties making it appear from the face of the instrument; the use of the word "quitclaim" not being absolutely decisive of the character of the deed. 8 R. C. L. p. 926, 6. If it appears from the language of the deed that the intention was to convey the land itself, rather than such title or chance of title as the grantor might have, it is not a quitclaim deed. *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850; *Tram. Lbr. Co. v. Hancock*, 70 Tex. 312, 7 S. W. 724; *Laughlin v. Tips*, 8 Tex. Civ. App. 649, 28 S. W. 551; *Barroum v. Culmell*, 90 Tex. 93, 37 S. W. 813.

[4] The terms of the deed, the adequacy of the price, or other circumstances, are admissible to show whether the purchaser bought the land or merely the chance of title. *Carleton v. Lombardi*, 81 Tex. 355, 16 S. W. 1081; *Thorn v. Newsome*, 64 Tex. 161, 53 Am. Rep. 747.

[5] It is apparent from the recitations of the deed under consideration that Pridgen intended to convey to Cook and Sheldon not only such title as he possessed at the time of the conveyance, but such title as the trustees of the town of Electra held and conveyed and therefore such title as J. B. Andrews received, and such title as was inherited by plaintiffs from J. B. Andrews. It was agreed in open court, as set out in the statement of facts, that the plaintiffs were the owners by and through mesne conveyances of the lot in controversy, receiving said title through a regular chain from the state. It was further agreed by all parties that the judgment should be affirmed as to plaintiffs. Since Pridgen covenanted to convey the title as held by the trustees of the town of Electra, and since he has agreed that J. B. Andrews, deceased, acquired a good title by reason of the deed from the trustees to him, and that the plaintiffs, claiming under J. B. Andrews' title, have a good title, it follows that the warranty in the deed from Pridgen to Cook and Sheldon binds the grantor to convey the same character of title as held by J. B. Andrews and the plaintiffs.

[6] Therefore the trial court would have been justified and should have peremptorily instructed the jury to find for Cook and

Sheldon against Bridgen for the purchase price of the lot. Both Cook and Bridgen testified that the consideration paid by the former to the latter for the lot was \$500 and a one-half interest in the brick wall. The testimony, as we understand, is uncontroverted that the one-half interest in the brick wall was as found by the jury of the value of \$175. Therefore it becomes immaterial as to whether any error is shown in the assignment heretofore mentioned, or in the second assignment complaining that the jury took into the jury room. During their deliberations the deposition of the witness Sol Williams.

The judgment of the trial court is hereby in all things affirmed.

**CATTLEMEN'S TRUST CO. OF FT.
WORTH et al. v. PRUETT.***
(No. 539.)

(Court of Civil Appeals of Texas, El Paso.
March 9, 1916. Rehearing Denied
April 6, 1916.)

1. CORPORATIONS — 80(10) — SUBSCRIPTION TO STOCK — FRAUD — WAIVER — RENEWAL OF NOTE FOR PRICE.

Where a subscriber to corporate stock, induced thereto by misrepresentations as to its par value, after discovering the truth of the matter, renewed the note given for the price of the stock, he waived the fraud and acquiesced therein, and could not have cancellation of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. 80(10).]

2. CORPORATIONS — 80(10) — SUBSCRIPTION TO STOCK — FRAUD — WAIVER — KNOWLEDGE — SUFFICIENCY OF EVIDENCE.

In an action by a subscriber to corporate stock, induced thereto by misrepresentations as to its par value, to cancel the note he gave for the price, evidence held to show that plaintiff, when he renewed the original note, not only had sufficient knowledge that the par value of the stock had been misrepresented, but had consulted with his attorneys, and told them the facts of the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 262; Dec. Dig. 80(10).]

3. CORPORATIONS — 80(12) — SUBSCRIPTION TO STOCK — MISREPRESENTATIONS — QUESTION FOR JURY.

In such suit, whether the party who negotiated the subscription contract with plaintiff represented that he was offering the stock at par value, and that such value was \$20 a share, held for the jury under the evidence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. 80(12).]

4. TRIAL — 213 — REFUSAL TO INSTRUCT — UNCONTRADICTED EVIDENCE.

Where evidence on an issue was uncontradicted, so that the matter was purely a question of law, the action of the court, after stating and finding the facts on the issue and making conclusions of law in favor of defendant, in refusing to instruct on the issue as requested by defendant, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. 213.]

5. CORPORATIONS — 99(1) — ISSUANCE OF STOCK FOR NOTE — STATUTE — "ISSUE."

Where a bank took a note for a subscription to its stock, which it issued in the subscriber's

name, but retained possession until the note should be paid, apportioning dividends to the subscriber from the earnings of the company from the date of making the certificate, and recognizing the subscriber's proxy to vote the stock as valid, also sending him notices addressed to him as a stockholder, there was no violation of Const. art. 12, § 6, or Rev. St. 1911, art. 1144, providing that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received; the stock not having been "issued."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 444; Dec. Dig. 99(1).]

For other definitions, see Words and Phrases, First and Second Series, Issue.]

Appeal from District Court, Presidio County; W. C. Douglas, Judge.

Suit by C. E. Pruett against the Cattle-men's Trust Company of Ft. Worth and another. From a judgment for plaintiff, defendants appeal. Case reversed, and judgment rendered for the named defendant.

A. H. Kirby and A. L. Camp, both of Ft. Worth, for appellants. Belcher & Sutton, of Marfa, and Lea, McGrady & Thomason, of El Paso, for appellee.

WALTHALL, J. This suit was filed by C. E. Pruett, in the district court of Presidio county, Tex., against the Cattle-men's Trust Company of Ft. Worth, and the Texas Underwriters Company, on the 21st day of December, 1914. Plaintiff, in his petition, sought the cancellation of one note for \$3,750, dated August 2, 1913, payable to the Cattle-men's Trust Company, which note plaintiff alleged had been renewed on August 2, 1914, on date of maturity, and extended to December 1, 1914. He also sought a cancellation of a note for \$1,250, executed by plaintiff, payable to the Texas Underwriters Company, due August 2, 1914, which note was also renewed on August 2, 1914, and date of payment extended to the 1st day of December, 1914.

Plaintiff alleged that at the time of the execution of the two notes, he subscribed for 250 shares of the capital stock of the Cattle-men's Trust Company of Ft. Worth; that said stock was evidenced by certificate No. 220, attached to the renewal note for \$3,750, as collateral security therefor. Plaintiff further alleged that said notes were given in full payment of the 250 shares of the capital stock of the Cattle-men's Trust Company; that the stock was issued to the plaintiff and was the sole consideration for the said notes, by reason of which plaintiff alleged that the consideration for said notes and each of them was illegal, and that all of said acts were ultra vires and contrary to article 12, § 6, of the Constitution of the state of Texas and the statutes thereof, and that defendants, by reason thereof, had perpetrated a fraud upon the plaintiff in Presidio county, where said notes and their renewals were executed. Plaintiff further alleged that J. B. Martin,

who acted as fiscal agent in taking his subscription for said stock for the purpose of selling him the said stock, represented to him that he was then offering the stock for sale at par value, to wit, \$20 per share, and that said statements were false and fraudulent, in that the said stock represented a par value of only \$10 per share, but that said statements were known to be entirely fraudulent by defendants; that said statements were material; that plaintiff relied wholly upon the said statements, and relied and acted thereon entirely in the several obligations alleged by him. Plaintiff offered to surrender 250 shares of stock for a cancellation of the said two notes, and prayed for an injunction, restraining the defendant from transferring or otherwise disposing of the said notes.

Each of the defendants filed its respective pleas of privilege to be sued in Tarrant county, Tex., both of which pleas were submitted to the jury on the trial of the case. Plaintiff filed reply to each of said pleas of privilege. On August 18th, defendants filed their original answer, consisting of a general denial of the allegations of the petition and specially answered as follows:

First. Defendants denied that any stock in defendant the Cattlemen's Trust Company of Ft. Worth has ever been issued to plaintiff, but say that while a certificate of 250 shares of such stock was written up in the name of plaintiff, same was never signed officially by the president or vice president, and said certificate was so written up only for convenience, and to avoid keeping an account with plaintiff on the books of defendant trust company, and that such certificate of stock is now, and has at all times been, in the exclusive possession and control of defendant trust company, and neither such certificate of stock, nor any other certificate of stock in said company, by reason of plaintiff's said subscription has ever been delivered to or given into the possession, control, or custody of plaintiff.

Second. Defendants alleged that the notes executed by plaintiff were given in connection with his subscription for stock in the trust company and as a part of the same transaction, and were given to evidence the time when, and the terms upon which, plaintiff was to pay for said stock, and not in full payment therefor, as alleged, and were executed and delivered upon the express condition and agreement that said stock so subscribed for was not to be delivered to plaintiff until said stock had been fully paid for, in accordance with said agreement; and that defendant trust company was ready at any time to deliver said stock to plaintiff upon his payment of the notes executed by him, by reason of which defendants denied that the consideration for said notes was or is illegal, or that there was any fraud perpetrated on plaintiff.

Third. Defendants denied all of the allegations as to the representations alleged by plaintiff as to the par value of the stock, and alleged that plaintiff knew, at the time he subscribed for the stock, that the par value of the same was \$10 per share.

Fourth. Defendants further alleged that, after having acquired full knowledge that the par value of the stock in the trust company was not \$20, as plaintiff alleged same was represented to him at the time he subscribed for same, plaintiffs and defendants, on or about August 2, 1914, made an agreement, whereby the notes originally executed and delivered to defendant trust company, for \$3,750, due August 2, 1914, should be renewed, and plaintiff executed in renewal thereof his note for a like amount, due December 1, 1914, and that plaintiff transferred and assigned to defendant underwriters company, all dividends accrued or to accrue December 1, 1914, on the stock subscribed for by plaintiff in defendant trust company, and that defendant trust company, as a party to said agreement and contract, did agree to extend, and did extend, the time of payment of plaintiff's said note, by reason of which plaintiff ratified his said subscription contract and the notes given by him in connection therewith, waiving any fraud or invalidity of said contract, and is now estopped to seek to avail himself of the alleged representations as to the par value of said stock.

Plaintiff, by supplemental petition, denied all the allegations contained in the original answer, and further alleged that the notes were given in full payment for the 250 shares of stock; that it was understood and agreed, and the intention of the parties was that said stock should become the property of the plaintiff, if his subscription contract was not rejected within 20 days as provided, which was not done, but said stock was issued as evidenced by the said certificate No. 220, and that the same was placed with and pinned to his said notes as collateral security; that defendant trust company, its officers, agents, and representatives, have constantly treated and recognized plaintiff as a stockholder and owner of the said 250 shares of stock—they sent him notices of stockholders' meetings, paid him dividends on said stock, and voted the same at stockholders' meetings, etc.—whereby plaintiff alleged that the defendants are estopped to claim that he is not the owner of said stock and stockholder in the company, and that said stock has been issued.

Plaintiff further alleged that if he is mistaken as to the issuance of the stock, then in that event the contract of subscription between him and defendants was unilateral and without mutual covenant, conditions, agreements, and options.

After the evidence on behalf of the plaintiffs in chief had been introduced and plaintiff rested, the defendants presented their motion for an instructed verdict in their favor,

which the court heard and overruled, and defendants excepted. The evidence having been heard, the court submitted the case to the jury on special issues, and on the answers of the jury thereto the court rendered judgment in favor of the plaintiff, canceling the notes described in the petition.

Defendants requested four special peremptory charges; the first having reference to defendant's pleas of privilege, the second, to the issue of false representations, the third, to the issue of the validity of the notes on account of the provision of the Constitution, and the fourth, a general peremptory charge, which special charges were refused by the court. Defendants filed exceptions to the main charge of the court, and, same being overruled, defendants excepted and preserved same in bills of exceptions. Defendants filed motion for new trial, which the court heard and overruled. Defendants requested findings of fact and conclusions of law by the court on the issues raised by the pleadings as to whether the stock issued by the Cattle-men's Trust Company was in violation of the Constitution and laws of Texas. The court filed findings of fact and conclusions of law, and under the findings concluded that the certificate of stock issued was not in contravention of the Constitution and statute. The court submitted to the jury two issues: First, did J. B. Martin, in negotiating for the stock subscription contract with plaintiff, represent to plaintiff that he was offering said stock for sale at its par value, and that such par value was \$20 per share; and, second, did plaintiff know, on or before August 8, 1914 (the date on which he agreed with defendants upon an extension of his notes to December 1, 1914), that the par value of the stock of the Cattle-men's Trust Company of Ft. Worth was less than \$20 per share? To the first question the jury answered, "Yes," and the second question the jury answered, "No."

The appellants, by fourth special charge, requested a general peremptory instruction in their favor, and the refusal to give the charge is made the ground for appellant's first assignment. The proposition under the first assignment is made that where an action for the cancellation of a note is based upon alleged false representations and the evidence is uncontradicted that after the discovery of the falsity of said representations and with full knowledge of the same, the maker of the note renews said note, he thereby waives the alleged fraud, and no judgment can be rendered based on such evidence, other than a judgment denying the cancellation of the note. The contention is based on the proposition that the evidence was undisputed that Pruett, with full knowledge that \$20 was not the par value of the stock when sold to him, renewed the notes, and that in so doing he waived whatever there was of fraud in the representations as to par value before the renewal of the notes. Appellee, in his counter

proposition, concedes that the law is as stated by appellant, and that there would be error in the court's refusal to give the requested special peremptory charge, but amplifies appellant's proposition, and further contends that the law is that, if a party originally possesses the right to set aside a transaction on the ground of fraud to have the effect claimed by appellants, and to be a complete waiver of the fraud, Pruett must have obtained full knowledge of all the material facts involved in the transaction and become fully aware of its imperfection and of his own rights to impeach the transaction on account of the fraud, so that, when the renewal of the notes is made he can, and by the renewal of the notes does, give a perfectly free consent to such waiver of the fraud, and in doing so acts deliberately, with the intention of ratifying the voidable transaction the evidence so shows, then his confirmation is binding on him, and his right of action, by the renewal of the notes, is destroyed. To discuss this proposition, we must concede that as alleged, J. B. Martin, on the 2d day of August, 1913, for the purpose of selling the shares of stock to Pruett, wrongfully and fraudulently represented to Pruett that he was then offering said stock for sale at its par value, to wit, \$20 per share; that Pruett relied upon the statements as true; that the par value of the shares of stock as represented was material, that is, that had Pruett known that the par value was less than \$20, he would not have entered into the transaction; that at the time of the renewal of the two notes, on August 8, 1914, Pruett had not then acquired full knowledge that the par value of the stock subscribed for was not \$20 per share, and if appellee's contention correctly states the law, Pruett, when he made the renewal notes, must have had full knowledge of his rights to impeach the former transaction, because of the representations as to the par value, so as to give free consent and sign the renewal notes with the intention to ratify the voidable notes. C. E. Pruett, appellee, on the point at issue under this assignment, testified:

"During the first time he (Martin) talked to me he didn't tell me the par value of the stock. He didn't tell me this until the last day he talked to me. He told me 15 or 20 minutes I guess before I closed the contract. I didn't know about the relative terms of par value or book value at that time. I didn't talk to anybody about the par value of the stock at that time or afterward. I first found out what the par value was something over a year after I subscribed. I found this out when the company sent me a contract to sign up, which was no part of the agreement I had with Martin. Therefore I refused to sign it. I don't know what kind of a contract you would call it, but I believe it was some time in 1914. It might have been later. Nobody told me the par value was not \$20. The contract went ahead and stated the par value of the stock. I had not learned this from anybody else. When I was writing the company about my note the first time, I had no information at all about the par value of the stock. I did not know what I

had paid. I knew I was out \$5,000 worth of notes. I had not talked to anybody at the time I wrote my first letter. I didn't know what the par value of the stock was at that time. When I said that I had paid one and a half for the stock, I didn't know at that time what the par value was. I didn't gain the idea that I had paid one and a half for the stock. I didn't consult anybody about this transaction prior to the time that I renewed my note. I didn't talk to anybody. I wrote my letters from the bank; I believe, but I am not sure. Previous to the time I signed up the renewal note, I didn't talk to anybody about the notes or the stock either. * * * I went ahead and wrote on my own initiative."

Being shown a letter dated July 24, 1914 (Exhibit G) introduced in evidence, the witness said:

"That is my signature, and I wrote that letter. It was written on Belcher & Sutton paper. It may have been written from there. When I went in there to write that letter, I don't remember who I saw, and don't know who I talked to in there about it. I don't remember talking to anybody about it. I don't think I talked to Mr. Sutton or Mr. Belcher at that time about this transaction. The first time I talked to them about it was just prior to the time I received that contract to sign up. I did talk to them about it at the time I signed up the renewal note and assigned the dividends. The paper you now show me, assigning dividends, is the contract that I refer to, and the signature is mine (Exhibit H). Before I signed this contract I didn't talk to anybody about it. I do not think I talked to Belcher & Sutton about it at that time—not anything about the stock. I didn't consult them as to whether I should renew the note and sign this agreement to transfer the dividends to the Texas Underwriters Company. I went ahead and signed. My intention was to carry out my contract, and the company laid down on me. When I wrote the letter of July 24th, I knew all the facts I mentioned therein to be true."

The letter of July 24, 1914, referred to, was read, which, among other matters, contained the following statement:

"I am not satisfied with this stock because it was misrepresented to me, in that I, according to the statements made, was not to pay a greater price than the par value of same, and in fact paid nearly one and a half."

Being asked what he meant when he said he had paid in fact nearly one and a half more than par, he testified as follows:

"He had heard it rumored around that he had paid more, and was trying to find out from the company what he did pay. I didn't know that I had paid more than par; I just put that in there to find out if I had. I had heard it rumored."

Being asked whom he talked with and who told him, he said:

"It was all over this country. Everybody that ought stock told me that the par value was only \$10. I had heard it, and it was common talk here that the par value was only \$10. Bertie Fitchell was one man who told me that. I think he had paid out his stock and gotten his certificate. I don't know who else told me. I believe Tom Crosson was one. Tom Crosson told me I had paid too much for it, I think. I don't think he told me that the par value was only \$10. I think he just told me I had paid too much for the stock. * * * It is not a fact that when Mr. Martin was negotiating with me down here that he told me that the par value was \$10, and that they were selling the stock at \$20 per share and paying \$10 to capital, \$5 to surplus

and \$5 for commission. If he had told me that, I would not have bought the stock. * * * I did remember the fact that I had paid one and one half for my stock when I wrote this letter on July 24, 1914. I knew at that time that I had in fact paid one and one half for my stock. I knew, also, that I had paid 25 per cent. for organization expenses on top of the one and one half, about that, the best I could figure it out. * * * I talked with my father about it right after I bought the stock. My father at that time had not paid out his stock and didn't have his certificate. * * * I did know at the time I wrote this letter that I had paid one and a half."

Being shown trust company letter of August 6, 1914 (Exhibit J) inclosing assignment of dividends on appellee's shares of stock, collateral agreement, and the renewal trust company note, for appellee's signature, appellee testified:

"After I received that letter with the note and the assignment I talked to Belcher & Sutton about the transaction. I signed them up. I think they wrote the letter sending the notes back. I showed them the letter from the company, and told them what my understanding was with Mr. Martin at the time I made the trade, and told them what I had heard about the stock and its value, gave them all the knowledge I knew about it, and after I had done that, Belcher & Sutton wrote the letter dated August 8, 1914. I think Mr. Sutton wrote it. Before he wrote this letter I went over the transaction with him, and then he wrote the letter and I signed up the renewal note and the assignment."

After going over in detail what Martin had said to him in reference to some matters referred to in the letter of August 6th, the appellee, among other things, said:

"Mr. Martin read me a lot of figures from a book as to what the company was doing. I intended to carry out my contract when I signed the renewal note, as soon as Mr. Martin carried out his, and I did this although I knew at that time that the par value was not \$20; that is, I thought I knew at that time. I had heard it. I had heard it, and talked with my attorneys before I signed up that extension note."

On recross-examination, appellee said:

"The parties of whom I inquired about the value of the stock were the same parties named by me on cross-examination awhile ago. I talked with a great many of the stockholders here, and they all understood it alike. In other words, it was commonly understood here among the stockholders as to what the par value was, at that time, not before, and this was the time that I wrote the letter in which I said that I had paid one and a half."

Witnesses J. B. Martin and George W. Medley testified on the trial. Mr. Martin testified:

"I stated to Mr. Pruett the par value of the stock was \$10. I stated it in black and white by figures, making figures to show that the stock was sold at \$20. \$10 went to capital stock, \$5 to surplus and \$5 to organization expenses."

George W. Medley said:

"I was present when Capt. Martin—at the time Mr. Pruett subscribed for stock in the Cattle-men's Trust Company, and suppose I heard what occurred at the time and what was said by the parties. At that time Capt. Martin stated to Mr. Pruett that the par value of the stock of the Cattle-men's Trust Company was \$10 per share. Capt. Martin went into detail to explain the matter to him as to par value. He did this by writing it off in figures. As to par value, he

wrote \$10 par value, \$5 surplus value, \$5 for organization expenses."

[1] The specific fact constituting the fraud charged is that J. B. Martin, for the purpose of selling appellee the certificate of stock, represented to him that \$20, the price at which he was then offering the stock, was its par value, when in truth and in fact its par value was \$10. Pruett gave his note for the stock, and at the maturity of the note renewed the note by taking up the original one and giving another, and the question to be determined here is: Does the uncontradicted proof show that when Pruett renewed the note he then had full knowledge that the par value of the stock was not \$20 per share, as represented? Ratification and acquiescence are always questions of fact. There can be neither without knowledge. The terms impart this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of the facts which will enable a party to take effectual action. Nothing short of this will do, but he may not willfully shut his eyes to what he might readily and ought to have known. The renewal of the note, in order to constitute such waiver or acquiescence, must be done with full knowledge of all the facts; for Pruett, by the renewal of the note, cannot be held to have waived the fraud of which he was at the time wholly ignorant. *Pence v. Langdon*, 99 U. S. 573, 25 L. Ed. 420; *Pomeroy on Contracts*, § 279. The Fourth Court of Civil Appeals, in *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584, stated the rule to be that if a party originally possessing the right of action to set aside a transaction on the ground of fraud has obtained full knowledge of all the material facts involved in the transaction, and has become fully aware of its imperfection, and of his own rights to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed, so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding and his right of action is destroyed. If, on the other hand, the original undue influence still remains, or if the act is simply a continuation of the former transaction, or if the party wrongly suppose that the original transaction is binding, or if he has not full knowledge of the material facts and of his own rights, no act of confirmation however formal, is effectual. 2 *Pomeroy on Equity*, § 964.

It seems to us, from the authorities we have examined, that to say that Pruett waived his right to cancel the renewal note because of the representations as to the par value of the stock, he must have had knowledge of his right to cancel the original note at or before the time he made the renewal

note. The knowledge of such right seems to be a prerequisite to its relinquishment. It could not be said that he waived that right unless he had knowledge of it, because, if he was ignorant of the right, an intention to waive cannot be implied. *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *Berman v. Fraternal Health, etc.*, 107 Me. 368, 73 Atl. 462; 2 Pom. Eq. § 964. Intention seems to lie at the very foundation of the doctrine of waiver. Nor is it sufficient that he should have notice of facts that, if followed up by inquiry, would have led to information that would have shown that he was discharged. *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Thornton v. Wynn*, 12 Wheat. 187, 6 L. Ed. 595.

[2] There is no doubt, however, but that, while an action for the cancellation of a contract based upon fraud in its procurement proceeds upon the theory of affirmance of the contract by the defrauded party, an important distinction exists with respect to acts done in affirmance of the contract after discovery of the fraud. The authorities are uniform in holding that if the defrauded party acquires full knowledge of the fraud and his rights in respect thereto while the contract remains executory, and thereafter does any act in affirmance of the contract, he thereby condones the fraud and waives his right of action. While the testimony of the appellee is confusing and contradictory in some of his statements, his evidence, quoted above, seems conclusive to us that appellee, not only had sufficient knowledge that the par value of the stock was not \$20 at the time he renewed his note, but had consulted with his attorneys and told them all the facts of the transaction. We think it could hardly be said that he did not have full knowledge, both that the par value of the stock was not \$20, and of his rights in the matter, so as to preclude the idea that he fully intended to consummate the transaction in the purchase of the stock when he renewed his note. In *G., H. & S. A. Ry. Co. v. Faber*, 77 Tex. 153, 8 S. W. 64, in which it was assigned as error that the court refused to instruct the verdict, the Supreme Court held that where the case was not made out, the jury should have been instructed. In the same case, the Supreme Court quoted with approval from *Tooney v. Railway Co.*, 3 C. B. (N. S.) 146, the following:

"A scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendant clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence."

[3] The Supreme Court further said that the rule stated in that case is sustained by the weight of authority. The case was reversed because of error in not charging the jury to find for defendant. But should it be held that there are some intimations in

the evidence of appellee that at the time of the giving of the renewal note he did not have full knowledge that par value of the stock was not \$20, or was not fully advised of his right to cancel the original note, because of the alleged fraudulent representations, and therefore no intention to condone the fraud was involved in the renewal of his note, and that the issue should be submitted to the jury, the evidence fully concludes that issue. Appellants, in their third, fourth, fifth, sixth, and ninth assignments, question the sufficiency of the evidence to sustain the finding of the jury on the second issue, that at the time of the execution of the renewal note, appellee did not then know that the par value of the stock was less than \$20 per share, and question the sufficiency of the evidence to sustain the judgment, based on that finding. What we have said in commenting on sufficiency of the evidence under the first assignment applies to these assignments. The evidence, in our opinion, is insufficient to sustain the finding of the jury and the assignments must be sustained. We think the evidence was sufficient to justify the court in submitting the issue to the jury on the question of false representations as to the par value of the stock as submitted in the first issue; and the second, seventh, and eighth assignments are overruled.

At appellant's request, the trial court made and filed a finding of fact and conclusion of law on the issue as to whether, under the undisputed evidence, the stock had been issued by the trust company. The court found that a certificate evidencing that C. E. Pruett owned 250 shares of the capital stock of the Cattleman's Trust Company of Ft. Worth of the par value of \$10 each was filled out in the office of the trust company about August 14, 1913, that said certificate was not signed by the president or vice president of the company, but that the certificate in that condition was retained in the office of the company with the understanding that the same would be delivered to Pruett upon the payment of his note to the company, and held by the company in payment for said shares of stock according to a contract of subscription therefor. Dividends were apportioned to Pruett out of the earnings of the company from the date of the making of said certificate. Pruett sent in a proxy for the shares of stock, and said stock was voted under said proxy at the stockholders' meeting held September 8, 1913. Several notices were received by Pruett from said company addressed, "To our stockholders," and, "To the stockholders." Under this finding the trial court concluded and so held that the certificate for 250 shares of stock was not issued in contemplation of the provisions of article 1146 of the Revised Statutes or of article 12, § 6 of the Constitution, providing that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received.

[4] The trial court refused to give appellant's special charge to the jury, directing a finding in their favor on the issue as to the validity of the notes on account of the above constitutional provision; and the court refused to give appellee's special charge, requesting a peremptory finding in his favor on said issue. The action of the court in refusing these special charges is made the grounds for appellant's tenth assignment and of appellee's first cross-assignment of error. The evidence on the issue being uncontradicted, and it being purely a question of law, and the court having fully stated and found the facts on the issue, and his conclusion of law being in appellant's favor, we fail to see any error in not instructing the jury on the issue as requested by appellant. We think the court might, without error, have adopted either method of disposing of the issue. The assignment is overruled.

[5] The question presented by appellee in his cross-assignment has recently been very fully considered and passed upon by the Ft. Worth Court of Appeals, and we think correctly so, in the case of the Cattleman's Trust Company of Ft. Worth v. Turner, 182 S. W. 438, not yet officially published. In that case the facts are the same as in this, and we think we need not restate them here. In that case the court holds that the transaction had between the trust company and Turner does not contravene the provisions in our Constitution and laws.

The view we take of appellee's first cross-assignment and appellant's tenth assignment necessarily disposes of the other cross-assignments.

For reasons stated, the case is reversed, and here rendered for appellant.

MCLEOD BROS. v. KIRKLAND et al.
(No. 8322.)

(Court of Civil Appeals of Texas. Ft. Worth.
Feb. 5, 1916.)

REFORMATION OF INSTRUMENTS \S 13(1)—MUTUAL MISTAKE—OMISSIONS.

Where through mutual mistake a chattel mortgage failed to include a debt which the parties agreed should be secured, the instrument will be reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 42-60; Dec. Dig. \S 13(1).]

Appeal from Baylor County Court; T. J. North, Judge.

Action by Jack and Don McLeod, copartners doing business as McLeod Bros., against P. E. Kirkland and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Milam & Wheat, of Seymour, for appellants. Bert King, of Seymour, for appellees.

CONNER, C. J. The appellants, Jack and Don McLeod, composing the partnership of

McLeod Bros., brought this suit against the defendants, P. F. Kirkland and Earl Brannon, in the county court of Baylor county to recover upon certain debts alleged to be due and to foreclose a mortgage upon certain property in their petition described. After alleging the execution of a joint promissory note on the part of the defendants for the sum of \$500, and the making of the mortgage referred to, the following allegations were made:

"The plaintiffs further aver, and would show to the court, that at the time of the execution of the said mortgage the contract and agreement made and entered into was had and occurred in the plaintiffs' store in the town of Seymour, Tex.; that the defendant Kirkland then owed the plaintiffs an unpaid debt for supplies furnished in 1911, and plaintiffs had sued and obtained judgment against the defendant Kirkland for the said amount, including interest and costs, amounting to the sum of \$300.82, and the defendant Kirkland came into plaintiffs' store and made the proposition to the plaintiffs that if plaintiffs would furnish and supply the defendants, Kirkland and Brannon, during the year 1914, with \$500 credit and furnish them supplies to that amount, they would execute and deliver to them a mortgage to cover the \$500 note, upon the personal property before mentioned, and would include in the said mortgage the debt owing by defendant Kirkland to plaintiffs in the sum of \$300.82. The plaintiffs, being anxious to secure their \$300.82 debt and judgment, and not having found any property subject to execution owned by the said P. F. Kirkland out of which to make said \$300.82 debt, then and there agreed with the defendant, if they would execute their said mortgage to secure both the \$300.82 debt by Kirkland and the \$500 signed by both of them, that he would advance them supplies to the extent of \$500 during the year 1914. Which condition was agreed to by and between the parties. Thereupon plaintiffs had the mortgage drawn at plaintiffs' store in the presence of all the parties, with the full intention and agreement by and between all the parties that the \$300.82 debt should be included in the mortgage, as well as the \$500 note. But by mistake and error in the legal effect of the instrument and oversight, and without negligence on the part of these plaintiffs, the debt for \$300.82 was not described in the mortgage, but was left out by mistake, when in truth and in fact it was intended by all the parties to so include the said \$300.82 debt in the mortgage, and though the same was not described in the said mortgage, having been, as before stated, erroneously left out, the same was in fact, by intention of the parties and agreement of the parties, included in the mortgage, and was a valid and binding contract upon the parties, and the plaintiffs were secured in the payment of the said \$300.82 debt with a mortgage lien upon the property so described in said mortgage and as above set out, which said debt and judgment in the sum of \$300.82 was either on that date, or on the 9th day of February, 1914, executed and expressed in a note of \$300.82, signed by the said P. F. Kirkland and payable to these plaintiffs on October 1, 1914."

The prayer was to the effect that the mortgage might be so corrected as to include the debt of \$300.82 mentioned in the quotation; that the mortgage lien should be foreclosed, the property described in the mortgage sold, and the proceeds applied to the remainder alleged to be due on the several debts declared upon. The effect of the court's

judgment was to deny the plaintiffs the right to foreclose the mortgage declared upon by them as to any part of the debt omitted from its terms, and the plaintiffs have appealed.

We are of the opinion that the court erred, as assigned, in sustaining special exceptions to that part of plaintiffs' petition which we have quoted. It is a familiar equitable doctrine that a deed or contract will be corrected, from which, by mutual mistake, material provisions have been omitted. Thus, it was held in *Mattox v. Davis*, 106 S. W. 160, that the grantor in a deed from which, by mutual mistake, a reservation of merchantable pine timber was omitted, should be granted relief as against the grantee and others purchasing the timber with notice of the mistake. And in *Willis v. Munger Improved Cotton Mac. Mfg. Co.*, 13 Tex. Civ. App. 677, 36 S. W. 1010, it was held, in an action to foreclose a chattel mortgage on certain machinery placed in a gin mill, that it was proper to permit the mortgage to be corrected so as to include an article which was omitted therefrom by mutual mistake, and a writ of error was denied in the case. The doctrine is so familiar that it seems hardly necessary to cite additional authorities, but reference might also be made to the cases of *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311; *Yarzombek v. Grier*, 32 S. W. 236; *Bailey v. Culver*, 175 S. W. 1083; *Aetna Ins. Co. v. Brannon*, 99 Tex. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020.

We think the plaintiffs should have been permitted, if they could, to prove their allegations of mistake, but which they were precluded from offering to do by the rulings complained of; and for the errors indicated the judgment must be reversed, and the cause remanded for a new trial. See *Drummond v. Allen National Bank*, 152 S. W. 739.

Reversed and remanded.

SAN ANTONIO TRACTION CO. v. COX. (No. 5642.)

(Court of Civil Appeals of Texas. San Antonio.
March 22, 1916.)

1. TRIAL \S 252(2) — INSTRUCTIONS — EVIDENCE—SUFFICIENCY.

In an action for personal injuries, testimony that 17 claims against the defendant had been propounded by various relatives of the plaintiff, and that he had witnessed a release in one of the suits, would not justify a charge on conspiracy, as it failed to connect the plaintiff with the other claims, except in the one instance and did not sufficiently indicate concerted action by the claimants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 597; Dec. Dig. \S 252(2).]

2. CARRIERS \S 806(5) — INJURIES TO PASSENGERS—NEGLIGENCE.

In an action for personal injuries received while alighting from a street car, if the car was stopped for a reasonably sufficient time to enable passengers to alight, and plaintiff, in-

stead of using this time in getting off the car, was not diligent, the defendant would not be liable, unless those in charge of the car knew, or had reason to know, that the plaintiff had not alighted and was about to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1228½; Dec. Dig. § 303(5).]

3. APPEAL AND ERROR § 1086 — REVIEW — PREJUDICIAL ERROR.

In view of evidence of the plaintiff that he got off to walk out of the car, that he was right behind G., that he thought G. was right behind the conductor, that the conductor got off at the front end, that G. got off at the same place, plaintiff followed G., and at the time that plaintiff got off the conductor had walked to the other side of the railroad track, 60 feet or more, an instruction which did not require the jury to find that the defendant failed to stop the car a reasonable length of time for his passengers to alight therefrom was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.]

4. TRIAL § 252(10) — SUBMISSION OF ISSUE TO JURY.

In an action for personal injuries, where the evidence showed that the plaintiff was earning the same amount after as he had earned prior to suffering the alleged injuries, and there was no evidence tending to show that his earning capacity had been affected, the submission of the issue whether plaintiff's future earning capacity had been impaired was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 608; Dec. Dig. § 252(10).]

Error from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by George Cox against the San Antonio Traction Company. From a judgment for the plaintiff, defendant brings error. Reversed and remanded.

Templeton, Brooks, Napier & Ogden, of San Antonio, for plaintiff in error. Chambers & Watson, of San Antonio, for defendant in error.

MOURSUND, J. George Cox sued the San Antonio Traction Company for damages in the sum of \$950 for personal injuries, which he claimed to have received in alighting from a street car on or about July 23, 1914. He alleged that while he was undertaking to get off of the car at the crossing of the San Antonio & Aransas Pass Railway on the west end car line, the car was carelessly and negligently started too suddenly and without notice or warning before plaintiff had sufficient time to alight, and in so starting the car it was jerked, with the result that plaintiff was thrown or fell from the car and received the injuries described in the petition.

Defendant denied the happening of the accident and the negligence alleged, and further alleged that Cox and some 10 or 11 members of his family have continuously "worked together, conspired, assisted, and abetted each other in propounding false and fraudulent claims against this defendant," and "that this suit and the claim propounded herein is a part and parcel of said co-operation, conspiracy, and abetting of the above-named parties for the purpose of obtaining

money from this defendant." Defendant also alleged that if plaintiff was suffering from any injury or disability, "such injury or disability is the result, not of any accident alleged in plaintiff's petition, but of another and prior accident for which this defendant is not liable."

The trial resulted in a verdict and judgment in favor of plaintiff for \$250.

Appellant complains of the exclusion of certain testimony which, as shown by the bill of exceptions, would have been given by the witness, Fred J. Johnston, in answer to questions propounded, viz.:

"Mrs. Lula Brown Cox, the mother of plaintiff, has had two claims against the company, one very recently and the other in March 18, 1914. Phillip Cox, plaintiff's brother, and Phoebe Cox Villareal, plaintiff's sister, each have had a claim against the company, respectively, on February 25, 1914, and March 4, 1914, and George Cox has had two claims against the company, one involved in this suit, and one on March 4, 1914, in all of which the claimants claimed that the accident involved occurred while they were getting off of the street car of the defendant and claiming injuries thereby. Also plaintiff's aunt, Minnie Brown Leak, has had two claims for herself, one on March 16, 1914, and one on March 29, 1915, in which she claims to have received injuries while getting off one of the company's cars, and Mrs. Leak propounded a claim for her daughter, Rosa, supposed to have occurred on January 30, 1915, while Rosa was getting off of one of the company's cars. Another aunt of the plaintiff, Mary Brown Callaghan, propounded a claim against the defendant for an accident which she claims to have occurred on March 23, 1914, while getting off of one of the street cars of the defendant. R. G. Brown, plaintiff's uncle, also has recently propounded a claim against the traction company for injuries supposed to have been received while getting off of one of the cars of the defendant, and in addition to this plaintiff's cousin, Lacy Brown, has had two claims against the company, one on January 29, 1914, and one on March 4, 1914, in one of which he claims to have received injuries while a passenger on one of defendant's street cars, and his (Lacy's) wife has also made a claim for injuries supposed to have been received on March 4, 1914, the same day as Lacy's second accident. Mrs. Lizzie Webb, Lacy Brown's mother-in-law, claimed to have had an accident on May 24, 1914, while she was getting off of one of the company's street cars."

Defendant also sought to introduce various releases signed by relatives of Cox upon payment being made them for injuries claimed to have been sustained, and separately sought to introduce a release signed by Lacy, a cousin of plaintiff, which was witnessed by plaintiff. We will consider all of this testimony together.

[1] It is contended that all of this evidence should have been admitted as bearing upon the answer of defendant alleging that plaintiff and certain members of his family had conspired against defendant to procure unmerited damages by means of false and fraudulent claims. In this connection appellant quotes portions of the testimony of plaintiff which show that he has no definite recollection of any details concerning the opera-

tives of the car or the car itself, and show a recklessness in testifying concerning his witness, Saunders, calculated to cast great doubt upon his entire testimony. It is also pointed out that every one of the motormen and conductors on that car line testified positively that no such accident occurred on that day with reference to his car.

The testimony excluded shows a remarkable condition of affairs. About 17 claims were propounded by Cox and his relatives, all of which, except 2, were for injuries alleged to have been sustained in alighting from cars. To get off of a street car is a simple thing; and it is inconceivable that all of these people could have been caused to fall by reason of negligence of the operatives of the cars. Surely the company had no desire to willfully inflict injuries upon the members of this family, and surely these people were not all suffering from infirmities such as to prevent them from getting off of a street car without assistance. In spite, however, of the warnings furnished by similar accidents to members of the family, they appear not to have learned caution, but continued taking the risk, a terrible one as to them, of getting off of street cars, with the result that every now and then one of them would be injured just like the others were. We think it is so highly improbable that all of these claims could be honest ones, that a jury would be justified in inferring that fraud had been practiced with regard to some of them. The testimony indicates a bad state of affairs, but we do not think, had it been admitted, it would, with the other testimony, have justified a charge on conspiracy. The evidence fails to connect plaintiff with the other claims, except in one instance in which he was with a cousin when he had his fall, and also witnessed the release executed by him to the company. We fail to find in the testimony given or excluded that evidence of concerted action such as is required to constitute a conspiracy. It is just as probable, if not more so, that each incident stood alone as that a conspiracy existed, and it is mere guesswork to say that any of the parties conspired together. If some of the claims were fraudulent, they may have been propounded upon the initiative of the complainant alone, without consulting with or being aided or abetted by any one, being induced thereto by the apparent ease with which claims could be collected, as shown by experiences of other members of the family.

The issue in this case was whether plaintiff was injured by reason of the negligence of the company as alleged by him, or whether, as is contended by defendant, no such incident as testified to by plaintiff occurred, or if it did, that it was willfully brought about by him, and not caused by negligence of the company. Proof of a conspiracy and of his connection therewith would undoubtedly tend strongly to corroborate the testimony of the employees of defendant that no such

incident occurred, or might lead the jury to believe that he willfully permitted himself to be thrown from the steps. But as above pointed out the evidence admitted fails to show any conspiracy between any of the members of the family who propounded claims, and the evidence excluded, considered alone or with that admitted, would not justify a charge on conspiracy, for it merely shows transactions of a similar nature, not connected with each other and not constituting a necessary element in a plan to reach an ulterior object. *Chamberlayne on Ev.* §§ 3244, 3245. We conclude the court did not err in regard to the matters complained of in the first four assignments of error, and they are overruled.

[2, 3] By the fifth assignment complaint is made of the charge of the court, because it did not require the jury to find that defendant failed to stop the car a reasonable length of time for its passengers to alight therefrom, but simply required the jury to find that while plaintiff was alighting therefrom and before he could alight defendant started the car. The charge is defective in the particulars pointed out. Nowhere in it do we find any statement from which the jury could deduce the rule of law that if the car was stopped for a reasonably sufficient time to enable passengers to alight, and the plaintiff, instead of using such reasonably sufficient time in getting off the car, was not diligent, the appellant would not be liable, unless those in charge of the car knew, or had reason to know, that the passenger had not alighted and was about to alight. *Railway v. Williams*, 70 Tex. 159, 8 S. W. 78; *Harris v. Railway Co.*, 36 Tex. Civ. App. 94, 80 S. W. 1023; *El Paso Elec. Ry. v. Boer*, 109 S. W. 199. The court eliminated entirely the doctrine of a reasonably sufficient time, and erroneously stated that plaintiff could recover if the car was started before he could alight therefrom. The evidence of plaintiff showed that he got up and started to walk out, that he thought Groverow was right behind the conductor, and plaintiff was right behind Groverow; that the conductor got off at the front end; that Groverow got off at the same place and plaintiff followed Groverow; that at the time plaintiff got off the conductor had walked across to the other side of the railroad track, a distance estimated by the witness Saunders at 60 feet or more from the car. In view of this evidence, it is clear that the error in the charge must be held to be a material one. The assignment is sustained.

By the sixth assignment the charge is again attacked, the objection being that the charge was erroneous in that it allowed a recovery without requiring a finding that a reasonably sufficient time had not been given, after the car stopped, in which to disembark, and without requiring a finding that those in charge of the car or any of them knew or should have known that plaintiff was alight-

ing or undertaking to alight. What we have said in disposing of the preceding assignment is applicable to this one. Defendant could not be liable unless it violated a duty to plaintiff, either by starting the car before giving him the time given by law to disembark or by starting it, knowing, or having reason to believe, that he was about to alight. The evidence is, to say the least, not of such character as to conclusively show that appellant knew, or was chargeable with knowledge, that plaintiff was preparing to alight. The assignment is sustained.

[4] It is contended that the court erred in submitting the issue whether plaintiff's future earning capacity had been impaired. There is no evidence, so far as we can find, in the statements contained in the briefs, from which a jury could find that plaintiff's future earning capacity had been impaired. He was earning the same amount as he earned prior to suffering the injuries testified to by him, and no evidence is pointed out in his brief from which it could be deduced that his earning capacity has been affected. The seventh assignment is sustained.

The judgment is reversed, and the cause remanded.

INTERNATIONAL & G. N. RY. CO. et al. v. PERKINS et al. (No. 984.)

(Court of Civil Appeals of Texas. Amarillo. March 15, 1916.)

1. APPEAL AND ERROR ⇐58—JURISDICTION—AMOUNTS IN CONTROVERSY—INTEREST.

In an action begun before a justice of the peace, where the prayer was for the recovery of \$95, with a prayer for general relief, plaintiff was entitled as a matter of law to interest from the accrual of the cause of action, and, if that interest brings the amount to more than \$100, the Court of Civil Appeals has jurisdiction of an appeal from the judgment of the county court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 268, 269; Dec. Dig. ⇐58.]

2. APPEAL AND ERROR ⇐58—JURISDICTION—AMOUNTS IN CONTROVERSY—INTEREST.

In an action begun before a justice of the peace to recover a sum and interest to date, which was treated by plaintiff and the court as entitling plaintiff to interest to the rendition of the judgment, which would bring the amount to more than \$100, the Court of Civil Appeals has jurisdiction of an appeal from the judgment of the county court on appeal, though plaintiff waived a part of the interest and recovered less than \$100.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 268, 269; Dec. Dig. ⇐58.]

Appeal from Hardeman County Court; D. E. Magee, Judge.

Action by J. J. Perkins and others against the International & Great Northern Railway Company and others. Judgment for the plaintiffs in the county court on appeal from the justice court, and defendants appeal. Motion to dismiss the appeal overruled.

Wilson, Dabney & King, of Houston, and J. A. Clarke, of Quanah, for appellants. Berry, Stokes & Morgan, of Vernon, and M. M. Hankins, of Quanah, for appellees.

HUFF, C. J. The appellees move to dismiss this appeal because the amount in controversy is less than \$100; this suit having originated in the justice court, and appealed from that to the county court.

[1] The suit was instituted against appellants for damages on account of the loss of eight cases of shoes, alleged to have been shipped over the lines of appellant on or before July, 1910. The wholesale value of the shoes is alleged to be \$76.80 and the retail value \$95. The prayer is that appellees recover the sum of \$95, together with costs "and all relief to which they may be entitled, general, special, legal, and equitable," and, if for any reason they are not entitled to recover the retail price, they recover the wholesale price, \$76.80, "with interest on said amount from July 12, 1910, to date." This suit was filed January 16, 1914. The judgment was rendered November 24, 1915, for the sum of \$99. Interest is not asked for on the \$95 count in terms, but the prayer for general and special relief entitles plaintiff, as a matter of law, to 6 per cent. from the date of the accrual of the cause of action upon this prayer, which the subsequent prayer shows to have been July 12, 1910, or at least in July. Allowing that rate of interest on the amount when the suit was filed would be more than \$100, and still more at the date of the rendition of the judgment. We believe under the prayer for special and general relief the \$95, with interest, was in controversy, which will give this court jurisdiction. This appears to us to be supported by the authorities cited by appellant. *Railway Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *City of Houston v. Lubbock*, 35 Tex. Civ. App. 106, 79 S. W. 851; *Railway Co. v. Timon*, 110 S. W. 82; *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11; *Barron v. Bank*, 138 S. W. 143; *Railway Co. v. Chisholm*, 146 S. W. 988; *Railway Co. v. Montgomery*, 141 S. W. 813.

[2] Interest was sought on the \$76.80 up "to date." If this refers to the date of filing the suit, the amount would be less than \$100; up to the date of the judgment it would be slightly in excess of \$100, from July 12, 1910. If on this latter item interest is to be limited by the pleading, "to date" of the filing of the suit, January 16, 1914, it may be that this court would not have jurisdiction, for the interest on that amount, at the time the suit was filed was less than \$100 (*Railway Co. v. Rayzor* [Sup.] 172 S. W. 1103); but, if interest is calculated from July 12, 1910, to the date of judgment, November 24, 1915, this court would have jurisdiction as the amount is slightly in excess of \$100 (*Rail-*

way Co. v. Fromme, 98 Tex. 459, 84 S. W. 1054). The appellees at the trial waived all interest prior to January 1, 1911, and the court gave judgment for the \$76.80 count, with interest up to the date of the judgment from January 1, 1911. It would appear that both the appellees and the court below construed the pleadings as authorizing interest up to the rendition of the judgment. Under the first count for \$95 this court has jurisdiction, as above pointed out. Under the second count, if the trial court and appellees' interpretation of the pleading is correct, we have jurisdiction on that item.

The motion to dismiss will be overruled.

HESTER v. BASKIN. (No. 945.)

(Court of Civil Appeals of Texas. Amarillo. March 22, 1916.)

1. APPEAL AND ERROR ⇨655(1) — RECORD — STRIKING INDEPENDENT PAPER.

Appellee's motion to strike out an independent paper filed in the Court of Appeals, not being part of the transcript, but purporting to be the conclusions of fact and of law of the trial court, will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823, 2825; Dec. Dig. ⇨655(1).]

2. ATTACHMENT ⇨125—FAILURE TO SWEAR TO AFFIDAVIT—EFFECT.

Failure to swear to an affidavit for attachment against a nonresident is a defect which can be urged against the proceedings before trial, but is a matter which defendant can waive, and will not render the judgment foreclosing the attachment lien void.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 344-350; Dec. Dig. ⇨125.]

3. ATTACHMENT ⇨125 — FAILURE TO MAKE AFFIDAVIT—EFFECT.

Failure to make affidavit for attachment will not defeat the court's jurisdiction as to a nonresident, where the writ is issued and levied on his property, since it is the levy of the attachment which gives the lien and jurisdiction over the property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 344-350; Dec. Dig. ⇨125.]

4. JUDGMENT ⇨143(2), 145(2)—BY DEFAULT — VACATION.

Where a default judgment which is not void is sought to be vacated by motion or suit, an excuse for failure to answer in the original suit and also facts showing a meritorious defense must be set up.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 270, 271, 293; Dec. Dig. ⇨143(2), 145(2).]

5. JUDGMENT ⇨153(4) — DEFAULT — SETTING ASIDE—AFTER TERM.

The trial court properly refused to consider a motion to set aside a default judgment rendered at a previous term of court, since new trial is never granted after adjournment of the term of court at which a judgment is rendered, no matter what the grounds urged.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 301; Dec. Dig. ⇨153(4).]

6. NEW TRIAL ⇨157—MOTION—DISPOSITION.

A motion for a new trial, not involving a trial upon the merits of the case, is properly disposed of in a summary manner, either upon the

face of the record, or upon affidavits of the parties and of their supporting witnesses.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. ⇨157.]

7. JUDGMENT ⇨435, 443(1, 3)—VACATION FOR FRAUD—"EQUITABLE ACTION."

A party who has been prevented from prosecuting his suit or making his defense by fraud or mistake can bring an "equitable action" after the close of the term to reopen the case and dispose of it upon its merits, which action has all the incidents of a trial and cannot be disposed of in a summary way, as a motion for a new trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 821, 822, 836, 838; Dec. Dig. ⇨435, 443(1, 3).]

For other definitions, see Words and Phrases, First and Second Series, Equitable Action.]

8. JUDGMENT ⇨173—DEFAULT—VACATION—REINSTATEMENT.

The trial court, which was in error in setting aside a default judgment after term, properly vacated the order on motion, leaving the default judgment as rendered at the previous term stand as originally entered, since an order is subject to the control of the court granting it during the term at which it is made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 340; Dec. Dig. ⇨173.]

Appeal from Deaf Smith County Court; Jas. A. Hughes, Judge.

Action by L. Baskin against B. M. Hester. From an order setting aside an order vacating a default judgment against defendant, he appeals. Affirmed.

Russell & Dameron, of Hereford, for appellant. Knight & Slaton, of Hereford, for appellee.

HUFF, C. J. The appellee Baskin brought suit against Hester on a promissory note, interest, and attorney's fees. It was alleged that Hester resided in Harper county, Kan. Notice for service on a nonresident was obtained and duly served on Hester, and in addition thereto an attachment was sued out and writ issued and levied upon certain lots in the city of Hereford, and judgment taken in the suit at the October term of the county court, foreclosing the attachment lien and directing its sale. At the December term of the county court of Deaf Smith county, Hester filed a motion to set aside the default judgment, alleging that his attorneys and appellee's attorneys had entered into an agreement to continue the case, but, through mistake, judgment by default had been entered. He attaches to his motion as part thereof an answer which he filed that day in the case of Baskin v. Hester, setting up several items of counterclaim, but admitting the execution of the note. The affidavit for attachment is signed by Baskin, and is in all respects sufficient, except the jurat of the officer before whom it was taken is not signed by the officer. After the filing of the motion at the December term, on December 9th, the trial court granted the motion to set aside the default judgment. In addition thereto, the answer was filed by the appellant in the

former suit. The plaintiff filed a supplemental petition to the answer on the 9th of December, containing several exceptions to the answer, which the court sustained. On the 21st day of December, the appellant Hester filed a motion, which is termed "a motion to set aside the judgment by default," setting up the fact that the court had no jurisdiction to render the judgment against a nonresident for the reason that the affidavit for attachment had not been sworn to. However, on the 11th day of December, it appears that appellee Baskin filed a motion to set aside the order of the court theretofore rendered during that term, which set aside the judgment rendered at the previous October term of court, because it was a simple motion and the court had no authority to entertain such a motion, and that the reasons set up could only be urged in equitable proceedings in an independent suit, and other reasons set out in the motion. The court, it appears, on the 24th day of December, set aside its order made on the 9th day of December, vacating the judgment of the court rendered on the 13th day of October, 1915. From this order the appellant Hester appeals.

[1] The appellee in this case presents a motion to strike out what purports to be conclusions of fact and of law of the trial court, filed herein on this appeal. The paper so filed is not part of the transcript brought up to this court, but appears to be an independent paper, without the certificate of the clerk of the trial court entered thereon. We think that appellee's motion to strike out the conclusions of fact and law should be sustained, as they are improperly brought to this court, and not in compliance with the rule.

[2-4] Without noticing the assignments in the order presented, we will discuss the questions involved in this appeal. The motion setting up the failure to make affidavit for attachment may, perhaps, be said to be a direct attack upon the judgment of the trial court at the previous term. *Crawford v. McDonald*, 33 S. W. 325. The failure to swear to the affidavit is a defect which could be urged against the proceedings before trial; but this is a matter which the defendant could waive, and will not for that reason render the judgment, foreclosing the attachment lien, void. The rule appears to be in this state that the failure to make the affidavit will not defeat the jurisdiction of the court as to a nonresident, where the writ of attachment has been issued and levied on the property of the defendant. The courts, as we understand them, hold that it is the levy of the attachment that gives the lien and jurisdiction over the property. *Barell v. Wagner*, 5 Tex. Civ. App. 445, 27 S. W. 17; *Cooper v. Reynolds Lessee*, 10 Wall. 308, 19 L. Ed. 931; *Baker v. Hahn*, 161 S. W. 443. It is also the rule, as we understand, where a judgment is sought to be vacated by a mo-

tion or by a suit for that purpose, where the judgment is not void, it will be necessary to set up an excuse for failure to answer in the original suit and also the facts showing a meritorious defense. *Kern v. Freeze*, 96 Tex. 513, 74 S. W. 303; *Western Lumber Co. v. Railway*, 180 S. W. 644.

[5-7] We are inclined to believe the trial court properly refused to consider the motion to set aside the default judgment rendered at a previous term of the court. The Supreme Court of this state has said:

"It must now be regarded as settled that a new trial is never in fact granted after the adjournment of the term of the court at which the judgment is rendered, no matter what are the grounds urged in support of the application." *Overton v. Blum*, 50 Tex. 417.

The motion for new trial does not involve a trial upon the merits of the case. It is properly disposed of in a summary manner, either upon the face of the record or upon affidavit of the parties and of their supporting witnesses. If, by fraud, or mistake, a party has been prevented from prosecuting his suit, or making his defense, he can bring an equitable action upon its merits after the close of the term to reopen the case and dispose of it upon its merits. This action so brought has all the incidents of a trial and cannot be disposed of in a summary way, as would a motion for a new trial. *Eddleman v. McGathery*, 74 Tex. 280, 11 S. W. 1100, and authorities there cited.

The trial court, it appears, when the motion was first considered, granted the prayer to set aside the former judgment, but afterwards, upon reconsideration, he set aside his order granting the motion vacating the former judgment at the preceding term.

[8] Complaint is here urged to the action of the trial court in setting aside the order granting a new trial. During the term at which an order is made, it is subject to the control of the court making it. If the trial court was in error in granting a new trial and in setting aside the former judgment because he then had no such power, on motion it was his duty to correct the error by setting aside the order granting a new trial. We think the trial court properly vacated the order for a new trial and left his judgment as rendered at the previous term stand, as originally entered. If we were to consider the motion of the appellant filed to set aside the judgment and the answer attached thereto, we would be unable to say the trial court abused his discretion in overruling the motion. It does not appear from the facts alleged in the motion or by the answer that appellant will suffer any injury. He does not deny the note sued on, but claims some items as counterclaims against the note. There is nothing shown that will prevent his recovery on the items thus claimed if he shall afterward show them to be just in another action therefor.

The case will be affirmed.

PROGRESSIVE OIL CO. et al. v. CRAWFORD. (No. 5633.)

(Court of Civil Appeals of Texas. San Antonio. March 8, 1916. Rehearing Denied April 12, 1916.)

APPEAL AND ERROR \S 759—**BRIEFS—ASSIGNMENT OF ERRORS.**

Under rule 29 for the Courts of Civil Appeals (142 S. W. xii), requiring assignments of error to be copied in appellant's brief, an assignment, reconstructed from two or three assignments of error in the motion for new trial, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3094; Dec. Dig. \S 759.]

Appeal from Bexar County Court for Civil Cases: John H. Clark, Judge.

Action by J. R. Crawford against the Progressive Oil Company and others. From judgment for plaintiff, defendants appeal. Affirmed.

J. T. Fly, of San Antonio, for appellants. Hicks, Hicks, Teagarden & Dickson, of San Antonio, for appellee.

MOORSUND, J. This is a suit, filed by J. R. Crawford on November 4, 1914, against the Progressive Oil Company, a corporation, Joe L. Hill, T. W. Woodruff, and R. M. Biard, upon a joint and several promissory note for \$233.34, payable to the order of plaintiff, executed by said defendants, dated June 8, 1914, due September 8, 1914, bearing 8 per cent. interest, and providing for 10 per cent. attorney's fee. Defendants Hill and Woodruff answered and denied liability, alleging that there was never a delivery of said note by them or any one authorized by them to deliver the same; that they instructed Biard not to deliver the note to plaintiff unless a certain trade should be consummated, and that said trade was never made. They also contended that plaintiff, by threats of personal violence, forced Biard to deliver the note to him. Plaintiff joined issue on said allegations, and specially alleged that, even if Biard was not authorized to deliver such note, the same was delivered by him to plaintiff without any knowledge on the part of plaintiff that Biard was not authorized to deliver same, and that plaintiff received and accepted the same in settlement of an open account, then due him by the Progressive Oil Company, and agreed to forbear suing until the maturity of said note; that at the time he accepted the note he was threatening to sue said oil company, of which defendants Hill, Woodruff, and Biard were officers and owners of practically all the stock, and would have sued said company, which at that time owned assets out of which plaintiff could have collected his debt; that within three or four days after said note was delivered

Biard informed Hill and Woodruff that he had delivered the same to plaintiff, and that plaintiff had accepted it in settlement of his open account against the company, and that said defendants acquiesced in the delivery thereof, and did not notify plaintiff until after the maturity of the note that it was delivered without authority; that plaintiff by such acts of defendants has been placed in a worse position than he was when he accepted the note, for the reason that, relying on the financial responsibility of the individuals who signed said note, he permitted defendants, as officers of the company, to dispose of all its assets, which they have done, and said company is now defunct.

The assignments of error are objected to because they are not copies of paragraphs of the motion for new trial. Without filing formal assignments of error, appellants have reconstructed, in their brief, their assignments contained in their motion for a new trial, making one assignment out of two or three paragraphs of said motion. This court has been very liberal in considering assignments which as printed in the briefs are substantial copies of those contained in the record, but we cannot permit new assignments to be formulated and printed in the brief without setting at naught rule No. 29 (142 S. W. xii) for the Courts of Civil Appeals. *Horseman v. Coleman Co.*, 57 S. W. 304; *Lakeside Irrigation Co. v. Buffington*, 168 S. W. 21; *Deweese v. Nicholson*, 182 S. W. 396, decided by this court, but not yet officially reported; *Overton v. Colored K. of P.*, 163 S. W. 1053.

The statements under the first two assignments are also insufficient. We must decline to consider any of the assignments. The issues are simple, and apparently all contentions sought to be made are without merit; but were we to consider the assignments, we would set a precedent which could justly be invoked in future cases. The impression appears to prevail with many members of the bar, judging by the frequency with which we are confronted with similar assignments, that the enactment of the law, permitting the use of paragraphs of the motion for new trial as assignments of error, liberalized the practice to such extent as to make it permissible to reconstruct assignments out of such paragraphs, and, without filing the same as formal assignments, print such new assignments in the brief. As rule 29 has not been repealed, there is no ground for such impression.

There being no fundamental error apparent, the judgment will be affirmed.

FLY, C. J., entered his disqualification and did not sit in this case.

AMEND et al. v. JAHNS et ux. (No. 922)*
(Court of Civil Appeals of Texas. Amarillo.
Feb. 16, 1916. On Rehearing,
April 5, 1916.)

1. HUSBAND AND WIFE \S 131(4)—SEPARATE ESTATE OF WIFE — ACTIONS — BURDEN OF PROOF.

Where the wife, seeking to save certain lands from execution levied by the husband's creditors, claimed that they were her separate lands, the burden was upon her to show what part, if any, of the land was paid for from her separate funds, in the absence of proof of which it would be presumed the property was that of the community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 477; Dec. Dig. \S 131(4).]

2. HUSBAND AND WIFE \S 133(7)—SEPARATE ESTATE OF WIFE—EVIDENCE—SUFFICIENCY.

Evidence held to support a finding that the husband gave live stock and its increase to the wife, so as to defeat the lien claim of the husband's creditors to land purchased with its proceeds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 491; Dec. Dig. \S 133(7).]

3. HUSBAND AND WIFE \S 49½(8)—SEPARATE ESTATE OF WIFE—GIFTS—EVIDENCE.

While mere branding cattle in the wife's name is insufficient to prove gift thereof to her, it is evidence which may be considered with the facts that the original stock was the wife's, that the husband branded the increase for her, and would not sell them without her consent, which she gave on condition that the proceeds should be invested in land for her, which land she selected, and is sufficient to show a gift of the increase as well as its proceeds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 254; Dec. Dig. \S 49½(8).]

4. HUSBAND AND WIFE \S 133½—SEPARATE ESTATE OF WIFE—EVIDENCE.

Evidence held sufficient to carry to the jury the issue whether land claimed by the wife to be exempt from husband's creditors was her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. \S 133½.]

5. HUSBAND AND WIFE \S 133(1)—SEPARATE ESTATE OF WIFE—EVIDENCE.

Evidence held to show that certain horses were of the separate estate of the wife, so that their issue and proceeds were exempt from the husband's creditors.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 487, 496; Dec. Dig. \S 133(1).]

6. HUSBAND AND WIFE \S 266 — SEPARATE ESTATE OF WIFE—EVIDENCE.

The husband may give or convey to the wife community property, and thereby make it her separate property, when it is not done in fraud of creditors, so that, where such gift was made prior to the time at which plaintiffs became creditors of the husband, the gift of community personalty to the wife was valid as against them.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 925-928; Dec. Dig. \S 266.]

7. HUSBAND AND WIFE \S 121—CONVEYANCE TO WIFE—HUSBAND'S NOTE FOR PRICE.

Where the wife's separate funds were used in a cash payment on the land, and the husband signed the note for the deferred payment, taking the land in the wife's name under agreement that the note should be paid from her funds, the equitable title to the land vested in her, and

she could defend against the lien claim of subsequent creditors of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 432, 435-441; Dec. Dig. \S 121.]

8. APPEAL AND ERROR \S 1068(5)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Where the jury found that the whole of land claimed by the wife as exempt from the husband's creditors had been paid for with her separate funds, it was not prejudicial error to refuse to submit the issue of the proportion paid by the wife.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4230; Dec. Dig. \S 1068(5); Trial, Cent. Dig. \S 475.]

On Rehearing.

9. HUSBAND AND WIFE \S 121 — SEPARATE ESTATE OF WIFE — MINGLING OF FUNDS — EFFECT.

The mere fact that the husband mingled the wife's separate money with his would not defeat her title to land purchased therewith.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 432, 435-441; Dec. Dig. \S 121.]

10. FRAUDULENT CONVEYANCES \S 95(5) — GIFT TO WIFE—VALIDITY.

Subsequent creditors cannot attack a gift of stock to the wife on the ground that it was only in pursuance of an antecedent agreement which is invalid, where it was actually a gift of things in esse.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 268, 269; Dec. Dig. \S 95(5).]

11. HUSBAND AND WIFE \S 121 — SEPARATE ESTATE OF WIFE—WHAT PROPERTY MAY BE HELD SEPARATE.

The mere fact that land purchased with proceeds of wife's separate personal property was school land, and the purchase money on a deferred payment was due that fund, would not affect the wife's right to hold it in severalty if it was paid for from her funds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 432, 435-441; Dec. Dig. \S 121.]

Appeal from District Court, Sherman County; D. B. Hill, Judge.

Action by W. S. Amend and others against George D. Jahns and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. E. Stalcup, of Dalhart, W. I. Gamewell, of Stratford, and B. K. Goree and H. A. Turner, both of Ft. Worth, for appellants. Stahl & Elliott, of Stratford, and Crudgington & Works, of Amarillo, for appellees.

HUFF, O. J. This is an action brought by the appellants to foreclose a judgment lien upon section No. 44, block 3-T, of the Texas & New Orleans Railroad Company, situated in Sherman county, alleged by them to be the property of their judgment debtor, George D. Jahns. Mrs. Nettie V. Jahns, the wife of George D. Jahns, intervened in said suit, alleging that the property was her separate property, and asked that it be decreed to her as her separate estate, and that the cloud created by the abstracting of appellants' judgment be removed. There are several parties

to this suit, and the pleadings are rather complicated, but the above will be a sufficient statement to understand the issues presented in this court, and discussed by us.

[1] The first assignment in this case is that the trial court erred in refusing to instruct a verdict for the appellants. The first proposition thereunder is to the effect that the burden was on Mrs. Jahns to show what part, if any, of the cash payment on the land was her separate funds, and, if not so established, the amount would be regarded as having been paid out of the community. Second, that the burden was on appellee to show that she had obligated herself to pay the deferred payment out of her separate estate, and that it was so paid, and, if not all, what portion thereof; and if not so shown, the deferred payment would be regarded as a community obligation. If the affirmative of either one of these propositions was shown by the appellee, then it would have been error to instruct a verdict for the appellants, and the trial court would have been justified in refusing the charge on that ground.

[2] Before the land was purchased and the deed executed by Amend to George D. Jahns, the husband, it was agreed by Jahns and wife that when her cattle and horses were sold, the money received therefrom should be placed in land for her separate use, and upon this condition she agreed to their sale. She went with her husband from their home in Gray county, to Sherman county, to look at the land. It appears that two sections were purchased at the same time by Jahns. The section in question the wife, when she looked at it, selected for her section, and this land, both husband and wife testified, her separate funds paid for. The consideration paid for this land was \$900 bonus, \$500 cash, and one note for \$400, signed by the husband alone. The \$500 paid down, it is testified by both husband and wife, was the proceeds of the sale of 16 head of cattle claimed by the wife, the price for which the cattle sold was \$20 per head, aggregating \$320, and three head of horses belonging to the wife, for the sum of \$280, making a total received for the horses and cattle, \$600. At the time of the marriage between Jahns and wife, the wife had 8 head of cattle and 6 head of horses, which were given her by her father before her marriage, and which also consisted of the increase from the original stock given her by her father up to the time of her marriage, which was some time in 1902. The land was purchased in September, 1905. The three horses first sold were part of the original stock given by Mrs. Jahns' father, and which she owned at the time of her marriage. The cattle sold, the proceeds of which went into the land, were in part the original stock and in part the increase therefrom after marriage. The evidence in this case shows that the husband owned cattle of his own, which he ran in one brand and that the wife had a

separate brand, which was used to designate her cattle. The testimony shows that the wife looked after the branding of the increase from her cattle and saw to it that her brand was placed thereon; that it was understood that the increase was not to be mingled with the husband's cattle. He would not sell them, and did not do so without her consent, and when he did sell them, it was upon the condition that the proceeds be placed in land for her, and she selected the land into which it should be placed. The cattle and horses were sold, and the proceeds held in the bank in the name of the husband, to be used in paying for the land for her, and at the same time he also sold his cattle and land owned by him, in Gray county, and after paying his debts, had remaining about \$1,000, which sum he paid for a section of land in Sherman county, purchased by him at the time the land in question was purchased. It is shown by the husband and wife that it was agreed at the time and before the deed that the deferred payment of \$400 should be paid from proceeds to be derived from the sale of the wife's remaining horses. The husband, shortly after their marriage, gave his wife two colts, which she owned and held at the time the land in question was acquired. When the note for the land fell due, the husband borrowed money from a bank to pay it, and secured the bank with a mortgage on his wife's horses and some of his own. Afterwards, under their agreement, when the land was purchased, the husband sold some of the wife's horses for \$360, and applied on the debt in the purchase of the land, and the balance due thereon was paid by check on the balance of the fund in the bank from the sale of the cattle of the wife, and the three first horses. It is explained by both husband and wife that some of the colts from the horses were not branded with the wife's brand for the reason that they did not desire to scar them. They both testified that these horses given by the father and the two colts by the husband, together with the increase, was the property of the wife, and was the property that paid for the land, together with the cattle. We believe the facts in this case were sufficient to authorize the jury to find that the husband gave the increase of the cattle from the original stock to the wife.

[3] While perhaps the mere branding of the cattle, as was held in *Rhodes v. Alexander*, 19 Tex. Civ. App. 552, 47 S. W. 754, will not be sufficient to prove the gift, yet we think it is nevertheless evidence of such fact, and may be considered with other circumstances. The jury's verdict ought not, we think, be set aside on that account. In this case the original stock was the separate property of the wife when she married her husband. The husband branded the increase for the wife, would not sell them without her consent, and she consented to sell on condition that the proceeds should be invested in land for her,

and she selected the land into which the proceeds were placed, and the land thereafter was regarded as her property. This, we believe, evidences a gift of the increase, as well as the proceeds therefrom.

[4] The three first horses sold were of the original stock. We believe it is reasonably certain that the cash payment was out of the wife's separate estate. The court would have been unauthorized to instruct a verdict for the appellant on that ground.

[5] We believe the evidence will support a finding that the horses were the separate property of the wife. They were set apart and designated as such by both the husband and wife. The wife controlled the sale of them to the extent that the proceeds, when sold, must be paid on the land. The husband agreed thereto, and all the facts indicate that the increase of the original eight head of horses was given to the wife.

[6] In this case it is shown at the time of the gift, the appellants were not the creditors of George Jahns, and therefore were in no way interested in the transaction had between the husband and wife; in fact, the evidence in this case shows that the judgment lien sought to be foreclosed was obtained on a warranty contained in a deed given in the sale of the land by Jahns, which was purchased at the time the land in question was acquired. It is the settled rule, as we understand it, in this state, that the husband may give or convey to his wife the community property, and thereby make it her separate property when it is not done in fraud of creditors.

[7] The deferred payment on the land, evidenced by the note of the husband, was paid by the separate funds of the wife, under an agreement of the husband and wife at the time the land was acquired. This, we think, vested in her the equitable title to the land, and she could defend against the lien sought to be established by subsequent creditors and lienholders. *Sparks v. Taylor*, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381; *Levy & Co. v. Mitchell*, 52 Tex. Civ. App. 189, 114 S. W. 172; *Carter v. Bolin*, 30 S. W. 1084; *Cavill v. Walker*, 7 Tex. Civ. App. 305, 26 S. W. 854.

It is not deemed necessary to discuss the question whether the land held by the husband in his name was under an express trust, or whether it was a resulting trust. If the land was purchased under an agreement that the land should be for the wife's separate estate, we see no reason why, when so purchased, the equitable title would not vest in her under an express trust, especially so when the property given to her paid the purchase price for the land.

[8] The second assignment will be overruled, for the reasons heretofore given. The third assignment is overruled. We think the trial court's charge fully covered the issue here sought to be given in the requested

charge. The verdict of the jury renders the assignment and the refusal of the requested charge immaterial, for the reason that they found the entire consideration for the land was paid out of the separate funds of the wife. The exact amount was thereby ascertained. They did not find that she paid only a portion out of her separate estate, and therefore there was no necessity of finding the exact proportion paid out of her separate property, and the amount paid from the community estate. The charge of the court, however, as given, we regard as a clear presentation of the rules governing this case, and which were sought in the specially requested charge by appellants.

The fourth assignment is overruled for the reasons first above given.

The case will be affirmed.

On Rehearing.

The evidence in this case, as stated in the original opinion, warranted the jury in their finding as to the cattle, 16 head of which were sold at \$20 per head, making a total of \$320, and three head of horses at \$280, totaling \$600. There can be no question but the horses were the separate property of the wife at the time of this sale. It appears these cattle were sold to the mother of the husband, together with some of his cattle—about 30-odd head in all. He took his mother's note for \$250. It is now asserted there is no evidence of the gift of this \$250 by the husband to the wife. The husband had \$600 of her money. The wife testifies specifically that her husband promised her, when they were selling out their property preparatory to the move, "If I would let him sell my stock, that he would let me have some land." She looked at the land for herself, "and I selected this section that I still own," and they sold the horses for \$280, and that his mother paid \$250, on the cattle, which was placed in the bank, and later the mother finished paying on the cattle, and paid that into the bank; that she intrusted to her husband all the proceeds of the cattle, and left to him the details of investing the money; that he sold the stock with her consent and deposited it, and she selected what she wanted done with the money. The evidence, if believed by the jury, established an agreement between the husband and wife that the proceeds from the cattle and horses should go towards paying for the land for her. The land should be hers, and that she selected it.

[9, 10] The fact that the husband mingled her money with his did not defeat her title to the proceeds from the sale. The fact that for part of it he took his mother's note for \$250, which was afterwards paid, did not defeat her right to the proceeds from the sale of the cattle, if they were hers. If the \$600 was hers, and her husband held it as hers and for her, and made the first payment on the land out of it, to that extent the land

was purchased with her separate money. Three horses were hers without question. The increase of the cattle shows a gift to the wife. They were set apart and designated as such by her husband as they increased. This shows it was not a mere agreement to change the law governing community rights, but it was a gift of property *in esse*. It was not such by virtue of an antecedent agreement alone, but by setting them aside to her separate use and as her property at the time. *Speer on Marital Rights*, § 116. The antecedent agreement made before the increase, the subsequent agreement, the agreement to place the proceeds in the land, the selection of the land, the intention expressed at the time and afterwards, authorized the jury to find it was then the understanding to make a gift of the community interest in the cattle, as well as the proceeds therefrom. Subsequent creditors, such as appellant and who were such years after this relation had been fixed by the agreement between the husband and wife, will not be permitted to attack the gift on that ground alone. *Cavil v. Walker*, 7 Tex. Civ. App. 305, 26 S. W. 854; *Jordan v. Marcetell*, 147 S. W. 357; *Cone v. Belcher*, 57 Tex. Civ. App. 403, 124 S. W. 149.

As to the horses which were sold to pay the deferred payment, the same rule above set out will apply. Although there was a deferred note, it was expressly agreed between the husband and wife, when the land was purchased, that such deferred indebtedness should be paid out of the proceeds from the sale of the wife's horses. The evidence shows the debt was finally so paid. This vested her with the entire estate in the land.

[11] The fact that the land was school land, and that the purchase money due that fund, will not affect the matter, as we understand the husband could so contract that the interest should be the separate property of the wife, except as to existing creditors at that time. *Swearingen v. Reed*, 2 Tex. Civ. App. 364, 21 S. W. 383.

The motion will be overruled.

BRIGGS-WEAVER MACHINERY CO. v. PRATT. (No. 7442.)*

(Court of Civil Appeals of Texas. Dallas.
March 11, 1916. Rehearing Denied
April 8, 1916.)

1. TRIAL \S 352(1)—PRESENTATION OF ISSUES.

In a salesman's action for compensation due under an oral contract, where defendant claimed that his employment was under a written contract, the court's statement in its formal presentation of the issues that plaintiff was suing upon an alleged oral contract, reciting its exact terms with reference to salary and commissions and how and when both were earned and payable, and that the defendant denied that, and said the contract was a written contract, omitting any reference to the terms of the written contract as pleaded, was not objectionable as

confusing the jury or leading them to believe that the written contract alleged by defendant was not an issue in the case, as it was necessary to recite the terms of the oral contract, that the jury might, if finding for plaintiff, find in accordance with its provisions, and not necessary to state the provisions of the alleged written contract, since, if the jury believed that it was the true contract of payment, the verdict in view of a plea of payment, would be for defendant, without reference to its terms.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 840; Dec. Dig. \S 352(1).]

2. APPEAL AND ERROR \S 1062(1)—HARMLESS ERROR—PRESENTATION OF ISSUES.

Such presentation, if objectionable, as confusing the jury or leading them to believe that the written contract alleged by defendant was not an issue in the case, was harmless, where the first interrogatory was whether plaintiff had an oral contract with defendant, or whether it was the written contract alleged by defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4212; Dec. Dig. \S 1062(1).]

3. TRIAL \S 350(4)—SPECIAL ISSUES—FUNCTION.

In a salesman's action for compensation under an oral contract, wherein defendant claimed that his employment was under a written contract, the refusal to submit defendant's requested special issue as to whether defendant on or about a certain date mailed plaintiff a contract in writing covering his employment was not error, though a dependent issue as to whether plaintiff accepted such contract should have been given, under the rule that the function of special issues is to have the jury determine from the evidence the existence of the material facts sought to be established by the respective parties.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 829; Dec. Dig. \S 350(4).]

4. TRIAL \S 351(5)—REQUESTED ISSUES—SUBMITTED ISSUES.

In such action, refusing to submit defendant's requested special issue was not error, where the court by its first interrogatory asked the jury whether plaintiff had an oral contract with defendant, reciting its terms, or whether he was employed under the written contract set out in the defendant's pleading.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 834; Dec. Dig. \S 351(5).]

5. PLEADING \S 177—ADMISSION—STATUTE.

In a salesman's action for compensation under an oral contract, where defendants in a paragraph of its answer alleged facts which, if true, constituted an acceptance by plaintiff of the alleged written contract of employment, and in a subdivision of such paragraph charged that such contract had been delivered to plaintiff, and that he entered the service of defendant thereunder for the year involved, plaintiff's reply denying the existence of the written contract and asserting the oral contract sued upon, and specifically denying each paragraph of defendant's pleading setting up the written contract, save the subdivision in reference to which he admitted receiving from defendant such written contract, but denied that he accepted it, was a sufficient denial under the Practice Act, as amended in 1913 (Acts 33d Leg. c. 127), and since repealed (Acts 34th Leg. c. 101), in force at the trial, requiring a reply to affirmative allegations of the answer to either admit or deny them or deny any knowledge or information in reference thereto sufficient to form any belief concerning them.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 354, 355; Dec. Dig. \S 177.]

6. PRINCIPAL AND AGENT \Leftrightarrow 89(9)—COMPENSATION—QUESTION FOR JURY—ACCEPTANCE OF WRITTEN CONTRACT.

In a salesman's action for compensation under an oral contract, where defendant pleaded that the employment was under a written contract, *held*, that whether plaintiff accepted the alleged written contract and acted thereunder was for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216, 233; Dec. Dig. \Leftrightarrow 89(9).]

7. TRIAL \Leftrightarrow 85 — EVIDENCE ADMISSIBLE IN PART—SCOPE OF OBJECTION.

An objection to evidence admissible in part should separate the admissible evidence from that which is inadmissible, and, unless it does so, the admission of the irrelevant evidence will not constitute reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225; Dec. Dig. \Leftrightarrow 85.]

8. WITNESSES \Leftrightarrow 398(1)—IMPEACHMENT—CONTRADICTION.

It is always competent for a party to contradict his adversary's witness by showing the facts to be otherwise than as testified to by him, and so discredit the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1267; Dec. Dig. \Leftrightarrow 398(1).]

9. APPEAL AND ERROR \Leftrightarrow 1048(6)—HARMLESS ERROR—EXAMINATION OF WITNESSES—REPE- TITION OF TESTIMONY.

In a salesman's action for compensation and salary under an oral contract, where defendant pleaded his employment under the terms of a written contract, and where defendant's president on his direct and cross-examination denied the execution of the oral contract alleged by plaintiff, and where a deposition of the president's former stenographer taken in behalf of plaintiff, in which he detailed a conversation between plaintiff and defendant's president tending to support plaintiff's contention, was not used, and the stenographer testified in person, the cross-examination of defendant's president by reading the conversation as first detailed by the stenographer in his deposition and inquiring whether it occurred, which the witness denied, while not approved, because presenting the testimony of the witness to the jury twice, once by deposition and once orally, so as to give it undue prominence, was not so prejudicial as to warrant a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. \Leftrightarrow 1048(6).]

10. WITNESSES \Leftrightarrow 398(2) — IMPEACHMENT — CONTRADICTION—PREDICATE.

In such case the statement taken from the deposition was proper and sufficient as a predicate for the contradiction of the testimony of defendant's witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1274; Dec. Dig. \Leftrightarrow 398(2).]

11. WITNESSES \Leftrightarrow 374(2)—CREDIBILITY—HOS- TILITY.

In a salesman's action for compensation and salary under an oral contract, where defendant set up his employment under a written contract, a letter from defendant to another company which had inquired about the capability of the plaintiff, whom it contemplated employing, which was unfriendly to and biased against plaintiff, was admissible, as the bias or unfriendliness of a material witness toward a litigant may be shown as affecting the weight to be given the witness's testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1202; Dec. Dig. \Leftrightarrow 374(2).]

12. APPEAL AND ERROR \Leftrightarrow 882(8)—PARTY EN- TITLED TO ALLEGE ERROR — ADMISSION OF EVIDENCE.

In such case the defendant, which proved the contents of the letter by its president before it was offered by plaintiff, was in no position to complain of its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3597, 3598; Dec. Dig. \Leftrightarrow 882(8).]

Appeal from District Court, Dallas Coun- ty; E. B. Muse, Judge.

Action by Clarence E. Pratt against the Briggs-Weaver Machinery Company, with cross-action by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Burgess, Burgess, Germany & Chrestman, of Dallas, for appellant. Israel Dreeben, of Dallas, for appellee.

RASBURY, J. Appellee sued appellant in the court below to recover a sum of money alleged to be due appellee as agreed compen- sation for personal services. There was trial by jury, to whom were referred certain special issues of fact. Upon the answers of the jury the court rendered judgment for appellee, from which entry this appeal is prosecuted.

Briefly stated, and without attempting to follow their mutations, the pleadings were as follows: Appellee alleged that he was em- ployed by appellant as traveling machinery salesman for the year 1913 by oral agreement between the parties by which appellee was to receive a salary of \$3,600, of which \$125 was payable monthly, the balance at the expira- tion of the year, with the further understand- ing that appellee was to receive the addition- al sum of 5 per cent. of all sales in excess of \$25,000 on which appellant realized a prof- it. No claim was made for the additional compensation, but it was alleged that ap- pellant had only paid \$1,875 of the agreed salary of \$3,600, leaving a balance of \$2,225, for which amount judgment was rendered upon the finding of the jury.

Appellant, while admitting appellee's em- ployment for the period and in the capacity stated, denied such employment was under the oral agreement alleged by appellee, but was, on the contrary, under a written one, by which appellee was to receive \$1,500, pay- able \$125 per month, together with the addi- tional compensation of 5 per cent. on all sales in excess of \$35,000, provided the profit on such sales was sufficient to warrant the com- mission, and that he earned no commissions, and that his agreed salary had been paid, save \$125, which was tendered. Appellant also sought by cross-action to recover of ap- pellee \$500 alleged overpayment on 1912 commissions, during which year appellee was in its employment. Verdict and judgment were against appellant on its cross-action.

Some issues arise on the pleading which require a more specific statement in that

respect, and in considering the issues we will when necessary make such further statement. It may also be said for the purpose of this appeal that evidence was adduced by both sides to the controversy in support of the allegations in their pleading sufficient to sustain verdict either way.

[1] The first issue presented is that the manner in which the trial court presented the issues made by the pleading and evidence preliminary to propounding to the jury the questions of fact to be determined by them was calculated to lead the jury to believe the contract relied upon by appellant was not an issue in the case, and to confuse them in that respect. In propounding questions of fact to the jury for their determination, the court preceded the questions with a formal statement of the nature of appellant's suit and appellant's defenses thereto. In such statement the court recited that appellee was suing upon an alleged oral contract, stating its exact terms with reference to salary and commissions and how and when both were earned and payable. In referring to appellant's defenses the court said, "The defendant denies this, and says the contract was a written contract," omitting any reference to the details of the written contract concerning salary and commission and payment thereof, as pleaded by appellant. Such omission, however, did not, in our opinion, either confuse the jury or lead them to believe that the written contract alleged by appellant was not an issue in the case. The issue in the case and the one the jury surely understood to be the controlling one was whether appellee was employed under the oral contract upon which he sued or upon the written contract under which appellant defended; and it was necessary to recite the precise terms of the alleged oral contract relied upon by appellee in order that the jury might, in case their verdict was for appellee, find in accordance with its provisions. It was not in like manner necessary to furnish the jury with the details of the written contract in case the jury should find for the defendant for the reason that its terms were immaterial, since, if the jury believed that the written contract was the true one, verdict would have been for appellant without reference to its terms, due to the fact that appellant claimed it had paid appellee in full thereunder, save \$125, which was tendered in court.

[2] It may further be said that, if the manner of presenting the issue is susceptible of the criticism directed against it, such action was harmless, since it appears that the jury were required to determine precisely whether the oral or written contract was the true one. By the first interrogatory the jury were asked whether appellee had an oral contract with appellant for the year 1913, stating its terms, or whether it was the written one as alleged by appellant in its pleading. It is

thus clear that, whatever the jury may have thought concerning the intention of the court to ignore the written contract, as disclosed by the preamble to his charge, all doubts were dispelled when they were required to pass directly upon the question.

[3] The next issue presented is the action of the court in refusing to propound to the jury two special issues submitted by appellant as follows:

"(4) Did defendant, on or about September 24, 1912, mail to Pratt a contract in writing, covering Pratt's employment by defendant for the year 1913?

"(5) If you have answered question No. 4 'Yes,' then did plaintiff accept said contract?"

The trial court did not, in our opinion, err in refusing to submit special issue four. All authority is agreed that the true function to be attained by special issues is to have the jury determine from the evidence the existence or not of the material facts sought to be established by the respective parties. One of the material, if not controlling, facts to be found by the jury in the instant case was whether appellee was employed under the contract alleged by him or under the one alleged by appellant. Consequently it is clear that, even though special issue 4 had been submitted, and the jury had found that appellant did mail the contract to appellee, it would not have established the fact upon which it bore, since mailing the contract would in no respect establish that appellee accepted it or agreed to its terms. Question 5, however, was pertinent and material, and presented to the jury a material and controlling issue, and, in the absence of any substantial presentation of such issue, the failure to submit the issue would have been error.

[4] The court did, however, present the precise issue, and in a manner as fair and impartial as did the refused charge. It is to be borne in mind that it was claimed by appellee that he was employed under the oral contract alleged by him, while it was maintained by appellant that he was employed under the written contract alleged by it. Consequently the issue was which was the true contract? In submitting the issue thus made the court by his first interrogatory inquired of the jury whether appellee had with appellant for the year 1913 an oral contract, reciting its terms, or whether it was the written contract set out in the pleadings of appellant. Here in one question was fairly put the issue made by both parties, because in answer to the question the jury was compelled, in making its answer, to find that the true contract was either oral or written. True, it would have been correct to have submitted the requested issue, but it would have been further necessary to make the presentation complete for the court to have also submitted affirmatively, or in the same manner, the issue of oral contract; and it would have been error for

the court to have refused to do so, since obviously it always has been the rule, applied both to cases submitted upon a general charge or upon special issues, that all issues of fact made by the pleading and sustained by the evidence must be affirmatively submitted to and determined by the jury. For the reasons stated, we conclude that the court did not err in the respect stated.

[5] The next issue is based upon the refusal of the trial court to instruct the jury to consider the written contract as the true one between the parties. This issue arises upon the Practice Act, as amended in 1913 (Acts 33d Leg. c. 127), and since repealed (Acts 34th Leg. c. 101). The ground upon which the charge was predicated was the alleged failure of appellee to specifically admit or deny plaintiff's allegation that said written contract had been delivered to him. Appellant by its first amended original answer alleged in paragraph 5 thereof facts which, if true, constituted an acceptance by appellee of the alleged written contract. Subdivision 5 of said paragraph charged that such contract had been delivered to appellee, and that appellee entered the service of appellant thereunder for the year 1913. In reply to such pleading appellee denied, first, the existence of the written contract at all and asserted the oral one sued upon. Then he denied specifically each paragraph of appellant's pleading setting up the written contract, save subdivision 5, wherein it was charged that he received it. In reference to this issue he admitted receiving from appellant in the fall 1912 the written contract, but denied that he accepted it or that it was consummated between him and the appellant. By the amended Practice Acts in force at trial of this case appellee, as plaintiff below, was required in replying to the affirmative allegations of appellant's answer to either admit or deny them or deny any knowledge or information in reference thereto sufficient upon which to form any belief concerning them. That appellee complied with the statute we think clear. Every material fact was denied, except receipt of the written contract, which was admitted. But such admission did not entitle appellee to the requested instruction, because accompanying the admission of the receipt of the contract was a denial of its acceptance or consummation, which raised an issue of fact for the determination of the jury, one of the purposes sought to be attained by the repealed act. Accordingly we feel constrained to overrule the assignment.

[6] It is next urged by two assignments that the court erred in refusing to withdraw from the consideration of the jury the evidence of appellee adduced in support of his plea just stated that, while he received the contract mailed him by appellant in the fall of 1912, he refused to accept its provisions, and in that connection to instruct verdict

for appellant. In the midst of the trial and upon cross-examination appellee testified that he never at any time received a written contract from appellant covering his employment for the year 1913; further, that the contract which appellant alleged was mailed to him, and which he admitted by his pleading he received in the fall of 1912, was, in fact, a contract intended to cover his compensation for the years 1911 and 1912, which had been in dispute between him and appellant. Appellant's contention is, in effect, that having admitted receiving the contract, and not having denied that it was for the year 1913, but only that he did not accept its terms, his testimony should have been excluded, and verdict instructed for appellant. Waiving the fact that the testimony sought to be excluded was elicited by appellant on cross-examination for the evident, but entirely proper, purpose of showing a variance between appellee's sworn answer and his testimony, and thereby reflecting against appellee any consequent inconsistency, we nevertheless conclude the court's action in refusing to peremptorily instruct verdict for appellant was correct. As we have said at another place, judgment against appellee could not properly be entered upon the pleading alone, because, without reference to the real facts, the issue of fact tendered by the pleading of appellant had been squarely met by the pleading of appellee, and there was in appellee's pleading no admission of fact which could have supported an instructed verdict for appellant. In short, the admission was that the contract pleaded by appellant had been received, but not accepted or agreed to by appellee. It then became an issue of fact to be affirmatively proven by appellant to the satisfaction of the jury that appellee did accept same and did perform his duties during the year 1913 under its terms and provisions. The fact that appellee admitted receiving, but not accepting, a contract alleged by appellant to be one for the year 1913, and on cross-examination testified that it was as matter of fact for the years 1911 and 1912, would in no respect change the situation that the issues tendered by the pleading were met, and that appellant was bound to prove the affirmative issues so met. The contradiction or variance developed between appellee's sworn pleading and his evidence was, of course, a matter of comment for counsel and consideration by the jury, and bore upon the credibility of the witness and the weight to be given to his testimony, rather than the right of appellee to maintain at all his suit upon the oral contract.

[7] The next issue presented is the action of the court in admitting in evidence certain letters written by appellee to appellant and some written by appellant to appellee. In reference to this issue we have carefully examined the correspondence sought to be excluded, and, in our opinion, some of it is

highly self-serving, and some irrelevant. Other portions of the correspondence are, however, clearly admissible. The objection was made to the correspondence as a whole, save, perhaps, in one instance, but in that exception a portion of the particular letter was admissible as relevant. The rule in such cases is that the objector should in his objections to the admission of mixed relevant and irrelevant testimony separate the admissible evidence from that which is inadmissible, and unless he does so the admission of the irrelevant will not constitute reversible error. *Railway Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694; *Railway Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

[8-10] J. C. Weaver, appellant's president, testified on direct and cross examination denying the execution of the oral contract alleged by appellee. On file in the cause was the deposition of A. C. Reed, formerly Weaver's stenographer, taken on behalf of appellee, in which Reed detailed a conversation he heard between appellee and Weaver which tended to support appellee's contention. The deposition was not used in evidence; Reed being present testifying in person. On cross-examination of Weaver counsel for appellee read the conversation as detailed by Reed in his deposition, and inquired of Weaver whether it as matter of fact occurred. The witness declared it did not. The proceeding related was objected to by counsel for appellant, and the contention is made that it was prejudicial to appellant, in that it was the means of presenting the testimony of the witness to the jury twice, once by deposition, and once orally, and hence gave same undue prominence. It is always "competent for a party to contradict his adversary's witness by showing the facts to be otherwise than as testified to by him, and thus discredit the witness." 40 Cyc. 2765. It is also proper and necessary to lay a predicate for the contradiction, and the statement taken from Reed's deposition was proper and correct as such predicate, and was not objectionable because wanting in essentials. While we do not approve the statement of counsel preceding putting the alleged conversation between Weaver and appellee that it was the statement of another witness, at the same time the im-

propriety is not, in our opinion, sufficient to warrant a reversal of the case. We would not be authorized in holding that the jury, because a witness was permitted to testify to the same fact twice, would for that reason alone accept his statement as true, notwithstanding another witness contradicted him on the issue to which he testified.

[11] The next and last issue arises upon the action of the court in admitting in evidence a letter by appellant to Murray Iron Works Company of Burlington, Iowa, inquiring concerning the capabilities of appellee, whom the inquiring company contemplated employing, and the answer of the latter thereto. It is unnecessary to set out the contents of the letter. Its purport as a whole may be said to be unfriendly towards appellee, and was sufficient to support a finding of the jury that Weaver was biased against appellee. Appellant earnestly maintains that it was irrelevant and prejudicial. It may have been prejudicial, but it occurs to us that it was not irrelevant. It is a settled rule that the bias or unfriendliness of a material witness towards a litigant may always be shown, since the existence of such a state of mind affects the weight to be given to the testimony of such witness. *Wentworth v. Crawford*, 11 Tex. 132; *Evansich v. Railroad Co.*, 61 Tex. 27; *Trinity Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856; *Cox v. M. K. & T. Ry. Co.*, 20 Tex. Civ. App. 250, 48 S. W. 745; *Houston, etc., Ry. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805; 40 Cyc. 2656.

[12] Further, appellant is not in a position to complain of the admission of the letter, for the reason that appellant proved its contents by its witness Weaver before it was offered by appellee. On cross-examination of Weaver counsel for appellee handed him the letter for identification. The witness identified the letter as one written by witness, its president, for appellant. Appellee did not then offer the letter in evidence. On redirect examination counsel drew from the witness orally the contents of the letter, together with the motives of the witness in writing it. Subsequently the letter was offered by appellee and admitted in evidence.

Finding no reversible error in the record, the judgment is affirmed.

**LAW SPRINKLE MERCANTILE CO. v.
HAUSE et al. (No. 5614.)**

(Court of Civil Appeals of Texas. Austin.
March 15, 1916. Rehearing Denied
April 12, 1916.)

**1. CHATTEL MORTGAGES §22 — VALIDITY —
FUTURE ADVANCES.**

A chattel mortgage to secure future advances is valid and binding on the parties.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 68; Dec. Dig. §22.]

**2. CHATTEL MORTGAGES §138(1)—RIGHTS OF
MORTGAGEE—EXECUTION PURCHASER.**

Property including a mule was mortgaged to secure future advances to make a crop. Thereafter the mule was sold under execution against debtor. At that time the remaining property was more than sufficient to discharge any advances made. The mortgagee continued to make advances and then prayed foreclosure of the mortgage on the mule. *Held*, that though Rev. St. 1911, art. 3744, permits a creditor to levy on mortgaged property, yet, as it provides such levy shall be subject to the mortgage, and as the mortgagee under penalty of breach of contract was bound to continue making advances, the mortgagee took priority over the purchaser at execution sale.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 225, 229, 231-236; Dec. Dig. §138(1); *Mortgages*, Cent. Dig. § 825.]

Appeal from Milam County Court; John Watson, Judge.

Action by the Law Sprinkle Mercantile Company against E. Hause and Arthur Cobb. From a judgment for the last-named defendant, plaintiff appeals. Reversed and remanded.

Morrison & Lewis, of Cameron, for appellant. Chambers & Baskin, of Cameron, for appellee.

RICE, J. Appellant, a private corporation, brought this suit against appellee Hause to recover a balance on a note and to foreclose its mortgage on certain mules and other personal property secured thereby, and against Arthur Cobb, on the ground that he had converted one of the mules so mortgaged to his own use, praying a foreclosure against him on said mule. John M. and J. D. Hefley Company, a private corporation, intervened, alleging that it had purchased the mule in question at execution sale against E. Hause and had sold it to Cobb, warranting title thereto. Cobb answered, admitting his possession of the mule in controversy, having bought the same at said execution sale, but claimed that his title thereto was superior to appellant's mortgage lien, because the mortgage was given for future advances, and that at the time of the levy of the execution appellant had not advanced to Hause the full amount mentioned therein, but had only advanced him the sum of \$45, and at that time the other property covered by the mortgage was of sufficient value to have paid appellant what Hause then owed it, and asserted that, after notice of such levy to appellant, it was

not protected by said mortgage as to future advances.

There was a nonjury trial in which judgment was rendered in favor of appellant against Hause for the sum of \$261.65 and interest, with foreclosure on all of the mortgaged property except the mule in question, and as to it awarded judgment in Cobb's favor, quieting his title thereto, and decreeing that the Hefley Company go hence without day, from which judgment appellant has prosecuted this appeal.

The facts show that on January 3, 1914, Hause executed and delivered to appellant his note for the sum of \$300, due on or before September 15, 1914, and to secure the same, as well as all other advances that might be made to him by appellant during said term, he mortgaged to it his entire crops of the year 1914, as well as certain stock, including the Cobb mule, the mortgage declaring that it was given in order to secure the payment of the above indebtedness and the amount of such other advances, whether of money, merchandise, or other property, that might be made to him by appellant, or their assigns, during the year 1914. This mortgage was forthwith filed for record with the county clerk of Milam county.

On December 29, 1913, the Hefley Company recovered a judgment against Hause for \$44.51 and costs of suit, upon which an alias execution was issued and levied on the 13th of January, 1914, by the sheriff upon said mule, and after legal notice the same was sold at public auction and purchased by the Hefley Company on the 26th day of January, 1914, the execution and sale being in all respects regular. On the 13th of January, 1914, the Hefley Company notified appellant that said mule had been seized under execution, at which time Hause was indebted to appellant in the sum of \$43.10, which indebtedness was incurred after the 3d of January, 1914. The property mortgaged by Hause, other than the mule seized under execution, was on January 3d, and is now, amply sufficient to satisfy the sum of \$43.10, then due by Hause to appellant; but the balance of the mortgaged property which remained on hand when judgment was rendered in behalf of appellant was not sufficient to satisfy same. The Hefley Company purchased said mule at the execution sale and thereafter sold it to Arthur Cobb.

The appellant brought this suit against Hause during the February term, 1914, of the county court, and Hause filed his appearance thereto at said term. The court found that when the mortgage was given on the 3d of January, 1914, appellant agreed to furnish Hause supplies to make his crop for that year, and that after said levy and execution sale the appellant did proceed to furnish Hause the further sum of \$522.47 in supplies to enable him to make and harvest said

crop, and that all the payments by Hause to appellant thereon were the proceeds of said crop which had been begun by Hause before the levy of said execution; and further found that such supplies were necessary to enable Hause to make the crop, and that he could not have made it without said advances; but it further found that if appellant had immediately ceased furnishing Hause supplies when notified of the levy of the execution, there was enough property described in the first-mentioned mortgage to have paid the debt for advances which had been made up to that time. It was likewise shown that E. Hause was totally insolvent, and that the mortgaged property was not sufficient to satisfy appellant's debt.

[1, 2] By its first assignment appellant urges that the court erred in failing to award it a foreclosure of its mortgage on the mule in question, for the reason that the same was acquired and forthwith duly recorded before the levy of the execution under which Cobb claimed, when the value of the property subject to his mortgage was insufficient to pay its debt, insisting by its proposition thereunder that when it and Hause entered into the agreement whereby it bound itself to furnish him supplies for the year 1914, in order to enable him to make a crop, and as security for such contemplated advances, he gave appellant a mortgage on certain stock, each party had a right to demand of the other compliance therewith; and a third party, at a later date and before the expiration of the contract, could not, by levying execution on such mortgaged property and giving notice thereof, deprive appellant of the right to make further advances under its mortgage, with the right to look to the mortgaged property as security therefor. While the contention of appellee is that appellant, after the notice of the levy was given it, had no right to make further advances to Hause, and if it did, was not protected by the mortgage.

Both of these contentions find support in the authorities. In this state it is no longer an open question that a mortgage may be given to secure future advances. See *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. 684. The court found that appellant agreed to furnish Hause during the year 1914 all advances and supplies necessary to enable him to make a crop for said year, and that it had furnished such advances and supplies. Under said agreement was it protected in so doing? Its mortgage was duly executed and forthwith recorded prior to the levy. In *Jones on Mortgages*, vol. 1, § 373, it is said:

"The rule that a mortgage for definite advances has priority in all cases has strong support in recent discussions. Notwithstanding all the distinctions and refinements which have been introduced into the law of this subject by the many conflicting adjudications upon it, there is strong reason and authority for the rule that a mortgage to secure future advances, which on its face gives information enough as to the ex-

tent and purpose of the contract, so that any one interested may by ordinary diligence ascertain the extent of the incumbrance, whether the extent of the contemplated advances be limited or not, and whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchasers or creditors, as to all advances made within the term of such mortgage, whether made before or after the claims of such purchasers or creditors arose, or before or after the mortgagee had notice of them. If the mortgage contains enough to show a contract between the parties, that it is to stand as a security to the mortgagee for such indebtedness as may arise from the future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it, he is not entitled to protection as a bona fide purchaser. Such a mortgage is considered as good against subsequent incumbrances to the full amount of the advances provided for, and the mortgagee is held to have a right to rely upon it, and to make such advances without regard to what other incumbrances may afterwards have been put upon the property."

To the same effect is *Witczinski v. Everman*, 51 Miss. 841; 5 *Ruling Case Law*, pp. 420, 421, § 51; *Divver v. McLaughlin*, 2 Wend. (N. Y.) 596, 20 Am. Dec. 663; *Lovelace v. Webb*, 62 Ala. 271; *Cobbey on Mortgages*, vol. 1, § 143. For other authorities discussing the subject, see *Willis v. Sanger*, 15 Tex. Civ. App. 855, 40 S. W. 229; *Groos & Co. v. Chittim*, 100 S. W. 1006.

It would be an anomaly to hold, we think, that appellant, being bound under the agreement to furnish Hause all necessary future advances to make the crop, and yet say that the Hefley Company, by reason of the notice of the levy, could prevent appellant from relying upon said mortgage to secure it for so doing. If under the obligation imposed by the agreement above referred to, appellant is bound to furnish all necessary advances, thereby giving to Hause the power to enforce compliance therewith, then we think it follows that appellant would have the legal right to enforce its mortgage on the property covered thereby, in order to secure such advances. Being bound to comply with its obligation entered into prior to the levy, a third party, such as the execution creditor in this case, could not be allowed, by levy upon the mortgaged property, to prevent appellant from complying with its contract and holding the mortgaged property as security therefor.

Nor do we think appellant's right is in any sense restricted or abridged by reason of article 3744, R. S. 1911, which permits a creditor to levy upon mortgaged property, because such statute provides that such levy and sale must be subject to said mortgage. This, we take it, means it must be subject to the mortgage in all respects, so that the purchaser must be held to take the property subordinate to the right already fixed by the mortgage. In the instant case Hause, we think, by virtue of the agreement, had the right to demand a compliance with its terms, and require appellant to furnish all supplies that might be necessary to enable him to make a crop during the year 1914; and that a failure so

to do on the part of appellant would have given him a right of action for breach of contract; and, so believing, we hold that it was appellant's duty under the law, irrespective of such levy and notice, to continue to furnish supplies to Hause in accordance with the terms of the agreement; and, having done so, as found by the court, it was entitled to a foreclosure on all the property mortgaged to secure it in so doing, for which reason we hold that the court erred in failing to render judgment in its behalf foreclosing the mortgage on the mule.

We therefore reverse the judgment, and remand the case for a new trial not inconsistent with the views herein expressed.

Reversed and remanded.

PATTERSON et al. v. KIRKPATRICK et al.
(No. 1589.)

(Court of Civil Appeals of Texas. Texarkana.
March 15, 1916. Rehearing Denied
March 23, 1916.)

**1. BROKERS — 78 — REAL ESTATE BROKERS
— RIGHT TO COMMISSION IN MONEY.**

Where landowners, employing realty brokers to sell their property, contracted to pay such brokers a commission in cash if they secured a purchaser for cash, and in the purchase-money notes if the sale should be on credit, and such brokers sold for notes, which the landowners thereafter sold to a third person, such sale, though the owners intended to repurchase the notes and deliver them to the brokers, rendered the owners liable in assumption for the brokers' commission in money, since, where a debtor fails to abide a stipulation to deliver a specific article, the neglect or omission operates to make the original promise to pay compensation an absolute engagement for the payment of money.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 99; Dec. Dig. — 78.]

**2. BROKERS — 89 — REAL ESTATE BROKERS—
RIGHT TO COMMISSION IN MONEY.**

Realty brokers, who contracted with landowners to sell for a commission payable in the purchase-money notes if such were taken, to whom the landowners, after sale on credit, tendered the commission in notes, which were refused, were not entitled to recover a money judgment for commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 130; Dec. Dig. — 89.]

Appeal from Hill County Court; J. D. Stephenson, Judge.

Suit by T. B. Patterson and others against Lee Kirkpatrick and others. From a judgment for defendants, plaintiffs appeal. Judgment reversed and rendered for plaintiffs.

The appellants, real estate brokers, sued the appellees to recover reasonable commissions for services rendered in effecting the sale and exchange of two tracts of land. The appellees pleaded, as material to state, that it was agreed and understood "that any commission earned or received by the plaintiffs upon said transaction would be collected out of the proceeds of the notes received in the transaction, and that defendants have

never denied the plaintiffs' right to collect their commission out of said notes, but deny any agreement to pay them any commission, or obligate themselves to do so, in any other way." The appellants, by supplemental petition, averred that appellees had sold and disposed of the notes received as a part of the consideration for the exchange of the lands, and were estopped from now claiming and asserting that they are not liable in money for the commissions. Appellees made reply that they had tendered and offered to deliver the notes to appellants in discharge of the debt, and that they had refused them; and that thereafter appellants had disposed of them, but were able to secure their return and deliver and transfer them in furtherance of the agreement.

The evidence establishes that appellees listed two separate tracts of land with appellants Patterson, Deal & Turk for sale or trade, and that they found a separate purchaser for each tract. The land did not sell for cash. The purchasers assumed the mortgage indebtedness then against the land, and executed notes for the difference, except in the 91-acre tract there was also paid \$100 cash. According to the evidence of appellants, they were to be paid for their services a reasonable commission in cash, and appellees had paid them only \$20. Appellants testified, and it was not disputed, that a reasonable commission on the 190½-acre tract was \$693, and a reasonable commission on the 91-acre tract was \$295.75, less the \$20 paid. The appellees did not dispute the fact that appellants rendered the services in disposing of the land, but claimed that the agreement respecting compensation was:

"If the land sold for money, we would pay the commission in money; if it sold on credit, they (appellants) would have to take part of the notes which we received in payment of the land."

The jury made the findings, on special issues, that appellees agreed to pay appellants a reasonable commission "out of the proceeds of sale if by notes commission in said notes," and that the aggregate amount of \$968.75 as claimed by appellants was a reasonable amount. It appears that appellees tendered and offered to deliver to the appellants part of the notes obtained on each tract as payment of the debt owing them, but that the appellants refused to accept same. After appellants refused or declined to take the notes as pay, the appellees, according to the undisputed evidence, sold to a third person the notes obtained on the sale of the 190½-acre tract. It does not appear that the appellants have sold and do not own the notes obtained on the sale of the 91-acre tract. It does not appear whether or not the land notes, or any of them, are due and payable. The sale of the 91-acre tract was a separate and distinct transaction, it appears, from the sale of the 190½-acre tract.

The court rendered judgment on the verdict in favor of appellees.

Wear & Frazier, of Hillsboro, for appellants. Morrow & Morrow, of Hillsboro, for appellees.

LEVY, J. (after stating the facts as above). [1] According to the evidence, the only controversy between the parties was respecting the mode of payment of the commissions earned by appellants in effecting the sale. The jury made the finding that it was the understanding of the parties that appellees might make payment of the compensation for the services of appellants in notes obtained as consideration for the sale of the lands. And the evidence conclusively, even admittedly, shows that appellees had sold and delivered to a third person all the notes obtained from the sale of the 199½-acre tract. The fact of the sale by appellees of the notes mentioned has the legal effect attaching, it is believed, of making the contract of the parties, respecting the sale of the 199½-acre tract, payable in money. It is the rule that, where the debtor fails to abide the stipulation to deliver the specific article, the neglect or omission operates to make the original promise to pay compensation an absolute engagement for the payment of money. *Baker v. Todd*, 6 Tex. 274, 55 Am. Dec. 775; *Chevalier v. Burford*, 1 Tex. 503; *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236; *Ward & Martin v. Lattimer et al.*, 2 Tex. 245; *Grant v. Burleson et al.*, 38 Tex. 214; *Short v. Abernathy*, 42 Tex. 94; *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 63, 21 Am. Dec. 410. And upon the fact of sale of the notes being a legal default the appellants were entitled to demand money and receive it on their petition in assumpsit for services rendered. The purpose and intention of appellees to repurchase the notes and deliver them to appellants would not avail as a defense against a moneyed judgment, for by the sale appellees lost the right to make payment in notes, and such right would not be restored except by express consent of appellants.

[2] It not appearing, though, that appellees have sold the notes obtained for the 91-acre tract, and it appearing, as it does, that they have tendered them on the compensation owing for that particular sale, the right of appellees to pay such demand in notes and not money would continue, and consequently appellants would not be entitled to recover a moneyed judgment in this case for the sale of the 91-acre tract.

The judgment is reversed and here rendered in favor of appellants for \$693, and this judgment to be without prejudice to enforce rights if legally necessary, respecting the agreement for compensation for sale of the 91-acre tract. The appellees will pay all costs.

ALAMO AUTO SALES CO. v. HERMS. (No. 5627.)

(Court of Civil Appeals of Texas, San Antonio.
March 15, 1916. On Motion for Re-hearing, April 12, 1916.)

1. SALES §38(1) — BUYER'S RIGHT TO RESCIND—INJURY.

Where the purchaser of a motor truck failed to show injury by fraud, if any, in the seller's representations as to the capacity of the truck, he was not entitled to rescind.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 65; Dec. Dig. §38(1).]

2. SALES §126(1)—BUYER'S ACTION TO RESCIND—TIME.

The buyer of an auto truck, even if the seller fraudulently represented its capacity, after using it for six or seven months and negligently and recklessly injuring it, had no right to rescind the contract of purchase.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 313, 315; Dec. Dig. §126(1).]

3. SALES §52(7)—BUYER'S ACTION TO RESCIND—VERDICT.

In a suit to rescind an executed contract for the purchase of a motor truck on the ground of the seller's misrepresentations as to its capacity, verdict for plaintiff held without support in the evidence.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 140-144; Dec. Dig. §52(7).]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Suit by Chris Herms against the Alamo Auto Sales Company. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Terrell, Walthall & Terrell, of San Antonio, for appellant.

FLY, C. J. This is a suit to rescind a contract of purchase of a motor truck brought by appellee against appellant, and for the cancellation of six notes aggregating \$650, and to recover \$900 already paid on the purchase price of the truck. The ground of rescission was that the truck was represented to be a one-ton truck, and would with safety and ease carry 3,000 pounds, and that the representation was false. The cause was submitted on special issues to a jury, and on the answers thereto judgment was rendered that appellee recover of appellant \$900, less the sum of \$111.90, with 6 per cent. interest for the cancellation of the notes and a chattel mortgage on the truck. The truck was adjudged to appellant. The effect of the judgment was a rescission of the entire contract.

The evidence shows that appellee bought a motor truck from appellant, under representation that it was a one-ton truck. A number of the notes given for the purchase money were paid, and, after using the truck for seven months or more, it was then concluded by the appellee that he would rescind the sale. The truck was bought on February 4, 1916, and he used it until August, when he broke a spindle and carried it to the shop of

appellant. Appellee never contemplated a rescission of the contract until appellant refused to allow him to take the truck from the shop until he paid a certain account. He stated:

"If I could have agreed with them on the open account, I would have taken the car out. I would know exactly then what I could haul on it, 2,000 pounds."

The evidence showed beyond controversy that the rescission was sought because appellee did not want to pay his account to appellant. This he stated time and again in his testimony. He stated:

"I was told that I would get a ton truck, and it did have that. The truck pulled 2,500 pounds all right."

There was no evidence tending to show that the truck would not transport all that appellant represented that it would. Appellee testified that it would haul as much as 3,000 pounds.

It was alleged in the petition:

"That prior to and at the time of the sale to, and purchase by, this plaintiff of said truck, the defendant, acting through its duly authorized agents and representatives, represented to this plaintiff that the said truck was a one-ton truck. That this plaintiff explained to the agents of said defendant the purposes and uses which his business required and demanded the truck should serve, and as an inducement to this plaintiff to purchase and take the truck, which he did purchase and take, the said defendant, through its said representatives, and who were by it fully authorized, and who were acting in the apparent scope of their authority, represented to this plaintiff that the truck was rated as a one-ton truck, but that it would, with safety and ease, carry 3,000 pounds."

The testimony of appellee showed that the truck was rated as a one-ton truck, and that it would carry 3,000 pounds. While he stated that the catalogue showed that the maximum capacity of the truck was 2,000 pounds, he never objected to it on account of its lack of power, but because he did not want to pay the account. To escape payment of the account he sought a rescission of his contract. He wanted a truck that would haul 20 cans of milk, and he did not testify that the truck failed to haul that number of cans. He obtained exactly what he contracted for.

[1] If there had been any fraud in the representation as to the capacity of the truck, the evidence failed to show that appellee was injured thereby, and he would not on a misrepresentation which did not damage him be entitled to rescind the contract. *Lemmon v. Hanley*, 28 Tex. 228; *Bremond v. McLean*, 45 Tex. 17; *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051.

[2] If the testimony had shown that there was fraud in the representations as to the truck, it cannot be said that appellee, after using the truck for six or seven months, and had injured the vehicle very much, would have the right to go into a court of equity and demand a rescission. He made no offer to reimburse appellant for the use of the

machine and for the injuries recklessly and negligently inflicted on it.

[3] The time that appellee used the truck before offering to return it was utterly unreasonable if he had discovered any fraud at or near the time when he purchased it. He found nothing, however, at fault with the power of the truck, which hauled any and all things he desired to transport, and there is not one word of testimony that tends to show that the truck would not do everything that appellant said it would. It was only after the amount of the account was demanded of him that he obtained a catalogue and ascertained that it stated that the truck's moving capacity was from 1,500 to 2,000 pounds. It in no way contradicted the representation that the car was a one-ton truck. Appellee testifies that it would transport more than a ton. He obtained all he contracted for, and his contract will not be rescinded. There was an utter absence of testimony to sustain the answers of the jury, and a verdict should have been instructed for appellant.

The judgment is reversed, and judgment here rendered that appellee take nothing by his suit, and that appellant recover of appellee the sum of \$844.08, with interest at 8 per cent. per annum on \$770 of that amount from January 17, 1915, and at 6 per cent. per annum on the sum of \$74.08, being the amount of the open account, from the same date, and all costs in this behalf expended.

On Motion for Rehearing.

The judgment on the open account will be corrected so as to be for \$111.90, instead of \$74.08, and a chattel mortgage lien will be foreclosed on the truck in favor of appellant. Except as herein mentioned, the judgment will remain as originally rendered by this court.

CARVER BROS. v. MERRETT et al.* (No. 1556.)

(Court of Civil Appeals of Texas. Texarkana.
Jan. 31, 1916. Rehearing Denied
Feb. 16, 1916.)

1. VENUE \S 27—SUIT BY BONA FIDE HOLDER OF ACCOUNT—STATUTE.

Under Rev. St. 1911, arts. 1830, 1842, providing that no inhabitant of the state shall be sued out of the county in which he has his domicile, except in certain cases, and that several obligors to any contract may be joined, a bona fide holder for value of an account could bring suit thereon against a bank, assignor and guarantor of the account, jointly with the parties primarily liable thereon, in the county of the residence of the bank, though the parties primarily liable were resident elsewhere.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 41; Dec. Dig. \S 27.]

2. JUDGMENT \S 589(2)—BAR—RECOVERY UPON TORT AND CONTRACT.

The assignor of an account could not recover thereupon, and also for a tort growing

out of the same transaction, as it would constitute a double recovery.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1065, 1101; Dec. Dig. ⚡ 589(2).]

3. VENUE ⚡ 8—SUIT FOR CONVERSION—STATUTE—"TRESPASS."

Under Rev. St. 1911, art. 1830, subd. 9, providing that, when the foundation of a suit is some crime, offense, or trespass for which a civil action in damages may lie, the suit may be brought in the county where such crime, offense, or trespass was committed, or in the county where the defendant has his domicile, where the agent of a copartnership converted securities at Titus county which the partnership had pledged with a bank, and which the bank had returned temporarily to the agent for the special purpose of making up his accounts, the assignee of the bank could sue the copartnership in Titus county, though such copartnership was resident elsewhere, for damages for the conversion, since a pledgee may maintain an action of trover against his pledgor for a conversion of collateral which the former has returned to the latter for a special purpose, while the act of the copartnership's agent was a "trespass" within the statute; the taking and appropriating having been intended, and not merely negligent.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 17; Dec. Dig. ⚡ 8.]

For other definitions, see Words and Phrases, First and Second Series, Trespass.]

4. PLEADING ⚡ 111—PLEA OF PRIVILEGE—BURDEN OF PROOF.

In a suit for conversion, plaintiff was bound to overcome a plea of privilege by proof that the conversion was committed in the county of suit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 234-236; Dec. Dig. ⚡ 111.]

5. APPEAL AND ERROR ⚡ 1170(9)—HARMLESS ERROR—INSTRUCTION—RULE OF COURT.

Under rule 62a of the Court of Civil Appeals (149 S. W. x), prohibiting reversal for harmless error in a suit for conversion, where defendants pleaded privilege, a charge technically incorrect in placing the burden of proof respecting the plea on the defendants, but practically putting the burden of proof on plaintiff, did not warrant reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4543; Dec. Dig. ⚡ 1170(9).]

6. JUDGMENT ⚡ 256(5) — SUPPORT BY VERDICT.

In suit by the assignee of a bank which guaranteed collection against it and its debtor, where, under the charge peremptorily directing verdict against the bank for plaintiff, the bank having confessed liability on its guaranty before the jury could find for the bank against the other defendants, they were required also to find for plaintiff against both the bank and defendants, the action of the court in entering judgment for plaintiff against the defendants other than the bank upon a verdict that the jury found for the plaintiff on the merits of the case against the bank, and further found for the bank against the other defendants, was proper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 451; Dec. Dig. ⚡ 256(5).]

7. PRINCIPAL AND AGENT ⚡ 159(1)—TORT OF AGENT—CONVERSION.

Where the agent for dealers in cotton, acting within the scope of his authority, obtained from the bank with which they had been pledged by the dealers cotton tickets to make a list, and thereafter refused to deliver possession of

the tickets to the bank, the dealers were liable to the bank for damages occasioned by the refusal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599-606; Dec. Dig. ⚡ 159(1).]

8. PRINCIPAL AND AGENT ⚡ 193—LIABILITY FOR AGENT'S TORT—QUESTION FOR JURY.

In suit by the assignee of a bank against the bank and cotton dealers whose agent converted from the bank cotton tickets pledged by the dealers, whether the bank was negligent in letting the agent have access to the tickets was a question for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 721½-726; Dec. Dig. ⚡ 193.]

9. PRINCIPAL AND AGENT ⚡ 193—LIABILITY FOR AGENT'S TORT—QUESTION FOR JURY.

In suit by the assignee of a bank against the bank and cotton dealers whose agent converted from the bank cotton tickets pledged by the dealers, whether the agent, in securing possession of the tickets, was acting within the scope of authority actually conferred upon him, held for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 721½-726; Dec. Dig. ⚡ 193.]

10. PRINCIPAL AND AGENT ⚡ 99—SCOPE OF AUTHORITY.

Where cotton dealers advised a bank that P. would "represent us in your city," the bank had the right to construe the language to mean that the dealers had authorized P. to do everything usually, customarily, or necessarily done by a nonresident cotton buyer's local agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. ⚡ 99.]

Appeal from District Court, Titus County; J. A. Ward, Judge.

Suit by John Merrett against Carver Bros., a copartnership, and another. From a judgment for plaintiff, the named defendants appeal. Affirmed.

See, also, 155 S. W. 633, 174 S. W. 929.

The suit is by appellee, Merrett, seeking to recover the sum of \$1,773.39 against appellants, a copartnership, and the Merchants' & Planters' National Bank. The petition alleged that Carver Bros. were during the fall of 1911 cotton merchants, with their residence and principal place of business in Collin county, Tex., and operating and buying and selling cotton throughout many counties in Texas, including Titus county; that on September 27, 1911, a contract was entered into between Carver Bros. and the bank by the terms of which the bank agreed to pay for cotton bought by them through their agent and representative, and Carver Bros. agreed and promised to refund to the bank any and all sums so advanced, together with 10 per cent. interest per annum, and the costs of yardage and weighing; that during that season the bank paid out \$67,417.31, including interest, and that Carver Bros. had repaid \$65,646.28, leaving a balance of \$1,773.39 still due the bank; that the bank transferred and sold this account to plaintiff, and guaranteed its payment. A second count

of the petition alleges substantially that the bank held as collateral and as a pledge to secure the payment of the account of \$1,773.-39 44 bales of lint cotton, property of Carver Bros., and of the value of \$45 per bale, which was represented by cotton tickets issued by Hammond & Culver and in the possession of the bank; that the agent of Carver Bros. came into possession of the cotton tickets and cotton while acting in the scope and apparent scope of his authority and in the course of his employment, to prepare shipping lists, make reports, and check the cotton, and after getting possession of the cotton tickets and cotton for the temporary purpose such agent and Carver Bros. failed and refused to return the same, and appropriated and converted the cotton and tickets; that this was done in Titus county; that the bank sold and transferred this claim for damages to plaintiff, and guaranteed its payment. The bank by its answer admitted liability as a guarantor of the account and the claim for damages, and prayed for judgment over and against Carver Bros. for the same judgment that might be rendered against it. Appellants, Carver Bros., first answered by plea of privilege to be sued in the county of their residence. A jury being demanded, the plea of privilege was submitted to the jury along with the merits of the case. Subject to the plea of privilege appellants answered that they were not liable for the 44 tickets nor indebted in the sum sued for; that they had received only 1,432 bales of cotton and cotton tickets from the bank; that the bank was not authorized to pay for any cotton except with the cotton tickets attached; that the bank was negligent in respect to the cotton tickets, causing damages to appellants to the amount sued for; and in offset. A jury rendered a verdict against appellants' plea of privilege and against appellants for damages.

The facts proved on the trial show that Carver Bros. reside at Farmersville, Collin county, Tex., and were during the years 1911 and 1912 engaged in buying and selling cotton. In September, 1911, Carver Bros. addressed the following letter to the cashier of the Merchants' & Planters' National Bank of Mt. Pleasant:

"Dear Sir: This will introduce to you Mr. J. W. Pierce, who will represent us in your city, and we hope he will be able to buy some cotton on the streets for us, and we would like for you to pay for cotton bought by him for us with tickets attached for us, and we will ship out and give you exchange on either Sulphur Springs or Pittsburg. We do not know whether it is your custom or not to figure the tickets on street cotton for the buyer. If you will do this, we will appreciate it, and it will also help Mr. Pierce. Any favors shown him will be greatly appreciated by us."

The bank agreed to this proposal, and entered into an agreement with Carver Bros. to the effect that they would pay for such cotton as J. W. Pierce would buy for the account of Carver Bros. when Pierce placed

with or caused to be placed with the bank tickets issued by cotton weighers showing the weight of the cotton and the price to be paid therefor. It appears without dispute that these tickets were to remain with the bank as collateral security for the money advanced in paying for the cotton. Pierce then began buying cotton for the appellants, and during the season purchased a large number of bales, all of which seem to have been paid for by the bank. Pierce himself had no interest in the cotton. In buying the cotton his custom was to give to the seller a slip of paper or ticket on which was noted the weight, price paid, and the weigher's number. He also noted the letters "O. K." and signed his initials. These slips were presented to the bank by the seller, and the amount called for was paid and charged to Carver Bros. It was Pierce's duty at stated intervals to make reports to his employers of the amount and quality of cotton bought by him. He was also expected to ship out certain quantities and grades of cotton as directed by his employers. For the purpose of performing these duties he was given access to the tickets held by the bank. He used them in making up his invoices to be sent to his employers, and was also permitted to use them in making out shipping lists, and, for the purpose of obtaining the bales from the weigher, was allowed to withdraw the tickets corresponding to the cotton he desired to ship. When shipped he would deliver to the bank, in lieu of the tickets taken out, bills of lading. These were attached to drafts upon the purchasers; and in that way the bank was reimbursed for advances made. This manner of doing business continued until some time in December, when, for reasons not disclosed, Pierce quit the service of the appellants, and was succeeded by an agent named Walter. Walter, in behalf of the appellants, in connection with the officers of the bank, checked up the number of tickets the bank had on hand, and found that 44 of them were missing. The evidence indicated that Pierce had appropriated the tickets. Testimony was introduced by the bank showing that none of the employees who had access to the tickets had appropriated any of them. There was also testimony tending to show that the officers of the bank exercised proper care to safely keep the tickets, and that no person had an opportunity to appropriate them except Pierce. Pierce, it appears, received the benefit of 30 bales of the cotton, and Carver Bros. received no benefit therefrom except the sum of \$400 paid by the insurance company. It appears that it was necessary, in the handling of Carver Bros.' cotton at Mt. Pleasant, that certain charges of yardage, weighing, and storing should be paid for, which was done by the bank at the instance and request of Carver Bros.' agent. The evidence authorized the findings that Pierce obtained possession temporarily of the

cotton tickets and cotton held as collateral security by the bank, in furtherance of the service of Carver Bros., and within his authority of agency so to do, and then converted the same, and that the collaterals were held by the bank to secure a debt due by Carver Bros. in the sum of \$1,773.39, and that the bank was not guilty of negligence in handling the tickets or cotton. The bank transferred its claim for damages against Carver Bros. to appellee, Merrett, who resided in Titus county, and in the transfer guaranteed the payment of the claim.

S. P. Pounders and J. M. Burford, both of Mt. Pleasant, for appellants. T. C. Hutchings, of Mt. Pleasant, and L. E. Keeney, of Texarkana, for appellee.

LEVY, J. (after stating the facts as above). [1-3] By the first, second, and third assignments of error, which may be here considered conjointly, the appellants urge that the legal effect attaching to the evidence respecting the ground of venue is to deny the legal right to appellee, Merrett, to bring suit against the appellants in Titus county, and that they were entitled to have the case transferred for trial to the district court of Collin county, the county of their residence. It is believed that the assignments must be overruled. Appellee, Merrett, sued the appellants in two counts: (1) Upon an account for money advanced and paid by the bank; and (2) for damages laid in conversion in Titus county of collateral security pledged to the bank to secure the payment of the account. The bank was joined as a party, and sued as assignor and guarantor of both the account and the claim for damages. Being a bona fide holder for value of the account, as appellee Merrett claims he was, he may bring the suit thereon against the bank, as assignor and guarantor of the account jointly with appellants, who were primarily liable on the account, in the county of the residence of the bank, which was in Titus county. Article 1842, R. S.; article 1830, subd. 4, R. S.; *Improvement Co. v. Bank*, 136 S. W. 558, and authorities there cited. But it is entirely immaterial and unnecessary to decide in this appeal, it is believed, the question of whether or not the transfer of the account to appellee, Merrett, was real and in good faith for value, for the charge of the court did not permit nor authorize a recovery against appellants upon the account, but only for damages, for the tort of conversion. And the charge of the court made the venue of the suit in Titus county dependent upon the sole ground of the tort's being committed there and appellants' being responsible therefor. The charge in respect to venue is:

"If you find from the evidence that said Carver Bros., and each of them, were resident citizens of Collin county, Tex., at the time this suit was filed, and have been continuously, and are now, and were not then nor have been since residents of Titus county, you will find for the

defendants Carver Bros., unless you find for the plaintiff against them on one or the other of the next following paragraphs of this charge."

The next two paragraphs following allowed venue in Titus county upon a finding that there was a conversion of the collateral security by appellants through their agent and representative in Titus county within the scope of the agency, and upon a finding that the bank did not negligently permit the agent to abstract the security. The charge would therefore seem to show that the court himself concluded that venue did not lie in Titus county against the appellants on the account, or that election was made by appellee to rely for recovery only upon the count for tort. The appellee may not recover upon both the account and the tort, for it would be double recovery, and it was a case that appellee should elect to recover upon one of the counts. So eliminating, as the present record does, any question of venue respecting that count in the petition on simple account for money advanced and paid, the precise question would be whether the suit was maintainable against appellants in Titus county, as the proper county of venue, for damages for the alleged conversion of the securities. Article 1830, subd. 9, allows suits to be brought in the county "where the trespass was committed," when "the foundation of the suit is some crime, or offense, or trespass, for which a civil action in damages may lie." Jones' Pledges and Collateral Securities (2d Ed.) § 45, lays down the rule as follows:

"A pledgee may maintain an action of trover against his pledgor for a conversion of collaterals which the former has returned to the latter for a special purpose. * * * After the special and temporary purpose for which a pledge has been redelivered to the pledgor has been accomplished, the pledgee may recover it or its value by action."

See, also, 2 Cooley on Torts (3d Ed.) pp. 859, 866.

That sufficiently shows that a civil action in damages may lie in the facts. And it is believed that "trespass," as meant by the statute and defined by the cases, includes the act of conversion here present. *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645; *Ward v. Odem*, 153 S. W. 634. In a conversion the taking and appropriating are intended, and not merely negligent. And withholding lawful possession of the pledgee is, while it continues, an injury by force, constituting it a trespass on possession of the owner. 2 Cooley on Torts (3d Ed.) p. 839. Thus all the elements of a "trespass," as defined, are present, and, further, the criminal statutes make punishable the taking and appropriating of property pledged from the pledgee entitled to possession. Articles 1335, 1336, 1332, Cr. Stat. of 1911. Consequently, if "trespass," as used in the statute, could only be regarded as comprehending matters legally kindred to "offense or crime," which are the words associated with it in

the sentence, the conversion here by the agent would be within the class of "trespass" intended by the statute pertaining to venue. This would be in line with, rather than opposed to, the rule of construction followed in *Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120, Ann. Cas. 1914B, 368. It is quite true that the appellants themselves could not be held criminally responsible for the trespass here. But appellants, acting through an agent, were, in legal principle, bound to see that no one suffered legal injury through the agent's wrongful act done in their service within the scope of the agency. The agent committed the act and wrong in Titus county. The injury done to appellee and the bank by the act or wrong was in Titus county. And upon the ground of being made legally chargeable with the conduct of their agent, acting within the real or apparent scope of his authority, the appellants could be sued for the damages, it is thought, in the county where the trespass was committed. *Connor v. Saunders*, 9 Tex. Civ. App. 56, 29 S. W. 1140; *Wettermark v. Campbell*, 93 Tex. 517, 56 S. W. 331. The question of whether the act was committed by the agent within either the real or the apparent scope of his authority was a matter of ultimate decision here for the jury, and their finding that it was in either respect would fix venue on the principal where the trespass was committed.

[4, 5] While the charge was not technically correct in placing the burden of proof respecting the plea of privilege on the appellants (*Holmes v. Coalson*, 178 S. W. 628), yet, it is concluded, the error does not in the record warrant reversal; for the charge practically put the burden of proof on the plaintiff. The charge required the jury to find for appellants on their plea "unless you find for plaintiff on one or the other of the next following paragraphs." Rule 62a (149 S. W. x).

[6] The verdict of the jury reads:

"We, the jury, find for the plaintiff on the merits of the case against the defendants Merchants' & Planters' National Bank to the amount of \$1,773.39. We further find for the said Merchants' & Planters' National Bank over against Carver Bros. to the amount of \$1,208.77."

The point is made by proper assignments that the verdict did not authorize a judgment in favor of plaintiff, Merrett, against Carver Bros. as was entered by the court. The manner in which the issues were submitted and the jury directed the verdict necessarily involved a finding on the liability of appellants in favor of appellee, and should be so construed. The charge peremptorily directed the jury to return a verdict against the bank in favor of appellee. This was proper because the bank confessed liability on its guaranty of the claim for damages assigned by it to plaintiff. And the charge further directed the jury as follows:

"If you find for the plaintiff on the merits of the case against the defendant Merchants' &

Planters' National Bank and defendant Carver Bros., you will further find for the bank against Carver Bros. the amount so found and stated in your verdict."

Thus before the jury could find for the bank against the appellants they must also find for plaintiff against both the bank and appellants. And finding, as the jury did, that appellants were liable to the bank, necessarily includes in the verdict a finding of fact that appellants were liable in damages for the tort. The appellants being primarily liable, and the bank having assigned and guaranteed to plaintiff the claim for damages, as shown by the pleadings and charge, the finding of fact that appellants owed the bank damages in the sum found legally operated to be a finding of liability in favor of plaintiff. A like contention based on a similar verdict was overruled in *McKenzie v. Barrett*, 43 Tex. Civ. App. 451, 98 S. W. 229; and we see no reason why a different ruling should be made in this case. The instant question is not analogous to the cases cited by appellants. A verdict against a partnership authorizes a judgment against the members thereof that have been cited or answered.

[7-10] If Pierce, acting within the scope of his authority as the agent of appellants, obtained possession of the cotton tickets for the purpose of making a cotton list, and thereafter refused to deliver possession of the tickets to the bank, appellants, we conclude, would be liable to the bank for damages, and consequently appellee for damages occasioned by such refusal. The possession of the tickets by Pierce under these circumstances would legally operate to be the equivalent of the possession of appellants, and Pierce's refusal to return them to the bank would be the equivalent of appellants' refusal to do so. And it is not thought, as appellants insist, that it conclusively appears that Pierce, in securing possession of the tickets, was not acting within the scope of authority actually conferred upon him by appellants. According to the letter of appellants to the bank introducing Pierce to the bank officials, such bank officials were advised that Pierce would "represent us [appellants] in your city." The bank had the right, it is believed, to construe the language to mean that appellants had authorized Pierce to do everything usually, customarily, or necessarily done by a nonresident cotton buyer's local agent in the transaction of his principal's business. 1 *Clark & Skyles' Agency*, § 194. There was evidence going to support a finding of fact that it was usual and customary for such agent to ship out cotton purchased for his principal, and there is evidence to support a finding that it was necessary for such agent to have possession of the tickets representing the cotton to be shipped, in order to list and ship out the cotton. As to whether or not the bank was negligent in letting Pierce have access to the tickets was a question for the jury. And the

evidence presents, it is thought, an issue of fact, requiring decision by the jury, respecting the several matters urged by appellants both in defense of liability and in offset. It is therefore concluded that the court did not err in refusing to peremptorily instruct a verdict for appellants, and assignment of error No. 9 is overruled.

We have considered the remaining assignments, and overrule each of them upon the ground that no such error appears as would require a reversal of the judgment.

Affirmed.

KERBOW et al. v. WOOLDRIDGE et al.
(No. 918.)

(Court of Civil Appeals of Texas. Amarillo, Feb. 23, 1916. On Motion for Re-hearing, April 5, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS \S 80(1) — **CONTRACTS—STATUTORY REQUIREMENTS—NECESSITY OF COMPLIANCE.**

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2904n (Acts 33d Leg. c. 120, § 13), providing that no public school building shall be constructed until the board of trustees shall have first secured a permit from the officer legally authorized to issue it, and article 2904o, providing that no person charged with the duty of disbursing school funds shall pay or authorize the payment of any money for the construction of a school building until the permit has been secured, there can be no recovery by the school trustees or by the contractor and his sureties with reference to a building constructed under a contract for which no payment was procured either on the express contract or on an implied contract arising from the benefits resulting from the construction of the pleading.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 191, 193, 194; Dec. Dig. \S 80(1).]

2. SCHOOLS AND SCHOOL DISTRICTS \S 81(2) — **CONTRACTS—SURETIES—LIABILITY OF MATERIALMEN.**

The invalidity of a contract for the construction of a school building because no permit was issued for it as required by Vernon's Sayles' Ann. Civ. St. 1914, arts. 2904n, 2904o, does not defeat the right of one who furnished materials or labor for the construction to recover from the sureties of the contractor on the bond to secure such claims given as required by articles 6394f-6394j.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. \S 81(2).]

3. SCHOOLS AND SCHOOL DISTRICTS \S 81(2) — **CONTRACTS—BOND—VALIDITY—CONFORMITY TO STATUTE.**

Where a bond given by the contractor for a school building under Vernon's Sayles' Ann. Civ. St. 1914, arts. 6394f-6394j, requiring the contractor to give the usual penal bond with the additional provision that he will promptly make payments to all persons supplying him with labor or materials, required the contractor to pay the indebtedness incurred by the trustees for labor and materials instead of that incurred by the contractor, the bond, if not a valid statutory bond, was valid as a common-law obligation.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. \S 81(2).]

4. SCHOOLS AND SCHOOL DISTRICTS \S 81(2) — **CONTRACTS—BONDS—CLERICAL ERROR.**

In a bond given by a school building contractor which stated that it was for the benefit of those furnishing labor and materials to the contractor, a condition requiring the payment of debts incurred by the school trustees was manifestly a clerical error, and will be construed to secure the payment of debts incurred by a contractor.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. \S 81(2).]

5. PRINCIPAL AND SURETY \S 101(2) — **DISCHARGE OF SURETY—ALTERATION OF THE SURETY CONTRACT—MATERIALITY.**

Where a contract for the construction of a school building, to which was attached a bond securing performance, was changed after some of the sureties had signed by pasting a strip of paper over a provision that the money due under the contract should be paid to the superintendent of building and by him disbursed to the materialmen and laborers, the alteration was material, and discharged the sureties who had theretofore signed.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 170; Dec. Dig. \S 101(2).]

6. PRINCIPAL AND SURETY \S 39 — **DISCHARGE OF SURETY—LIABILITY OF COSURETY.**

One who signed as surety a bond previously signed by others who were represented to him to be bound thereby when the assured contract had been altered so as to release the liability of the other sureties is not liable on the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 82-85; Dec. Dig. \S 39.]

7. APPEAL AND ERROR \S 1039(13) — **HARMLESS ERROR—VARIANCE.**

Where the petition declared upon a school building contract with an interlineation, but the contract as offered had a strip of paper pasted over the interlineation one end of which was loose so the writing could be seen, and the other parties had set out the contract in their pleadings in the altered condition, the admission of the contract, if objectionable because of the variance, could not have surprised the other parties, and the error was therefore harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086; Dec. Dig. \S 1039(13).]

8. ALTERATION OF INSTRUMENTS \S 27(3) — **DOCUMENTARY EVIDENCE—ALTERED INSTRUMENT—BURDEN OF PROOF.**

The burden is on one offering an altered or mutilated writing to explain its condition before it is admissible in evidence.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 242, 243; Dec. Dig. \S 27(3).]

9. SCHOOLS AND SCHOOL DISTRICTS \S 81(2) — **BOND OF CONTRACTOR—ACCEPTANCE.**

Permission by the school trustee to the contractor to take down his forfeit money after the presentation of his bond and to proceed with the work is a sufficient acceptance of the bond.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. \S 81(2).]

10. SCHOOLS AND SCHOOL DISTRICTS \S 81(2) — **BOND OF CONTRACTOR—DISCHARGE OF SURETY—REJECTION OF BOND.**

The refusal of school trustees to accept a contractor's bond when first tendered because the sureties were not sufficient does not terminate the liability of its sureties so as to prevent

the contractor from securing other sureties and again presenting the bond for acceptance.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. ¶81(2).]

11. ACTION ¶47 — MISJOINDER — CONTRACT AND TORT.

There is no misjoinder of an action in contract by a materialman against the sureties on a school contractor's bond for the value of material furnished and an action against the school trustees for tort committed in failing to take the required statutory bond, since suits in contract and tort may be joined when they grow out of the same transaction.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 469, 470, 472-489; Dec. Dig. ¶47.]

12. SCHOOLS AND SCHOOL DISTRICTS ¶81(2) — CONTRACTS — BONDS.

Where a bond given by a school building contractor stated that it was for the benefit of all persons who might furnish labor and material, and provided that it should be satisfied if the contractor should complete the building free of all mechanics' liens, one who furnished material can recover on the bond, though there could be no mechanics' liens on a school building.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. ¶81(2).]

On Motion for Rehearing.

13. SCHOOLS AND SCHOOL DISTRICTS ¶86(2) — CONTRACTS — ACTION — PRESUMPTION — COMPLIANCE WITH STATUTE.

In a suit on a contract for the construction of a school building, compliance with Vernon's Sayles' Ann. Civ. St. art. 2904n, requiring a permit to be secured before a contract for the erection of a school is entered into, must be affirmatively shown; it cannot be presumed in view of article 2904o, prohibiting every disbursing officer from paying out any portion of the funds for the construction of the building until the permit has been secured, since the court should not order an officer to do what may be contrary to the law.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. ¶86(2).]

14. APPEAL AND ERROR ¶708 — QUESTIONS PRESENTED — FACTS OUTSIDE THE RECORD.

The Court of Civil Appeals cannot consider facts stated in the motion for rehearing, but not shown by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2948; Dec. Dig. ¶708.]

Appeal from District Court, Donley County; Hugh L. Umphres, Judge.

Action by Mrs. M. A. Wooldridge, as executrix of the will of J. C. Wooldridge, deceased, against H. C. Kerbow and others, in which R. B. Gatlin filed plea in intervention. From the judgment, defendants appeal. Reversed and remanded, and motion for rehearing overruled.

Simpson & Steed and Harwood Beville, all of Clarendon, for appellants. H. B. White and A. T. Cole, both of Clarendon, R. Y. King, of Hedley, E. F. Ritchey, of Clarendon, and Davis & Davis, of Gainesville, for appellees.

HALL, J. Appellee, as executrix of the will of her deceased husband, by whom this

suit was originally instituted, made herself a party to the action, and by a second amended original petition alleged that about the 1st of September, 1913, J. C. Wooldridge, deceased, was the owner of a wholesale and retail lumber yard in Hedley, Tex., and engaged in the sale of lumber and building material; that one of the defendants, E. O. Barnes, was a mechanic and contractor; that E. L. Kennedy, Clark Cook, and William Mace were the duly qualified trustees of common school district No. 2, Donley county, Tex.; that said trustees were desirous of erecting a public school building within said district; that bonds in the sum of \$6,000 had previously been voted for that purpose; that said bonds had been sold, and the proceeds thereof were in the hands of said trustees; that the trustees entered into a written contract with E. O. Barnes, a copy of which was attached to the pleading, whereby said Barnes agreed to erect a school building for said district at a price of \$5,600; that in order to secure the performance of said contract upon his part Barnes executed a bond in the sum of \$2,500, a copy of which was also attached to the pleadings; that said bond inured to the benefit of those who might furnish labor or material in the construction of said building, and was conditioned that the defendant Barnes should pay for all labor and material used in the construction of said building, and that in the event of his failure to do so the laborers and materialmen had a right of action thereon; that the debt for the material furnished by plaintiff was covered by the terms of said bond; said bond was signed by H. C. Kerbow, A. M. Beville, P. A. Buntin, L. C. Barnes, and H. C. Brumley; that by so doing the appellants, as sureties on said bond, became liable to plaintiff in the amount of his debt; that in carrying out his contract the defendant E. O. Barnes purchased from plaintiff a large amount of building material, to wit, about \$2,007.97, an itemized sworn statement of which was attached to the pleadings, which said amount was entitled to certain credits, reducing the balance due to \$1,738.57; that the defendant E. O. Barnes worked on said building until about the 18th of December, 1913, on which date he abandoned the work, but that the material shown in the account had been purchased by him before such abandonment; that said bond was executed under the general laws of the Thirty-Third Legislature (chapter 99), and that in accordance with the provisions of said act and the breach of the contract by E. O. Barnes plaintiff had instituted this suit against the contractor, sureties on his bond, the school district, and the trustees thereof, for the recovery of his debt; that by reason of the fact of the erection of the school building and the use and enjoyment thereof by the patrons of the district that said dis-

strict and trustees were legally entitled to pay him his debt, and that the material had been purchased by the trustees, together with the contractor.

The appellants the sureties on the bond filed their amended original answer, which contained a general and seventeen special exceptions, a denial that appellants were liable to plaintiff as sureties, and contested the justice of the account against them. It is further alleged that said material was not sold to the trustees or to the school district, but to the contractor, E. O. Barnes, and his subcontractor, S. H. Bolling.

Appellants Beville, Bunting, L. C. Barnes, and Brumley admitted by way of special answer that they had signed the bond, but alleged that after their signatures had been secured the defendant trustees, as co-obligees in said bond, rejected it when tendered to them, because of its insufficiency, and released them from all liability thereon, demanding of the contractor a bond signed by a surety company on pain of forfeiting a check for \$200 previously deposited by the contractor; that the said E. O. Barnes never procured a surety company bond; that appellants Beville, Bunting, L. C. Barnes, and Brumley were never afterwards informed that said trustees had rescinded their action in refusing the bond and that they had later approved the same; that said trustees never did thereafter in fact approve said bond; that after they had signed the bond the trustees, acting through their agents, W. I. Mills and B. W. Kieran, who were the superintendents of construction of said building, took the contract which the bond they had given secured, and which said contract was printed on the reverse side of the same sheet of paper containing said bond, both of which instruments were to be considered together, and made a material alteration in the contract by pasting a piece of paper over a clause written into the face thereof, which clause provided that the 80 per cent. of the money due every two weeks on estimates should be paid to W. I. Mills, and by him disbursed; that they would not have signed the bond without said clause being contained therein; that this alteration was made before the contractor, Barnes, had incurred plaintiff's debt.

Appellant Kerbow admitted that he signed the bond set out in the plaintiff's petition, and that the alteration last mentioned had been made therein when he executed it, but that at the time same was presented to him it bore the signatures of his codefendant sureties, and that the school trustees, acting through Mills and Kieran, as their agents, and the contractor, Barnes, represented to him that the other sureties were bound thereon, when said parties knew that the school trustees had rejected the bond with the other sureties, and had released them by materially altering the instrument; that this

occurred before the plaintiff's debt had been incurred.

The appellants Beville, Bunting, L. C. Barnes, and Brumley further alleged that when they signed the bond the contract which it was given to secure contained a clause providing that the money due in the construction of said building should be paid to W. I. Mills, and by him disbursed, and he should be superintendent of construction; that in violation of said provision the trustees discharged Mills, and refused to pay any money into his hands, but paid the moneys due for work on the building directly to the contractor, E. O. Barnes, and to the subcontractor, S. H. Bolling; that this occurred before the major portion of plaintiff's debt had been incurred; and that said four appellants were therefore released.

All five of the sureties further alleged that the contract between the school district and E. O. Barnes provided that the building should be completed within 60 days from the time notice was served to proceed with the work, the time to be extended only on the happening of certain contingencies mentioned in the contract; that in violation of said clause in said contract, and without the happening of any of the contingencies mentioned therein, the trustees extended the time for the completion of the building more than 2 months; that said extension contract was made between the trustees and E. O. Barnes, the consideration for which was the promise on the part of the trustees not to charge the contractor, Barnes, with the damages provided in the contract for delay and the agreement on the part of the contractor, Barnes, to labor on the building after the contract time for the completion thereof had expired; that a large part of the plaintiff's debt was incurred after the extension was granted; that the contract which the bond was given to secure provided that no portion of the work should be sublet without the written consent of the architect; that in violation of said clause, and without obtaining the consent of the architect, the school district and its trustees permitted the contractor, Barnes, to sublet a large portion of the work on the building to one S. H. Bolling; that the subletting was done without the knowledge of appellants, but with the knowledge of the original plaintiff, J. O. Wooldridge; that the plaintiff sold to S. H. Bolling \$828.77 worth of the material for the value of which suit was brought, knowing that Bolling was a subcontractor in violation of the terms of the contract; hence appellants were released; that the trustees refused to pay to the contractor, E. O. Barnes, or his superintendent, W. I. Mills, the money due upon certain estimates regularly allowed by the superintendent of construction, and on other occasions refused to allow estimates when the same were due, so that the contractor, Barnes, was forced to abandon work on said building, by reason of which wrongs these

appellants asked judgment over against the school trustees for the amount of any judgment plaintiff might secure against them; that, when the contractor, Barnes, abandoned work on the building, there was about \$867.35 worth of the material which had been furnished by plaintiff lying on the ground near the building, and that plaintiff could have recovered the same by the use of any diligence, thus saving himself from loss to that extent, but that he negligently failed to do so, and permitted the material to be worked into the building by one Chism, who completed the work after the contractor, Barnes, defaulted; hence they were not liable for this sum; that under the terms of the bond they were bound, if at all, as sureties, to pay only such debts as might be incurred by the school trustees in the construction of the building, and alleged that the debt of plaintiff was not incurred by the school trustees, but by the contractor, E. O. Barnes, and that even he was not bound to pay for same, but was only required to provide and furnish material; that the school district and its trustees overpaid on the work as it progressed during the construction of the building, in violation of the terms of the contract, thus releasing appellants.

R. B. Gatlin filed a plea in intervention, alleging that he was interested in the subject-matter; that he was a laborer on the building, together with a large number of other persons named in his pleading; that he and the others had been hired by the contractor, E. O. Barnes, who owed intervener, and the other parties named in the plea, the various sums shown in sworn accounts attached to the plea for labor done on the building; that said Barnes and the sureties on his bond were obligated to pay him all the sums set forth in his plea, alleging that he had purchased all of said accounts from the original creditors.

Appellants replied to the plea of intervention by general and special exceptions, general denial, and specially answered that they were bound, if at all, on the bond to pay debts incurred by the trustees only, and that the intervener's debt was incurred by the contractor, Barnes, and not by the trustees; that \$173.50 of the claim of one Geo. Ryan sued for by the intervener was for money loaned by Ryan to the contractor, Barnes, so they could not be liable therefor.

The defendants the school trustees filed a plea of misjoinder of parties and of causes of action, because the plaintiff was seeking to hold the sureties liable upon a contract and the trustees liable because of a tort committed in failing to take the bond required by law and in breaching the same after it was taken. By way of cross-action the trustees alleged that common school district No. 2 of Donley county was in need of a new school building, for which bonds in the sum of \$6,000 had been voted; that they let the contract for the erection of the build-

ing to E. O. Barnes; that he was to complete the same within 60 days from the time notice was served upon him to proceed with the work; that his contract, a copy of which was attached to their cross-action, provided that, if he failed to finish the work within the contract time, he should pay to said trustees as liquidated damages the sum of \$10 per day for each day's delay; that as a prerequisite to the taking effect of said contract they required the said Barnes to execute a bond to them in the sum of \$2,500, signed by the appellants Kerbow, Beville, Buntin, L. C. Barnes, and Brumley, whereby the sureties upon said bond became liable to said trustees for any sums they might be forced to pay out above the contract price and for all damages occasioned by delay; that the said E. O. Barnes did not complete the building within the time, and abandoned the work about the 18th day of December, 1913; that about the 27th day of December, 1913, they notified the sureties of his default; that they then took possession of the building and of the material on hand, and as soon as possible advertised for bids to complete the building; that the smallest bid received was \$2,904.25, which was \$223.93 more than the contract price, for which amount they asked judgment against the sureties on the bond. It is further alleged that by reason of the default of the contract of E. O. Barnes the trustees were deprived of the building 135 days over the contract time, and asked judgment against appellants for the further sum of \$1,350, being \$10 per day for said delay, which they alleged was a reasonable damage to the school district; that some person unknown to them committed spoliation upon the contract made between them and E. O. Barnes by writing into the face of the same after it had been signed by them as trustees, and by Barnes, the following: "The eighty per cent. as allowed by the superintendent, W. I. Mills, shall be paid to the said W. I. Mills, who will disburse the same to all who have furnished labor and material equally"—alleging that said clause was no part of said contract; that when said contract and bond was finally delivered to them, accepted, and approved that a piece of paper had been pasted over said clause, leaving the same in its natural state. They prayed that the contract be reformed so as to read as originally executed, and that said clause be stricken out of the same.

The bondsmen, by first amended original answer to the cross-action of the trustees against them and to the plea of intervention, after certain special exceptions, pleaded a contract and agreement made upon a sufficient consideration between the trustees and E. O. Barnes, by which they agreed not to charge him with overtime used in the work on the building; that the trustees further knowingly permitted the contractor to sublet a portion of the work in violation of the contract; that they paid the money due for

the work on the building to E. O. Barnes and S. H. Bolling, instead of W. I. Mills; that after they had all signed the bond, except appellant Kerbow, the trustees refused to accept the same and rejected it; that the trustees, through their agents, materially altered the contract and bond by striking out the clause which provided that the money should be paid to W. I. Mills. Appellant bondsman Kerbow alleged that said trustees, through their agents, perpetrated a fraud upon him in procuring him to sign the bond by representing that the other appellants were bound thereon, when they knew the bond had been rejected; that they altered the bond and contract, thus releasing them; that the \$200 attorney's fees sued for by said trustees and the damages for overtime were not included in the terms of suretyship in said bond; that said trustees failed to give the sureties any notice of the default of the contractor until about two months had expired. They denied that the trustees let the contract for the completion of the building by a public bid and for the least sum obtainable. Estoppel against the trustees in the recovery of \$223 is set up, alleging that the trustees overpaid the work to E. O. Barnes and S. H. Bolling in violation of the contract, and that they refused to pay E. O. Barnes and Mills the money due upon certain estimates made by the superintendent of said building, and refused to permit certain estimates to be made when they were due, and by so doing prevented the contractor, Barnes, from completing the building, which he would have done if not prevented by said trustees. The prayer is for judgment over against the trustees for the amount of any judgment that might be taken because of their wrong.

The plaintiff, Mrs. Wooldridge, by first supplemental petition, among other exceptions and pleas, alleged that in the sale of the materials to the contractor, Barnes, her deceased husband relied upon the school trustees having required such a bond in conformity of law; that such trustees informed plaintiff's agent before the sale was made that such a bond had been taken, and said trustees personally guaranteed to plaintiff the payment of his debt in full.

A jury was impaneled to try the issues. Upon the close of the testimony the trial judge withdrew the issues from the jury, and instructed a verdict upon the bond against E. O. Barnes, as principal, and his sureties, in favor of the plaintiff in the sum of \$1,889.45, and in favor of common school district No. 2 against the principal and sureties on the bond in the sum of \$1,572, and in favor of the intervener, Gatlin, against the same parties for the sum of \$352.90, and in favor of Gatlin against E. O. Barnes alone in the sum of \$184.50, and in favor of the defendants the trustees, Kennedy, Mace, and Cook, as against all parties. Up-

on the return of the verdict a judgment was entered in conformity therewith, the judgment providing that the claim of the common school district, amounting to \$1,573, should be first paid from the proceeds of the judgment, and that the plaintiff and intervener, Gatlin, should participate in any amount remaining.

Plaintiff filed a motion to reform the judgment. The motion was granted, and the court gave the school district priority in the judgment for the sum of \$223 only, being the amount which the district was forced to pay to complete the building over and above the contract price. The judgment as reformed further provides that plaintiff and intervener, Gatlin, should next be paid the amount of their claims proportionately, and, if any sum remained, that it should be applied to the balance due the school district.

[1] We are confronted with fundamental error upon the very threshold of the case. In the formation of the contract between the trustee and E. O. Barnes the parties have overlooked Acts 1913, c. 120, p. 244, which is incorporated in Vernon's Sayles' Civil Statutes as chapter 19A, tit. 48. This act was operative when the building in question was constructed. It declares in detail what shall be done in the construction of public school buildings with reference to providing light, heat, ventilation, etc., for the pupils. Vernon's Sayles' Civil Statutes, art. 2904n (section 13 of the act), provides that no public school building shall be constructed in this state at an expense of more than \$400 until the board of trustees of the district in which the work is to be done shall have first secured a school building permit from the officer legally authorized to issue it certifying that the plans and specifications of the proposed building conform to hygienic, sanitary, and protective regulations established by this act for public school buildings in Texas. The article further provides that for buildings in common school districts the county superintendent of public instruction of the county in which the school is to be located is required to examine the plans for such building and to grant the permit. Article 2904o provides that no person charged with the duty of disbursing school funds or of authorizing disbursement of school funds in the state shall pay or authorize the payment of any vouchers or in any other manner pay out any sum of public money for the construction of any school building at an expense of more than \$400 until such permit has been secured, and that any disbursing officer failing to observe the provisions of the act shall be held liable for such amounts so paid out.

In *Bone v. Black*, 174 S. W. 971, this court held that under the provisions of the act a contract for the erection of a school building could not be enforced where it did not appear that a permit had been issued by

the proper officer. While in that case the building had not been constructed, the rights of the contracting parties are in no degree altered because of the erection of the building and the consequential benefits to the district. The failure of the parties to contract strictly in accordance with the terms of the statute renders the contract itself void and precludes a recovery upon an implied contract. Section 51 of the drainage act of 1907 (Acts 30th Leg. c. 40) provides that the commissioners may employ counsel to represent the district "upon such terms and for such fees as may be agreed upon by them and approved by the county judge." *Matagorda County Drainage District v. Gaines & Corbett*, 140 S. W. 370, is a case in which the appellees, as attorneys, sought to recover fees alleged to be due them from the drainage district for professional services rendered the commissioners. They recovered in the lower court, but upon appeal Judge Fly reversed and rendered the judgment, saying:

"It was clearly the intent of the Legislature to require as an essential the approval of the chief officer of the county. The official watchman of the county treasury undoubtedly by this requirement was made to safeguard and protect the fund that was raised by taxation of the inhabitants of a district, and to render more difficult the making of contracts which might squander a fund raised for the public good. The authority to contract for the services of attorneys is given by section 51 alone to drainage commissioners, and to that we must look to ascertain the mode of exercising the power. The law requires the approval of the county judge of contracts made by drainage commissioners for legal services, just as it requires the approval of contracts for canals and other improvements by the county judge. It is the rule, stated by Dillon in his work on *Municipal Corporations* (5th Ed.) § 783, and fortified by numerous authorities, that when the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation. The rule is a salutary one, upholding the legislative checks and restraints put upon the officers of municipal corporations, and strictly construing the powers conferred upon them in the disbursement of public funds. To hold that a contract made in a different mode from the exclusive one prescribed by the Legislature can be enforced would be to nullify and destroy the law, and to set up judicial discretion or judicial pleasure instead thereof. Experience has taught how prone municipal officers are to squander and dissipate public funds, even when held to the strict letter of their warrant of authority, and, if requirements of the statute which the Legislature has deemed necessary can be set aside by a court, the last safeguard has been destroyed, and the public left at the mercy of improvident or unscrupulous servants. Drainage commissioners are the agents of their respective districts in attending to and superintending its affairs; but, when debts are to be incurred and money expended, the law provides that they cannot act without the approval of the county judge. The mode of incurring liabilities is prescribed by statute, and as said by Chief Justice Roberts in *Ferguson v. Halsell*, 47 Tex. 421: 'The prescribing of a mode of exercising a power by such subordinate agencies of the government has often been held to be a restriction to that mode.' In the case of *Bryan v. Page*, 51 Tex. 532, 32

Am. Rep. 637, a suit was instituted to recover of the city of Bryan the reasonable value of legal services rendered under employment by the mayor, and the court, in reversing and rendering judgment for the city, held: 'The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter, the source of all the power of the mayor or council over the subject, having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such contract.' To the same effect is *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 23 S. W. 283. The authorities cited, as well as various others, hold that, where the power of contracting is limited to a certain mode, the officers of a municipal corporation cannot in a different mode make a valid contract, nor can they by any subsequent approval or conduct vitalize such contract, nor would the law imply such contract. * * * As said by the Court of Appeals of New York, in *Smith v. City of Newburgh*, 77 N. Y. 131: 'An absolute excess of authority by the officers of a corporation in violation of law cannot be upheld; and, when the officers of such a body fail to pursue the strict requirements of a statutory enactment under which they are acting, the corporation is not bound in such cases. The statute must be strictly followed, and a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done, no subsequent act can make the contract effective.'"

See also *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Peck v. City of Hempstead*, 27 Tex. Civ. App. 80, 65 S. W. 653; 10 R. C. L. p. 708, § 36; *Id.*, p. 801, § 112.

In *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659, the following language from *State Board v. Citizens' Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702, is approved:

"Although there may be a defect of power in a corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract."

A pleading based upon a contract which must be executed in accordance with the terms of the statute must allege facts showing compliance with its requirements in order to be good as against a general demurrer. *Crowell Independent School District v. First National Bank of Benjamin*, 163 S. W. 339; *McCollum v. Adams*, 110 S. W. 526. In the note to *McCormick v. Niles*, 27 L. R. A. (N. S.) p. 1120, the law applicable to the liability of municipal corporations for benefits received under contracts violative of statutory restrictions is stated as follows:

"By the great weight of authority where by statute the power of a municipality or other public corporation to make a contract is limited to a certain manner and under certain circumstances, and any other manner of entering into a contract, agreement, or obligation is expressly or impliedly forbidden, no implied liability can arise against the municipality for benefits received under a contract within the scope of such statute and violative thereof."

It follows that neither the school district nor the contractor and his sureties can re-

cover anything from the other by reason of the written contract or upon an implied contract.

[2] Appellants claim that the bond in this case was executed under Acts of the Legislature of 1913, c. 99, (Vernon's Sayles' Civil Statutes, arts. 6394f to 6394j, inclusive). A comparison of this act with Act Cong. of Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. 1913, § 6923), shows that they are practically identical, and that the Texas statute has been passed after the federal statute. Investigation shows that several of the states have adopted the provisions of the federal statute, and that the purpose of such enactment in all cases is to assure the payment of debts incurred in the construction of public buildings to mechanics and materialmen. Under the law as it existed prior to the enactment of this statute, mechanics and materialmen could acquire no lien upon public buildings. Although the contract, in our opinion, as heretofore stated, is void, it does not follow that the obligation resting upon the sureties in the contractor's bond is discharged; on the contrary, the weight of authority is that the invalidity of the building contract in no way affects the liability of the sureties upon the contractor's bond for the value of materials and labor furnished the contractor in the prosecution of the public work. 4 Elliott on Contracts, § 3543; Knight & Jillson Co. v. Castle, 27 L. R. A. (N. S.) 597, note 13; Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793 and note, 120 Am. St. Rep. 621.

[3] The bond upon which this suit is based is substantially as follows:

"Know all men by these presents that we, E. O. Barnes and the other subscribers hereto, of the city of —, county of Donley, state of Texas, are held and firmly bound unto the trustees of common school district No. 2 of the city of —, county of Donley, state of Texas, as well as to all persons who may furnish labor or material on the contract hereinbefore mentioned, in the sum of twenty-five hundred (\$2,500.00) dollars, lawful money of the United States of America, to be paid to the said trustees and to said parties who may furnish labor or material, their executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, one and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our hands. Dated this 26th day of July, 1913. The condition of this obligation is such that, if the above-bounden E. O. Barnes, his executors, administrators, or assigns, shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, and agreements in the above-mentioned contract entered into by and between the said E. O. Barnes and the said trustees, dated on the 26th day of July, 1913, for the construction of the work or works on the lot mentioned in the foregoing contract, and shall duly and promptly pay and discharge all indebtedness that may be incurred by the said trustees in carrying out the said contract, and complete the same free of all mechanics' liens, and shall truly keep and perform the covenants, conditions, and agreements in said contract and in the within instrument contained on his part to be kept and performed, at the time and in the manner and form therein specified, as well as all costs, including attor-

ney's fees, in enforcing the payment and collection of any and all indebtedness incurred by said trustees in carrying out the said contract, then the above obligation shall be void, else to remain in full force and virtue. This bond is made for the use and benefit of all persons who may furnish labor or material on the hereinbefore mentioned contract, according to the provisions of law in such cases made and provided, and may be sued upon by them as if executed to them in proper person.

"In testimony whereof," etc.

The statute above mentioned provides that the contractor shall execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and material in the prosecution of the work provided for in said contract. The bond is in substantial compliance with this requirement of the statute in obligating the contractor to duly and promptly pay and discharge all indebtedness that may be incurred by the said trustees in carrying out the said contract, and to complete the same free of all mechanics' liens, unless it be that it binds the sureties to pay the indebtedness incurred by the trustees instead of indebtedness incurred by the contractor. There is considerable contention on the part of the parties as to whether this is a statutory bond or merely a common-law obligation. We incline to the opinion that in its essential parts it is in conformity with the requirements of the statute, but in any event, if liability has otherwise accrued under it, so far as its form is concerned, it would be good as a common-law bond. The right of action arising from a breach of this bond is one of common-law liability, and does not depend upon the existence of the statute. Even without the statute, or without a bond of any kind, the materialmen and laborers would be entitled to recover against Barnes upon his common-law liability. State v. Teague, 50 Tex. Civ. App. 535, 111 S. W. 234; Knight & Jillson Co. v. Castle, supra, 27 L. R. A. (N. S.) 581, note 6; Dillon, Municipal Corporations (5th Ed.) § 830.

[4] Under several assignments of error appellants contend that, because the bond provides that it shall be void if payment is made for all material and labor debts incurred by the school trustees, and the undisputed proof shows the debts were incurred by the contractor, and not by the trustees, no liability attaches to the sureties. The question was raised in the court below by exceptions, plea, special charge, and objections to evidence. Ordinarily such a bond is a dual obligation (Equitable Surety Co. v. United States, to Use of McMillan & Son, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394), evidencing the terms of an undertaking between the trustees, on the one hand, and the contractor and his sureties, on the other. The original contract being void, the obligation to the trustees is a nullity. It also constitutes an obligation between the latter and all persons who may furnish labor and material in the

construction of the building. Considered in this aspect, it must be liberally construed. *Equitable Surety Co. v. United States*, supra. The contract referred to in the bond is the building contract, which the evidence shows was written upon the same paper, and must be construed in connection with the bond. By referring to the contract it will be seen that the contractor covenanted and agreed with the trustees of said school district that he would provide and furnish labor and materials of such kind, quality, and description as might be proper and sufficient for completing and finishing all the work mentioned in the contract. It is clear from the record that the use of the word "trustees" in the bond, instead of the word "contractor," is a clerical error, and a mistake of the scrivener. The rule is that such mistakes do not have the effect of releasing the parties from the contract, but the court will correct the mistake and construe the writing which evidently does not speak the original intention of the parties so as to make it conform thereto. 1 Elliott on Contracts, § 800; 2 Elliott on Contracts, § 966; 3 Elliott on Contracts, §§ 2367, 2378.

[5] The next contention urged is that, the contract having been altered in a material term, the effect of it is to release the sureties upon the bond from all liability. The facts are that after E. O. Barnes had been awarded the contract, and its terms had been reduced to writing and signed by him and the trustees, the contractor then took the instrument and endeavored to obtain sureties upon his bond satisfactory to the trustees; that he approached A. M. Beville, who consented to become a surety, but before signing the bond wrote into that part of the contract which provides that the trustees shall pay the contractor on certificates of the superintendent from time to time as the work progressed 80 per cent. of the estimated value of the work this clause:

"And the 80 per cent., as allowed by the superintendent, W. I. Mills, shall be paid to the said W. I. Mills, who will disburse the same to all who have furnished labor or material equally."

L. C. Barnes, the father of the contractor, H. C. Brumley, and P. A. Buntin, signed the bond while the contract had in it the words inserted by Beville as above stated; Buntin signing in pencil. The trustees declined to accept the bond for the reason that the sureties were not considered sufficient. The contractor then contemplated executing a bond with a surety company as his surety, but, being informed that the clause inserted by Beville in the contract would militate against his obtaining a bond signed by a surety company, he pasted a paper over the clause, effectually concealing the words. Failing to obtain the surety company upon the bond, H. O. Kerbow signed it as an additional surety, knowing nothing of the insertion of the words in the contract by Beville, or that they

had been concealed by pasting the piece of paper over them. At this time Buntin again signed it with ink. When Kerbow executed the bond with the clause inserted by Beville covered up, the trustees, considering it good for the amount, accepted it, knowing that Beville had interlined it, and that Barnes had pasted paper over the clause inserted.

When Beville made the interlineation in the contract neither the principal, Barnes, nor any of the sureties had executed the bond, though the contract had been signed by the trustees. An alteration of the contract before the bond, which in this connection must be considered as a part of it, was executed by the principal and sureties, did not avoid the bond as to them, nor as to the trustees if the latter accepted the instruments with knowledge of the change. Prior to the interlineation by Beville the contract bound the trustees to pay to the contractor 80 per cent. of the estimated value of the work. Subsequent to the interlineation the contract bound the trustees to pay the money to the superintendent, Mills, by whom it was provided it should be paid upon debts for labor and material. It is apparent that this term is material, a change of which might greatly affect the liability of the sureties to laborers and materialmen. However, the contract being void, because not approved by the county superintendent of public schools, as required by the statute, it is a matter of no importance except in so far as it may affect the obligation of the sureties to those furnishing labor and material in the construction of the building.

[8-9] The act of the contractor, Barnes, in pasting the slip of paper over the interlineation materially changed the contract which the sureties, by their undertaking in the bond, had guaranteed, resulting in a release from liability of the sureties, with the possible exception of Kerbow and Buntin. Kerbow alleged facts which, if proven, may also entitle him to be released, but Buntin has not by his pleadings set up any facts which would, if true, release him. The amended petition declared upon the contract as interlined by Barnes, and had a copy of it attached as an exhibit. To sustain the allegation plaintiff offered in evidence a contract in which the interlined clause had a slip pasted over it, but torn loose at one end. This constituted a variance. However, since one party had declared upon it in its original condition, and the other parties set it out in their pleadings in its altered condition, and the slip pasted over the interlineation was raised so the writing could be seen, appellants could not have been surprised, and the action of the court in overruling the objection, if error, was harmless. The burden is upon the one offering an altered or mutilated writing to explain its condition before it is admissible in evidence. The fact that the trustees permitted Barnes to take down his forfeit money

after the presentation of the bond and to proceed with the work is a sufficient acceptance.

[10] There is no merit in the contention that the refusal of the trustees to accept the bond when first tendered them, because the sureties were not sufficient, terminated the liability of sureties then upon it. There is nothing in the record which would prohibit Barnes from adding other sureties and again presenting it to the trustees for acceptance. There was an issue made by the pleadings and evidence as to the item of \$12 for lime which should have been submitted to the jury.

[11] The pleadings show no misjoinder of either parties or causes of action. Suits upon contracts and torts may be joined when they grow out of the same transaction. *Hoskins v. Velasco National Bank*, 48 Tex. Civ. App. 246, 107 S. W. 598; *Hooks v. Fitzendriler*, 76 Tex. 277, 13 S. W. 230.

[12] Appellant contends under the fifteenth assignment that, because the condition of the bond is that Barnes shall duly and promptly pay and discharge all indebtedness, etc., and complete the building free of all mechanics' liens, the exception to the amended petition should have been sustained, because the petition fails to show that either the plaintiff or intervener, Gatlin, had a mechanic's lien fixed upon the building. The bond expressly provides that it is made for the use and benefit of all persons who may furnish labor or material, and, if considered as a common-law bond, the labor done and material furnished is a sufficient consideration to support it. It was alleged that Barnes did partially comply with the condition named in the bond, and the words, "free of all mechanics' liens" may be considered as surplusage and still the instrument be complete as an obligation. The statute under which this bond was executed, was designed to provide security as a substitute for the lien which might otherwise exist in favor of mechanics and materialmen, such lien not being permissible upon a public building, for which reason the federal courts, in construing the statute from which the Texas statute was evidently drawn, have always given it a liberal construction in favor of laborers and materialmen, and we think the rule should be applied here. *Equitable Surety Co. v. United States to Use of McMillan & Sons*, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394. Besides the issue as to whether all of the material charged in the itemized bill was used in the building, there are other issues of fact which the court should have submitted to the jury.

The transcript in this case contains over 260 pages, nearly half of which is taken up by the pleadings of the parties. The pleadings of all parties are unnecessarily prolix, and before another trial the court should order a repleader.

For the errors pointed out and because the

court directed a verdict, the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

[13] Appellants insist that, since the contract was entered into between the contractor and the trustees, we should presume that the permit required by Vernon's Sayles' Civil Statutes, art. 2904n, was previously issued. By the explicit terms of section 14, c. 120, Acts of 1913 (article 2904o), every disbursing officer of school funds is prohibited from paying out any portion of such funds for the construction of a building costing more than \$400, until the permit required by the act has been procured; and a violation of this inhibition renders the disbursing officer liable for the sum so paid. Certainly a party who seeks to recover any part of such fund should show by his pleadings that he has met the condition precedent upon which his right to demand the money of the disbursing officer depends. No court should by its judgment require the payment of a claim to which the claimant was not entitled without suit, and it is fundamental that his pleadings should allege every fact necessary to a recovery. If the permit has, in fact, been issued, the pleadings should show it, and because they do not they are subject to general demurrer, and the error is fundamental. The requirement that the permit be obtained relates to the power and authority of the parties to contract, rather than to its form when the contract is made. *Reynolds v. Schweinefus*, 27 Ohio St. 313, is a case where the power of a city council to improve the streets of the city, without the prior recommendation of the board of city improvement was involved. In discussing the presumption of the performance of official duty, Ashburn, J., said:

"When a statute requires an act to be done, and gives no direction as to the mode of performance, and proceedings are had in the direction of performance, the duty will be presumed to have been rightfully performed until the contrary is made to appear. This presumption does not arise so strongly in regard to the exercise of power as to the performance of duty under the power. * * * So that, in cases where restraint is put upon their action by statute, and they can only act upon the authority of a report and recommendation of another body, it would not be wise, by mere construction, to lessen the force of the restraint to presume jurisdiction simply because of its exercise."

The classification and appraisal of public lands before they are placed upon the market by the land commissioner and sold must not only be alleged, but proved.

"The establishment of that distinct fact has been held to be one of the essentials of a plaintiff's case, so that no recovery can be had without it." *Anderson v. Walker*, 95 Tex. 596, 65 S. W. 981; *Hardman v. Crawford*, 95 Tex. 193, 66 S. W. 206; *Thompson v. Gallagher*, 32 Tex. Civ. App. 591, 75 S. W. 567, writ of error denied, 97 Tex. 649, 77 S. W. xv.

[14] In our opinion, the statute in question limits the power of the parties to contract. It appears from the motions for rehearing

that the statute had been complied with, but the record fails to show it, and we cannot consider questions presented which could properly arise only under a record showing compliance with the statute. That portion of the opinion in which it is stated that the bond, as between materialmen and laborers, upon the one part, and the contractor and his bondsmen, on the other, should be liberally construed, is probably a too generous statement of the rule, and that expression is withdrawn. In all other respects we think we have correctly announced the rules of law which should govern in another trial, and the motions for rehearing are overruled.

FINLEY et al. v. WAKEFIELD.

(No. 7460.)

(Court of Civil Appeals of Texas. Dallas.
March 11, 1916.)

BILLS AND NOTES 452(1) — PURCHASE FROM BONA FIDE HOLDER—PURCHASE FOR SPITE.

The legal and equitable owner and holder of a note, given to secure advancement of the purchase price of land, by indorsement and written transfer and assignment from the assignee of the original payee, for valuable consideration, could sue the makers, though he purchased the note for spite and not for profit or in the ordinary course of trade.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. 452(1).]

HOMESTEAD 81—INTEREST SUBJECT.

When a guardian's sale of land to husband and wife was confirmed by the county court, the title vested substantially in the purchasers, subject to the payment of the purchase money, who, before the execution and delivery to them of deeds by the guardian and a ward, had such an interest in the land that they could impress a homestead upon it, since the homestead right may attach to an equitable estate, or an estate for life, or even a leasehold interest, while the confirmation by the court of the sale related back to and conveyed title from its date.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 114-118; Dec. Dig. 81.]

HOMESTEAD 96—LIEN FOR ATTORNEY'S FEES.

Where a vendor of land requires the purchaser to stipulate in the original purchase-money note for the payment of attorney's fees, the note is not paid at maturity, and it is recorded in an attorney's hands for collection, a lien on the land is created by the obligation to pay fees, which cannot be defeated by the subsequent establishment of a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 147-153; Dec. Dig. 96.]

HOMESTEAD 96—LIEN FOR ATTORNEY'S FEES.

Under the Constitution, protecting the homestead of a head of a family from forced sale for payment of all debts except for the purchase money, etc., where buyers of land from a guardian, the sale being subsequently confirmed by the county court, gave a purchase-money note, stipulating for attorney's fees, which was subsequently renewed, the notes having been given subsequent to the fixing of the buyers' homestead upon the land, and the original contract having stipulated for attorney's fees, such a lien could not be made a charge upon the land, since, when homestead property cannot be le-

gally incumbered, except for certain purposes specified, a liability not embraced in such purposes cannot become by contract a charge upon the property because coupled with another obligation with which the property may be charged.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 147-153; Dec. Dig. 96.]

5. GUARDIAN AND WARD 81 — ORDER OF SALE OF LAND—AUTHORITY OF COURT—PRESUMPTION.

In the absence of contrary proof, every fact necessary to support the authority of the county court to make an order of sale, directing a guardian to sell the wards' land, and to confirm the sale made thereunder, must be presumed.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 334-336; Dec. Dig. 81.]

6. GUARDIAN AND WARD 108 — SALE OF LAND BY ORDER OF COURT—TITLE OF WARD.

Where a county court ordered the sale by a guardian of her wards' lands, such sale, and its confirmation, passed title to the buyers, subject only to the payment of the unpaid purchase money, leaving no title in a ward or her husband.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 369, 395-398; Dec. Dig. 108.]

7. GUARDIAN AND WARD 98 — SALE OF LANDS—CONSUMMATION.

Where the court's order of sale authorized a guardian to sell the wards' lands for cash or half cash and balance on credit as to her should seem best for the interest of the estates of the minors, and the buyers, instead of paying a part of the purchase price cash and executing their notes for the balance, as originally agreed with the guardian, gave their note to a third person, who furnished the purchase money in cash to the guardian, the sale, as reported to the court and confirmed by it, was carried out, and the buyers acquired title through the confirmation, and not through a deed from a ward thereafter executed.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 369; Dec. Dig. 98.]

8. BILLS AND NOTES 445 — ELECTION TO DECLARE DUE.

Where the assignee of a note, given to secure the advancement by the payee of the price of lands purchased by the makers, sold in his turn, with the understanding that the suit instituted by him thereon should be dismissed, its dismissal did not set aside or annul his previous election to declare the entire note due for nonpayment of interest, or estop his transferee from such election and declaration after he purchased.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1311-1329; Dec. Dig. 445.]

9. JUDGMENT 675(2)—BINDING FORCE ON ONE NOT A PARTY.

Where a bank, to which a note was delivered as collateral security, returned the same to the pledgor or his counsel that suit might be brought upon it by the pledgor, an attorney of the bank bringing and prosecuting the suit to judgment, the judgment rendered was binding on the bank, and estopped it to maintain a suit on the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1191; Dec. Dig. 675(2).]

10. APPEAL AND ERROR 1086(3)—IMMATERIAL ERROR.

In suit on a note, where the judgment, under the circumstances, was binding on a bank not a party, error of the court in declining to

continue the case to make the bank a party was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4071; Dec. Dig. ¶1036 (3).]

11. HUSBAND AND WIFE ¶238(3) — JUDGMENT NOT PERSONAL AGAINST WIFE.

In suit on a note renewing a note given by the purchasers of land at guardian's sale to secure the advancement of the purchase price by the original payee, judgment decreeing that plaintiff recover of the purchasers, husband and wife, the amount sued for, with foreclosure of liens, and directing that, if the property condemned to pay the judgment should not sell for enough to satisfy it, plaintiff should have execution against the husband for the balance, but that no execution should ever issue against the wife, was not in proper form for a judgment other than personal against the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 855; Dec. Dig. ¶238(3).]

Appeal from District Court, Grayson County; M. H. Garnett, Judge.

Suit by John T. Wakefield against A. P. Finley and another. From a judgment for plaintiff, defendants appeal. Reversed in part, reformed in part, and otherwise affirmed.

C. B. Randell and J. W. Finley, both of Sherman, for appellants. Wolfe & Wood, of Sherman, for appellee.

TALBOT, J. On April 11, 1914, appellee filed suit on note, dated October 6, 1909, signed by appellants and payable to H. O. Head, or order, five years after date, for the sum of \$1,260, with interest at the rate of 8 per cent. per annum, and stipulating that if the same was placed in the hands of an attorney for collection, the makers agreed to pay 10 per cent. on the amount as reasonable attorney's fees. The note sued on was given in renewal and extension of a certain other note, dated August 25, 1903, signed by appellants, payable to the order of W. H. O'Neal as trustee, five years after date, for the sum of \$1,200, with interest at the rate of 8 per cent. per annum from date, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection. The said W. H. O'Neal, trustee, for a valuable consideration, transferred and assigned said note to H. O. Head, to be held by him as security for payment of the note sued upon, and thereafter, on the 16th day of April, 1914, the said H. O. Head, by written transfer, sold and conveyed said note to appellee. The note was secured by a vendor's lien, as well as by a deed of trust, executed by appellants on the land described in plaintiff's petition, and the interest on said note, according to its terms, was payable annually, on the 6th day of October of each year, and the deed of trust stipulated that if default was made in payment of any installment of interest thereon, when due, that the same could, at the option of the holder, be declared due and payable. Appellants had failed to pay certain installments of interest due on said note, and H. O. Head,

who was then the legal and equitable holder and owner of the note, declared the same due, and brought suit thereon. The appellee then purchased the note, and H. O. Head then dismissed his suit. After acquiring said note, appellee borrowed \$1,000 from the Sherman Loan & Trust Company, and placed the note with it as collateral security for such loan, but for the purpose of bringing suit upon it said company returned said note to appellee. Appellee, after purchasing the note, ratified the act of said Head in declaring the note due, and further exercised his option of declaring the same due and payable, according to the terms of said note and the authority conferred upon him as the holder thereof, by said deed of trust, and brought this suit.

The principal matters of defense were: First, that the note sued on and the deed of trust given on the land involved in the controversy were not obtained in the usual course of business nor for profit or business reasons, but for spite, and that appellee was estopped from claiming the attorney's fees sought to be recovered; second, that the appellee had no lien on said land for the attorney's fees claimed in his petition, because said land, at the time the original note was given to W. H. O'Neal and at the time the renewal note sued on was executed, which provided for the payment of attorney's fees, was, and had been for some months, the homestead of appellants. The property described in appellee's petition belonged to two minor children, Lula Sophia Matthews and Paul Matthews, and Mrs. M. T. Brown was their guardian. Mrs. Brown, as such guardian, made application to the county court of Grayson county, Tex., for an order to sell said property. On January 17, 1903, this application was granted, and Mrs. Brown, by order of the court duly made, was authorized and directed to sell the property for cash or half cash and the balance on credit, not to exceed four years, as to her should seem best for the interest of said estate. On June 4, 1903, said guardian reported to the court that she had sold the property to Eudora T. Finley, one of the appellants, at private sale, on May 15, 1903, for \$1,600, one-half thereof to be paid cash and the remainder in equal installments, payable on or before one, two, and three years from date of said sale, each secured by note bearing 10 per cent. interest from its date, and by vendor's lien on said premises. On June 11, 1903, said sale was approved and confirmed by the court, and Mrs. Brown, as guardian of the estates of said minors, was ordered to make deed to the purchaser, Mrs. Eudora Finley, upon her compliance with the terms of the sale. The appellants were, at the time of all the transactions in question, husband and wife, and the property was purchased with the intention of making it their home, and before or about the time of the

confirmation of the sale by the county court they moved onto it, and continuously since that date have occupied, used, and claimed it as their homestead. In making the purchase of the property from the guardian of the minors, appellants did not contract or agree to pay any attorney's fees whatever, and the order of sale did not require that the purchaser agree to pay attorney's fees in any event. At some time, the date of which the record does not disclose, but prior to the making of any deed by the guardian, the minor, Lula Sophia Matthews, intermarried with Charles E. Hipolite. On the 25th day of August, 1903, Mrs. Brown, as guardian, executed and delivered to appellant Mrs. Eudora Finley a deed for the land in question. This deed purports to have been made by virtue of the order of sale granted to Mrs. Brown as guardian of the Matthews children, the sale to Mrs. Eudora Finley, and the subsequent confirmation thereof by the county court, and contains the following recitations:

"And whereas said purchaser has elected to pay and has paid the entire purchase money: Now therefore, in consideration of the premises and the payment of the entire purchase money as follows: Four hundred dollars (\$400.00) paid by Mrs. Eudora T. Finley and received by me for Lula Sophia Hipolite, formerly Lula Sophia Matthews, and twelve hundred dollars (\$1,200.00) paid by W. H. O'Neal, trustee, and for which said Mrs. Eudora T. Finley and her husband, A. P. Finley, have executed their certain promissory notes, payable five years after date, with the privilege of paying the same at the end of two years or at the end of any year after said two years and before five years, interest payable semiannually at the rate of 8 per cent. per annum, and providing for 10 per cent. attorney's fees, and to secure the payment of said note the vendor's lien is hereby retained and the grantor herein does hereby sell and convey to the said W. H. O'Neal, trustee, the superior title and vendor's lien given by law to further secure said note, which is also further secured by the grantee herein, joined by her said husband, executing their certain deed of trust to secure the said W. H. O'Neal as trustee, I, Mrs. M. T. Brown, guardian as aforesaid, have granted, sold," etc.

Following the foregoing recitations is the habendum clause, the description of the property, and this provision:

"It is expressly understood, however, that the vendor's lien is retained upon said premises and improvements, to W. H. O'Neal as above specified, until the note above mentioned and all interest thereon, is fully paid, according to its tenor and effect."

On the same day that Mrs. Brown executed the deed just referred to, Mrs. Lula Sophia Hipolite, joined by her husband, also executed and delivered to appellant Mrs. Eudora Finley a deed to said property, which, omitting the description of the land, the habendum and warranty clauses, and formal parts, is as follows:

"Know all men by these presents, that we, Lula Sophia Hipolite, formerly Lula Sophia Matthews, joined by her husband, Charles E. Hipolite, of the county of Jefferson, state of Arkansas, in consideration of the sum of one thousand six hundred dollars (\$1,600.00) paid to Mrs. M. T. Brown, guardian of the estate of said Lula Sophia Matthews and Paul Matthews,

as follows: Four hundred dollars (\$400.00) paid by Mrs. Eudora T. Finley to said guardian for me, and the sum of one thousand, two hundred dollars (\$1,200.00) paid said guardian by W. H. O'Neal, trustee, and for which said Mrs. Eudora T. Finley and her husband, A. P. Finley, have executed their certain promissory note payable five (5) years after date with the privilege of paying the same at the end of two (2) years, or at the end of any year after said two (2) years and before five (5) years, interest payable semiannually at the rate of eight per cent. per annum, and providing for ten per cent. attorney's fees, and to secure the payment of said note a vendor's lien is hereby retained and the grantors herein do hereby sell and convey to said W. H. O'Neal, trustee, the superior title and vendor's lien given by law to further secure the said note, which is also further secured by the grantee herein, joined by her said husband, executing their certain deed of trust to secure the said W. H. O'Neal as trustee, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said Eudora T. Finley of Grayson county, Texas, as her sole and separate property the undivided one-half interest of the said Lula Sophia Hipolite in and to that certain tract or parcel of land situated in the city of Sherman in Grayson county, Texas, and being part of the J. B. McAnair survey. Said land having been the property of the estate of Lula Sophia Matthews and Paul Matthews, minors, guardianship proceedings on which estate is pending in the county court of Grayson county, Texas, by order of which court entered on the 17th of January, 1903, the guardian of said estate, Mrs. M. T. Brown, was ordered to make sale of said property, and such sale was accordingly made to said Eudora T. Finley and was duly confirmed by said court and this deed is intended to convey to said Eudora T. Finley all interest of said Lula Sophia Hipolite and Charles E. Hipolite in said property. But it is expressly agreed and stipulated that the vendor's lien is retained in favor of said W. H. O'Neal against the above-described property, premises and any improvements until said note and all interest thereon is fully paid according to its face, tenor and effect, when this deed shall become absolute."

These deeds were delivered to appellants at the same time and were recorded in the deed records of Grayson county.

The case was tried before the court without the aid of a jury, and the trial resulted in a judgment in favor of appellee against both appellants for the sum of \$1,728.80, being the amount of the principal, interest, and attorney's fees represented by the note sued on, with foreclosure of the liens claimed by appellee on the land described in appellee's petition, and directing that an order of sale be issued, commanding the sheriff of Grayson county to sell said land and apply the proceeds of such sale to the payment of the judgment. The judgment further provided that if the land did not sell for enough to satisfy the same, appellee have execution against A. P. Finley, but that no execution ever issued against Mrs. Eudora Finley.

[1] The first assignment of error complains of the court's action in sustaining appellee's demurrer to that portion of appellant's petition charging that the note in suit was not obtained by appellee for profit, or in the ordinary course of trade, but for spite. The court did not err in this ruling. If the appellee was the owner and holder of the note

sued on, it was immaterial, so far as his right to sue thereon is concerned, whether he obtained the same for profit or in the ordinary course of trade or for spite. He alleged that he was the legal and equitable owner and holder of the note, by indorsement and written transfer and assignment from H. O. Head, for a valuable consideration, and these allegations entitled him to maintain the suit, regardless of the motives that actuated him in purchasing the note.

Assignments 2 and 3, in so far as they assert that the court erred in not finding that appellants had not agreed to pay an attorney's fee, nor agreed that any of the papers should stipulate for such fee, will be overruled. The evidence very conclusively shows that the note executed and delivered by appellants to W. H. O'Neal for a part of the purchase money of the land involved in this suit and the note sued upon, which was given in renewal of said O'Neal note, provided for the payment of 10 per cent. attorney's fees, if placed in the hands of an attorney for collection, and that such provision was made with the knowledge and consent of appellants.

By more than one assignment of error it is asserted by appellants, in substance, that the amount of the attorney's fee allowed appellee, and included in the judgment rendered in his favor, was no part of the original purchase price agreed to be paid for the land involved in this suit; that the first time appellants promised or agreed to pay an attorney's fee, in the event the deferred payments for said land were not made when they became due, was when they executed the note for \$1,200 to W. H. O'Neal, on the 25th day of August, 1903, which provides for such fee; that before and at that time said property was, and continuously since has been, the homestead of appellants, and the court erred in making the amount of said attorney's fee a charge against said property and in foreclosing liens therefor.

[2] The assertion in the assignments to which we refer, to the effect that the first time appellants, in the transactions out of which this controversy arose, agreed to pay an attorney's fee, was on August 25, 1903, when the \$1,200 note stipulating therefor was executed and delivered to W. H. O'Neal, is clearly borne out by the record, and if before and at the time the stipulation for the payment of attorney's fees was made the appellants had acquired such an interest in or title to the land in controversy as authorized the establishment of a homestead upon it, then the evidence is practically conclusive that it constituted the homestead of appellants when the agreement to pay attorney's fees was entered into. As stated in a former part of this opinion, the order of the county court, authorizing and directing the guardian of the minors, Lula Sophia Matthews and

Paul Matthews, to sell the land, did not require her to exact of the purchaser thereof an agreement to pay attorney's fees, and no such agreement was exacted or required of appellants or entered into by them with said guardian. The first time any such agreement was made was when a stipulation to that effect was incorporated in the note made by appellants to W. H. O'Neal August 25, 1903. This was some months after the guardian had been granted an order to make sale of the property, the sale thereof to appellants and the confirmation of said sale by the court. There was then no promise or agreement included in appellant's original contract of purchase to pay attorney's fees, and the first agreement to that effect was made, as stated, when the \$1,200 note payable to W. H. O'Neal was executed on the 25th day of August, 1903. On the issue of homestead vel non the facts are undisputed. The appellants bought the property with the intention of making it their homestead, and moved upon it prior to or about the time the sale by the guardian to them was confirmed by the probate court of Grayson county, and ever since that time they have occupied, claimed, and used it as such. The questions then are: First, did appellants acquire, before the execution and delivery to them of the deeds made by Mr. and Mrs. Hipolite, and by Mrs. Brown as guardian, on August 25, 1903, by the sale to them by said guardian and confirmed by the court, such an interest in or title to the land involved in this litigation as that the homestead character could be impressed upon it? and, second, did the attorney's fee, provided for in the note executed and delivered by appellants to W. H. O'Neal on the 25th day of August, 1903, and which was likewise provided for in the renewal note sued on, constitute a part of the purchase money agreed to be paid for the land, or the obligation assumed by appellants, against which the homestead claim of appellants could not prevail? The first question, we think, should be answered in the affirmative and the second in the negative. In *Wheatley v. Griffin*, 60 Tex. 209, it is said:

"There is nothing in the Constitution or laws of this state which prevents the homestead right of the wife from attaching to any interest in land which may be owned by the husband or wife, or by the community, and be used as homestead; and the great current of authority is to the effect that the homestead right will attach to an equitable estate, an estate for life, or even to a leasehold interest."

When the sale made by the guardian, Mrs. Brown, to the appellants was confirmed by the decree of the county court of Grayson county, the title of the land vested substantially in appellants, subject, of course, to the payment of the purchase money, and the execution of the deed, on August 25, 1903, by Mrs. Brown as guardian, was at most but the formal evidence of the title vested by such decree of the court. *Rock v. Heald*,

27 Tex. 523. Prior to the date of this deed, and about the time of the confirmation decree referred to, appellants moved upon the land and dedicated it to homestead purposes. It was not essential to the attaching of homestead rights that the fee to the land had passed, or that the purchase money had been paid, although the land remained subject to the vendor's lien. The confirmation by the county court of the sale made by the guardian to appellants under its order related back to and conveyed title from the date of such sale. *Edwards v. Gill*, 5 Tex. Civ. App. 203, 23 S. W. 742. It is thus very well established by the decisions of this state that by the order of sale, the sale and its confirmation by the court, appellants acquired such title or interest in the land in question from the date of the sale as gave them the legal right to fix their homestead upon it, and the evidence is without dispute that about said date they designated it by use and occupancy as such. At the time, then, that appellants signed the note of \$1,200 payable to W. H. O'Neal, for the deferred payment of purchase money for the land and in which for the first time attorney's fees were agreed to be paid, the land constituted the homestead of appellants.

[3, 4] The second question remains, namely, did the attorney's fee stipulated for in the O'Neal note and carried into the renewal note sued on constitute a part of the purchase money agreed to be paid for the land, or the obligation of appellants, against which their homestead claim could not prevail? In other words, did there exist for the payment of such fee a lien upon the land superior to the homestead rights of appellants? It is doubtless true that where a vendor of land requires the purchaser to stipulate, in the original note executed for the purchase money, or a part thereof, for the payment of attorney's fees in the event the note is not paid at maturity and is placed in the hands of an attorney for collection, a lien is created by the obligation which cannot be defeated by the subsequent establishment of a homestead upon the land. In such a case the judgment of foreclosure may embrace the amount due as such fees. *Garrett v. Interstate Bank*, 79 Tex. 133, 15 S. W. 224; *Neese v. Riley*, 77 Tex. 348, 14 S. W. 65; *Green v. Johnson*, 44 S. W. 6. But when provision is not made for attorney's fees in the original note given for the purchase money, and a renewal note is taken after the property has become the homestead of the purchaser, with stipulation for attorney's fees, no lien is thereby created for such fees superior to the homestead claim. *Bullard v. Mayne*, 49 S. W. 522. The Constitution of this state protects the homestead of the head of a family—

"from forced sale for the payment of all debts except for the purchase money thereof, or for part of such purchase money, the taxes due thereon, and for work and material used in con-

structing improvements thereon; and in this last case only when the work and material are contracted for in writing with the consent of the wife, given in the same manner as is required in making sale of the homestead."

The attorney's fees sought to be recovered in this suit, as will be seen, are not embraced within the exceptions named in the Constitution, for which the homestead may be incumbered, and, although the promise to pay same is included in the note given W. H. O'Neal and in the renewal note payable to H. O. Head upon which this suit is founded, still as this promise was not made in the original contract of purchase, but subsequent to the fixing of appellants' homestead thereon, they cannot be made a charge upon the land. In *Walters v. Loan Association*, 8 Tex. Civ. App. 500, 29 S. W. 51, this court said that the proposition announced in *Neese v. Riley*, supra, and similar cases—

"is clearly right where the parties are authorized to incumber the property generally to secure their obligations; but when the property cannot legally be incumbered, except for certain purposes specified in the Constitution, a liability not embraced in such purposes cannot become by contract a charge upon the property on account of the fact that it is coupled with another obligation with which the property may be charged."

We adhere to this view, and as the property in question constituted the homestead of appellants at the time they first contracted to pay attorney's fees, the same did not become a charge upon said property because coupled with their obligation to pay the deferred payment of \$1,200 purchase money. The trial court therefore erred in ordering the property sold for the payment of such fees.

[5, 6] That the minor Lula Sophia Matthews had intermarried with Charles E. Hipolite prior to the time her guardian conveyed the land to appellants, and that she, joined by her husband, also conveyed said land to appellants, does not alter the case. The evidence shows that this marriage occurred before the date of the deed executed to appellants by the guardian, Mrs. Brown, but whether before or subsequent to the date of the order of sale granted by the county court, the sale and confirmation under which said deed was made, does not appear. That the guardianship was still pending at the date of said order of sale, said sale, the confirmation thereof, and when the deed of said guardian was executed and delivered is not controverted. If the minor Lula Sophia Matthews was married to Hipolite prior to the time the order of sale was granted, or the date of its confirmation, it does not so appear. In this state of the evidence the validity and binding effect of the county court's orders upon Mrs. Hipolite cannot be questioned, even though it should be admitted, which is not done, that said orders would have been ineffectual for the purpose intended had it been shown that her marriage occurred prior thereto. In the absence

of proof to the contrary, every fact necessary to support the authority of the county court to make the order of sale, directing the guardian to sell the land and to confirm said sale, must be presumed. It not being shown by the evidence that Lula Sophia Matthews intermarried with Charles Hipolite before the order of the county court was made directing the guardian to sell, or the date of the sale to appellants, or confirmation of said sale, the presumption will obtain, for the purpose of sustaining the validity and legal effect of said orders, that such marriage took place thereafter. The effect of the county court's order of sale, the sale to appellants by the guardian, and the confirmation of said sale passed the title of land to appellants subject only to the payment of the unpaid purchase money, and left no title in Mrs. Hipolite, or her husband, as a subject of conveyance by them, and the deed given by them to appellants at the date of the guardian's deed cannot have the effect of fixing upon the land conveyed a charge for the attorney's fees claimed.

[7] Nor do the facts that appellants entered into an agreement with W. H. O'Neal to furnish them \$1,200 of the purchase money, giving him their note therefor, and electing in view thereof to pay all cash to the guardian for the land, instead of paying a part of the purchase price cash and executing their notes for the balance, as authorized by the order of sale granted to the guardian, materially affect the question. The consummation of the sale of the land in that manner was, to say the least, as favorable to the minors and the estates represented by the guardian as would have been a strict compliance with the original terms of sale as agreed on by the appellants and the guardian. The order of sale authorized the guardian to sell the property for cash or half cash and balance on credit as to her should seem best for the interest of the estates of the minors, and we fail to see how it can fairly and reasonably be said as we understand appellee does in effect, that the sale as reported to the court and confirmed by it was never carried out, and hence Mrs. Finley did not acquire title by reason of the confirmation of the sale reported by the guardian, but by reason of the deed made by Mrs. Hipolite and her husband, upon the therein expressed consideration of \$400 cash paid by Mrs. Finley to Mrs. Brown as guardian and \$1,200 paid said guardian by W. H. O'Neal, trustee, and for which said last-named sum Mrs. Finley and her husband, A. P. Finley, executed their promissory note, providing for 10 per cent. attorney's fees, etc. Mrs. Finley acquired the title of the land by reason of the order of sale, the sale to appellants, and the confirmation of that sale by the court, and the conveyance from Mrs. Hipolite and her husband was ineffectual to vest the title thereof in her, as she then had no title to convey; and

neither the said deed nor the transactions between appellants and W. H. O'Neal recited therein operated to fix as a charge upon the property therein attempted to be conveyed the attorney's fees stipulated in the note to O'Neal to be paid.

[8] The contention of appellants, to the effect that the court erred in not finding that by a valid agreement, entered into between appellants and H. O. Head while the said Head owned the note sued on and during the pendency of the suit instituted thereon by the said Head, there was an extension of time for the payment of the interest due on said note, and hence a waiver of the right to declare the note due for default in the payment of such interest, which was binding on appellee, will be overruled. The evidence is wholly insufficient to show that any agreement for such an extension was made; and the sale of the note sued on to appellee, with the understanding that the suit instituted by H. O. Head was to be dismissed, and its dismissal, did not have the effect to set aside or annul the election of H. O. Head to declare the entire note due under the terms of the contract for nonpayment of interest, or estop the appellee from such election and declaration after he purchased the note.

[9, 10] It is further contended that:

"The court erred in not finding that the Sherman Loan & Trust Company had an interest in the subject-matter of the suit and was a necessary party."

This contention is not believed to be well taken. As pointed out by appellee's counsel, the only interest which the Sherman Loan & Trust Company ever had in the note sued on was acquired by appellee's delivering the same into its possession as collateral security, and the evidence shows without contradiction that before this suit was instituted, it was returned to appellee or his counsel, not only with knowledge that suit would be brought upon it by appellee, but for that express purpose. One of the attorneys of said company brought and prosecuted the suit to judgment, and there is no pretense that it was not fully aware of the institution and pendency of this suit. Under these circumstances the judgment rendered on the note is binding on the Sherman Loan & Trust Company, and will estop it from maintaining a suit on the same cause of action. This being true, there was no material error on the part of the court, if any at all, in declining to continue the case for the purpose of making said company a party to the suit.

[11] As shown in our statement of the nature and result of the suit, the trial court decreed that the appellee recover of appellants, A. P. Finley and his wife, Mrs. Eudora Finley, the amount sued for, with foreclosure of liens, and directed that if the property condemned to pay the judgment should not sell for enough to satisfy the same, appellee have

execution against A. P. Finley for the balance, but that no execution should ever issue against Mrs. Eudora Finley. This judgment is treated by appellants as a personal one against Mrs. Finley and assigned as error. It may be that since the judgment provides that no execution shall ever issue against Mrs. Finley, it should not be regarded as a personal one against her, but we do not approve of the form of the judgment, and it will be reformed so as to relieve it of the objection urged by appellants.

For the reasons indicated, the judgment of the court below, in so far as it forecloses the lien claimed by appellee and orders the property described in appellee's petition sold for the payment of the amount of the attorney's fees recovered, will be reversed, and judgment here rendered denying a foreclosure of said lien and condemnation of said property for the payment of such fees. The judgment will also be reformed so as to deny a personal recovery for any amount against Mrs. Finley. In all other respects the judgment is affirmed.

FOSTER LUMBER CO. v. RODGERS et al.* (No. 74.)

(Court of Civil Appeals of Texas, Beaumont.
March 2, 1918. On Motion for Re-
hearing, March 23, 1918.)

1. NEGLIGENCE — 32(2) — DUTY TO USE ORDINARY CARE — "INVITEE" — "LICENSEE."

Defendant F. furnished ties to defendant K. under a contract, the ties to be paid for only after inspection. F. knew that they were then sold to the defendant G. Plaintiff, G.'s tie inspector, came monthly to inspect ties, which were piled along its tramway by F., in K.'s motor car operated by its employé. F.'s superintendent accompanied them in the motor car and indicated the ties to be inspected. Plaintiff made reports in triplicate, one for each defendant, and on these reports both F. and K. were paid. No specific agreement existed for the use of the tramway, but plaintiff had made over 20 trips with F.'s superintendent and with its knowledge and without objection. Plaintiff was injured in an accident to the motor car caused by the defective condition of the tramway. Held, that the defendants had a mutual interest in the plaintiff's work, he was an "invitee," and defendant F. was bound to use ordinary care to keep its tramway in a reasonably safe condition, since, while one who goes on the premises of another for his own convenience, even by permission, is a "licensee," and the owner owes him no duty other than not to willfully or maliciously injure him, one who goes upon the premises of another by invitation of the owner, either express or implied, in the performance of work to the mutual interest of both, is an invitee, and the owner owes him the duty to keep such premises in a reasonably safe condition for his use while performing the work (citing Words and Phrases, Second Series, Invitation; see, also, Licensee.)

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 43; Dec. Dig. 32(2).]

2. APPEAL AND ERROR — 742(1) — BRIEFS — STATEMENT OF EVIDENCE.

Under the rules of the court and by statute if the appellant's brief does not set forth the substantial matter referred to in each assign-

ment of error, and contains mere references to pages of the record, the appellate court cannot consider the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8000; Dec. Dig. 742(1).]

3. APPEAL AND ERROR — 1004(1) — VERDICTS — EXCESSIVE DAMAGES — PREJUDICE OF JURY.

As the assessment of damages is a prerogative belonging peculiarly to the jury, a finding will not be disturbed as excessive, unless the record discloses that the jury has abused its authority or has been unduly influenced in some manner, and the amount is clearly excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944, 3946; Dec. Dig. 1004(1).]

4. APPEAL AND ERROR — 1126 — MOTION FOR DISMISSAL — APPEAL NOT PERFECTED.

Where no appeal is perfected against a defendant, a judgment in its favor will be affirmed upon its motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3144, 4429-4431; Dec. Dig. 1126.]

Appeal from District Court, Hardin County; J. Llewellyn, Judge.

Action by J. B. Rodgers against the Foster Lumber Company and others. From a judgment for the plaintiff, the named defendant appeals. Affirmed.

N. C. Abbott, of Houston, and W. W. Dies, of Kountze, for appellant. Smith, Crawford & Sonfield and Howth & Adams, all of Beaumont, for appellee.

MIDDLEBROOK, J. This cause was brought in the district court of Hardin county, Tex., by J. B. Rodgers, against the Foster Lumber Company, the Kirby Lumber Company, and Gulf, Colorado & Santa Fé Railway Company, for damages caused by motor car wrecked, which was the result of spreading of rails, in consequence of bad ties. The motor car was the property of the Kirby Lumber Company, and was operated by one of its employés. Plaintiff, J. B. Rodgers, was a tie inspector for the Gulf, Colorado & Santa Fé Railway Company, and was out inspecting ties when the injury occurred. The Foster Lumber Company was furnishing ties to the Kirby Lumber Company by virtue of contractual relations between them, and the Kirby Lumber Company was selling the ties to the Gulf, Colorado & Santa Fé Railway Company, on contract between them, and the Foster Lumber Company knew such was the case.

The railroad on which plaintiff was traveling at the time he was injured was a tramroad, and was owned by the Foster Lumber Company. It was being used but little by the Foster Lumber Company at the time of the accident; but the company's locomotive and cars were still being operated over the road and during the months of February, March, April, and May, 1913, 216,000 feet of logs were hauled over the track from points beyond the point where the injury occurred, and from April 14, to April 22, 1913, the company hauled logs and ties over the

road every day. The locomotive used by the Foster Lumber Company on this road weighed 60 tons. The tramroad was built in 1909, and was originally intended to be a common carrier; and there were no other tramroads in that locality built like that one.

Under its contract with the Kirby Lumber Company, the Foster Lumber Company manufactured hewn railroad cross-ties in the woods, and hauled them out and distributed them along the tramroad for inspection, and the Gulf, Colorado & Santa Fé Railway Company would send an inspector out each month to inspect and take up the ties. The Kirby Lumber Company would send the inspectors out to the ties in its motor car, and it had the privilege to operate its motor car over the tracks of the Gulf, Colorado & Santa Fé Railway Company for that purpose.

When the inspection trips were made, the Foster Lumber Company would be notified when the inspector would arrive, and the Foster Lumber Company would have its superintendent of the tie department meet the motor car and he would get on the motor car with the inspector of the Kirby Lumber Company, and the inspector of the Gulf, Colorado & Santa Fé Railway Company, and the operators of the motor car, and they, together, would travel over the line of the tramroad of the Foster Lumber Company to such places as the Foster Lumber Company's tie superintendent would direct, and inspect the ties piled on the right of way that he pointed out. It was a part of the contract with the Kirby Lumber Company that the ties were to be inspected before the Foster Lumber Company could receive pay for them, and monthly inspections were made.

J. B. Rodgers, appellee, was in the employ of the Gulf, Colorado & Santa Fé Railway Company, and before the accident occurred, had made about 20 to 23 trips over the tramroad to inspect ties pointed out by the Foster Lumber Company, and an agent of the Foster Lumber Company accompanied each trip. J. B. Rodgers, tie inspector, made reports of his inspection to the Gulf, Colorado & Santa Fé Railway Company, to the Kirby Lumber Company, and to the Foster Lumber Company, and upon these reports of inspection by Rodgers, the Kirby Lumber Company and Foster Lumber Company each got pay for the ties. It made no difference to the Foster Lumber Company who inspected the ties, just so it got its money.

There is evidence of express invitation by the Foster Lumber Company to Rodgers to go upon its track; but the preponderance of the evidence is to the effect that no specific agreement existed between the Foster Lumber Company and either of the other defendants for the use of the tramroad by them. The Foster Lumber Company, however, knew of the use of its tramroad for the inspection of the ties, as it was used at the time of the accident, since the beginning of its contract with the Kirby Lumber Company, and never

objected to such use. The Foster Lumber Company could have taken the tie inspector out on the tramroad with its locomotive, but did not do so, and the gasoline motor car was a better and more economical way of getting out to the ties to inspect them, and was much lighter on the track than the locomotive.

The trial court instructed a verdict for the Gulf, Colorado & Santa Fé Railway Company and for the Kirby Lumber Company, and submitted the case to the jury as to the plaintiff and defendant Foster Lumber Company, resulting in a verdict and judgment in favor of plaintiff, J. B. Rodgers, in the sum of \$7,500.

The record of the case is quite lengthy, but the above brief statement is sufficient for a full understanding of the issues presented to us, except as we may hereinafter state, in passing upon specific issues. Appellant's first five assignments of error are grouped, and presented in conjunction, and are substantially:

(1) The evidence is insufficient to sustain the verdict of the jury and judgment of the court, as it does not show that the defendant Foster Lumber Company owed plaintiff the duty of keeping its tramroad in a safe condition, or that it was obligated to use ordinary care, or any kind, for the protection of plaintiff against injury while on its tramroad, under the circumstances and at the time shown by the evidence.

(2) The verdict of the jury and judgment is not supported by the evidence, because there was no contract for the use of the tramroad between the Kirby Lumber Company and the Foster Lumber Company, and therefore plaintiff assumed the risk incident to going upon the road.

(3) The third assignment is substantially the same as the second.

(4) The fourth assignment is like the second and third, with the addition that no liability attached by reason of the fact of acquiescence in or permission to use the tramroad by the Foster Lumber Company.

(5) The trial court erred in refusing to give to the jury special requested charge No. 1, asked for by defendant Foster Lumber Company, as follows:

"The jury are instructed that under all of the evidence adduced on the trial of this case, the defendant Foster Lumber Company is not liable to the plaintiff for any damages he may have suffered because of the injury alleged in his petition, and shown by the evidence, and your verdict should be for the defendant Foster Lumber Company, and you will so find."

Each of the assignments of error is presented as a proposition, and seven other propositions are presented under the five assignments, which, briefly stated, are:

(1) There being no contractual relation between the Foster Lumber Company and the Gulf, Colorado & Santa Fé Railway Company, no contract obligation would rest on Foster Lumber Company to furnish a safe, or

any, means of transportation for the plaintiff, an employé of the railway company for the inspection of ties, and if he assumed to go on the tramroad of Foster Lumber Company, without such invitation as would impose a duty, it would be at his own risk, and if injured he could not recover of Foster Lumber Company, in the absence of affirmative or active negligence.

(2) There being no contract between the Foster Lumber Company and the Kirby Lumber Company, specifying manner and means of inspection, no obligation would attach to the Foster Lumber Company to furnish safe means of transportation to plaintiff, even though plaintiff be an employé of Kirby Lumber Company, without such invitation as would impose a duty.

(3) The third proposition is practically the same as the second, except that if the Kirby Lumber Company assumed to use the tramroad of the Foster Lumber Company for transportation of plaintiff for such inspections, without such invitation as would impose a duty, and plaintiff went thereon in the motor car of said Kirby Lumber Company, and while so using said tramroad suffered an injury, the Foster Lumber Company would not be responsible therefor.

(4) In the absence of contractual relation between Foster Lumber Company and Kirby Lumber Company, Gulf, Colorado & Santa Fé Railway Company, or plaintiff, permission to use its tramroad growing out of no greater authority than the failure to object to such use, would not create a liability to compensation for the suffering of plaintiff while passing over said tramroad at his own or at the instance of the Kirby Lumber Company, or the railway company, or the employé of either.

(5) The remote interest which the Foster Lumber Company might have in the inspection of ties it sold to Kirby Lumber Company, in the absence of any contract covering the means or manner of their inspection, is insufficient to create an obligation on the part of the Foster Lumber Company to use ordinary or any other degree of care in protecting plaintiff, an employé of the railway company, or the employé of Kirby Lumber Company, if so held, while passing over its tramroad with no other authority than that which grows out of its permission, and it would not be liable for injuries, in the absence of affirmative or active negligence.

(6) The evidence in the case does not justify the submission to the jury of the question whether plaintiff was an invitee, either express or implied, of the Foster Lumber Company, on its tramroad at the time of the accident, nor is the evidence sufficient to justify the submission to the jury of the question whether plaintiff was on said tramroad acting for the advantage, profit, or benefit of the Foster Lumber Company on the trip when the accident occurred.

(7) The circumstances under which the plaintiff was on the tramroad of the Foster

Lumber Company at the time of the accident showed that the Foster Lumber Company owed him no duty, and was under no obligations to him to keep the tramroad in repair, or in a safe condition, nor does the evidence show any controverted question of fact on that subject.

The following authorities are presented by appellant, in support of these propositions: *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843; *Blossom Oil & Cotton Co. v. Poteet*, 104 Tex. 280, 136 S. W. 432, 35 L. R. A. (N. S.) 449; *Mack v. H. E. & W. T. Ry. Co.*, 134 S. W. 846; *Kirby Lbr. Co. v. Gresham*, 151 S. W. 847; *Railway Co. v. Brown*, 11 Tex. Civ. App. 503, 33 S. W. 146, writ of error denied 93 Tex. 673, 33 S. W. xvii; *Louthian v. Ft. Worth & D. C. Ry. Co.*, 50 Tex. Civ. App. 613, 111 S. W. 665; *Hall v. H. & T. C. Ry. Co.*, 125 S. W. 946; *St. Louis Southwestern Ry. Co. v. Anderson*, 125 S. W. 628; *Southwestern P. Cement Co. v. Rustillos*, 169 S. W. 638; *St. Louis So. Ry. Co. v. Bolthrop*, 167 S. W. 246; *Indian Refining Co. v. Mobley*, 134 Ky. 822, 121 S. W. 657, 24 L. R. A. (N. S.) 497; *Hamilton v. Minn. Desk Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800; *Huebner v. Hammond*, 177 N. Y. 537, 69 N. E. 1124; *Ky. Dis. & W. Co. v. Leonard* (Ky.) 79 S. W. 281; *Glaser v. Rothschild*, 106 Mo. App. 418, 80 S. W. 332; *St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491, 71 N. E. 56; *Briscoe v. Henderson L. & P. Co.*, 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (N. S.) 1116.

The two cases reported in the *Northwestern Reporters* are to the effect that no liability exists without mutuality of interest. In the case of *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 802, Justice Winslow says:

"The main question in the case, however, is whether, under the facts testified to by the plaintiff himself, and found by the jury, there is any liability shown; and this depends upon the question whether, under those facts, the plaintiff was a mere licensee, or one who was upon the premises by invitation, express or implied. If he was a mere licensee, there can be no recovery, because a mere licensee takes the premises as he finds them, and the licensor owes him no duty, save to refrain from * * * active negligence rendering the premises dangerous [citing *Oahill v. Layton*, 57 Wis. 600, 16 N. W. 1, 46 Am. St. Rep. 46]. If, on the other hand, he was more than a mere licensee, and was on the premises by invitation, express or implied, the defendant owed him the duty of exercising ordinary care to keep the premises in safe condition for use by persons themselves exercising ordinary care [citing *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N. W. 656]. Mere permission or license does not imply invitation. When that fact alone appears, the permitted person is a mere licensee; but when it is shown that the permitted person enters on the premises in the ordinary way to transact business with the licensor, or that the object of his visit is one in which there is mutuality of interest between licensor and licensee, then the permitted person ceases to be a mere licensee, and becomes not only a licensee, but an invited person, to whom the duty of exercising ordinary care is

owing [citing *Hupfer v. Nat. D. Co.*, 114 Wis. 279, 90 N. W. 191]."

In *Huebner v. Hammond*, 177 N. Y. 537, 69 N. E. 1124, there is not sufficient statement of the case to tell whether it is applicable to the instant case. The opinion is:

"Judgment affirmed, with costs, on the ground that there was no proof of negligence to submit to the jury."

In *St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491, 71 N. E. 56, the court says:

"It does not appear that the boathouse was placed upon the premises under any contract, invitation, or permission to which the appellants were parties; and, if any duty on their part to exercise care with reference to the boathouse existed, it must be based on some other reasons. If such damages occur to the owner of neighboring land, or to one occupying such land in the accomplishment of some lawful purpose by agreement with the owner (as in *Lynds v. Clark*, supra), the proprietor whose structure, by reason of its insecurity, has caused the damage, will be held to have been bound to exercise reasonable care and skill, both in the original construction and in the inspection and the repairing of such structure; but this rule cannot be applied here in the determination of the question as to the sufficiency of * * * demurrer, for the facts which would make it applicable are not sufficiently stated."

Of course, this case went out on a general demurrer to the petition. The case referred to in the notation as *Lynds v. Clark*, supra, is *Lynds v. Clark*, 14 Mo. App. 74.

We have quoted from the two cases above, which are cited by the appellant, as fair examples of the authorities cited by them.

All of the cases cited by appellant are distinguishable from this case in one of two ways, i. e.: There was not sufficient pleading to charge the defendant with duty to a trespasser or licensee, or that no mutuality of interest existed between plaintiff and defendant.

In the instant case, plaintiff pleads elaborately, interest of all parties in the work being performed by him, and invitation and acquiescence in his traveling over the tramroad in the motor car, as he did; in fact the pleadings are so full and exhaustive that no exception was seriously urged to them.

Mr. F. J. Womack testified: That he represented the interests of the Foster Lumber Company in Texas. That the contract with the Kirby Lumber Company was verbal. That he made a contract with the Kirby Lumber Company to furnish it with hewn ties, which the Foster Lumber Company was to stack on the right of way of the Foster Lumber Company tram, wherever it happened to have a track, and they were to pay the Foster Lumber Company so much a tie for the ties. That the Kirby Lumber Company was to furnish the Foster Lumber Company with specifications by which to make the ties, and the Kirby Lumber Company was to have them inspected once a month. That there was nothing in the contract with reference to the manner of inspection or how it was to be done, or by whom. That it did not concern the Foster Lumber Company who

inspected them, as long as the Kirby Lumber Company had them inspected. That the Foster Lumber Company did not know the Santa Fé at all. That it was trading with the Kirby Lumber Company, and it made no difference who McNeely (agent of Kirby Lumber Company) sent out. Nothing was said about furnishing of transportation or means of transportation for inspecting. Mr. McNeely was to furnish the tie cars to move the ties from the right of way. That the Foster Lumber Company had nothing to do with the inspection of the ties at all. That the Foster Lumber Company employed tie makers to go out in the woods and hew the ties out, and employed other men with wagons to haul them up to the right of way. That in pursuance with the agreement with McNeely, the Foster Lumber Company went ahead and furnished ties and inspected them on the right of way, and when the Kirby Lumber Company brought the car out they let them load the ties and the Foster Lumber Company took its locomotive and pulled them up to the railroad company's line. That when the inspections were made by the railroad company, a representative of the Foster Lumber Company accompanied the party that made the inspection. That the Foster Lumber Company's agent, who accompanied the inspecting party, was Mr. Hamblen. That the Foster Lumber Company was interested in the inspection to the extent that the Kirby Lumber Company had agreed to inspect these ties, and, of course, they wanted them inspected, but supposed if they had not done so, the Foster Lumber Company would have been in the same position. That the Foster Lumber Company put out the ties under the instructions of the Kirby Lumber Company.

He testified further on cross-examination:

"We were furnishing the Kirby Lumber Company ties from some time in 1911 up to the time of the accident. During that time I was part of the time at Houston and part of the time at the mill. I have never been there while they were inspecting ties. The only time I was out there was while they were loading ties after they had been inspected. The Kirby Lumber Company furnished the locomotive and our engineer operated the locomotive and hauled the ties over the track and then turned them over to the Santa Fé. We were not using this track (on which plaintiff was hurt) all the time. Just prior to the time we had not used the track for loading except just occasionally. About once a month it was necessary for us to use it for loading ties out of there. When we needed the track we needed it mighty bad, but if we had not had the track we would have put the ties somewhere else. We did put the ties along that track and we wanted to preserve that track. Mr. Hamblen is here to speak for himself as to whether he knew they were using that motor car on that track. He was supposed to go along. I never refused permission to the Santa Fé or Kirby Lumber Company to use the motor car on this track; I was never asked. In a way the Foster Lumber Company was interested in the inspection of the ties. The contract called for the inspection of the ties. I guess the contract could have been performed without the inspection of the ties. I heard while the ties were being taken up there that the Kirby Lumber Company was re-selling them to the Santa Fé."

Our contract provided that the ties were to be inspected by the Kirby Lumber Company once a month. They were to inspect the ties right on the ground where they were stacked. I suppose the most convenient way of getting from place to place on that track was to take the locomotive. And in answering the question as to which would be, I suppose it is true that with four or five men going along to inspect the ties, the most economical and quickest way would be by gasoline-propelled vehicle. It is cheaper to run than a locomotive. I suppose the locomotive is more likely to break down a rotten track than a motor is. The locomotive is heavier. I believe I said I was interested in having those ties inspected. I was interested. I got my money after the inspection of the ties; my contract called for that. In a general way, if there was delay in the inspection, it would delay us in getting our money. The contract was to inspect the ties once a month. We could not have settled with the tie makers without inspection of the ties. Our contract called for them to make the ties in accordance with the specifications. The ties had to be inspected before we could get our money. We contracted to have them inspected. The Kirby Lumber Company was supposed to inspect them and contracted to do it, and I was interested in having them do it, and contracted to have them do it. To a certain extent, I had a financial interest in the proper inspection of the ties."

E. C. Smith, manager of Foster Lumber Company mill, testified: That he did not know whether it would be deemed a delivery of those ties under their contract with the Kirby Lumber Company when they were inspected, or when they loaded them. That he supposed it would be deemed a delivery on inspection, because they would get their report on them then. That they got a report on ties each month that they were inspected. That they got their report from Mr. Hamblen and would get a copy of the report from the inspector. That they knew it was the custom of the Kirby Lumber Company to go out in a motor car to inspect the ties, and that he knew that they ran over the Foster Lumber Company's track. That he knew all the time before the accident, during the time they had been furnishing ties to the Kirby Lumber Company, that the inspector and the checker were coming on that motor car over their track for the purpose of inspecting the ties. That he knew they had been coming over that track for this purpose for about two years before the accident, and that after the accident they did not prohibit those men from coming back over there and inspecting ties, and that they could have stopped them from coming over their track in the motor car had they desired to do so. That they had no reason to stop them. That he was manager of the company and knew the ties had to be inspected, and that the company would not get its money until after the inspection, and sometimes not then. That he guessed the company expected them to come and inspect the ties, and in a way he would think the company was interested and had them come and inspect the ties. That that was the custom for them to come and inspect the ties, and that they knew the ties were going to be inspected, and loaded out,

and that if they had not come to inspect them once a month they would have been inquiring what was the reason. That they stacked the ties along the tramroad for the Kirby Lumber Company, to enable them to load them out on the cars and for them to be hauled over the tramroad, in order that they might be conveniently inspected. That he knew the inspector would not go out in the woods where the tie makers were at work and inspect the ties. That they put them along the railroad for the purpose of enabling the inspector to get at them conveniently.

"We put the ties out there expecting they would come, and they did come. We put the ties out there for the purpose of being inspected. We knew we were not going to get our money until they were inspected. I knew they were coming on the motor car. * * * I knew when the inspections were made that the Kirby Lumber Company had a man to run the car and I knew we were likely to have a representative on the car. We generally had a man on the job as inspector. Our man, Hamblen, was the man that went on those inspection tours. Mr. Hamblen usually met the motor car at Cleveland or Fostoria and made the trip with them. We generally knew about when the car was ready to make the trip; they would notify him. Mr. Hamblen was on the car the day it was wrecked. He is here in court. It was a custom and habit to meet this motor car and the motor car would carry them over the line and he would show them the ties."

J. G. Hamblen testified: That he had been in the employ of the Foster Lumber Company 15 years, and was employed in the tie department in 1913, and that it was his duty to have the ties made and to put them on the road. He knew a contract existed between the Foster Lumber Company and the Kirby Lumber Company for the making of ties during the period mentioned, and that he generally went with the man who inspected the ties, who generally came once a month. That he accompanied the inspections that took place in 1913 on the Foster Lumber Company's tram between Fostoria and Midline, and that Rodgers, Matthews, Winters, Sparks, and himself made the trip together. That they went on the motor car, and that he got information that the car was coming from notice of the Kirby Lumber Company tie checker. That he understood that Rodgers was the inspector for the Santa Fé Company. He knew that he claimed to be the Santa Fé inspector. That he put the ties on the right of way because it was according to the contract the Foster Lumber Company had with the Kirby Lumber Company. That the purpose of stacking them along the right of way was to enable the purchaser to come there and inspect them, and that he knew it had been the custom to come in the motor car. That he had been notified that they would be along the railroad on this motor car. That he knew they were coming along that tram track on the motor car to inspect the ties that were stacked along the track. The motorman would ask him where he had ties, and he would

tell the motorman. That the ties were put along the track under his supervision, and that it was his understanding that Mr. Rodgers was there to inspect the ties.

W. P. Matthews testified: That he was on the car the day Rodgers was injured, and Mr. Hamblen, the Foster Lumber Company's inspector, showed them around where the ties were to be found. That he had not gone over that track without his being along with him to show him where to go. That he never went over that track without a representative of the Foster Lumber Company. That he was checker for the Kirby Lumber Company, and that it never happened while he was checker that Mr. Hamblen or some other representative of the Foster Lumber Company was not along, and that he checked there four months.

J. B. Rodgers, appellee, testified: That he was tie checker for the Gulf, Colorado & Santa Fé Railway Company. That he made his first trip in October or November, 1911. That he rode over the road of the Foster Lumber Company up around Fostoria. That the accident occurred in February, 1913. That he was over that road every month once a month. That he would run out there and make inspections. That the accident occurred after they had made the inspection for that trip. That they had made the inspection. That he had passed over the road before the accident occurred, and that the rails had not sprung, or at least had not spread sufficient to cause the car to go in the ditch. That he had run over that track once a month for 22 or 23 months, and that he did not operate the car on the date of the accident, but a Mr. Sparks operated it. That Mr. Sparks was motorman for the Kirby Lumber Company. That he went down to inspect the ties at the instance and request of the Kirby Lumber Company, and that all he knew was that it was customary for him to get on the car and ride out when these inspections were made.

Sparks, the motorman of the car, testified: That he was hired by the Kirby Lumber Company to run the inspection car, and by virtue of their authority he ran over the particular track. That a representative of the Foster Lumber Company met them and they took him over the track. That the Kirby Lumber Company furnished the car, but that the representative of the Foster Lumber Company directed them over the track, and invited them on the track. That he was there at his invitation and by his consent, and performed the duty of inspecting ties for the benefit of this company, among others. The representative of the Foster Lumber Company told him where to stop and what ties to inspect, and directed his movements. That the gentleman who represented the Foster Lumber Company would flag him down whenever he wanted them to inspect ties. That he was working under his orders,

in a way. That he never objected to his going on that track. That he knew he was doing it. That it had been customary with them to run that car on that track to inspect ties. That he did not know whether the Foster Lumber Company could have gotten those ties inspected in any other way or not. That it was most convenient and the quickest way to inspect them, and that they joined in with them to inspect them that way and had their representative along on these trips. That they always had a representative along at all times.

[1] Under these facts, it is clear and undisputed that Rodgers had been over the appellant's tramroad many times for the same purpose and in the same capacity he was acting when he was injured. The Foster Lumber Company knew this and its agent accompanied him on these trips. The undertaking was mutual and for the benefit of all the parties. Such being true, the Foster Lumber Company was under further obligations to Rodgers than to a trespasser or a mere licensee. It was under obligations to him to use ordinary care to keep its railroad in a reasonably safe condition for him to pass over when performing the work.

It was necessary for the ties to be inspected before appellant could get pay for them. The ties were placed along the tram by the appellant to be inspected. These inspections had been going on, under the conditions, for two years. Each time the motor car went over the track, a representative of appellant was on it, and directed its movements. The Gulf, Colorado & Santa Fé Railway Company's agent, after inspecting the ties, made triplicate reports, one for the appellant, one for the Kirby Lumber Company, and one for his own company, and upon these reports appellant received its money.

Under these facts, can it be said, the inspector was a trespasser or mere licensee? We think not. It is true that the contract did not designate who the inspector should be, nor how he was to get to the ties to inspect them; but it did provide for an inspection, and the inspection was to be performed by some one chosen by the Kirby Lumber Company, and the fact that the Foster Lumber Company piled the ties on its tram for inspection and knew that the Kirby Lumber Company was selling the ties to the Gulf, Colorado & Santa Fé Railway Company, and the Gulf, Colorado & Santa Fé Railway Company's inspector was doing the work of inspection, and had been so inspecting for 2 years, would be sufficient to warrant a finding that Rodgers was an invitee, but when, in addition to these pertinent facts, it is shown that the appellant always had its agent on the motor car on these inspection trips and directed the motorman where to go and where to stop, we think such facts fix the status of Rodgers as an invitee working to a common purpose for the benefit of all parties concerned, and un-

der such conditions, the appellant was bound to use ordinary care to keep its tramroad in a reasonably safe condition for the motor car to pass over. Such being the case, Rodgers was on the tramroad not only by permission or acquiescence, but as an invitee, and did not assume the risk of injury incident to the negligence of the appellant in maintaining a defective road.

While the contract did not provide who the inspector was to be, yet it did provide for inspection, and the inspection had to take place before appellant could receive any pay for its ties; therefore inspection was not only incident to but a part of the contract, and Rodgers, in performing the inspection, was doing a work incident to the contract and for the benefit of all of the parties concerned; therefore the Foster Lumber Company had mutual interest in the work Rodgers was doing, and owed him the duty of ordinary care to keep its track in a reasonably safe condition for him to pass over to perform this work.

It follows from what has already been said that it would have been error for the trial court to have given appellant's first requested instruction.

The difference between a licensee and an invitee has taxed the capacity of the best legal talent, both text and opinion writers. However, under a statement of facts as in the present case, authors are almost, if not unanimously, agreed.

In *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, the Supreme Court of that state fixes the rule thus: One who goes on the premises of another for his own convenience, or pleasure, or matters which concern him alone, even though by permission of the owner of the premises, is a licensee and the owner of the premises owes him no duty other than to not willfully or maliciously injure him; but one who goes upon the premises of another by the invitation of the owner of the premises, either express or implied, in the performance of work mutual to the interest of the person going upon the premises, the owner of the premises owes him the duty of keeping such premises in a reasonably safe condition for his use while performing such work. See, also, authorities cited in this case.

Mr. Street, in his splendid work on *Personal Injury* (page 178, § 104), states the rule thus:

"It may be stated generally that it is the duty of the owner, occupier, or controller of premises to use due or reasonable care for the safety of persons present by his actual or implied invitation, such as a person of reasonable or ordinary prudence would use under the circumstances; this duty extends to reasonably safe guidance or caution against injury from things dangerous in themselves, as open and unguarded trapdoors, elevator shafts, chutes, excavations, and blasting, and to things dangerous in their use, such as machinery in operation, to prevent unnecessary or unreasonable exposure to danger. Customers having business with the

owner or occupier, workmen, or third persons lawfully using the dock warehouse and railroad yards and appliances provided by the owner or occupier, are present by implied invitation, and while using the premises in the usual way and at reasonable hours, the duty stated is owing to them by the owner, occupier, or controller. Where an injury is caused by machinery on defendant's private premises, the existence of a duty to exercise care depends on the owner's or occupier's express or implied invitation to the injured party to enter on the premises. Whether such duty is owing to mere visitors in ordinary social intercourse, would probably depend upon whether they could fairly be said to be present by invitation. *T. & P. Ry. Co. v. Watkins*, 88 Tex. 20, 29 S. W. 232."

In section 106 he says:

"Persons entering for their own pleasure or advantage on the premises of another by the permission, express or implied, of the owner or the occupier, are licensees. They take the premises as they find them; a mere naked license imposes no duty on the owner or occupier to provide against dangers or accidents growing out of unsafe condition of the premises."

Thus it will be seen that this writer draws the distinction between a licensee and an invitee from the standpoint of the mutual interest in the work under consideration. *Words & Phrases*, Second Series, vol. 2, pp. 1190, 1193.

Mr. Cooley, in his splendid work on *Torts* (3d Ed.) vol. 2, p. 1258, says:

"It has been stated on a preceding page that one is under no obligation to keep his premises in safe condition for the visits of trespassers [citing many authorities]. On the other hand, when he expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

Again, on page 1265, this able author says:

"An invitation may be inferred when there is a common interest of mutual advantage, a license when the object is the mere pleasure or benefit of the person using it. A United States revenue officer assigned a duty in a distillery and required to visit all parts of same daily, is there at the implied invitation of the owner—citing *Anderson & Nelson Dis. Co. v. Hair*, 103 Ky. 196 [44 S. W. 658]."

It has been decided by eminent authority that where a city and light company use each other's poles for electric wires, there is an implied invitation by each to the servants of the other to use its poles, and care is owed accordingly. *Barker v. Boston Electric Light Co.*, 178 Mass. 503, 60 N. E. 2; *Mackie v. Heywood & M. Rattan Co.*, 88 Ill. App. 119.

So, too, Judge Townes, in his estimable work on *Torts*, pages 224-234, announces the doctrine of liability to one legally upon the private property of another, in the following language:

"As these persons have a legal right to enter the premises, their coming onto it does not make them wrongdoers, and beside, as this right exists, the owner would ordinarily be charged with notice of the fact that the right may be exercised, at proper times and in proper ways. He must, therefore, maintain the premises with a view to this right, and as a rule could not excuse the bad condition of the premises by saying he was not expecting the entry at the time it

was made. The nature and extent of the right to enter *depends in each case upon the facts*, and in each instance these must be taken into account in determining the degree of care and the fact or not of its exercise. Again, a person may have the right to go upon one part of the premises and have no such right as to another part, or a right to enter at one time of day but not at another. These matters are all determined by the facts of the case. But granting that the person is on the premises in the exercise of a legal right then existing in him, the duty of the owner of the premises toward him is to use ordinary care to have and keep the premises in such condition that the person so rightfully thereon will not be injured by them. If he does this he is not liable for any injury received. If he does not do this, and the person on the premises in the exercise of a legal right is injured on account of an unsafe condition, without negligence or other legal fault on his part, he can recover."

Again, on page 231, he says:

"The owner of property or one responsible for its condition must use reasonable and ordinary care to keep it in such condition as not to injure persons rightfully thereon in response to invitation. What facts constitute such care must be determined by the circumstances of each case. Among these circumstances to be considered are the conditions under which the injured person entered. If he came at a time previously agreed upon between him and the person in charge of the premises, or at such a time as such person had reason to expect him, this should be taken into account in determining the question of care. If he comes under implied license, under circumstances not carrying any notice as to his prospective presence, this may be looked to in the question of determining reasonable care."

Mr. Webb (Webb's Pollock on Tort [Enlarged American Edition] pp. 627, 628) thus announces the rule:

"It is hardly needful to add that a customer, or other person entitled to the right measure of care, is protected not only while he is actually doing his business, but while he is entering and leaving.

"And the amount of care required is so carefully indicated by Willes, J., that little remains to be said on that score. The recent cases are important chiefly as showing in respect to what kind of property the duty exists and what persons have the same rights as customers. In both instances the law seems to have become on the whole more stringent in the present generation. With regard to the person, one requires this right to safety by being upon the spot, or engaged in work on or about the property whose condition is in question in the course of any business in which the occupier has an interest. It is not necessary that there should be any direct or apparent benefit to the occupier from the particular transaction.

"Where a gangway for access to ships in a dock was provided by the dock company, the company has been held answerable for the safe condition to a person having lawful business on board one of these ships, for the provision of access for all such persons is a part of a dock owner's business; they are paid for it by the owners of ships on behalf of all who use it.

"A workman was employed under contract with the shipowner to paint his ship lying in a dry dock, and the dockowner provided the staging for the workman's use; a rope by which the staging was supported, not being of proper strength, broke and let down the staging and the man fell into the dock and was hurt; the dockowner was held liable to him.

"It was contended that the staging had been delivered into the control of the shipowner and became as it were part of the ship; but this was held no reason for discharging the dockowner

from responsibility for the condition of the staging as it was delivered. Persons doing work on ships in the dock must be considered as invited by the dockowner to use the dock and all appliances provided by the dockowner as incident to the use of the dock."

In *Bennett v. Railway Co.*, 102 U. S. 577-586, 26 L. Ed. 235, Bennett, the appellant, was a traveler on the railroad from Vernon to Danville, Tenn. At Danville he was to take boat. The railway company had constructed a plank gangway to the wharf boat, where the passenger boat landed. A stationary engine was used at the wharf to draw loads, merchandise, etc., from the boat through hatchways. Bennett heard the whistle of the passenger boat and hurriedly left his hotel, with a lighted lantern, and, by direction of the hotel proprietor, took the gangway across the marshy ground between the hotel and the wharf boat. The wind blew his lantern out, but being able to discern the plank walk he proceeded to the wharf boat; but upon arriving stepped into one of the unguarded hatchways and was injured. His trip and paid passage on the railroad had ended; but mutual interest between the railway company and the navigation company was pleaded. Demurrers to the petition were sustained by the trial court, and Justice Harlan, in passing upon the case, in his opinion said:

"The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule, founded in justice and necessity, and illustrated in many adjudged cases in the American courts, that the owner or occupant of land who, by *invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons* [Italics ours, except word "invitation"], they using due care, for injury occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation—citing *Railway Co. v. Hanning*, 15 Wall. (82 U. S.) 649 [21 L. Ed. 220]; *Carleton v. Iron & Steel Co.*, 99 Mass. 216; *Sweeney v. Railway Co.*, 10 Allen [92 Mass.] 368 [87 Am. Dec. 644]; *Warrenton on Negligence*, §§ 349, 352; *Cooley on Torts*, 604-607, and authorities cited by those authors."

We have already cited Mr. Cooley in a later edition of his work.

"The last-named authority says that when 'one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.'"

In the same opinion, this able jurist says:

"It is sometimes difficult to determine whether the circumstances make a case of *invitation*, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'"

The rule seems to be well settled that facts such as are presented in this case make Rodgers an invitee, and, further, his work was to the mutual interest of all the defendants, and his work was an incident to the performance of the contract among them, and such being true, the Foster Lumber Company owed him the duty of ordinary care to keep its tramroad in a reasonably safe condition for him to pass over to get to the ties where the Foster Lumber Company had collected them on its tramroad for inspection. Appellant's first, second, third, fourth, and fifth assignments of error are therefore overruled.

Appellant's sixth assignment of error is as follows:

"The trial court erred in giving that part of his charge to the jury reading as follows: 'A licensee is one who is on the premises of another without an invitation, either express or implied, for his own pleasure or convenience, but with the consent or acquiescence of the owner of the premises,' for that the same does not give a complete definition of the term 'licensee,' in this: That if one is upon the premises of another without invitation, express or implied, whether he is there for his own pleasure or convenience, or in the performance of a duty for another than the owner of the premises, he is still a licensee; to the giving of which this defendant filed its exception."

He presents under this assignment the following proposition:

"An uninvited person on the premises of another, by consent or acquiescence of the owner, is a licensee, whether there for his own pleasure or convenience, or in the performance of a duty for another than the owner; and if plaintiff was upon the tramroad of the Foster Lumber Company in the performance of a duty or obligation for or to the Gulf, Colorado & Santa Fe Railroad Company, or Kirby Lumber Company, he was still a licensee as to the Foster Lumber Company, and under the circumstances of this case the omission to give such definition to the jury was prejudicial error as to the Foster Lumber Company."

This proposition is followed by the following statement:

"The charge of the court on page 23 of the transcript, showing the language of the court as quoted in the assignment.

"Exceptions filed and found on page 26 of the transcript.

"Sixth assignment of error in motion for new trial, page 41 of the transcript.

"Bill of exceptions No. 1, taken to the overruling of the exceptions entered to the charge, page 48 of the transcript.

"The court is also referred to statement under first assignment of error, showing that plaintiff was in the employ of the railroad company, and acting under the contract between railroad company and the Kirby Company, and at the time of the accident was in the performance of such employment and duty, and was there in the interest and for the benefit of said railroad company, and Kirby Company."

Then follows the seventh, eighth, ninth, tenth, and eleventh assignments of error, each of which is followed by similar statements as is presented under the sixth assignment.

The appellee has raised objection to the court's consideration of each of these assignments of error, on the grounds:

(1) That it does not appear from the state-

ment thereunder that any objections were filed to this part of the court's charge, or, if any objections were filed, what those objections were; wherefore the statement in support of the proposition under said assignment is wholly insufficient.

(2) Because the statement thereunder does not show that any exceptions were filed to said part of the court's charge before the court read its charge to the jury, nor when said objections, if any, were filed thereto.

(3) Because said statement thereunder does not show when the exceptions, if any, were taken to the overruling of objections, if any, to the court's charge.

(4) Because said statement does not set out the evidence pertinent to said issue, nor does it refer to the pages of the statement of facts where same can be found, but merely refers to another statement, without even referring to the pages of the brief, on which said other statement can be found.

[2] Under these four objections, it has been held many times by the appellate courts of this state that a statement which merely refers the court to pages of the record is insufficient. The substantial matter referred to must be set forth in the statement, and should be followed by reference to pages of the record.

For authorities pertinent to these objections, see *Lupton v. Willmar*, 154 S. W. 261; *Griffin v. State*, 147 S. W. 328; *Railway v. Olds*, 112 S. W. 787; *Vann v. Denson*, 56 Tex. Civ. App. 220, 120 S. W. 1020; *Stockwell v. Glaspey*, 160 S. W. 1151.

As to authority on statement failing to show exceptions filed, see article 1971, *Vernon's Sayles' Civ. Statutes*; *Gillett v. Hooligan*, 162 S. W. 367; *Railway Co. v. Reed*, 165 S. W. 4; *Carlock v. Willard*, 149 S. W. 363; *Hulme v. Levis-Zuloski Mercantile Co.*, 149 S. W. 781; as to time of taking exceptions, see *Gillett v. Hooligan*, 162 S. W. 367; *Railway Co. v. Reed*, 165 S. W. 4; and as to the statement not setting out the facts pertinent to the issue, see *Moore v. Miller*, 155 S. W. 573; *Fuel Co. v. Ellis*, 162 S. W. 911; *Bute v. Williams*, 162 S. W. 989; *Daugherty v. Wiles*, 156 S. W. 1089.

This court has been very liberal in its consideration of assignments of error where objections have not been urged to them, but it has been decided a number of times by our appellate courts that where objections are urged, and the brief is not in accordance with the rules, as promulgated by the Supreme Court and by the statute, that the appellate court has no alternative in the matter, if the objections are well taken, other than to decline to consider the assignments. See *De Lay et al. v. Wolfarth*, 154 S. W. 1081; *El Paso Electric Ry. Co. v. Lee*, 157 S. W. 748; *Greene Gold-Silver, etc., Co. v. Silbert*, 158 S. W. 803; *Cain v. Delaney*, 157 S. W. 751. However, a casual reading of each of appellant's assignments of error, be-

ginning with the sixth and including the eleventh, discloses that our disposition of the first five assignments of error would dispose of these assignments, if no objection was urged to them.

Appellant's twelfth assignment of error is: "The amount of the verdict is excessive, showing that the same was rendered under the influence of passion."

The statement following it is:

"Fifth assignment of error in motion for new trial, page 41 of the transcript."

And following this is a lengthy statement of the testimony pertinent to this assignment, which we will not attempt to copy in full, but take extracts from the testimony as quoted in the statement more directly as to this issue.

Dr. J. T. Roberts testified that the kneecap was dislocated for half or three-fourths of an inch; that part of the quadriceps extenso muscles of the kneejoint were partially torn loose, and that that muscle had all to do with the extension of the knee; that it was the muscle that controlled the power of a man's knee, and bends it backward and forward; that it is a primary muscle in controlling that movement and the effect of tearing that muscle partially loose is to impair a man's ability to walk; that he found also an extravasation of the synovial fluid below the joint capsule; that the synovial fluid is the fluid that belongs in the kneecap, and is for the purpose of lubricating the kneejoint, and that in plaintiff's case the fluid is leaking out and wasting away, and that such leaking makes it hard upon plaintiff's power to walk and ability to get around on his feet, and involves both pain and difficulty; that the effect is to prevent plaintiff from being active on his feet like a man that has to do manual labor; that he could get around as long as some of the synovial fluid is left, but after it is all gone, it would be almost impossible for him to get around; that in view of the fact that plaintiff was injured in 1913, and has been limping ever since in connection with the condition as he found him in, in his opinion plaintiff's injuries are permanent; that the muscle that he spoke of is practically torn away, and that if it was entirely torn away, plaintiff would not have any extension; that by the term "extension" he meant the ability to raise the leg; that he would say that the plaintiff has about 40 per cent. or something like that of extension as compared with the normal extension, and that he thought that about two-thirds of the tendon is torn loose, but that that was an estimate; that the part where the muscle was torn off had healed, but it is not in apposition—that is, not in normal position; that he could not tell whether the loss of the leakage of synovial fluid had stopped or not, but so far as he could tell he did not think the loss was stopped now, because there is still a swelling in the joint; that plaintiff

could walk, but it would be painful, and the more he worked, the worse it would be.

Rodgers testified that he was a little past 42 years old, and had been engaged in the timber business inspecting, and that his work required manual labor and activity; that he was hurt about the middle of February, 1913, and since that time he had not performed the duty of the inspector to what he should do it. For a while he could hold a job, but would soon lose out, because unable to do the work; that he had been in no physical condition to hold a job as the inspector since he was injured, and was not at work at that time; that he had earned some money just about half the time since he was injured; that he had had a trial at three or four different jobs, but only had one that he had for any length of time; that he could not make a full hand at anything that required activity on his feet and strength in getting about; that a part of the time since he got hurt, he walked on a crutch, and part of the time with a stick, and since then he had just been hopping about the best he could; that in walking he carried his left leg stiff in order to keep from bending it too much; that his knee would bend, but it hurt when he bent it; that he had suffered pain as a result of the injury; that he did not believe there had been three hours during any day but that his knee bothered him, and that sometimes he was awake until 2 or 3 at night bathing it and keeping hot towels on it; and that his shoulder was hurt and bruised at the same time his knee was hurt, but his shoulder had gotten all right, except that when he went to use an axe his shoulder hurt; that at the time of the accident he had a "mighty" bad bruised-up knee and bruised-up shoulder, and skinned up all over; that when the car stopped he was lying on the ground, fell in among the ties; it was knocked off, and he was trying to run to keep the car from getting on top of him; that he was conscious at the time and that they helped him up and got a wagon and hauled him into Cleveland.

The doctor also testified:

"When I say that plaintiff's injury is permanent, I mean that he will always be crippled in that kneejoint. He will never have the full use of it."

[3] We do not think, under these facts, it can be said that the jury did not have evidence sufficient to warrant a finding in damages for the plaintiff in the sum it did find. This prerogative belongs, peculiarly, to the jury, and appellate courts should not disturb the finding, unless the record discloses that the jury has abused its authority or has been unduly influenced in some manner, and the record clearly shows it to be excessive. *I. & G. N. Ry. Co. v. Brett*, 61 Tex. 483; *San Antonio & A. P. Ry. Co. v. Long*, 28 S. W. 214; *G., C. & S. F. Ry. Co. v. Silliphant*, 70 Tex. 623, 8 S. W. 673.

In the last-cited case, the appellee, Silliphant, suffered a permanent injury and suf-

ferred great pain and he secured a judgment of \$10,000, and Justice Walker, writing the opinion for the Supreme Court, says:

"The verdict is large, and it is claimed to be excessive. The expert medical testimony is contradictory as to the probability of final and complete recovery by plaintiff from the effects of his injuries. That his injuries were serious, his loss of time great, and his physical pain intense and protracted, is not in dispute. The amount is not so great as to show prejudice or misconduct on part of the jury"

—citing *Heath v. Garrett*, 50 Tex. 266, T. & P. Ry. Co. v. O'Donnell, 58 Tex. 42, Galveston Oil Co. v. Malin, 60 Tex. 646, I. & G. N. Ry. Co. v. Brett, 61 Tex. 484, *Manchaca v. Field*, 62 Tex. 135, and *T. & P. Ry. Co. v. Hardin*, 62 Tex. 368; and the Supreme Court affirmed the judgment.

It seems to be the rule that before appellate courts will disturb a finding of a jury as to amount of damages, it must appear clearly that the amount is excessive.

In *Railway Co. v. Porfert*, 72 Tex. 353, 10 S. W. 207, the Supreme Court, in passing upon an assignment that the damages were excessive, the judgment being for the sum of \$14,167, said:

"The verdict was large, but not so clearly excessive as to require us to set it aside after it has been approved by the trial judge"—citing *Railway Co. v. Dorsey*, 66 Tex. 148 [18 S. W. 444]; *Railway Co. v. Garcia*, 62 Tex. 292, and other authorities.

There is nothing in this record to show any undue influence over the jury or any prejudice against the defendant, or bias in behalf of the plaintiff, and under the facts of the case, we do not think that the amount awarded by the jury, though large, would require a reversal of the case upon the assignment of excessive damages. Appellant's twelfth assignment is overruled.

[4] No appeal is perfected in this case by the plaintiff against the judgment in favor of the Kirby Lumber Company, nor were there any cross-pleadings between any of the defendants. Such being the case, the Kirby Lumber Company is entitled to have the judgment in its favor affirmed, and its attorneys have filed its motion in this court asking that such be affirmed, and such motion, we think, is well taken, and that part of the judgment would be affirmed in any instance. Authorities: *Hamilton & Co. v. Wm. Prescott*, 73 Tex. 565, 11 S. W. 548; *Anders v. Spalding*, 44 S. W. 298; *Wimple v. Patterson*, 117 S. W. 1037; *H. E. & W. T. Ry. Co. v. Moyer*, 128 S. W. 1135; *O'Donnell v. Kirkes*, 147 S. W. 1167.

This disposes of each issue presented to us for review, and no error appearing, we are of opinion that the case should be affirmed; and it is so ordered.

On Motion for Rehearing.

Appellant, in its motion for rehearing, complains of the findings of fact, as stated by this court in the original opinion, as follows:

"In the presentation of the facts by the court, the following is said:

"J. B. Rodgers, tie inspector, made reports of his inspection to the Gulf, Colorado & Santa Fé Railroad Company, to the Kirby Lumber Company, and to the Foster Lumber Company, and upon these reports of inspection by Rodgers, the Kirby Lumber Company and Foster Lumber Company each got pay for the ties.

"In this statement, so far as the Foster Lumber Company is concerned, I think it was an error, in this, that the evidence shows that the inspector did not make any report to Foster Lumber Company, but in his report to Kirby Lumber Company, it was stated what ties came from the Foster Lumber Company tram, and what came from other places, but neither the report of inspection or a copy thereof was sent to Foster Lumber Company. This you will find in the testimony of T. E. Heath on pages 11-12, statement of facts."

Following this statement, appellant's counsel says this ought to have a material effect, for, instead of showing there was a recognized relation between Foster Lumber Company and the railroad company, the exact opposite appears.

By reference to pages 11 and 12 of the statement of facts, we find the following testimony by Mr. Heath:

"D. J. Flaven represented the Kirby Lumber Company at Silsbee in arranging to have these ties inspected. As to whether or not the Kirby Lumber Company was buying the ties from the Foster Lumber Company to fill its contract with the railroad—we give the Foster Lumber Company a certificate for them. I don't know whether I signed the certificate upon this occasion, or Mr. Rodgers. I do not think I have got the report here. I have no copy of that report, but I presume Mr. Rodgers signed the report; if he did not, I did.

"Whenever I made an inspection over there and finished the inspection I gave the Foster Lumber Company a certificate of so many ties taken up on that tram, to apply on the Kirby Lumber Company contract. I do not know how many ties we took up on the Foster Lumber Company tram on the trip when Mr. Rodgers was injured. The report shows we took up 1579 ties on said trip.

"As to whether or not the Foster Lumber Company knew that these ties had to be inspected before they could get their money for them—it was customary to have them inspected, with the Foster Lumber Company and the Kirby Lumber Company and the Santa Fé. They all knew about that custom and acted upon it."

Appellant complains again at the following language used in the statement of the case in the original opinion:

"The Foster Lumber Company could have taken the tie inspector out on the tramroad with its locomotive, but did not do so, and the gasoline motor car was a better and more economical way of getting out to the ties to inspect them, and was much lighter on the tram than the locomotive."

On pages 60 and 61 of the statement of facts, Mr. Wornack, the Foster Lumber Company's man, testified as follows:

"I suppose the most convenient way of getting from place to place on that track was to take the locomotive. Possibly the quickest and most convenient way would be either by motor car or by locomotive. * * * I suppose it is true that with four or five men going along to inspect ties, the most economical and quickest way would be by gasoline-propelled vehicle. It is cheaper to run than a locomotive."

On pages 18 and 19 of the statement of facts, Mr. Heath, testifying, said:

"We would have ridden an engine out to carry the inspector. The Foster Lumber Company could not have sold those ties to the Kirby Lumber Company and the Kirby Lumber Company sold them to the Santa Fé without having them inspected. The motor car was the customary method of transporting the inspector to the place where the ties were to be found. That was known to each of these companies, and acquiesced in by them and participated in by them."

On page 27 of the statement of facts, Mr. Flaven testified:

"It is true that when the Kirby Lumber Company's motor car would go out for these ties to be inspected, they would take the Santa Fé inspector on that motor car, and also the inspector of the person they were buying from, purely as a matter of convenience. They would have to do that or furnish transportation themselves. It was more convenient to do it that way than any other way. In some of the territory the situation was that the Kirby Lumber Company had a motor car and a man to run the car, and it was convenient for it to take its own men and also the Santa Fé man along with them. Some of the subcontractors had their own cars."

The testimony copied above, we think, warrants the statement complained of by appellant, but out of deference to appellant's counsel, we change that statement and make it read as follows:

"The inspector could have gone out on the tramroad in a locomotive, but did not do so, and the gasoline motor car was a better and more economical way of getting out to the ties to inspect them. It was much lighter on the track than the locomotive."

Appellant complains again of this statement by this court in the original opinion:

"The Gulf, Colorado & Santa Fé Railroad Company's agent, after inspecting the ties, made triplicate reports, one to the appellant, one to the Kirby Lumber Company, and one to his own company, and upon these reports appellant received its money."

Appellant's counsel says:

"This, I think, the court will find to be an error, and one which would change the entire relation of the parties. I am making these statements without having the statement of facts before me, but feel confident that they are right, and the court will so find them on more careful examination."

On page 35 of the statement of facts, Rodgers, testifying in his own behalf, said:

"It was my understanding that the Santa Fé was buying the ties from the Kirby Lumber Company, and that the Kirby Lumber Company was getting them from the Foster Lumber Company."

On page 36 he testified:

"I made out my report for hewn ties along the line of the G., C. & S. F. that I inspected as follows: We would tram them at the end of some subcontractor's division, and we would finish up the ties, and would set them down, and make out a certificate, and the Kirby Lumber Company's checker would sign it, and I also signed it, and the original was given to him (the subcontractor's agent) and the duplicate was sent to the Silsbee office, and when we finished our inspection and came in, we checked our books against the certificates and made out a general inspection sheet. When I was inspecting ties along the line of the G., C. & S.

F. I always sign my name as 'The Inspector G., C. & S. F.' I did not always put the 'G., C. & S. F.' on the certificate to the subcontractor, but when I signed the general certificate, I always signed it 'G., C. & S. F.' on it. The reports now shown me are carbon copies of some reports I made, and one is shown me that Mr. Heath made."

Mr. Womack, agent of the Foster Lumber Company, on page 57 of the statement of facts, testified:

"There might have been some reports signed by some Santa Fé inspector that was turned over to us from the Kirby Lumber Company; I don't know. I never saw one of those reports that were turned in."

Mr. E. O. Smith, manager of the Fostoria mill for the Foster Lumber Company, on page 71 of the statement of facts, testified:

"In February, 1913, the Foster Lumber Company had ties on the right of way of the tramroad, and they were inspected somewhere about the 15th or 18th of February. I do not know whether you would term a delivery of these ties under our contract with the Kirby Lumber Company when they were inspected, or when they were loaded up. I suppose you would term it a delivery on inspection, because we would get our report of them then. We got a report of the ties each month as they were inspected. We got that report from Mr. Hamblen, and we would get a copy from the inspector."

We think these facts quoted above, both from plaintiff's and from defendant's witnesses, fully warrant our statement of the case complained of by appellant's counsel.

We have carefully considered appellant's motion for a rehearing in this case. There is nothing new presented in it, nor any new authorities cited, and we see no reason for changing our view, as expressed in the original opinion.

Appellant's motion for rehearing is therefore overruled.

REPUBLIC TRUST CO. v. TAYLOR.* (No. 7536.)

(Court of Civil Appeals of Texas, Dallas. Jan. 15, 1916. On Rehearing, April 8, 1916.)

1. RECEIVERS \S 1.—APPOINTMENT—ANCILLARY REMEDY.

The appointment of receivers is an ancillary remedy in aid of the principal object of a litigation between the parties, and such relief must be germane to the principal suit, and a suit cannot be maintained where the appointment of a receiver is the sole primary object thereof, and no cause of action or ground for equitable relief is otherwise stated.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. \S 1; Dec. Dig. \S 1.]

2. CORPORATIONS \S 99(1)—SUBSCRIPTION TO STOCK—VALIDITY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. art. 12, \S 6, declaring that no corporation shall issue stock except for money paid, labor done, or property actually received, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, providing that any corporation violating such inhibition shall, upon proof thereof, forfeit its charter and all rights under the laws of the state, a subscription to the capital stock of a corporation on credit, accompanied by the simultaneous issuance and delivery of the stock,

was altogether void, and the buyer was not liable upon his notes given in payment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 444; Dec. Dig. § 99(1).]

3. BILLS AND NOTES § 375—RIGHTS OF HOLDER—ILLEGAL CONSIDERATION.

Where the consideration of a note given by a purchaser of the capital stock of a corporation was illegal under the constitutional and statutory provisions as to the sale of capital stock on credit, the note was void and its payment could not be enforced, even in the hands of an innocent purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. § 375.]

On Rehearing.

4. CONTRACTS § 103—VIOLATION OF STATUTE—PUBLIC POLICY.

When an act is prohibited by the fundamental law or by statute as a means for the protection of the public from fraud in contracts or to promote such object of public policy, all contracts in violation thereof are void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 468-476; Dec. Dig. § 103.]

5. BILLS AND NOTES § 375—PAYMENT FOR CORPORATE STOCK—VALIDITY OF CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 12, § 6, declares that no corporation shall issue stock except for money paid, labor done, or property actually received, and Vernon's Sayles Ann. Civ. St. 1914, art. 1146, provides that any corporation violating such provision shall forfeit its charter and all rights, etc., under the laws of the state. Held, that the provisions were intended to protect the public from fraudulent contracts and to promote public policy, so that notes given for capital stock sold and delivered on credit were void and unenforceable, even in the hands of a bona fide holder for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971-981; Dec. Dig. § 375.]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by the Republic Trust Company against H. O. Taylor, with answer asking for appointment of a receiver. Receiver appointed, and plaintiff appeals. Reversed and remanded.

S. P. English and F. W. Wozencraft, both of Dallas, for appellant. H. P. Edwards and Cockrell, Gray & McBride, all of Dallas, for appellee.

RASBURY, J. This appeal is prosecuted from an interlocutory order of the trial judge appointing a receiver for the affairs of appellant. The substance of the facts necessary to a disposition of the appeal are practically undisputed, and are as follows:

Appellant, Republic Trust Company, as we gather from the pleadings, is a private corporation incorporated under the laws of the state of Arizona, with a permit from the state of Texas to transact its business therein, although we do not find such facts otherwise established. On July 25, 1912, appellee, H. O. Taylor, as the result of negotiations with J. O. Everett, the agent of appellant, signed the following contract:

"This is to certify that I hereby purchase 333 1/3 shares of the capital stock of the Republic Trust Company, for which I agree to pay five thousand and no/100 dollars.

"I further agree that no statement, representation, or agreement or warranty made to me by the person taking this subscription shall in any way operate to cancel or annul this contract, unless the same be reduced to writing and filed in on the following line. This contract is subject to Ass't Director contract. Also a privilege of renewal for 6 to 12 months longer is allowed on notes.

"I hereby constitute and appoint C. L. Wakefield, of Dallas, Texas, my true and lawful attorney to represent me and vote my proxy, and I hereby ratify and confirm the acts of my said attorney until hereafter annulled by me in writing. This proxy is revocable at my pleasure. It is agreed and understood that 25 per cent. of the sale price of the stock of said company is to be expended for organization and promotion expenses.

"Dated this 25th day of July, A. D. 1912."

Simultaneously with the execution of the foregoing contract appellee also executed and delivered the following note and collateral agreement:

"On December 30, 1912, without grace, after date, for value received, I, we, or either of us, promise to pay to the order of A. Silver & Co. thirty-seven hundred and fifty and no/100 dollars, at the office of said company in Dallas, Texas, with interest at the rate of 6 per cent. per annum from date until paid, and in the event default is made in the payment of this note at maturity and it is placed in the hands of an attorney for collection or suit is brought on same, then an additional amount of 10 per cent. on the principal and interest of this note shall be added to the same as collection fees. The drawers and indorsers severally waive presentment for payment, protest, and nonpayment on this note. H. O. Taylor."

"As collateral security for the foregoing note, and other notes, if any, this day given for the stock hereinafter named, I have delivered to the Republic Trust Company the following securities: 333 1/3 shares of the Republic Trust Company. In case of default in the payment of any of the foregoing and above-described notes at maturity, I, we, or either of us authorize the holder of said note to sell said securities, with or without notice, at public or private sale, at the option of the holder, applying the proceeds to the payment of the above note, including interest and attorney's fees, and the surplus, if any, remaining thereafter to be paid to the maker hereof on demand. H. O. Taylor."

Simultaneously also with the foregoing appellee executed and delivered to appellant's said agent another note for \$1,250, payable to the same parties, and maturing evenly with the first note. Both notes while payable to A. Silvers & Co., were taken for the benefit and use of appellant, and represented the sale price of the 333 1/3 shares of stock described in the foregoing transactions. Everett, acting as agent for appellant, negotiated the \$1,250 note with a bank at Edna, Tex. The bank acquired the note before maturity for value. So the matter stood until October 15, 1915, at which time appellant commenced the instant suit on the \$3,750 note and collateral agreement, alleging that appellant acquired the note before maturity for value. Judgment was sought for the amount of the note, interest, attorney's fees, a foreclosure

of the lien upon the collateral security, and sale thereof under order of the court. Appellee by his answer admitted the execution of the note sued on, but denied liability on the ground that it was void because unlawfully given in payment of stock in appellant corporation sold and issued to him on credit and because obtained by fraud. By appropriate plea in reconvention appellee also sought affirmative relief against the \$1,250 note, alleging it also to be subject to same defenses urged against the \$3,750 note. Subsequently by amended answer he alleged the appellant to be insolvent or in imminent danger thereof, and sought the appointment of a receiver pendente lite. We have said that receiver was appointed. In addition to the facts recited the court also found as a fact that appellant's agent induced appellee to sign said two notes by certain false promises and representations; also that appellant was insolvent or in imminent danger thereof. Such findings are challenged as being without support in the evidence. The disposition of the appeal from our view of the issues does not depend upon the facts so found, and for that reason it is not necessary to determine whether the findings are or are not sustained by the evidence, and as a consequence we express no opinion in that respect.

The controlling issue on appeal, presented in various forms, is the right of the district judge to appoint a receiver. We will discuss the issue without reference to the manner in which it is presented in the briefs.

[1] It is first contended, stating the proposition in our own language, that the right of a court to appoint a receiver of a corporation is not a cause of action per se, but only a remedy ancillary to a cause of action, "a preliminary protective measure, by which property is impounded and held by the court until the cause of action" is judicially determined. The general rule is stated thus:

"It is well settled as a general rule that the appointment of receivers is an ancillary remedy in aid of the primary object of a litigation between the parties, and such relief must be germane to the principal suit; and a suit cannot be maintained under this general rule where the appointment of a receiver is the sole primary object of the suit, and no cause of action or ground for equitable relief otherwise is stated." 34 Cyc. 30.

The rule as stated has been affirmed in a number of cases by our appellate courts. *Espuella Land & Cattle Co. v. Bindle*, 5 Tex. Civ. App. 21, 23 S. W. 819; *New Birmingham I. & L. Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 828; *People's Inv. Co. v. Crawford*, 45 S. W. 738; *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509; *Hermann v. Thomas*, 143 S. W. 195.

[2] The rule stated is of moment in the instant case under the further proposition by appellant, stated again in our own language, that appellee is not liable upon either of the notes sued on, for the reason that the same were executed and delivered in payment for

the capital stock of the appellant in violation of article 12, § 6, of the Constitution which declares that "no corporation shall issue stock or bonds except for money paid, labor done or property actually received," and in violation of article 1146, R. S. 1911, which is interpretive of the constitutional provision. In connection with the proposition thus asserted appellee pleaded that both notes were given in payment of the stock of appellant, and that he was not liable thereon for the constitutional and statutory reasons stated unless the purchase by said bank of the \$1,250 note before maturity for value would make him liable to that extent. The first inquiry then is: Does it appear from the record that both notes in controversy were given in payment of the capital stock of appellant? We conclude it does. The only facts on that issue before us, and they are undisputed, is the contract to purchase the notes and the agreement pledging the stock as collateral security for payment of the notes. These are simple matters, and, standing alone, establish, in our opinion, a completed sale on credit of the capital stock of the company. While the sale of the stock could have been completed without entering into the contract which we have copied in this opinion, it appears therefrom that it was intended to serve purposes other than the mere acknowledgment of appellee that he had purchased stock. It provides against canceling or annulling the purchase because of statements, representations, or agreements made by or with the selling agent aliunde the contract. It also serves the purpose of appointing C. L. Wakefield appellee's attorney in fact to represent him and vote his stock at stockholders' meetings. Incidentally it may be said that, if the stock had not actually been issued and sold, it could not have been voted. As security for the notes so given in payment of the capital stock the parties to the transaction recite that appellee has delivered to appellant the identical stock so purchased. There could not have been a delivery of the stock back to appellant without an issuance of the same. Further, it is agreed that, if appellee fails to pay the notes, the stock shall be sold, and the proceeds applied to the payment of the notes; any surplus remaining to be paid to appellee. Such proceedings could not be had in the absence of ownership. Accordingly, in view of the provisions of the contract, notes, etc., and the deductions to be made therefrom, and in the absence of any other facts disclosing a different intention than that to be deduced from such several matters, no other conclusion can be reached than that the stock was issued and delivered to appellee, constructively perhaps, but delivered nevertheless, and in turn redelivered to appellee as collateral security for the notes given in payment therefor. Being a sale and delivery and consequent issuance of the

capital stock of appellant on credit, the entire transaction was void, because in violation of the constitutional and statutory inhibitions quoted. It has been so held. *San Antonio Irrigation Co. v. Deutschmann*, 102 Tex. 201, 105 S. W. 486, 114 S. W. 1174; *McCarthy v. Tex. Loan & Guaranty Co.*, 142 S. W. 96; *Farmers' & Merchants' State Bank v. Falvey*, 175 S. W. 833; *Sturdevant v. Falvey*, 176 S. W. 908. The reasons for holding such contracts void have been stated so often we deem it unnecessary to reiterate same here. The reasons are, however, well settled in *McCarthy v. Tex. Loan & Guaranty Co.*, supra.

We do not understand that counsel for appellee denies the correctness of the rule stated in the cited cases, but that he does contend that the holdings in the cases we have cited were based on facts unlike those shown in the instant case, and cites as cases presenting facts similar to those in the instant case *Cope v. Pitzer*, 166 S. W. 447, and the two *Falvey* Cases, supra. An examination of the cases relied on by counsel will disclose a wide dissimilarity in the facts in those cases with the facts in the instant case. In *Cope v. Pitzer*, supra, it appears that the company delivered no stock actually or constructively, made no attempt to pledge, nor provided for voting the stock, and demanded payment of the notes of the subscriber before issuing the stock. In the first *Falvey* Case, where the contract was quite similar to the one in the instant case, the court based its holding that the sale was not on credit upon facts allunde the contracts, notes, etc., and say in that respect, "if we had no evidence before us other than the note and the certificate of stock, we might be constrained to hold that it did," constitute a sale on credit. The second *Falvey* Case was perhaps erroneously cited, since it sustains the general rule stated in this opinion. It appearing, then, that there was a sale of the capital stock of appellant on credit, accompanied by simultaneous issuance and delivery of same it follows that the entire transaction was void, and that appellee was liable upon neither note, and being liable upon neither could not use his supposed liability as maker of the \$1,250 note as basis for his application for the appointment of a receiver.

[3] It is, however, urged that appellee was liable upon the \$1,250 note, for the reason that the bank acquired same before maturity for value. The manner of acquiring the note does not change the rule, since, the consideration of the note being illegal, it is void, and its payment cannot be enforced even in the hands of an innocent purchaser for value. *Seeligson v. Lewis*, 65 Tex. 216, 57 Am. Rep. 503; *Wegner v. Biering*, 65 Tex. 510; *Davis v. Sittig*, 65 Tex. 498; *Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120, 47 S. W. 288; *Mason v. Bank*, 156 S. W. 366.

For the reasons stated, the judgment of

the court below is reversed, and the cause remanded for further proceedings not inconsistent with the views expressed herein.

Reversed and remanded.

On Rehearing.

It is earnestly and ably argued by counsel for appellee that we erred, among other things, in ruling that appellee was not liable on the \$1,250 note of which the bank at Edna was alleged to be a bona fide holder for value. The conclusion reached upon consideration of the case was that the sale of stock on a credit was void, and, being void, the fact that the contract evidencing the illegal act was a promissory note in the hands of a bona fide holder for value could impart no legality to the void transaction. In our opinion, we stated the rule only, and did not attempt to discuss the fundamental and underlying principles from which the rule was evolved. We will now briefly do so. The constitutional provision, popularly known as the stock and bond law, declares that "no corporation shall issue stock or bonds except for money paid, labor done or property actually received." Article 12, § 6, Const. In furtherance of the constitutional provision, the Legislature enacted that any corporation, foreign or domestic, that violated the constitutional inhibition should, upon proof thereof in a court of competent jurisdiction, forfeit its charter, permit, or license as the case may be, as well as all rights and franchises conferred or permitted by the laws of the state. Article 1146, *Vernon's Sayles' Stats.* Thus the issuance of corporate stock save as directed is declared illegal, and hence void, and the offending corporation is denied further right to transact business in the state, and all rights and franchises acquired under its permit forfeited. Such laws are not uncommon, and well-settled rules of construction have followed their enactment.

[4] One of the rules is that, when an act has been prohibited by the fundamental law or by statute, it is material to ascertain what the Legislature had in view when the law was enacted, whether the collection of revenue or the protection of the public from fraud in contracts or the promotion of some object of public policy. If for the latter two purposes, all contracts in violation of the statute, whatever character they may assume, are void. And in seeking the meaning of the lawgiver it is also material to inquire whether the penalty is imposed once for all on infraction of the statute, or whether it is a recurring penalty repeated as often as the statute is violated. If a recurring penalty, the intention of the lawgiver was to prohibit the doing of the thing denounced, and its accomplishment in any manner is void. *Benj. Sales (Bennett 1899)*, § 538.

[5] The foregoing is nearly literally the text which we have cited, and presents quite clearly the correct rule for determining the issues in the instant case. The first inquiry

then is: Was the purpose of the law to raise revenue or to protect the public from fraudulent contracts or the promotion of some object of public policy? Clearly the purpose was not revenue, since no revenue results from the imposition of forfeiture. That the other two objects were the purpose sought we think quite as clear. The public policy sought to be promoted was the protection of the citizens of the state against the issue and sale of stock in private corporations, save for money paid, labor done, or property actually received, and the purpose thereby attained, as said in *McCarthy v. Texas Loan Co.*, 142 S. W. 96, was to protect creditors and prevent irresponsible persons from creating corporations of unlimited capital stock without assets of substantial value, and to insure to corporate investors the right which they have to assume that the corporation's actual capital, in money or money's worth, is equal to the capital stock which it purports to have. It being then the purpose of the law to protect the citizens of the state against the results of unlimited issue of stock in corporations and consequent financial loss, the doing of the prohibited act, however accomplished, is void. Broadly speaking, any contract founded upon an act which is forbidden by the Constitution or statutes of the lawmaking power, or which cannot be enforced because in violation of the Constitution or statute, is void, and cannot be enforced. It was said in *Deutschmann's Case*, cited in our original opinion, that:

Such a contract was "plainly and unquestionably in violation of the Constitution of the state, and, being in violation of the Constitution, that agreement * * * was void," and "cannot give a right of action for damages or for any other relief in the courts of this state."

In consonance with the declaration of our Supreme Court just quoted it is said:

"The general rule is that any act which is forbidden either by the common or statutory law, whether it is malum in se or merely malum prohibitum, whether indictable or only subject to a penalty or forfeiture or however otherwise prohibited by statute or the common law, cannot be the foundation of a valid contract. A fortiori the agreement is illegal and unenforceable if it contravenes the Constitution. Accordingly a promissory note the consideration whereof is bills of credit, issued in contravention of a constitutional prohibition, is void." 3 R. C. L. 951.

By the same authority (and by all authority we have examined) it is declared:

"The protection which the law extends to an innocent holder who for value in the usual course of trade has received negotiable paper is of no avail when the statute in terms, or by unavoidable implication, has pronounced the instrument absolutely void." 3 R. C. L. 1017; 1 *Dan. Neg. Ins.* § 197; *Thompson v. Samuels* (Sup.) 14 S. W. 143; *Gilder v. Hearne*, 79 Tex. 120, 14 S. W. 1031; *State Bank of Chicago v. Holland*, 103 Tex. 266, 126 S. W. 564.

While our Constitution and the statutes do not enact in express terms that a negotiable promissory note given in payment of stock or in evidence of the void transaction shall

be void, yet that the acts do so by unavoidable and necessary implication seems beyond intelligent controversy. Can it be logically argued that, when the fundamental law declares a given act shall be void, by concealing it in legal form it takes on legality? We think not. If the sale of the stock was evidenced by a contract reciting the true consideration, none would deny that the same would be void ab initio. Then by mere change of the evidence of the unlawful transaction it surely cannot be made other than what it was from its inception. Such a construction would at one stroke hold as vain and useless the clear intention and purpose of the Legislature, and declare as absurd an act intended as the climax of a much-discussed question of public policy, particularly when it is considered that under established commercial usages the sale of corporate stock would rarely, if ever, be evidenced save by negotiable promissory notes.

Appellee relies upon the case of *State Bank of Chicago v. Holland*, supra, as sustaining his claim that the note is not void. The effect of the holding in that case is to declare that the statutory provisions which bar foreign corporations from the courts of our state until they have a permit to transact business in the state does not render void an otherwise good consideration of a promissory note, and by analogy that another corporation, which is entitled to sue in our courts, which acquires such note, may maintain suit thereon. The decision in that case is determined, when carefully considered, by the rules announced by Mr. Benjamin, since the act there construed, while in some respects regulatory, is clearly a revenue or tax measure, as distinguished from acts to prevent fraud in contracts or in furtherance of the public policy of the state.

While the case presents some difficulties, we conclude our original conclusion should stand as our judgment in the case.

Accordingly the motion for a rehearing is overruled.

COMMONWEALTH BONDING & CASUALTY INS. CO. v. HOLLIFIELD. (No. 904.)*

(Court of Civil Appeals of Texas. Amarillo. Jan. 19, 1916. Rehearing Denied March 15, 1916.)

CORPORATIONS §—99(1)—CORPORATE STOCK—PURCHASE PRICE.

Where plaintiff entered into an agreement to buy the stock of a corporation to be organized with a capital and surplus, and to pay the purchase price in money or in satisfactory securities, and plaintiff gave notes for the purchase money, which notes were renewed and the amounts varied, held that, the stock issued for the notes being void because being issued in violation of Const. art. 12, § 6, prohibiting the issuance of corporate stock for notes, the notes should be canceled.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 444; Dec. Dig. §—99(1).]

Huff, C. J.; dissenting.

Appeal from District Court, Hall County; J. A. Nabers, Judge.

Action by I. P. Hollifield against the Commonwealth Bonding & Casualty Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Speer & Brown, of Ft. Worth, and Presler, Thorne & Hamilton, of Memphis, for appellant. Moss & Leak, of Memphis, for appellee.

HALL, J. This was an action by appellee, Hollifield, against the appellant company, to recover certain money paid and to cancel three promissory notes in the sum of \$562.50 each, executed by Hollifield, in favor of the defendant company. Appellee also prayed for the cancellation of a certain deed of trust, given by him to secure the notes. He alleges that the payment of the money and the execution of the notes were induced by fraudulent representations, and that the only consideration moving to him therefor was the issuance of a certain stock certificate, in violation of article 12, § 6, of the Constitution of the state. Briefly stated, this is the history of the transaction: September 29, 1910, appellee executed a subscription contract, which is as follows:

"Commonwealth Bonding & Accident Insurance Company.

"Capital \$10.00 Surplus \$30.00.

"Subscription to Capital Stock.

"No. 963.

"Whereas, Stuart, Harkrider & Co. of Fort Worth, Texas, are promoting the organization of a casualty, bonding and accident insurance company, to be incorporated in pursuance of the laws of the state of Texas, under the name of Commonwealth Bonding & Accident Insurance Company, with an authorized capital stock of three hundred thousand dollars, and a paid up capital of at least two hundred thousand dollars, paid up and free from organization expenses, all in accordance with a printed prospectus issued by them and delivered to me.

"And, whereas, by their acceptance of this subscription said Stuart, Harkrider & Co. agree to endeavor with all reasonable diligence to accomplish on or before December 31, 1910, the organization of said corporation with capital stock fully paid as aforesaid, they to defray all expenses of organization and incorporation.

"Now, therefore, I do hereby subscribe for 62½, one-tenth shares of the par value of ten dollars each, of the capital stock of said Commonwealth Bonding & Accident Insurance Company, and agree with said company and with the said Stuart, Harkrider & Co. to pay therefor the sum of \$2,500.00 as follows: The sum of \$2,187.50 I agree to pay in money or securities satisfactory to the Insurance Department, with six per cent. interest, to said Commonwealth Bonding & Accident Insurance Company, or its trustees (which goes to capital stock and surplus), at any time after September 1, 1910, immediately upon receipt of notice from said Stuart, Harkrider & Co., that its capital stock has been subscribed in good faith in amounts and at rates netting the company at least two hundred thousand dollars of capital in the aggregate when paid. The remaining sum of \$312.50 I agree to pay, and do pay concurrently with this subscription, to the said Stuart, Harkrider & Co., in consideration of their agreement hereinbefore recited, and in lieu of any further or other contribution to expenses of organization and incorporating said company.

"No conditions, representations or agreements

other than those printed herein shall be binding on Stuart, Harkrider & Co., or the Commonwealth Bonding & Accident Insurance Company. "Witness my hand, this the 29th day of September, 1910.

"I. P. Hollifield (name of subscriber)
"Memphis, Texas (Post office address)
"Merchant and Ranchman (Occupation)."
"Witness: R. E. Bristol."

This subscription contract was at once delivered to Stuart, Harkrider & Co., a partnership, which was afterwards incorporated and known as the Organization Company. Thereafter, on December 1, 1910, upon the promise that stock would be issued to him as soon as the defendant company was organized, appellee executed and delivered to the Organization Company four notes, payable to said company, and also a deed of trust conveying certain lands as security for said notes. The first of these notes was in the sum of \$687.50; the other three were in the sum of \$500 each. Prior to December 1, 1912, the first note was paid by appellee, and on that date he renewed the remaining three notes, including some unpaid interest which had accrued thereon in the face of the renewals. The new notes aggregated \$562.50 each. On the same day he executed a second deed of trust to secure the payment of the renewal notes. Twenty days thereafter the deed of trust securing the original notes was released by appellant.

Appellee alleged that it was fraudulently represented to him by the promoters, as an inducement to secure his subscription to the stock, that appellant company, when organized, would lend him money; that the representations were relied on, were untrue, etc. Among other things, appellant company alleged that it was incorporated under the laws of Arizona, where there was neither statute, constitutional provision, nor rule of law prohibiting the execution and delivery of notes in payment for certificates of stock; that in such case the laws of Texas, forbidding the payment for stock with negotiable notes, is in violation of the Constitution of the United States.

The case was tried before the court without a jury and resulted in a judgment in favor of plaintiff, canceling the three notes and deed of trust, but denying plaintiff a judgment for the money already paid. In the findings of fact and conclusions of law, the trial judge states that the defendant corporation was chartered under the laws of Arizona in March, 1911, and was granted a permit to do business in Texas, in June of the same year; that upon solicitation of R. T. Stuart, and because of promises made by him that the company, when organized, would lend plaintiff money, plaintiff subscribed for 62½ shares of its capital stock; that Stuart and one Harkrider composed a partnership known as the Organization Company, which promoted the defendant company; that, in accordance with the subscription contract, the Organization Company took plaintiff's notes for \$2,187.50, in payment for the 62½

shares of stock to be issued by the defendant company; that after the defendant company had obtained a permit to do business in Texas, and plaintiff had paid \$687.50 on his subscription, the promoting company released the deed of trust and the defendant company took from plaintiff three notes for \$562.50 each, the renewals of which are sought to be canceled, together with the deed of trust securing the same; and that said notes were taken in payment of the stock which was then issued to plaintiff at Ft. Worth, Texas. The court concludes that no fraud was shown in the case; that the certificate of stock under the Constitution, as well as article 1146 of the Revised Statutes, was absolutely void and constituted no consideration for the notes and deed of trust; that plaintiff was not in pari delicto, but was not entitled to recover of the appellant company the money paid. Appellee filed no cross-assignments.

By the first assignment of error, this proposition is urged: After said defendant company had been organized and chartered and had its permit to do business in Texas, and plaintiff had paid \$687.50 of its said subscription, said promoting company released the deed of trust securing said subscription, and the defendant company took from plaintiff the three \$562.50 notes, which, and the renewals of which, so sought to be canceled and the deed of trust herein sought to be canceled, in payment of the stock which they then issued to plaintiff; that is, the 62½ one-tenth shares of stock in controversy.

The first assignment is that the court's conclusions of fact are not supported by the evidence. We think, when appellee executed the notes and the deed of trust securing them, the subscription contract as an obligation became functus officio as to him; he had, by complying with its terms, merged the obligation evidenced by it and resting upon him, in the notes themselves. His indebtedness, evidenced by the subscription contract, was satisfied and thereafter was evidenced by the notes which he had executed. The contract bound the promoters to organize a company with reasonable diligence, having its capital stock fully paid up and free of organization expenses. It bound appellee to pay in cash \$312.50 to the promoters as compensation for their services. This has been done. It further bound him to pay to the company the balance of the \$2,500 subscribed, viz., \$2,187.50 "in money or securities satisfactory to the Insurance Department, with 6 per cent. interest, at any time after September 1, 1910, immediately upon receipt of notice from Stuart, Harkrider & Co.; that its capital stock had been subscribed in good faith in amounts and at rates netting the company at least \$200,000." The parenthetical clause provides that this amount shall go to capital stock and surplus. It must be borne in mind, in the construction of this contract, that appellant is a corporation, organized

for bonding and casualty insurance purposes. This court said, in *General Bonding & Casualty Insurance Co. v. Mosely*, 174 S. W. 1034, quoting from *Words & Phrases*:

"'Capital stock' has been defined as follows: When applied to the amount subscribed towards the stock of a corporation, 'capital stock' of a corporation, in its primary sense, means the fund, property, or other means contributed or agreed to be contributed by the share owners as the financial basis of the corporation's business, either directly through stock subscriptions or indirectly through the declaration of stock dividends. The term signifies those resources the dedication of which to the uses of the corporation is made the foundation for the issuance of certificates of capital stock, and which, as the result of the dedication, becomes irrevocably devoted to the satisfaction of all obligations of the corporation. * * * 'Capital stock' of a corporation consists of the property and money subscribed and paid in for the purpose of carrying on its business. * * * The term 'capital stock' has a * * * definite meaning, and designates the amount of capital contributed by the stockholders for the use of the company. * * *"

The par value of each one-tenth share of stock is stated in the subscription contract to be \$10. "Par value," as there used, means simply the face value of the stock. 6 *Words and Phrases*, 5136; 3 *Words and Phrases* (2d Series) 866. The amount due, according to the recital of the contract, for the 62½ one-tenth shares, at \$10 each, is \$625, or one-fourth of the entire amount subscribed; yet no separate obligation was made as was done in providing for organization expenses for the price of the stock at the stated sum per share. After the payment of the \$312.50, as organization expenses, a note was executed for \$687.50, and the remaining amount of the total subscription, viz., \$1,500, was divided into three separate notes. After the payment of the first note, the shares of stock were issued. These facts show a practical construction of the contract, which to our minds is inconsistent with the idea that the price to be paid for the stock, and the sum to be paid in as surplus, were independent and distinct obligations. The subscription contract bound appellee to execute his obligations in the sum of \$2,187.50, evidencing an agreement to pay for the stock in installments.

It has been frequently held that a subscription contract binding the subscriber to pay for his stock in installments is not inhibited by article 12, § 6, of the Constitution; but it has also been uniformly held that, when the stock is issued before the installments are fully paid, the transaction is void. When the subscription contract was drawn it is apparent that this article of the Constitution, and the decisions which have construed it, were not in the mind of the party who wrote it. We further said, in *General Bonding & Casualty Ins. Co. v. Mosely*, supra:

"But the plaintiff in error company is engaged in a business requiring ready cash to meet demands arising at unexpected times in uncertain amounts. An insurance company, in the very nature of things, should have on hand, ei-

ther in cash or in available securities, sufficient funds with which to meet extraordinary emergencies. This it could not do, at least for a time, if the subscribers paid for stock with labor or with property other than cash or securities easily convertible into cash."

That provision in the contract with reference to the approval by the Insurance Department shows that it was drawn under the act of 1909, specially relating to insurance companies. We have given our views with reference to this law and its application in the Mosely Case, and they will not be repeated here. Suppose, in the instant case, appellee had agreed to pay only \$1 each for his shares of stock, and the balance of the \$2,187.50 should have been represented by his promissory notes, and this course had been pursued with reference to all other subscribers: The result would have been the organization of a \$300,000 bonding and insurance company, with less than $\frac{1}{40}$ of that amount in its treasury to secure policy holders and creditors. Under the construction contended for by appellant, the entire subscription contract would be void. However, if we construe it to mean that the whole amount subscribed, less organization expenses, rather than \$625 constitutes the consideration for the stock, the contract would be valid and enforceable. The vice in the transaction rests in the fact that the stock was issued and delivered to appellee, thus enabling him to enjoy all the privileges of a bona fide stockholder without having "fully paid up" the amount of his subscription. As has been frequently decided, both the stock and the notes were absolutely void. *Irrigation Co. v. Deutschmann*, 102 Tex. 201, 105 S. W. 486, 114 S. W. 1174; *McCarthy v. Loan Co.*, 142 S. W. 96; *Sturdevant v. Falvey*, 178 S. W. 908; *Bonding & Casualty Ins. Co. v. Mosely*, supra.

Under the third assignment, it is insisted that because the appellant company was organized under the laws of Arizona, and the evidence shows that there is neither constitutional provision nor statute of Arizona prohibiting the payment of shares of stock with a promissory note, the transaction in question is valid. Article 1146 of the Revised Statutes 1911 provides that no foreign corporation, domestic or foreign, doing business in this state, shall issue any stock whatever except for money paid, etc. The record shows that the home office of appellant company was at Ft. Worth; that the subscription contract was executed in Texas; and that the notes, together with the deed of trust, were executed and renewed in this state. The contract itself provides that the company "is to be incorporated in pursuance of the laws of the state of Texas." Under the provisions of the above statute, these facts render the transaction subject to the laws of Texas. *State Bank v. Falvey*, 175 S. W. 833; *Sturdevant v. Falvey*, supra; *Fowler v. Bell*, 90 Tex. 150, 37 S. W. 1058, 39 L. R. A. 254,

59 Am. St. Rep. 788; *Loan Ass'n v. Griffin*, 90 Tex. 487, 39 S. W. 656.

What has been said disposes of the fourth assignment.

The fifth assignment insists that the court erred in holding that the notes were without consideration because the evidence shows that, relying upon plaintiff's subscription contract and his promise to pay for his stock, defendant and the public generally dealt with plaintiff as a stockholder, and that the defendant company has incurred liabilities and created obligations on the strength of plaintiff's subscription; and further, by reason of the fact that plaintiff had participated by proxy in the management and conduct of the affairs of the company, he was estopped to assert the invalidity of the transaction. This is not a suit by a creditor of the corporation, seeking to hold appellee upon his subscription, and it is not necessary to consider that question.

The stock being declared invalid by the constitutional and statutory provisions, appellee is not estopped by participation as a stockholder in the meetings of the company from asserting the invalidity of the notes.

We think the record warranted the court in finding, in accordance with the testimony of appellee, that the whole amount of his subscription, as evidenced by his original notes, was the consideration for the stock issued to him; and the judgment is therefore affirmed.

HENDRICKS, J. (concurring). I agree with Justice HALL in affirming this case, and relative thereto make the following observations:

I think the obligatory features of the contract of subscription as to the methods of payment for the stock, for which Hollifield subscribed, are unambiguous.

That portion of the contract is as follows:

"Now, therefore, I do hereby subscribe for 62½ one-tenth shares of the par value of \$10.00 each, of the capital stock of said Commonwealth Bonding & Accident Insurance Company, and agree with said company to pay therefor the sum of \$2,500.00, as follows: The sum of \$2,187.50 I agree to pay in money, or securities satisfactory to the Insurance Department, with six per cent. interest, to said Commonwealth Bonding & Accident Insurance Company, or its trustees (which goes to capital stock and surplus). * * *

As I read it, the obligation on its face is to pay the sum of \$2,500 for the stock, either in money or securities satisfactory to the Insurance Department.

According to my view, the question is: Is the liability on the subscription contract actually extinguished by the giving of securities, as shown by the acts of the parties in this record, as intended by their acts; and whether such securities are a payment for the stock as evidenced by their acts, as an alternative substitute for the actual cash? When the contract reads he may either pay in cash or approved securities, the alterna-

tive nature of the payment, that is, cash or securities, adds force to the meaning that they really intended under appropriate conditions that the securities should be considered in lieu of the cash. If such a condition is sufficiently shown in this record—declaring the intention of the parties with reference to the alternative provision as controlling the method of payment—I am unable to say that the subscription contract continues to be one payable in installments, and that said securities, if shown in this record to be regarded as payment by the parties, would continue to be substituted obligations as merely continued installments of the subscription contract, instead of obligations in payment of the stock.

The question is not wholly one of renewals being a perpetuation of the same debt, but there is also involved the question, which of the alternative provisions of this contract is acted upon, as shown by the acts of the parties?

"* * * When the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on the part of the other party to the agreement, * * * and may be accepted and adopted by the corporation after such organization. * * *" *Railway Co. v. Granger*, 86 Tex. 355, 24 S. W. 795, 40 Am. St. Rep. 837.

Hence, when the corporation, Commonwealth Bonding & Casualty Insurance Company, came into existence, by virtue of the issuance of its charter, and said contract was in its possession and presumptively adopted by the company, it was adopted as a whole.

The contract was executed by Hollifield the 29th day of September, 1910. About that time, according to the testimony of Mills, who was the secretary of this defendant company, an organization meeting was held, and some of the officers of said proposed corporation elected.

Subsequent to the date of the contract, December 1, 1910, this defendant executed the first series of notes, with an accompanying deed of trust on 1,400 acres of land, to secure said paper. Evidently the above contract, with the paper, was in the hands of the officers of the proposed corporation prior to the date of its charter in March, 1911, for on February 6, 1911, Mills, who had been elected secretary of the contemplated corporation, wrote Hollifield that they had been advised that the State Commissioner of Insurance required a statement from two disinterested parties, placing an estimate of value on the property used in securing the balance due for Hollifield's stock subscription, Mills, the secretary, inclosed forms, for the purpose of obtaining a valuation, as indicated, and two certificates, made by two different citizens of that community; of date February 16, 1911, were sent to the preliminary organization, placing a valuation of \$17 per acre upon the 1,400 acres of land embraced in the first deed of trust. After the charter was obtained,

Mills continued to be the secretary of said corporation until some date in July, 1911. It is very inferable from the fact that Mills, who had nothing to do with Stuart, Harkrider & Co., was assuming duties and making requests of this particular subscriber, with reference to said securities. The date of the contract, with the subsequent date of these securities, with said contract and said securities in the possession of the corporation when chartered in March, 1911, and after the officers and directors had been elected, at least suggested to the corporation that securities had been executed which bore different dates of maturity of rather extended time, and that said subscriber was not intending at least during the life of the securities, to pay in cash for the stock. These facts apparent to the company, when obtaining the documents, were consistent with the intention of the parties in compliance with the alternative provision in the contract to pay in securities, and not in cash, at least during that period; whether you reject or admit the testimony as to what Mills did prior to the charter, as bearing upon intention.

I infer from Mills' testimony that a much larger per cent. of the stockholders gave notes in closing up their subscriptions than cash payment of stock. In testifying in regard to the mooted questions of loans (which at one time had very much bothered the company, on account of promises as to loans as well as on account of one of their own statements about loans, which they had presented to the stockholders), he said:

"The purpose was to take the stockholders' notes which were amply secured, and convert them into money from any source we could, in order to meet the stockholders' requirements. Where we could, we would negotiate the notes given for stock in the company and that would put cash into the treasury of the company."

Mills testified they did no business prior to the organization of the company and hence what notes were negotiated, given by subscribers for stock, were sold after incorporation.

These particular notes, under the first deed of trust, according to the valuation of the property, were amply secured. The second deed of trust, executed in December, 1912, was made subject to a mortgage in favor of one Darlington, for the sum of \$10,000, placed upon property intervening the first and second mortgage.

Before this was done, and during the pendency of the previous notes, it is inferred that some effort was made to merge this particular company, in some manner, into another corporation called the Bankers' Guaranty Company. The record shows that an instrument of some character, with Hollifield's signature attached, providing for the sale of his stock, and authorizing B. F. Allen, Jr., to transfer the same and obtain other stock in lieu thereof in the guaranty company was testified about. Hollifield said:

"That is my signature there to the instrument, reciting that there was a sale made of 62½ shares of the capital stock of the Commonwealth Bonding & Casualty Insurance Company, represented by certificate No. 102, to the Bankers' Guaranty Company, and authorizing B. F. Allen, Jr., to transfer that stock."

He further said: "I returned the first stock I got to the Commonwealth, and they sent me this stock afterwards," meaning the stock evidenced by the transfer signed by him. This instrument was referred to Hollifield by defendant company's attorneys, on cross-examination, producing the above testimony. Hollifield testified that the certificate with the instrument, was returned, and that afterwards they sent the particular certificate in this record in place of the former stock. Further, on cross-examination, it is true, that he said "it seems like" that he got a certificate from the Bankers' Guaranty Company. However, his remembrance as to what he got being in apparent conflict with the instrument presented to him, which Hollifield was apparently summarizing, would not destroy the right of the trial court to conclude that the Commonwealth Bonding & Casualty Company actually sent Hollifield and issued certificate of stock in the Commonwealth Company. It is to be presumed that this act was after incorporation; otherwise, you would be required to infer that an attempt was made to transfer certificates in a corporation which had never been organized.

After the execution of the second series of notes, and the cancellation of the old paper, another and different certificate of stock, signed by Mills, was actually issued and delivered to Hollifield, the subscriber, and accepted by him.

It is not shown by any fact in this record, unless you were to infer from the delivery of the stock and the fact of valuation that the Insurance Department in reality approved any securities. The Insurance Department held up the permit to this corporation to do business in this state from some time in March, 1911, when the charter was issued, to the ——— day of June, of that year.

For appellant's benefit, I think it is true that when this subscription contract was executed it was contemplated that the proposed corporation would be organized under section 62 of the Insurance Code of 1909, now constituting article 4950 of the Revised Statutes of 1911.

Such state companies were permitted, under section 10 of the same act, now constituting article 4734 of the Revised Statutes, to invest their funds in "first liens upon real estate, the title to which is valid, and the value of which is double the amount loaned thereon," etc. And that article 4711, of the Revised Statutes, applicable to such companies, and relating particularly to the investment of capital stock, provided by the third clause that such capital stock may consist in mortgages upon unincumbered real estate in this state, the title to which is valid, of

a market value double the amount loaned thereon," etc. It is troublesome, it is true, in analyzing the statutes with reference to foreign corporations in part doing an insurance business, just what jurisdiction the Commissioner of Banking and Insurance had and to what extent securities are embraced within his jurisdiction, under the law.

If the company switched its purpose to incorporate under the Texas laws (which would have required the approval of these securities), and then incorporated under the laws of a foreign state or territory, which might not require such approval, the inference, however, is deducible that some one approved these securities, and, if the company did so, the alternative provision of the contract in its spirit was followed. It attempted first, according to this record, to issue and actually deliver a certificate of stock, as an evidence of Hollifield's right in this incorporation, though for the purpose of transfer for other stock in another corporation. Thereafter it actually issued and delivered another certificate of stock to the subscriber, which was received by him and held until the institution of this suit.

With which of these two provisions, framed in the alternative, were these two parties intending to comply? One of them expressed an obligation by payment in money; the other by payment in approved securities.

"We recognize the rule that, in a case of doubt, courts should favor a construction which upholds the validity of the contract, but such a rule cannot apply to a case where the intent of the parties is obvious. A court cannot do violence to the plain meaning of words and the clear intent by making a contract for the parties, under the fiction of a construction." *Scripps v. Sweeney*, 160 Mich. 148, 126 N. W. 72.

The rule of preferred legality, as an arbitrary rule, I take it, is referable more to contracts ambiguous and susceptible to two constructions on their face.

The condition here is: The parties have a contract, one provision of which is valid, and the other void if paid by the securities signed by Hollifield. Thereafter they deal with reference to the contract, and as to its consummation. To which provision are their acts to be referred? To say that a court or a jury could not pass upon a question of this character as a question of fact, the same as any other issue, I am unable to concede.

"The terms 'money paid' are very definite and plain and do not mean that stock can be sold for money to be paid, but must be sold for cash." *Irrigation Co. v. Deutschmann*, 102 Tex. 207, 114 S. W. 1176.

"The terms in which this section of the Constitution is expressed indicates the purpose that the assets of the corporation should be something substantial and of such a character that they could be subjected to the payment of claims against the corporation as well as to secure the shareholders in their rights in the capital stock." *Glass Co. v. Antelope Co.*, 101 Tex. 434, 108 S. W. 968, 16 L. R. A. (N. S.) 520, 180 Am. St. Rep. 265.

Here the corporation evidently intended to invest this subscriber with the rights of a full-fledged stockholder, in the first attempt to deliver, as well as in the last delivery of the stock. The Constitution, and the statutes thereunder, with reference to railroad securities, are complete, in preventing such stock and such securities from going into the hands of innocent purchasers upon insufficient security. Among the purposes evidently contemplated by the particular provision of the Constitution was to prevent the same thing as well as a protection to the creditors and the original stockholders, though incomplete. Where it is intended, as I believe the trial court had the right to infer from this record, viewing it as a whole, that the securities paid for the issuance and delivery of the stock, if the corporation is not insolvent and the rights of creditors have not intervened, such stock and such securities should be canceled.

This holding I do not consider in conflict with the *Medlin Case*, 180 S. W. 901, the *Barrington Case*, 180 S. W. 936, the *Hill Case*, 181 S. W. 219, lately decided, or any other case decided by this court. When the real basis of each of the different cases is analyzed, I can see no real contrariety.

Hence, "treating the * * * company as a foreign corporation, within the meaning of the article (1146, E. C. S. 1911), and it having been shown that the corporation was doing business in this state (when this stock was issued and delivered), the statute applied to it with full force, and prohibited the issuance of stock by it for the promissory note of the purchaser." *Bank v. Falvey*, 175 S. W. 836.

The *Barrington Case* cited, and the case of *Citizens' Trust Co. v. Turner*, 182 S. W. 438, lately decided by the Second Court of Appeals, and the *Falvey Case*, *supra*, are in accord upon the question of issuance and delivery; but the facts in each case insisted upon as showing delivery for the stock are clearly distinguishable from this case. I am not deciding this question upon conclusions of witnesses, but upon the acts of the parties, as evidencing which provision the parties were acting under.

Appellant contends that the securities canceled represent the surplus, and that the stock, on account of previous payments, has been actually paid for in cash. I think this position is wholly untenable. I am unable to see how logically and legally it can be said that because this defendant agreed to pay \$2,500 for the stock (whatever its face value), and further agreed that a certain proportion paid, or agreed to be paid, would go to capital, and another proportion to surplus, that the whole amount the subscriber agreed to pay did not represent the consideration for the stock. Whatever the division of the proceeds realized upon the subscription, said proceeds were in consideration of the stock *Hollifield* agreed to buy. As a last analysis, he promised to pay said consideration for the stock; he did not purchase any certifi-

cates in a surplus fund; nor did he own any interest in that fund except through the medium of his stock, whatever its par value; nor did the corporation own that fund, except as a result of the purchase of the stock, which was the consideration the subscriber agreed to pay for said stock. If the \$2,500 is the agreed consideration for the stock, and such stock should be void, it is wholly immaterial what agreement the parties may have made as to the disposition of the fund. Ordinarily, of course, the more surplus a corporation possesses, whether the result of subscriptions originally paid in, or thereafter earned, the stock is the representative of that surplus and is more or less valuable, in proportion to the amount of the surplus. The promise to pay \$2,500 for the stock, though a part may go to surplus, I do not think divisible in a legal sense. Further, I understand it to be the invariable rule that:

"Where the agreement consists of one promise made upon several considerations (though I do not concede the consideration is even divisible in this promise) some of which are bad and some good, here, also, the promise is wholly void, for it is impossible to say whether the legal, or the illegal portion of the consideration, most affected the mind of the promisor, and induced his promise." *Clark on Contracts*, p. 473, and numerous cases cited.

I am unable to differentiate it in the contract as a legal proposition. I think the judgment should be affirmed.

HUFF, O. J. (dissenting). I am unable to assent to the affirmance of this case and respectfully dissent from the action of the majority of this court in doing so. My learned Brethren are very much at variance in giving the grounds for affirmance. One holds when the notes were executed the subscription contract or agreement was merged in the notes and that the evidence shows that they were executed upon an agreement to issue stock therefor. The other holds the subscription contract was accepted by the corporation when organized, and in effect that appellee had elected the alternative provision in his proposition to pay for the stock in securities satisfactory to the insurance department, and hence a payment in securities was made and therefore void. I cannot concur with either opinion filed. The subscription was made and delivered to the agents of appellee before the company was organized, and he executed the four notes, one for \$687.50 and the three for \$500 each, payable to his agents, the Organization Company, and secured these notes by a deed of trust on $2\frac{1}{2}$ sections of land. All these instruments were in the hands of his agents before the incorporation of the company. The company was incorporated March 23, 1911, and granted a permit to do business in Texas in June, 1911. The Organization Company, the appellee's agent, indorsed the notes to appellant and turned over to it the subscription contract. After the company was incorporated and before the renewal of the three \$500 notes,

with the interest added in, the appellee paid off to appellant the \$687.50 note before he received the certificate of stock. Thereafter he renewed the three \$500 notes and executed a deed of trust on the same land to secure them. These last notes and the deed of trust are the instruments sought to be canceled. These last notes are dated December 1, 1912, while the original notes are dated December 1, 1910, and the original deed of trust is dated January 13, 1911.

The appellee testified that the old notes were given "for stock in the Commonwealth Company." "These new notes which I executed are for the same consideration." "These three notes for the sum of \$562.50 each, executed on December 1, 1912, were renewal notes of old ones." I find no evidence that there was a promise that the stock would be issued to him when the company organized. True, while testifying, he stated that he paid \$2,500 for the certificate which he then held in his hand, and that he got nothing else for his money except the certificate; that he paid \$1,000 in money and the three notes sought to be canceled, but he did not testify, as I construe the testimony, that the corporation promised to issue stock in payment or in consideration of those notes. The stock introduced in evidence was dated July 10, 1912, but in fact was not delivered to him until after he had paid the first note falling due and the renewal of the old notes in December, 1912. I am unable to find from this testimony anything warranting the inference that there was stock delivered to him prior to the one shown in evidence. There is some testimony that an agreement was prepared for him to sign, agreeing to transfer his stock in this company to another corporation, which was delivered to him, and which he refused to sign and return to the company. I do not interpret it as testimony showing that any stock was issued to him and delivered to him. The appellee's testimony on that point shows that he does not know what it really was, except that they sought to get a transfer of his stock in appellant to some other company.

I believe that the original contract of subscription, the original notes, and the deed of trust given to secure those notes, must be read together as part of his proposition to the proposed corporation to take stock in the company, when organized. When so read, his proposition to the corporation is, if it accepted his proposition to pay for 62½ shares of stock at \$10 per share, \$30 per share to the surplus, that he would pay this sum of money at a time certain; in other words, he agreed to pay his subscription by installments. This was not a promise to pay upon the issue of stock to him, but a promise to pay for the stock, and clearly implied that he would pay before issuance under the contract. Even without any statutory or constitutional inhibition, he could not have compelled the issuance of the stock before he

paid for it. *California Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99. The contract being valid furnished a sufficient consideration for the new notes, and they were not therefore void. I quote from *Ruling Case Law*, vol. 7, "Corporations," § 193:

"A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First, it is a contract between the subscribers themselves to become stockholders without further act on their part, immediately upon the formation of a corporation. As such, the contract is binding and irrevocable from the date of the subscription, at least in the absence of fraud or mistake, unless canceled by consent of all the subscribers before acceptance by the corporation. Second, it is also in the nature of a continuing offer to the proposed corporation, which upon acceptance by it, after its formation, becomes as to each subscriber a contract between him and the corporation. The uniform postulate of all the adjudicated cases is that any subscription to stock in a corporation to be thereafter formed is not and cannot be from the very nature of the transaction, a complete contract—it is an open proposition—until the actual formation of the corporation; it is merely a continuing offer to take stock upon the condition that the corporation be called into existence and a fulfillment of which condition works at once without further act on the part of the subscriber an implied acceptance and concludes a binding contract. It is not essential to constitute one a subscriber to the capital stock of a corporation that he should have subscribed to the stock books after articles of incorporation have been perfected and filed. If there is a preliminary subscription and the corporation is thereafter formed as contemplated within a reasonable time, the subscribers become stockholders without any further act. Again, notice of acceptance by a corporation of a subscription for its benefit made before it was organized is not necessary. Such acceptance may be inferred from the conduct of the corporation retaining the subscription paper in its possession and expending large sums of money on the faith of it. * * * A promoter of a proposed corporation, who solicits and procures stock subscriptions, is the agent of the body of the subscribers to hold the subscriptions until the corporation is formed and then turn them over to it without any further act of delivery on the part of the subscribers. Hence a delivery of a subscription to such promoter is a complete delivery so that it becomes eo instante a binding contract as between the subscribers."

This, I believe to be the rule established in *Texas. Belton Compress Co. v. Saunders*, 70 Tex. 699, 6 S. W. 134; *Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319, 322, 323; *Mathis v. Fridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015; *Bivins v. Panhandle Packing Co.*, 140 S. W. 523.

The clause "pay in money or securities satisfactory to the insurance department" does not, in my judgment, render the proposition void; but if it, standing alone, did so, then before appellant accepted the proposition appellee had changed that part of it by his note to pay in cash upon a day certain and at all events. It was not a promise to pay if the stock was issued, and no such inference is legally inferable. The company could not issue the stock, and, if it afterwards did so, it was an ultra vires act, and the certificate

of stock was void and not an obligation upon the company for its par value. This stock could have been called in and canceled at any time by the company, or the Attorney General of the state could have instituted proceedings to that end. Articles 1147, 1148. I cannot see how this would render a valid note invalid. The purpose of the Constitution and law was to prevent the issuance of watered stock, not to declare illegal a contract to pay for stock. The contract did not require its issuance before paid for, and the subscription was not therefore illegal. Because the corporation, after accepting the note, did an illegal thing, this would not render the notes illegal when the illegal thing was not the consideration for the note. Contracts of this kind, as well as this very contract, have been upheld as legal by the courts, and I see no reason for holding differently in this case.

Considering the proposition, notes, and deed of trust as one instrument, it was unambiguous in that it was a promise to pay cash for the stock. The rule is so well recognized by all the courts that an agreement to pay for stock by subscribers may be enforced after organization of the proposed corporation, that I deem it unnecessary to cite further authorities. The appellee's interpretation that the certificate was to be issued to him in consideration of his note and subscription in my judgment is not warranted by his written contract and proposition.

I am also unable to agree on the proposition that the facts in this case do not show a payment for the stock before its issuance. I believe the facts show that it was paid for before there was any stock delivered to Hollifield. The subscription contract divides the amount subscribed into stock, the shares of which were to be of the par value of \$10; the surplus should be \$30. The expenses of organization were deducted from the \$2,500 paid by appellee to his agent at the time of subscribing. He expressly stipulates in his contract that the amounts subscribed should go to capital stock and surplus. He, himself, made the division. He stated that his shares should be \$10 each, and that his surplus should be \$30 each, and, having made the division himself, he should not now be heard to say that he paid \$2,500 for the shares. The contract was that he agreed to pay when the capital stock had been subscribed in good faith to the amount of \$200,000 of capital in the aggregate when paid. It makes no difference whether the value was placed on them at \$1 or \$10 per share; the capital stock was \$200,000. And the surplus was to be \$30 per share, which would have been \$600,000 in addition to the capital stock. This, I believe, to be the interpretation of this contract. The charter of the corporation provides that its shares shall be divided into 30,000 shares at \$10 each, and the stock issued in this case shows that it was issued

at \$10 per share—32½ shares at \$10 per share. It occurs to me that there must be some confusion with reference to what constitutes capital stock, or the shares of stock owned by the individual. Cook on Corporations, vol. 1, § 8, defines "capital stock" as:

"The sum fixed by corporate charter as the amount paid or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation."

Again, he says in the same section:

"The capital stock of a corporation remains fixed, although the actual property of the corporation may fluctuate widely in value and may be diminished by losses or increased by gains. The term 'stock' has been used at times to indicate the same as capital stock. Generally, however, it means shares of stock and in this sense it is used in this treatise."

The United States Supreme Court and the federal courts, in cases arising on the question of taxation with reference to stock and surplus as to whether or not surplus fell under the term stock, have drawn the distinction between "stock" and "surplus," and hold that the surplus is subject to the taxation. In *Leather Manufacturers' Bank v. Treat*, 128 Fed. page 262, 62 C. O. A. 644, in discussing this question it is said:

"It is quite usual, upon the organization of financial corporations, for the stockholders to contribute, besides the share of capital, a fund which is known as 'surplus.' It is also quite usual for the directors or managers of these institutions to set apart and to add to this fund from time to time some part of the accumulated profits of the business in excess of dividend requirements. The fund produced in either of these ways is what is known as 'surplus.'" *Central Trust Company of New York v. Treat* (C. C.) 171 Fed. 301.

The ownership of this large surplus by the corporation, available to make good losses in any of its enterprises, would naturally increase its credit generally.

The Supreme Court of the United States, in *Bank of Commerce v. State of Tennessee*, 161 U. S. 134, 16 Sup. Ct. 458, 40 L. Ed. page 645, in discussing the taxes which may be collected against a banking corporation, uses this language:

"The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one-half of one per cent. upon each share of the capital stock, which shall be in lieu of all other taxes. * * * Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock and there is a surplus over, above, and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders."

Ruling Case Law, vol. 7, in section 166, defines "capital stock," and in section 160 says:

"The tangible property of a corporation and the shares of stock therein are separate and distinct kinds of property and belong to different owners. The first being the property of the artificial person, the corporation; the latter the property of the individual owner."

The Constitution in this state forbids the issuance of "stock" without money paid. Until issued, the capital stock is in the corporation. After issued, when delivered, it becomes the property of the individual, and not before. It is not an obligation on the part of the corporation to pay to the individual the amount represented by the shares. Stock issued and delivered as fully paid up, if in the hands of an innocent third party, could be enforced against the corporation. Hence the evident purpose of the framers of the Constitution and of the law was to prohibit the issuance and delivery of stock as fully paid up. The capital stock in appellant company could be issued to the amount of \$300,000 of the par value of \$10. It will not be contended, we apprehend, that it could have issued stock for \$300,000 plus the surplus. The obligation on the part of the corporation was only for \$10 per share, and there was no other outstanding obligation against it represented by that certificate, and this was the obligation which is prohibited from being issued by the Constitution. There is no provision in the law or Constitution that prohibits an individual stockholder from contributing to the corporation a sum of money independent of the shares of stock for the purpose of making the assets of the corporation more valuable. Such an obligation or such a note could not violate the law or Constitution, for the reason that the public, in dealing with it, had the assurance, not only that the stock is paid, but that, in addition thereto, there is \$30 per share over and above the stock, and public policy would not prohibit, it occurs to me, a corporation from making its stock more valuable and its customers better secured by this addition than it otherwise would be by the mere payment of the par value of the stock. We apprehend that it will not be contended that under articles 1198, 1208, and 1210, the shareholder, in case a creditor should desire to collect a debt against the corporation, could collect from the shareholder more than the face value or par value of his stock; or, in case of insolvency, that he would be assessed for more than his pro rata part as shown by the face or par value of his stock. I believe that when this note was paid, and it having been paid before the issuance or delivery of the stock to the appellee, that the par value of the stock was paid for, and that the Constitution and law of Texas were satisfied, and that he was entitled to his certificate of stock. By that certificate the

company did not represent to the world that it was fully paid up when it was not, for in fact it received the par value of the stock and had the money on hand. The other notes for \$1,500, with the accrued interest, was not for stock, but it was for something over and above the stock which he had agreed to pay as surplus, as was shown by his written proposition, and it was not in violation of the Constitution and laws for him to so execute such notes. It made the corpus of the corporation more valuable and should be commended, rather than condemned. I therefore am of the opinion that this case should have been reversed.

MICHAELIS v. NANCE et al. (No. 5590).*

(Court of Civil Appeals of Texas. Austin.
March 2, 1916. On Motion for Re-hearing April 12, 1916.)

1. **WILLS** \S 423—**PROBATE—EFFECT.**
Under Rev. St. 1911, \S 3248, limiting the time for probating wills, the probate of a will at the instance of one not in default under that statute inures to the benefit of all of the heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 911-918; Dec. Dig. \S 423.]

2. **WILLS** \S 324(1)—**LIMITATIONS—IGNORANCE—COMPUTATION OF PERIOD—IN DEFAULT.**

Under Rev. St. 1911, \S 3248, limiting the time for probating wills, evidence that delay in discovering and offering for probate a holographic will was due to intrusting possession of testator's papers to another of his children held not insufficient as a matter of law to prove that the proponent was not in default.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 767; Dec. Dig. \S 324(1).]

3. **PRINCIPAL AND AGENT** \S 178(1)—**NOTICE TO AGENT—SCOPE OF AGENCY.**

The knowledge of one performing a mere ministerial duty is not imputed to his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 680, 683, 683½; Dec. Dig. \S 178(1).]

4. **NOTICE** \S 5—**TO AGENT—SCOPE OF AGENCY.**

The knowledge of the contents of papers by one given physical custody thereof does not affect the person depositing the papers.

[Ed. Note.—For other cases, see Notice, Cent. Dig. \S 3, 8-12; Dec. Dig. \S 5.]

Appeal from District Court, Hays County; Frank S. Roberts, Judge.

Proceeding by Mrs. Bessie Nance and others to probate a will. From judgment probating the will, defendant M. G. Michaelis appeals. Affirmed.

R. E. McKie, of San Marcos, and Henne & Fuchs, of New Braunfels, for appellant. O. T. Brown and Barber & Johnson, all of San Marcos, for appellees.

Findings of Fact.

JENKINS, J. W. W. Haupt died at his residence in Hays county, Tex., on the 27th day of August, 1907, leaving surviving him his wife, Sarah A. Haupt, and six children, to wit: Mrs. A. B. Landers, wife of A. P. Land-

ers; Mrs. Lelia Cooper, a widow; Mrs. Bassie Nance, wife of J. M. Nance; G. B. Haupt; L. M. Haupt; and Mrs. Touay Barbee, wife of W. H. Barbee. He left an instrument in his own handwriting claimed to be his last will and testament. His wife died September 1, 1912. Upon the death of W. W. Haupt his son, Louis Haupt, who had been attending to his business for some years, took charge, with the consent of all of the heirs, of all of his property, including his private papers. His property consisted of pasture lands which Louis Haupt leased and applied the proceeds to the support of the wife of W. W. Haupt during her lifetime, and it is to be inferred from the record that thereafter he divided such proceeds among the surviving children, except Mrs. Landers. Mrs. Landers at the time of the death of W. W. Haupt, and for some years prior thereto, had been insane, and had made her home with her father, though she had a husband and two sons living at Sulphur Springs, in Hopkins county, Tex. Prior to his death W. W. Haupt divided his farm lands, except 125 acres, equally among his five children, not including Mrs. Landers. There were 125 acres of this land which the evidence shows that W. W. Haupt had expressed an intention of dividing prior to his death in like manner as he had divided his other lands, but this was not done. The instrument purporting to be the will of W. W. Haupt was signed by him, but not witnessed by any one. Louis Haupt supposed that the same was invalid as a will for the reason that it was not witnessed. The other four children, and also the son of Mrs. Landers, knew of the existence of this writing, but none of them ever saw it until about March 20, 1914, when it was seen by J. M. Nance, the husband of Mrs. Nance, who took it to San Marcos, submitted it to a lawyer, and was informed that it was a valid will. On the following day it was offered for probate. The will provided that the lands referred to should become the property of the five children, excluding Mrs. Landers. All of the children of W. W. Haupt, except Mrs. Landers, resided in Hays county. Shortly after the death of W. W. Haupt it was thought advisable to send Mrs. Landers to a sanitarium at San Antonio. The remaining children, supposing that their father had died intestate, and that Mrs. Landers had an interest in the estate, sold the 125 acres above referred to for \$1,000, and appropriated that money to the use and benefit of Mrs. Landers. Appellant had bargained with Mrs. A. P. Landers, the husband and guardian of Mrs. Landers, for the purchase of her one-sixth interest in the land. He afterwards completed his purchase from Landers, who executed to him a deed for such interest by order of the probate court of Hopkins county. Appellant resisted the probate of the alleged will in the county court, and upon the same being

there probated he appealed to the district court, where a like judgment was rendered, from which judgment this appeal is prosecuted.

Opinion.

[1] It will be seen from the foregoing findings of fact that the will of W. W. Haupt was not offered for probate until about seven years after his death, for which reason, appellant contends, that the probate of said will was barred by the statute of limitation under article 3248 of the Revised Statutes, which prescribes that wills shall not be admitted to probate after a lapse of four years after the death of the testator, except where the party offering the same is not in default. Appellee contends that article 3248, supra, is essentially a statute of limitation, and therefore, by virtue of article 5708, does not apply to married women. Mrs. Nance and Mrs. Barbee were married at the date of their father's death, and continued so to be up to the time of the trial hereof. We deem it unnecessary to pass upon this issue, inasmuch as this judgment, we think, ought to be affirmed upon the ground that Mrs. Barbee, at least, was not in default in not sooner offering the will for probate; and, if not, the probate of the will at her instance inures to the benefit of all of the heirs of W. W. Haupt. *Masterson v. Harris* (Sup.) 174 S. W. 570. The case was submitted in the district court upon special issues as follows:

"Special Issue No. 1. If instrument offered for probate was, in fact, written and signed by William W. Haupt, did he intend it for and as his will, that is, did he intend thereby to express and direct the disposition to be made of all or any of his property after his death? You will answer this question 'Yes,' or 'No,' on the following form of verdict. *Ans. Yes.*

"Section No. 1. For your guidance in making your findings upon issues Nos. 2, 3, 4, 5, and 6 you are instructed by the court that the laws of Texas provide that: 'No will shall be admitted to probate after the lapse of four years from the death of the testator, unless it be shown by proof that the party applying for such probate was not in default in failing to present the same for probate within the four years.' The undisputed evidence in this case shows that each of the parties offering the alleged will for probate knew, within less than four years next after the death of William W. Haupt, that he had either written or started to write some character of instrument with reference to his estate and the disposition to be made thereof after his death. Now, you are directed by the court that it was the duty of each of the interested parties who now offer said instrument for probate to exercise due care to know the nature and effect of such paper; and, if by the exercise of such care he or she would have ascertained the true character of the paper in question in time to have offered same for probate within four years after the death of William W. Haupt, then, under such circumstances, he or she would be in default in not offering same for probate within that time. (a) The expression 'due care,' as used herein, means that degree of care which a person of ordinary prudence would have exercised under the same or similar circumstances.

"Section No. 2. If under all the facts and circumstances in evidence you find that any party or parties now offering the said instrument for

probate did exercise due care and did not, in fact, ascertain or know the true condition of the paper in question at any time within four years next succeeding the death of William W. Haupt, then you will be authorized to find that such party or parties was not in default. Bearing in mind the foregoing instructions, you will answer each of the following questions or issues Nos. 2, 3, 4, 5, and 6:

"Special Issue No. 2. Was W. H. Barbee in default in not offering the instrument in question for probate within four years next after the death of W. W. Haupt? Ans. No.

"Special Issue No. 3. Was Mrs. Touay Barbee in default in not offering the instrument in question for probate within four years after the death of W. W. Haupt? Ans. No.

"Special Issue No. 4. Was G. B. Haupt in default in not offering the instrument in question for probate within four years next after the death of W. W. Haupt? Ans. No.

"Special Issue No. 5. Was J. M. Nance in default in not offering the instrument in question for probate within four years next after the death of W. W. Haupt? Ans. No.

"Special Issue No. 6. Was Mrs. Bassie Nance in default in not offering the instrument in question for probate within four years next after the death of W. W. Haupt? Ans. No."

We need consider only special issues Nos. 2 and 3, relating to Mrs. Barbee and her husband. The testimony which we think is sufficient to sustain the judgment of the court as to Mrs. Barbee and her husband is as follows:

W. H. Barbee testified:

"After the death of Mr. Haupt I understood that he had started a will. My wife told me that he had left a paper or will, something of the kind. She did not know exactly what it was. This was soon after Mr. Haupt's death. I did not know but what it was a will. I asked Louis [L. M. Haupt], and he told me that he had started a will, but had never completed it, and that it was not signed. He told me about what he had in it. It was some time within a year after Mr. Haupt died. From what Louis told me I just supposed he had started a writing, but had never completed it, and had never signed it at all, and I didn't give it any more thought. I thought it was worthless. If Louis had told me that Mr. Haupt had written out and signed a paper, I would have insisted on having it probated, because I understood that was legal. When Louis Haupt told me that, I did not have any reason to question his statement. I took his word for it. I did not ascertain anything to the contrary until the Sunday before it was brought down here, which was in February or March. * * * My understanding was that Louis was taking charge of the property, and everything in the house was left, and nobody lived in the house. Between the death of Mr. Haupt and that of Mrs. Haupt the only income they had was from the rent of the pastures. Mr. Haupt had kept them rented out. Several years before he died he had sold all his stock. Louis attended to this, and after Mr. Haupt's death he would collect the earnings and place that money in the bank to Mrs. Haupt's credit, and she would check it out at her will. * * * Subsequent to the death of Mr. Haupt the children executed a deed by which they conveyed part of the land that had belonged to the estate, which deed recited that he died without any will. * * * I think it was 125 acres. Before Mr. Haupt's death there had never been any division as between the children of that 125 acres of land."

He then states that this 125 acres was sold to secure funds for the support of Mrs. Landers, and also that the deed to this 125 acres

was drawn by Mr. Barber, attorney for appellee in this case, and that at the time the deed was drawn Mr. Barber asked if Mr. Haupt had left a will, and that Louis Haupt then made the statement to him substantially as he had previously made it to the witness, namely, that Mr. Haupt had begun a writing with reference to his property, but had not finished it, and that it was not signed. The witness stated that he had no other information in regard to this instrument until the Sunday before it was offered for probate on Monday (March 21, 1914), at which time he and his wife were at the house of Mr. Nance; that he was discussing with Mr. Nance the offer of appellant to purchase the undivided interest of Mrs. Landers, and that he stated that he wished Mr. Haupt had signed the instrument that he had written, so that the members of the family could control the land, and not let an outside party in. Mr. Nance then stated to him that the instrument was signed, but was of no value as a will because it was not witnessed. The witness then said that, if Mr. Haupt wrote the instrument and signed it, it could be probated as a will. Thereupon they went to church, where Louis Haupt was, and took him aside, and the witness asked Louis if the instrument referred to had been signed by Mr. Haupt, and Louis answered that it had, but was not witnessed. He then stated that it was his understanding in such cases witnesses were not required. On the next day Mr. Nance went to the house of Louis Haupt, got the instrument, took it to San Marcos, and submitted it to Mr. Brown, a lawyer there, who advised that it be offered for probate, which was accordingly done. On cross-examination the witness said:

"I knew all the time from a short time after Col. Haupt's death that he had left an instrument of some kind in the form of a will or something that purported to be a portion of a will or something of that sort. I never did request to see the paper. Louis told me that it was not signed, and I did not think it was necessary. * * * I did not think that Louis Haupt intentionally made a false statement to me about it. As well as I recollect, he did not tell me that the will was not signed up properly, but he said the will was not signed; that is what he told me as well as I recollect. I am certain that that is what he told me at the time."

Referring to the sale of the 125 acres, the proceeds of which were used for Mrs. Landers' benefit, the witness said:

"I guess I did recognize the fact that Mrs. Landers was entitled to a share in the property that was being divided. We did not think there was any will, and, of course, we thought she was entitled to it. * * * At that time we were raising money to send her to San Antonio for treatment."

Referring to the conversation in the office of Mr. Barber at the time the deed to the 125 acres of land was made, witness said:

"I never requested Mr. Barber to look at it [the will] and tell me what it was. I did not consider it worth looking at, if it was not completed. I never requested any lawyer at any

time to examine it until it was brought down here to Mr. Brown about a year ago. I considered that if it had no signature that it was worthless; that it was just as if it was not made. I am not a lawyer."

On redirect examination the witness said:

"There was nothing at all to cause me to suspect or surmise that Louis was incorrectly stating the situation to me when he told me the paper was not signed. I had absolute confidence in him. * * * I do not know that I ever talked with Mr. Nance about it before until after I heard that Michaelis had contracted to buy Mrs. Landers' interest. I just in talking in a general conversation said that I was sorry that Mr. Haupt had not completed the will and signed it up, so we could protect Mrs. Landers, and also ourselves, and keep out undesirable persons. * * * I don't think I ever mentioned it to any of the other heirs."

Mrs. Touay Barbee testified as follows:

"Before my father's death my mother told me he had started a writing. She said it was for us children to go by after their death. I never saw any paper that my father had prepared. After he died Louis said that it was a paper, but that it was of no value, because it was not signed. This must have been some months after my father died; I don't remember exactly. I probably may have told my husband that some time there was a writing, but that was all. We did not discuss it. After Louis told me that I never had any information subsequent to that until the matter came up recently advising me that the paper, whatever it was, was actually signed by my father. If at any time after my father's death Louis had told me that there was a paper written out and signed by my father, I would have consulted my husband, and gone by his wishes; he is the business member of the firm. * * * Up until that Sunday night when we were at Mrs. Nance's house I had no information that caused me to think or surmise that this paper was actually written out, completed, and signed by my father. All of that time I had believed that it was not, in fact, signed by my father. * * * From the first I didn't think the will was finished. The idea I conceived was that it was not a finished will. My mother first told me about this paper being in existence. Louis was the first one told me about it not being signed up properly. * * * My mother did not tell me the paper was not signed. Louis told me shortly after Papa's death that it was not signed. That was seven years ago. I may not repeat his exact words, but he said that Papa left a writing, but it was not signed, and it was of no value. * * * I knew there was a writing started for us to go by, but I never knew that it was finished or signed. * * * Louis Haupt is my brother. I knew him to be an honest man, and I knew that he would not make away with anything. He would not do anything wrong intentionally. If he misled us, it was by ignorance or mistake."

The witness stated that she knew her father's wishes with reference to his property by talking with him about it, and that she supposed his wishes were being carried out. "He frequently expressed his wishes in regard to the Landers people." The will of Mr. Haupt states that he does not wish Landers or his sons to have any of his land, but undertakes to make an equal division of it among the other children after the death of his wife.

[2] Appellant cites in support of his contention that the testimony shows, as matter of law, that Mrs. Barbee, as well as the

others, was in default within the meaning of the statute. *Boren v. Boren*, 38 Tex. Civ. App. 139, 85 S. W. 48; *Stanford v. Finks*, 45 Tex. Civ. App. 30, 99 S. W. 449; *Kuhlman v. Baker*, 50 Tex. 681; *Connolly v. Hammond*, 58 Tex. 16; *Calhoun v. Burton*, 64 Tex. 518; *Bass v. James*, 83 Tex. 110, 18 S. W. 336; *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109; *Hudson v. Wheeler*, 34 Tex. 366; and several other cases not stronger than the ones stated. In *Boren v. Boren* and *Stanford v. Finks*, supra, in which cases it was held that negligence was shown as matter of law, the facts in the cases were shown by public records. In the first case a will had been made devising the life estate in land to the mother of appellant, who was then 15 years old, with remainder to him. The will was duly probated. He alleged that his elder brother procured him to sign a deed to the land with his mother, upon the representation that he had no interest in the land, but that his signature was necessary in order to obtain a loan. Eleven years afterwards he brought suit to set aside the probate of the will. A demurrer to his petition was sustained. The court said that it was not shown that appellant was not of average intelligence, although it was alleged that he could not read or write; that every boy of average intelligence 15 years of age ought to be presumed to know that he had some interest in land belonging to his deceased father, unless his father had disposed of it by will. If he had gone to the records, he could have ascertained that there was a will, and that he was the legatee thereunder. This he did not do until after he was 23 years of age.

In the case of *Stanford v. Finks*, supra, there was a judgment against the party of which he had knowledge, and it was held that he should be required to take notice as to how he was affected by the judgment.

In *Bass v. James* and *Smith v. Fly*, supra, suit was brought to recover for a deficiency in acreage, not upon a warranty, but upon the ground of misrepresentation. In the first case the suit was brought within three years after the purchase of the land. In the second case the deed was made December 23, 1853, and the suit was filed April 1, 1859. In these cases it was held negligence, as matter of law, for a man to fail for the length of time shown to ascertain the quantity of land in a tract owned by him, as he could easily have done by having a survey made.

In *Kuhlman v. Baker*, supra, the allegation was that Baker had represented to Kuhlman that he had a good title to a tract of land, and was making him a warranty deed. The deed was made in 1856. Kuhlman alleged that suit had been brought, and that he had been evicted from the land, and that he did not discover that Baker did not have a good title, nor that his deed was not a warranty until such suit was filed 17 years after the deed was executed. In addition to what was said as to the duty of a party to know under

what kind of a deed he holds title to land, the court said that it did not appear that confidential relations continued to exist between the parties after the execution of the deed.

In *Hudson v. Wheeler*, supra, an attempt was made to set aside two deeds, duly recorded, and under which the land had been held, one for the period of 17 years, and the other for 25 years. On the other hand, it was held in *Pitman v. Holmes*, 34 Tex. Civ. App. 485, 78 S. W. 961, that the fact that land that was purchased with the separate money of plaintiff's father was misrepresented to plaintiff and concealed from her by her mother was sufficient to suspend the running of the statute of limitation until her discovery of such fraud, 17 years thereafter.

In *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970, it was held that failure to discover that the wrong lots were pointed out to the purchaser suspended the statute of limitation for a period of more than 4 years. In *Shuttleworth v. McGee*, 47 Tex. Civ. App. 604, 105 S. W. 823, an attorney employed to collect a note reported to his client, a non-resident, that he had obtained judgment thereon, and subsequently by letter confirmed this statement. This was in 1902. In 1906 the owner of said note heard of the death of his said attorney, and employed another attorney to attend to the collection of said judgment. The latter attorney informed the plaintiff that no judgment had been obtained, and thereupon he instituted suit upon said note. The court, among other things, said:

"Under the facts as set up in the petition, which the demurrers admit to be true, the trial court erred in holding that the plaintiff's cause of action was barred by the four-year statute of limitation; and, if the two-year statute applied to plaintiff's cause of action, still we think the statute was suspended by the misrepresentation of Pope [the deceased attorney] to his client."

In *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 998, Lee brought suit to set aside a deed which he alleged he had been induced to execute upon the fraudulent representation of the defendant, who was his son-in-law and legal adviser. It was held that this was sufficient to raise the issue as to reasonable diligence in bringing the suit. See, also, *Ryan v. Railway Co.*, 64 Tex. 239; *Ochoa v. Miller*, 59 Tex. 462; *Elwell v. Convention*, 76 Tex. 519, 13 S. W. 552; *St. Mary's Asylum v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587; *Pena v. Brunl*, 156 S. W. 315; *Brown v. Brown*, 61 Tex. 56. In *St. Mary's Asylum v. Masterson*, supra, the will was not offered for probate until 21 years after the death of the testator, but it was held under the facts of that case that proponent was not in default within the meaning of the statute.

The issue in the instant case, as it is in cases where fraud or concealment of material facts is alleged, is as to whether the party deceived or misled has used reasonable dili-

gence to discover the fraud or mistake. The court submitted this issue upon a correct definition as to diligence, and the jury found in favor of appellee on the issue submitted. As above stated, we think the evidence was sufficient to raise the issue, and that the court did not err in refusing to peremptorily instruct the jury to find for appellant, and did not err in refusing to grant appellant a new trial on the ground that the verdict of the jury was unsupported by the evidence.

Appellant assigns error upon the action of the court in overruling the special exception to the petition; his proposition being that the general allegations contained in the pleading of proponents that they acted with proper diligence, and that through no fault of theirs was the will not sooner propounded for probate, are conclusions, and are wholly insufficient to excuse such default. The petition not only stated the legal conclusion from the facts relied upon, but also stated such facts. Hence we hold that the court did not err in overruling the special exception referred to.

Appellant assigns error as to the judgment rendered, for the reason that it does not appear from the record that the witnesses by whom the will was proven up subscribed to their testimony in either the county court or in the district court. As to the proceedings in the county court, it is immaterial whether or not the witnesses subscribed to their testimony, inasmuch as the trial in the district court is *de novo*. As to the proceedings in the district court, it does not appear from the record whether or not the witnesses subscribed to their testimony, but we think that is immaterial. The issue presented on this appeal is as to whether or not the testimony of such witnesses is sufficient to sustain the verdict of the jury. This testimony is before us upon an agreed statement of facts, and to that alone we look in determining the issue here presented.

Appellant assigns error upon the action of the court in refusing to submit to the jury special issue No. 6 requested by contestant. Said issue was as to whether or not Louis M. Haupt was the agent of the respective proponents for the purpose of caring for and having custody of the papers left by W. W. Haupt at the time of his death. The court refused to submit this issue. The testimony in support of this issue, as stated in appellant's brief, is as follows:

The witness Mrs. Bassie Nance testified that Louis Haupt took charge of his father's affairs after his death; that she did not know whether Louis was acting for all of the proponents in taking charge of her father's papers or not.

J. M. Nance testified:

"Mr. Haupt had Louis Haupt looking after his business affairs for several years before his death. He was getting tolerably old. Louis lived there with him until he married, and then he moved to Kyle, but attended to his father's

business at the time he was living there with him. Louis took charge of the old man's affairs after his death, or it seems it turned out that way. I did not ask him, but I supposed he was looking after the property in the interest of all the heirs. I offered no objection to it."

W. H. Barbee testified:

"My understanding was that Louis Haupt was taking charge of the property, and everything in the house was left, and nobody lived in the house. I supposed Louis Haupt had the papers, as he attended to all his father's business for him, and in the discussion in Mr. Barber's office I think I knew that Louis had possession of it. In fact, I think that Louis took charge of all the papers of Mr. Haupt's estate after Mrs. Haupt broke up housekeeping. I think he took all the papers down to Kyle, and probably put them in the bank, but I am not sure. That, however, is my understanding. I never objected at all to Louis having possession of these papers."

Mrs. Touay Barbee testified:

"Louis did not take charge of the management of the papers and other property of my father's estate for my mother and the other children, only in this way: He said to me, and probably to my husband: 'Some one has got to take the lead and settle off the funeral expenses of our mother and the estate, and will it be all right for me to give out the checks?' I told him so far as I was concerned it was all right. There was no other lead to take. I knew that Louis had all the papers of my father's estate, and I didn't make any objection to his retaining possession of them. I thought, as he had been with father and attended to his things, he was the proper one."

G. B. Haupt testified:

"I told him [Louis] at the time: 'You had better get all of his papers and put them somewhere where they are not liable to get burned up.' I might have said: 'We had better get them papers.' I left it to him, as he knew where they were, which part of the desk they were in. He had been attending to that, and I knew he would get them all."

Louis Haupt testified:

"I took all of his papers. I knew where he kept his deeds and private papers. It is not a fact that shortly after my father's death I took charge of all my father's papers with the consent of my brothers and sisters. I supposed they all knew I had these papers. There was no objection raised to my taking them. None of them ever came to me and demanded any of these papers. If they had demanded it, I would have let them look at the papers. I did not feel that I had any more right than they did, only they were in my possession."

In addition to the above, W. H. Barbee testified:

"I did not understand that Louis was caring for the papers for the benefit of all the heirs, but for Mrs. Haupt."

[3] This testimony, at most, shows that Louis M. Haupt took the physical custody of the papers belonging to his father's estate, including the will, with the knowledge of the other heirs, and without objection on their part. The contention of appellant is that Louis Haupt was the agent of the other heirs, and that his knowledge that the will was written and signed by the deceased is to be imputed to the other heirs. It is true that, under proper restrictions, knowledge acquired by an agent will be imputed to the principal,

but this is true only where the agent acquires such knowledge while in performance of the principal's business, and while acting with reference to the matter for which his agency was created. Where one in performing a mere ministerial duty learns facts material if known to his principal, there is no imputation of such knowledge as to the principal. *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808; *Storms v. Mundy*, 46 Tex. Civ. App. 88, 101 S. W. 258; *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 595; *Mechem on Agency* (2d Ed.) §§ 1831-1834; 39 Cyc. pp. 1587, 1595.

In *Labbe v. Corbett*, supra, the issue was as to whether Labbe knew of the diseased condition of certain sheep. In receiving the sheep he had with him persons to assist in taking charge and driving the sheep, and these parties observed at the time that the sheep were diseased. Under this state of facts the court said:

"If it had been shown that appellant had an agent or agents to whom he had intrusted the duty of ascertaining the condition of the sheep, then such a charge as was given would have been correct; for in such case the making of inquiry would have been within the scope of the agent's power, and it would have been his duty to communicate to his principal the knowledge possessed by himself. The facts, however, do not show any such agency, but do show that the appellant was present to examine the sheep for himself, and that he had persons with him whose sole duty it was to assist him in driving and caring for the sheep. Some of these persons stated that they saw some diseased sheep at the time they were delivered. The knowledge of persons so situated could not be deemed to affect the appellant with knowledge of the facts known to them."

[4] There is no testimony in this case tending to show that Louis Haupt was the agent of the other heirs for the purpose of ascertaining the contents of the will, or as to whether or not it was signed or properly signed. The mere fact that, with the consent of the other heirs, or even at their request, he took charge of the papers, including this will, for safe-keeping, would not affect the others with knowledge which he may have acquired from an examination of this paper.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

On Motion for Rehearing.

Appellant in his motion for rehearing complains that we in our opinion herein construed the will of W. W. Haupt as providing that "the lands referred to should become the property of the five children, excluding Mrs. Landers." We had no intention of construing the will, as that was not an issue before us, and what we said in reference thereto is, of course, dicta.

All the grounds set out in the motion for rehearing have been carefully examined, and we overrule the same.

Motion overruled.

REINHARDT v. BORDERS et ux. (No. 531.)*

(Court of Civil Appeals of Texas. El Paso.
March 23, 1916. Rehearing Denied
April 13, 1916.)

1. DAMAGES ⇐78(6)—LIQUIDATED DAMAGES
—NOTE GUARANTEEING DELIVERY OF TITLE.

Where the seller of a hotel, in exchange for personalty and notes, executed a note which stated that it represented a forfeiture to the amount mentioned, the mortgage securing it providing that it was a forfeit put up to guarantee delivery of title, upon the seller's failure to convey good title the buyers could recover on the note, the stipulation for the forfeiture of the amount expressed having been intended as agreed or liquidated damages, while the intention of the parties in regard to such a matter is controlling.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157, 159; Dec. Dig. ⇐78(6).]

2. DAMAGES ⇐78(2) — LIQUIDATED DAMAGES
—“FORFEIT.”

The expressions, “he agrees to forfeit the sum of one thousand dollars,” “this note, to the extent of the amount herein mentioned, represents a forfeiture put up,” and “said note being a forfeit put up,” mean something different from the word “penalty.”

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 157; Dec. Dig. ⇐78(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Forfeit*.]

3. DAMAGES ⇐163(1)—BREACH OF CONTRACT
—PRESUMPTION OF DAMAGE.

Damages, which must be actual or liquidated, are presumed to flow from a breach of contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 454, 455; Dec. Dig. ⇐163(1).]

4. DAMAGES ⇐79(1)—LIQUIDATED DAMAGES
OR PENALTY.

Where no approximation between actual and stipulated damages for breach of contract can be made, the stipulated damages must control.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 164; Dec. Dig. ⇐79(1).]

Appeal from District Court, Ward County; S. J. Isaacks, Judge.

Suit by W. F. Borders and wife against Marvin Reinhardt. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. A. Hudson, of Pecos, for appellant. B. W. Baker, of Barstow, and Jno. B. Howard, of Pecos, for appellees.

WALTHALL, J. On the 24th day of March, 1914, appellant and appellees entered into a contract for the sale and exchange of properties, the several provisions of which are substantially as follows: (1) In consideration of \$6,500 Reinhardt agreed to convey to the Borders within 60 days, free of incumbrance, except as to the unpaid purchase money, certain town lots in Barstow, Tex., on which the Pearle Hotel was situated. (2) The consideration was to be paid as follows: \$3,600 was paid by a sale and delivery of certain horses, wagons, and harness. The balance of the consideration was to be evidenced by promissory notes due one in No-

vember, 1914, and one in each year following, until all were paid, and secured by vendor's lien. (3) Reinhardt could convey the property directly from himself or from the record owner, including the hotel furniture, the Borders to keep the property insured to the extent of the amount of the unpaid notes. (4) If a release of the lien on the hotel property then existing could not be procured and placed of record before the execution of the Border notes, Reinhardt should procure such a release and place the same in escrow in some bank, to be agreed on, the release to be delivered to the Borders with the deed, Reinhardt to furnish complete abstract, showing title in the party executing the deed. (5) The Borders agreed to accept deed within 60 days from date of contract and to execute the notes, and to then give bill of sale to the personal property. (6) Possession of the personal property was delivered at the time of the making of the contract. (7) The Borders should have possession of the hotel property from the signing of the contract, and had the right to the possession of the personal property until the delivery of the deed to them. In the event the Borders should fail or refuse to comply with the terms of the contract, they agreed to surrender possession of the hotel. (8) The Border notes should also be secured by chattel mortgage on the hotel furniture and to execute the mortgage on delivery of the notes.

On the 25th of April, the same parties, in the same matter, entered into a supplemental contract. After several whereases, reciting the provisions in the first contract, the supplemental contract provides substantially as follows:

(1) The amounts and dates of payment of some of the notes are changed. (2) The title to the live stock given by the Borders as part consideration shall remain in the Borders until Reinhardt delivers a good and merchantable title to the hotel property. (3) (We quote the verbiage.) “It is further agreed that should the said party of the first part (Reinhardt) fail or refuse to deliver good and merchantable title to said hotel property, as contracted, he agrees to forfeit the sum of one thousand dollars, said amount to be paid to the parties of the second part (Borders) in such event. However, it is agreed that in the event of any objection to title to the said property on the part of the parties of the second part, then the party of the first part shall have a reasonable time from the date of such objection in which to correct such defects, if any, as are objected to, and, to secure the payment of the said sum, the party of the first part agrees to execute deed of trust to a certain section of land situated in Ward county, Texas, and being all of section 190, block 34, H. & T. C. Ry. Co. survey.”

Reinhardt executed and delivered the \$1,000 note, and also executed and delivered a mortgage on the said section of land to secure its payment. The note is for \$1,000, and is dated April 24, 1914, and made payable to W. F. Borders 60 days after date. After the formal statement of the note, these words occur in the body of the note:

"This note, to the extent of the amount therein mentioned, represents a forfeiture put up by said Marvin Reinhardt in accordance with a contract of even date," etc.

The mortgage contains the following:

"\$1,000.00. Said note being a forfeiture put up to guarantee delivery of title to certain property described in contract of even date between Marvin Reinhardt and Mr. and Mrs. W. F. Borders, with interest from maturity until paid at the rate of eight per cent. per annum, said interest payable as it accrues, at the office of W. F. Borders, then this conveyance shall become null and void and these presents shall be released in due form at my expense."

The mortgage makes provision for the sale of the mortgaged property "in case of default or failure to observe and keep any of the covenants hereof" by the grantor.

Appellees brought this suit against appellant to recover on the \$1,000 note and for a foreclosure of the mortgage lien; alleged a breach of the contract to convey the hotel; alleged that the \$1,000 note represented agreed or liquidated damages; alleged appellees' readiness and willingness to perform their part of the contract; alleged damages to the personal property while in the hands of appellant; and asked judgment for such damages.

Appellant denied that he had breached the contract, and pleaded his ability and willingness to perform his part of it; alleged that appellees had never pointed out any defect in the title to the hotel property, nor had given him an opportunity to correct such defects; pleaded refusal to perform the contract on the part of appellees; alleged that the note with the deed of trust sued upon was executed for the sole purpose of guaranteeing delivery of title to the hotel property, and to become void upon a tender of a good and merchantable title thereto, and was a penalty and not agreed or liquidated damages, and that appellees were not the owners and holders of said note and mortgage. Appellant asked for specific performance of the contract; prayed for the agreed value of the personal property given in exchange for the hotel, converted by appellees; asked that a lien be decreed against the hotel property to secure the unpaid balance of the purchase money; and prayed for a cancellation of the \$1,000 note and mortgage.

On special issues submitted, the jury found that there had been liens of record against the hotel property at all times since March 24, 1914 (the date of the first contract); that Reinhardt knew of the existence of such liens; that prior to April 6, 1915, Reinhardt had never tendered to the Borders a warranty deed to the hotel property with a release of such liens, nor placed the same in escrow to be delivered to the Borders upon the execution by them of the vendor's lien notes, called for in the contract, nor had Reinhardt, prior to said date, told the Borders that he

would secure a release of the said liens and place same in escrow, to be delivered contemporaneously with the notes should the Borders execute the vendor's lien notes and place them in escrow for delivery; that the Borders did not at any time, prior to the filing of the suit, agree with Reinhardt that they would assume the outstanding vendor's lien notes against the hotel property in lieu of executing the notes, as agreed in the original contract; that Reinhardt did tender to the Borders a warranty deed in which the Borders were to assume the payment of the outstanding vendor's lien notes, but that the Borders refused to accept that deed; that the time elapsing between the date of the refusal to accept the said tendered deed and the 6th day of April, 1915, was an unreasonable length of time for Reinhardt to have to procure the release of liens and tender same with a deed to the hotel property.

On the above findings of the jury, judgment was rendered in favor of appellees on the \$1,000 note, less \$346.66, the rental value of the hotel, and a foreclosure of the mortgage lien on the section of land. Appellant presents ten assignments of error, but we think the fourth and fifth are the only ones that we need discuss. By the fourth assignment, appellant insists that the \$1,000 note sued on, with the mortgage given to secure it, is a penalty and not agreed or liquidated damages. And by the fifth assignment appellant insists that no actual damages are shown to have been sustained by the appellees; that, while a sum is named as liquidated damages, the courts will not so treat it unless it bears such proportion to the actual damages that it may reasonably be presumed to have been arrived at, upon a fair estimation by the parties, as the compensation to be paid for the prospective loss. By other assignments, appellant insists that the proof shows that appellees breached the contract, and that on that account they should not be permitted to recover on the note. We need not state the evidence here, but a careful examination of it convinces us that such contention is not sustained. The facts found by the jury in our opinion are well sustained by the evidence, and show that appellant not only breached the contract, but totally disregarded the obligations he had assumed to clear the hotel property of liens of which he well knew, and tender to appellees a good and sufficient merchantable title, if not within the 60 days, at least within a reasonable time. The jury found that he did neither. The court did not submit to the jury for their finding whether the appellees had sustained any actual damages arising from a breach of the contract by appellant. The court construed, as a matter of law, the \$1,000 note sued on to be agreed or liquidated damages independently of any question of damages actually suffered, or question of intention of the parties in making

the note other than is expressed in the writing.

[1, 2] In the third paragraph of the supplemental contract, it will be observed that the parties agreed that should Reinhardt "fail or refuse to deliver a good and merchantable title to the hotel property as contracted, he agrees to forfeit the sum of one thousand dollars." The note states: "This note, to the extent of the amount herein mentioned, represents a forfeiture." The deed of trust provides: "\$1,000.00. Said note being a forfeit put up to guarantee delivery of title." From the words used in the contract, in the note, and in the mortgage given to secure the note, and from the nature of the contract itself and all the facts and circumstances attending the making of the contract, note, and mortgage, we think it clear that the stipulation for the forfeiture of the amount expressed by the note was intended as agreed or liquidated damages. It is the intention that controls. The damages incident to appellees' leaving their former place of residence in Tarrant county and moving to Ward county, and in surrendering to appellant for 60 days the possession and use of their personal property agreed to be worth \$3,600, would hardly be capable of being definitely ascertained. But independently of the question as to whether the damages could be definitely ascertained on a breach of the contract by the appellant, the very language used in the contract, note, and mortgage is sufficient to clearly express the intention of the parties. As said by the Supreme Court in Eakin v. Scott et al., 70 Tex. 442, 7 S. W. 777, the expressions, "he agrees to forfeit the sum of one thousand dollars," "this note, to the extent of the amount herein mentioned, represents a forfeiture put up," and "said note being a forfeit put up," mean something different than the word "penalty." In that case, the expression was, "shall act as a forfeiture," and the court held that the parties meant that the defendant, in the event he abandoned the trade, should pay absolutely to the plaintiffs the sum named as their agreed damages.

[3, 4] In this case, the jury found that appellant did not comply with his contract. The contract being broken, damages will be presumed to flow from its breach. Halff et al. v. O'Connor, 14 Tex. Civ. App. 191, 37 S. W. 238. These damages must be either actual or liquidated. No approximation is made to appear by the evidence between the actual and the stipulated damages. This not appearing, the actual damages, under the rule stated by the Supreme Court in Collier v. Betterton, 87 Tex. 440, 29 S. W. 468, cannot be the measure of recovery; hence the basis of the recovery must be the damages stipulated in the contract. Halff et al. v. O'Connor, supra.

Appellant's assignments must be overruled.

DONADA v. POWER. (No. 5579.)

(Court of Civil Appeals of Texas. San Antonio. Feb. 9, 1916. On Motion for Rehearing, April 12, 1916.)

1. LANDLORD AND TENANT §22(2)—LEASES—CONSTRUCTION—SUPPLEMENTAL AGREEMENT.

A lease of irrigated land providing, "in case lessees take more than 20 acres within six months, the parties to enter into a supplemental contract to evidence same," construed to be an offer to lease, and not effective as a contract until accepted.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 55; Dec. Dig. §22(2).]

2. LANDLORD AND TENANT §25(5)—LEASES—VALIDITY—ACCEPTANCE.

Taking possession of land by the lessee after an offer to lease it to him is an acceptance of the offer as binding on him as an express verbal acceptance.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 73-75; Dec. Dig. §25(5).]

3. LIMITATION OF ACTIONS §27—LEASE NOT IN WRITING.

Under the statute of limitations the right to remit under a lease not in writing is barred if suit is not commenced in two years after it accrues.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 132, 133; Dec. Dig. §27.]

4. APPEAL AND ERROR §1151(2)—DISPOSITION—MODIFICATION—AMOUNT OF RECOVERY.

Error in allowing damages barred by a statute of limitations may be corrected by an appellate court without remanding the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4500, 4503-4505; Dec. Dig. §1151(2).]

5. APPEAL AND ERROR §843(2)—DISPOSITION—MODIFICATION.

Where a judgment must be reversed in any event, an appellate court will not itself undertake to estimate the amount of excess damages in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331, 3338; Dec. Dig. §843(2).]

6. APPEAL AND ERROR §882(12)—REVIEW—PARTIES ENTITLED TO ALLEGED ERROR—ERROR COMMITTED.

One is precluded from urging error in a charge which is almost a literal copy of a special charge asked by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8602; Dec. Dig. §882(12).]

7. DAMAGES §214—PROCEEDINGS FOR ASSESSMENT—INSTRUCTIONS—REDUCTION OF DAMAGES.

An instruction precluding recovery of any damages if plaintiff could have diminished them is error.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 542; Dec. Dig. §214.]

On Motion for Rehearing.

8. LIMITATION OF ACTIONS §24(2)—PARTICULAR ACTIONS—WRITTEN CONTRACTS.

A suit for the rent of acreage over 20 acres where a lease provided, "in case lessees take more than 20 acres within six months, the parties to enter into a supplemental contract to evidence same," and within the six months the lessees accepted the offer of more land by parol,

but made no written contract therefor, held a suit "where the indebtedness is evidenced by or founded upon any contract in writing" within the statute of limitations permitting such suits to be brought within four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 113; Dec. Dig. § 24(2).]

Appeal from District Court, Refugio County; John M. Green, Judge.

Action by J. F. Power against B. J. Donada. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Dougherty & Dougherty, B. D. Tarlton, Jr., and H. S. Bonham, all of Beeville, for appellant. Wilson, Dabney & King, of Houston, and J. Turner Vance, of Refugio, for appellee.

MOURSUND, J. Appellee, Power, sued appellant, Donada, to recover rents alleged to be due under a written contract which reads as follows:

"The State of Texas, County of Refugio.

"Know all men by these presents that we, James F. Power, of the one part, and C. P. Fox and B. J. Donada, of the other part, witnesseth:

"The party of the first part is preparing for irrigation purposes about thirty-seven acres of land hereinafter described, and he does hereby lease to the said parties of the second part twenty acres of the same with the privilege to the said second parties to lease all of said thirty-seven acres or any amount of same in excess of twenty acres that they may choose, provided they exercise said privilege of taking more than twenty acres within six months from this date: the rental of said twenty acres to begin when party of first part is ready to furnish sufficient water to irrigate the same; and in case second parties take more than twenty acres within said time (six months from date hereof), the parties hereto to enter into a supplemental contract to evidence the same. Said land is situated on the west side of the Mission river on the town tract of the town of Refugio, in said county of Refugio, about two and one-half miles below the said town of Refugio, the same being part of farm lots Nos. 57, of twenty-three acres, and 4, of twenty acres, and it is thought that said twenty acres or more may embrace parts of other farm lots belonging to party of the first part adjoining said lots 57 and 4. To further identify the land embraced in said twenty acres or more the same is declared to be the twenty acres or more adjoining the said Mission river, now cleared of brush and being prepared for irrigation purposes by party of first part.

"This lease is made for the period of five years from the date hereof, with the privilege to the parties of second part to renew this lease at the expiration of said five years for any period of time therefrom not to exceed five years from said date of the expiration of said first five years lease. Said parties of second part agree to pay a rental for said land at the rate of thirty dollars per acre per annum, payable semiannually.

"Party of first part, in consideration of said sum, agrees to furnish the following:

"(1) Having purchased suitable irrigation machinery, he agrees to have same placed in position at once and to furnish sufficient water at any and all times to irrigate said twenty acres or more.

"(2) To inclose said twenty or more acres with a substantial fence with twenty-four inch wire netting (to exclude all small animals) and two barbed wires stretched at top of fence, and to

maintain the same during the period of this lease in good repair.

"(3) To furnish one or more main canals, as may be necessary, for the perfect irrigation of said land.

"(4) A substantial tenant house and suitable dwelling for extra workmen to be employed on the farm.

"(5) A substantial warehouse 20 feet by 40 feet, well ventilated.

"(6) A substantial pen for work animals, a proper shed in which to feed the same, and suitable place to store feed for said animals, and shed to protect machinery and implements.

"(7) The use of the pasture in which said farm is located to graze the necessary animals employed on the farm.

"(8) Parties of the second part are to have the use of all water supplied by said irrigation plant, and water shall not be furnished to others, or for other purposes, unless there is a surplus of water; that is, more water than said second parties need for their purposes of irrigation.

"Said parties of the second part bind themselves as follows:

"(a) They agree to admit said party of first part to partnership to the extent of one-third interest after the expiration of one year from date of this lease, in consideration of the total amount of the lease money to be paid as hereinbefore provided; that is, party of the first part shall become a full partner if he so desires, provided he makes no charge to parties of second part for lease of said land from the date he so enters said partnership. It being understood that in case the party of the first part elects to become a partner he is to share equally one-third interest without any expense for tools, etc., on hand at the time of his entrance to such partnership, but thereafter to furnish his pro rata for such tools, etc.

"(b) Parties of second part agree to pay the rental for said land promptly semiannually as it accrues, unless party of first part elects to become a partner, as before provided, when all further rental for this lease shall cease.

"(c) Parties of second part agree to furnish the necessary gasoline and lubricating oil with which to pump the necessary water for irrigation, but to be at no other expense in running or maintaining the irrigation machinery in repair, unless party of first part elects to become a partner as before provided, in which case all expenses of maintaining the irrigation plant are to be borne by all three partners.

"The parties of the second part shall have the first privilege to lease any other body of land that may be cleared and prepared for irrigation adjoining the said above thirty-seven acres.

"This lease is transferable, but should either of the parties of the second part, or of all the parties, should the said James F. Power become a partner as hereinbefore provided, desire to sell and transfer his interest, he binds himself to give his partner or partners the preference to purchase his said interest, provided the other partner or partners pay as much for such interest as is offered by any other bona fide prospective purchaser.

"A bona fide sale of his interest shall release such party selling his said interest from further liability under this lease.

"Witness our hands this 11th day of September, 1907.

"[Signed] James F. Power,
"Party of the First Part.
"B. J. Donada,
"C. P. Fox,
"Parties of the Second Part."

On this contract is written an agreement reciting that it is supplemental to said contract, wherein it is stated that the rental of the 20 acres mentioned began on October 1, 1907. This agreement is dated February 20,

1908. Fox transferred his interest in the lease to Donada. Power never exercised his option to become a partner. Plaintiff alleged that Donada elected to use the entire 37 acres, and entered thereon, used and enjoyed the same under said contract; that the rentals under the contract amounted to \$5,700; that on or about January 1, 1908, defendant, by verbal contract, leased from plaintiff 77 acres additional for a term of one year beginning January 1, 1908, and agreed to pay \$6 per acre therefor, payable semiannually; that defendant paid plaintiff \$1,500, the items and approximate dates being set out; that plaintiff in the beginning operated the machinery and pumped the water, but later on agreed with defendant that the latter should do so, and be paid by plaintiff for such work. Plaintiff alleged that under such agreement defendant was entitled to certain credits. The parties agreed upon this matter, the agreed credits being allowed, and therefore it will receive no further notice.

Defendant admitted the execution of the contract, but insisted that he was liable to plaintiff for rent on only 20 acres by virtue of such contract. He further alleged that he was liable for only the reasonable rental value of so much of the land as he actually used, and that this liability was subject to various set-off and counterclaims due him by reason of payments and by reason of work done and labor performed by defendant for plaintiff, and by reason of damages suffered through plaintiff's failure to comply with the obligations imposed upon him by the terms of said contract. Plaintiff denied the material allegations of defendant's cross-action, and pleaded the two and four year statutes of limitation. Defendant by supplemental answer invoked the two and four year statutes of limitation, and pleaded the existence of ambiguity in the contract.

The court construed the contract above copied as one for the lease of the 37 acres at the rate of \$90 per acre per annum, payable semiannually, with a provision that the lessees need not take more than 20 acres under the lease, and submitted only the issues:

(1) "How much of the 37-acre tract contracted by the plaintiff to the defendant under the contract referred to above over 20 acres did the plaintiff furnish to the defendant, on the defendant's request, under and in accordance with the terms of this contract, and when?"

(2) "What amount of damage, if any, did the defendant suffer by reason of any breach by plaintiff of any obligation of his, imposed by the contract herein involved, on the plaintiff (if there was any such breach), to wit: (A) By his failure (if there was any failure) throughout the periods hereinafter stated to supply suitable machinery to furnish sufficient water as was necessary at all times to carry on the irrigation enterprise; (B) by his failure (if failure there was) throughout the periods hereinafter stated to furnish and inclose said land with a suitable fence, and maintain the same in good repair, with 24-inch wire netting, to exclude all small animals, and two barbed wires stretched at the top of the fence; (C) by his failure (if failure

there was) to furnish one or more main canals as was necessary for the perfect irrigation of the land?—it being claimed by the defendant that the canals furnished were insufficient for the proper irrigation of the land; that is to say, damages within the following periods: (a) Between March 23, 1910, to March 1, 1911; (b) between March 1, 1911, and September 11, 1912."

In connection with these issues the court gave certain instructions which will be stated when the assignments of error relating thereto are discussed. The jury found that plaintiff furnished to defendant at his request, under the terms of the contract, 17 acres in excess of 20 acres out of the 37-acre tract, not later than January 1, 1908, and that defendant suffered no damages by reason of the matters alleged by him and submitted to them.

The court entered judgment in favor of plaintiff for \$4,400, with interest thereon from March 26, 1915, at the rate of 6 per cent per annum.

[1] The contract above copied is a contract for the lease of 20 acres of land for five years upon the terms and conditions therein stated, with an option to the lessee to take all or any part of 17 acres adjoining the same, upon the same terms and conditions, the lease thereof to expire when the lease of the 20 acres should expire, which option, it was provided, must be exercised within six months from date of said contract. The provision that, "in case second parties take more than 20 acres within said time (six months from date hereof), the parties hereto to enter into a supplemental contract to evidence the same," must be construed as a provision for an express acceptance of the offer, which acceptance would make a contract between the parties. To construe it as meaning that the lessor was merely contracting to enter into a contract without defining the terms upon which he was to be bound would be equivalent to eliminating from the contract all that was said with respect to the 17 acres; for an agreement to enter into a contract upon terms to be thereafter agreed upon would be a nullity.

Plaintiff alleged that the defendant entered upon the property "on or before the first day of October, 1907, and elected and agreed to use the whole 37 acres, and has been occupying, using and enjoying the same under this lease, and in accordance with its terms as stated above." In a supplemental petition it was alleged that such agreement and election was made within six months from date of contract. The allegation shows that a contract was made with regard to the 17 acres, whereby the same terms would apply thereto as applied to the 20 acres. Assignments Nos. 2 and 6 are therefore overruled.

[2] The stipulation that the lessee could within six months elect to take the 17 acres was a continuing offer on the part of the lessor, based upon a valuable consideration, to include said 17 acres within the terms of the lease contract for the 20 acres, condi-

tioned that acceptance be made within six months. The lessee, by verbally notifying the lessor of his acceptance of the offer within the stipulated time, could make it a valid contract, subject to such difficulties with regard to its enforcement as might be encountered if the statute of frauds should be invoked. We think that taking possession of the land by the lessee would be equivalent to an acceptance equally as binding on him as an express verbal acceptance. In the case of *Patton v. Rucker*, 29 Tex. 408, the court said:

"In order to their enforcement by the courts, contracts for the sale of land must be evidenced by writing. When the writing relied on contains within itself all the particulars of a concluded contract, it is sufficient if it be signed by the party against whom it is sought to be enforced; but if, instead of being evidence of a concluded agreement, whatever may be its form, it is really a mere proposal, such a writing is turned into an agreement, and can be enforced in equity by the other party only by his acceptance of it in writing. A proposal by one party and an acceptance of that proposal according to the terms of it by the other constituted a contract."

In the case of *Foster v. Land Co.*, 2 Tex. Civ. App. 514, 22 S. W. 260, the Court of Civil Appeals of the Galveston District followed the *Patton v. Rucker* Case, but recognized the fact that there is strong reason and high authority to sustain the opposite view. The same court has recently adhered to its holding in said case. *Daugherty v. Lee-wright*, 174 S. W. 841. See, also, *Lanz v. McLaughlin*, 14 Minn. 72 (Gil. 55). The following cases reannounce the rule that, when the memorandum contains within itself all the particulars of a concluded contract, it need only be signed by the party against whom it is sought to be enforced: *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Morrison v. Dailey* (Sup.) 6 S. W. 427; *Ragsdale v. Mays*, 65 Tex. 256; *Hazzard v. Morrison*, 130 S. W. 244, affirmed by Supreme Court 104 Tex. 589, 143 S. W. 142. If the rule announced in the case of *Patton v. Rucker* is applicable to contracts for the lease of land, it is clear that no action could have been maintained by appellant against appellee based upon the theory that there was a written contract for the lease of the 17 acres, unless he could show a written acceptance made within the six months.

[3-5] But, whether this could be done or not, it is clear that, in the absence of a written acceptance of the continuing offer to include the 17 acres within the terms of the lease contract for the 20 acres, there is no memorandum in writing of any contract for the lease of the 17 acres signed by appellant. It is true that, although appellant pleaded the statute of frauds, he does not upon this appeal urge any contentions based upon such defense, but he does urge assignments interposing the statute of limitation of two years. We think it is clear that the suit against appellant as to the rents for the 17 acres is based upon a contract not in writing, for a written contract cannot be shown by proof

only of an offer in writing, and that therefore the two-year statute of limitations is applicable to the demand for such rents. Assignments Nos. 4, 5, and 21 relate to limitation as to the rents of the 17 acres, and must be sustained. The error in allowing that portion of said rents which became due more than two years before the suit was filed could be corrected by this court, but, as the judgment must be reversed on another ground, it will be unnecessary to undertake to estimate the amount of excess in the judgment.

As no issue is raised with regard to the statute of frauds, we will decide all questions submitted in appellant's brief upon the theory that there was an enforceable parol contract for the lease of the 17 acres for the period sued for by plaintiff. It follows that no error was committed by the court in sustaining an exception to that part of appellant's first supplemental petition in which he undertook to plead that he was only due plaintiff the reasonable rent on various portions of said 17 acres for small periods of time during which he alleged that he used the same. Assignment No. 1 is overruled.

Appellant admitted that he took possession of part of the 17 acres under the option given him, and the only issue was as to the number of acres he elected to take. This issue was submitted to the jury, and they found he took the entire 17 acres. While the court's description in his charge of the provisions of the lease contract is not correct, and is confusing in that it describes the contract as one for the lease of 87 acres, with provision that lessees need not take more than 20 acres, but if they should take more than 20 they should within six months exercise the privilege of taking more, and the first issue assumes there was a contract for 37 acres, still, as the jury was required to find only one fact, namely, how many acres appellant elected to take, we think the errors in the portions of the charge referred to would not require a reversal of the judgment. We do not see how it could be prejudicial to appellant, leaving out of consideration, as we must, all issues relating to the statute of frauds, if the court had instructed the jury specifically that there was a verbal contract between plaintiff and defendant as to such acreage out of the 37 acres which defendant elected to take, and for them to find, in addition to the 20 provided for in the contract, the number of acres in the additional tract so taken. Assignments 7 to 11, inclusive, are overruled.

[6] Appellant objects to the second issue on the ground that it submits in one complex, intricate mass practically the entire case, so far as made by the cross-action, and urges that this constitutes error in view of the fact that he requested that the case be submitted on special issues. It appears from the qualification of the bill of exceptions that the court had before him the defendant's ex-cep-

tions to his proposed charge as well as all of defendant's special charges when he drew his charge. The contents of his proposed charge are not disclosed by the record. It appears that defendant requested a special charge couched in almost the identical language of the charge given by the court. The bill of exceptions shows that defendant excepted to such charge in spite of the fact that it was almost a literal copy of the special charge asked by him. We conclude that under the circumstances he is precluded from insisting that the court erred in the method adopted in submitting the matters covered by the second issue. Assignments 12 and 13 are therefore overruled.

[7] Appellant also assigns error upon that portion of the court's charge which reads as follows:

"The defendant cannot recover damages (if any) by reason of any default of the plaintiff in regard to the matters complained of and mentioned above (if any there were) in any case to any extent where the accrual of such damages could have been prevented or diminished by reasonable exertions and by the use of ordinary care and reasonable expense on the part of the defendant."

This charge was excepted to in the trial court on various grounds. One was that it denied the defendant the right to recover the amount it would reasonably have cost him to prevent or diminish the injuries complained of. Another was that it did not allow defendant to recover such damages less the diminution that defendant could have brought about. It appears that defendant requested the court to give a special charge on this issue, which was not subject to the two objections above set out, made by him to the court's charge. We conclude that the court erred in giving the charge, and that such error is a very material one; for the charge precluded any recovery if defendant could have diminished the damages. The fifteenth assignment of error therefore is sustained.

Appellant by his fourteenth assignment contends the court erred in giving the charge above copied and held to be erroneous, because the plaintiff failed to plead that defendant by the exercise of reasonable care could have prevented or diminished the damages. He contends that, although he did not object to the charge on such ground, and in fact asked a charge on the subject, he can take advantage of the giving thereof as a fundamental error. Having held it was an erroneous charge, it becomes unnecessary to say anything in regard to whether it was fundamental error to give the same in the absence of pleadings raising the issue. But in view of another trial we call attention to the fact that this court has recently held that such an issue cannot be raised under a general denial, but must be specially pleaded by the party who has breached the contract. *World's Special Films Corporation v. Fitchberg*, 176 S. W. 733.

Appellant contends that his exception urg-

ing the statute of limitations to that portion of the petition in which plaintiff sought to recover rent due under a verbal contract for the lease of 77 acres of land should have been sustained, and by another assignment contends that the court erred in rendering judgment for such rent. Appellee virtually admits that he is not entitled to judgment for such sum, and answers the assignments with a denial that such sum entered into the judgment of the court. The judgment recites that plaintiff should recover rent for 74 acres at \$6 per acre, with interest thereon at the rate of 8 per cent. per annum from January 1, 1900, to date of judgment; but, after summing up the various amounts due plaintiff, said judgment contains a proviso to the effect that the allowance of all of such sums is subject to the limitation pleaded and the deductions to be made on account thereof, as well as the credits admitted. It is further recited that after making such deductions and credits plaintiff is found entitled to recover \$4,400, and said sum is awarded, with interest. The court fails to explain how he arrived at this amount, and neither side has undertaken an analysis of the matter with the view of showing what items were finally allowed. We have gone over the matter, with the result that we are unable to find any basis for awarding \$4,400 without allowing rent for said 74 acres. As the judgment must be reversed on another ground, and the case remanded, it would be profitless for us to explain how we arrived at such conclusion. Assignments Nos. 3 and 20 are sustained.

Assignments of error Nos. 16 and 17 are overruled.

In view of what has been said with regard to assignments 14 and 15, it becomes unnecessary to discuss assignments Nos. 18 and 19.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

[8] Appellee contends that we erred in holding that the suit for rent, in so far as it relates to the 17 acres found by the jury to have been taken possession of by appellant in addition to the 20 acres covered by the original written contract, was for a debt "evidenced by or founded upon any contract in writing." Much is said about the statute of frauds, but it will be seen from our original opinion that the application of the statute of frauds was not sought by any assignment of error, and that what we had to say had reference solely to the question whether the two-year statute or the four-year statute of limitation applied to the claim for rent of the 17 acres. We find in Cyc. vol. 25, p. 1038, the following statement:

"The statutory description of an action as 'founded on an instrument in writing' refers to contracts, obligations, or liabilities growing, not remotely or ultimately, but immediately, out of written instruments. Parol acceptance of an offer in writing does not give rise to an agreement or contract in writing, within the meaning

of statutes relating to limitations governing actions on contracts in writing."

In this case appellee sued appellant to recover the amount of lease due for the 20 acres covered by the written contract copied in our previous opinion, and also for the amount alleged to be due for lease of the seventeen acres. While it is true that the written contract is a proposal to rent to appellant such part of the 17 acres as he may elect to take, it is also true that it is more than that; for it is a contract signed by appellant, in which he binds himself to pay at the rate of \$30 per acre per annum for the 17 acres if he elects to take same, or for such part thereof as he may elect to take. The contract was completed as to the 17 acres by appellant's taking possession thereof. It may be stated that the suit for rent for the 17 acres is founded upon a written agreement to pay \$30 per acre per annum for such part of said 17 acres as appellant should agree to take. It has been held in this state that a suit to recover the value of goods delivered pursuant to a written order is founded upon a contract in writing. *Page v. Payne*, 41 Tex. 143. And it was so held by this court, even though the order contained no promise to pay. *Laredo Electric Light & Mach. Co. v. U. S. Electric Lighting Co.*, 26 S. W. 310. A view not in accord with the holding in the last-mentioned case may be deduced from the opinions in the case of *Voelcker v. McKay*, 61 S. W. 424; *Voelcker v. McKey*, 60 S. W. 798.

It has been held that, where a change was made by verbal agreement in the quality of iron to be used in an iron fence contracted in writing to be erected, the suit nevertheless was upon the written contract, the court explaining its holding as follows:

"It was evidently intended that the services rendered should be controlled by the terms of the written agreement, and that the subsequent agreement changing the quality of the material should not have the effect to destroy the written contract." *Hughes Bros. v. Smith*, 83 Tex. 496, 18 S. W. 955.

It has also been held that a suit for the price of extras provided pursuant to a building contract which stipulated a certain price to be paid for the completion of the building according to specifications and for the payment "for all extras above the contract and for all changes that might be made in the plans and specifications" was governed by the four years statute of limitation. The court said:

"The fact that the extent of extras and changes in the plans were subsequently agreed to would create no new right or contract that was not fully provided for in the written contract. The making of such changes and extras is simply putting into operation a contingency that the parties contemplated might occur when they executed the contract, and for which they provided in this written agreement." *Wilkinson v. Johnson*, 83 Tex. 392, 18 S. W. 746.

See, also, *Stringfellow v. Elsea*, 45 S. W. 418; *Sanborn v. Flowman*, 20 Tex. Civ. App.

484, 49 S. W. 639; *Fidelity & Casualty Co. v. Callaghan & Graham*, 104 S. W. 1073. When the parties executed the written contract, they contemplated the contingency that appellant might take more land than the 20 acres, and provided in such contract for the payment of rent for such additional land, and also for obligations with reference thereto by appellant. The above cases indicate a tendency upon the part of our courts not to give a strict construction to the words "contract in writing" such as would classify all contracts as oral contracts which are partly written and partly oral, and we therefore hold that in this case the suit for rent of the 17 acres is governed by the four-year statute of limitations, and overrule assignments of error Nos. 4, 5, and 21. We realize that the question is one upon which legal minds may well differ, but believe that our decision thereof is in line with the views expressed in the cited cases.

The letter and advertisement relied upon by appellee speak for themselves. We cannot find therein any evidence that appellee accepted the offer to take the 17 acres. The same may be said concerning the cross-action, if, indeed, it can be considered.

We are unable to agree with appellee in his contention with reference to the other assignments of error sustained by us. The judgment reversing the judgment of the trial court and remanding the cause for another trial must therefore be permitted to stand. Our former opinion is modified as above indicated, but the motion for rehearing is overruled.

LUTEN et al. v. MISSOURI, K. & T. RY. CO. OF TEXAS. (No. 7450.)

(Court of Civil Appeals of Texas, Dallas. Feb. 5, 1916. On Motion for Rehearing, April 8, 1916.)

1. RAILROADS \S 300—PERSONS ON TRACK—DUTY OF ROAD.

A railroad company is guilty of actionable negligence in failing to exercise ordinary care to discover and avoid injuring persons upon the track at such places and upon such occasions as one of ordinary prudence would expect to find them, and whether such persons are trespassers or rightfully upon the track makes no difference in the determination of the issue of the road's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 981; Dec. Dig. \S 309.]

2. RAILROADS \S 350(13)—USE OF CROSSING—NEGLECTANCE.

The act of a person going upon a railroad track at a public crossing or where the railroad has expressly or impliedly licensed the act, as by permitting the use of the place as a crossing, is not negligence per se.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1166; Dec. Dig. \S 350(13).]

3. RAILROADS \S 350(32)—INJURIES AT CROSSING—QUESTIONS FOR JURY.

In a widow's action against a railroad for death of her husband at a crossing, issues wheth-

er deceased was killed at the crossing and whether the train operatives in striking him were guilty of negligence which was the proximate cause of his death, *held* for the jury under the evidence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1190; Dec. Dig. ¶350(3).]

4. TRIAL ¶139(1)—DIRECTION OF VERDICT.

To authorize the court to take a material question from the jury, the evidence must be of such a character that there is no room for ordinary or reasonable minds to differ as to the conclusion to be drawn from it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. ¶139(1).]

5. NEGLIGENCE ¶136(2)—QUESTION OF FACT AND LAW.

Negligence, whether by plaintiff or defendant, is generally a question of fact, and is a question of law for the court only when the act done is violative of some law or the facts are undisputed and admit of but one inference.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 279, 281; Dec. Dig. ¶136(2).]

6. RAILROADS ¶350(7)—INJURIES ON TRACK—NEGLIGENCE—QUESTION FOR JURY.

In a widow's action against a railroad for death of her husband at a crossing, whether the servants of the road in charge of its train failed to ring the bell or blow the whistle of the locomotive or otherwise give warning of its approach to the crossing, was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1161; Dec. Dig. ¶350(7).]

7. RAILROADS ¶350(7)—INJURIES ON TRACK—QUESTION FOR JURY—QUESTION OF FACT AND LAW.

In a widow's action against a railroad for death of her husband at a crossing, whether the train was being run without a headlight was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1161; Dec. Dig. ¶350(7).]

8. RAILROADS ¶350(7)—INJURIES AT CROSSING—QUESTION FOR JURY.

In a widow's action against a railroad for death of her husband at a crossing, the question whether the road's servants kept a proper lookout for persons about to use the crossing was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1161; Dec. Dig. ¶350(7).]

On Motion for Rehearing.

9. RAILROADS ¶348(1)—INJURIES AT CROSSING—CIRCUMSTANTIAL EVIDENCE.

It may be established by circumstances that a person was killed by a railway train at a public crossing through the negligence of the road's servants, and that the person killed was at the time in the exercise of due care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. ¶348(1).]

10. EVIDENCE ¶54—CIRCUMSTANTIAL EVIDENCE.

Circumstances establishing that a person was killed by a train at a public crossing through the negligence of the railroad's servants must be shown by direct evidence and cannot be inferred from other circumstances.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 74; Dec. Dig. ¶54.]

1. EVIDENCE ¶53—"PRESUMPTION OF FACT."

A "presumption of fact" is a probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and

circumstances with each other, being always to be drawn by the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 73; Dec. Dig. ¶53.]

For other definitions, see *Words and Phrases*, First and Second Series, *Presumption of Fact*.]

12. RAILROADS ¶348(2)—INJURIES AT CROSSING—DIRECTION OF MOVEMENT OF TRAIN—SUFFICIENCY OF EVIDENCE.

In a widow's action against a railroad for death of her husband at a crossing, evidence *held* sufficient to warrant the conclusion that the train which killed decedent was moving north.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1139; Dec. Dig. ¶348(2).]

Appeal from District Court, Hill County: Horton B. Porter, Judge.

Suit by Mrs. E. E. Luten and others against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiffs appeal. Judgment reversed, and cause remanded.

Wear & Frazier, of Hillsboro, for appellants. Walter Collins, of Hillsboro, and Chas. B. Braun and Spell & Sanford, all of Waco, for appellee.

TALBOT, J. The appellant Mrs. Luten, for herself and as next friend of her minor children, brought this suit against the appellee, the Missouri, Kansas & Texas Railway Company of Texas, to recover damages sustained on account of the death of her husband, and the father of said children, E. E. Luten, who it is charged was killed by the negligence of appellee's servants on or about the 1st day of April, 1914. It is alleged, in substance, that the deceased, E. E. Luten, was struck and killed by one of appellee's trains at the intersection of its railroad track with a dirt road crossing; that said crossing had been constructed and maintained by the appellee, and commonly used by the public with the knowledge of appellee, a great many years next preceding the accident causing the death of the deceased, for travel; that the deceased resided near the said crossing, and while traveling along said dirt road and in the act of crossing the appellee's line of railway where it intersects said road he was negligently and with great violence struck by a rapidly moving train of appellee and instantly killed. The acts of negligence alleged are that appellee's servants in charge of said train carelessly and negligently failed to blow the whistle or ring the bell of the locomotive in approaching the crossing; that the servants in charge of said train negligently ran the train in approaching and passing over said crossing at a reckless and dangerous rate of speed and negligently cut off the steam and permitted the train in approaching the crossing to run without steam by reason of which it failed to make the usual and ordinary noise incident to the running of a train; that said servants negligently failed to keep a lookout for persons

about to cross or passing over the railroad at said dirt road crossing; that on the morning of the accident in which the deceased, Luten, lost his life a dense fog prevailed, and the said servants of appellee negligently failed to provide the locomotive drawing the train that struck and killed the said Luten with a headlight. It was alleged that for a long distance in approaching the crossing there was nothing to obstruct the view of appellee's servants, and that had they exercised proper care to discover persons about to pass over the crossing they could and would have seen the deceased in time to have avoided striking and injuring him by the use of ordinary care. The appellee answered, practically admitting that there was a dense fog the morning the deceased was killed, and that he was struck by one of its trains and knocked from the railroad track, receiving injuries thereby, from which he immediately died. Appellee denied, however, that it was guilty of any of the acts of negligence charged, and alleged that the deceased's death was due to his own negligence. When the evidence offered by the appellant was concluded, the court, upon motion of appellee, instructed the jury to return a verdict in its favor, which was done, and judgment entered in accordance therewith. From this judgment, the appellant has appealed.

The assignments of error complain of the action of the court in instructing a verdict for the appellee, and the sole question raised is whether the evidence adduced was sufficient to take the case to the jury. The deceased lived west of the appellee's railroad and about 400 yards northwest of the crossing in question. A short time before the accident causing his death he left home carrying a shotgun. The railroad where it intersects the dirt road leading from the deceased's house runs practically north and south, and the dirt road practically east and west. At this intersection of said roads the railway company had constructed and maintained for many years prior to the death of the deceased, Luten, the crossing in question, and the same had been commonly and habitually used by the public for travel during all those years. About 9 o'clock of the morning the deceased left home with his gun a train operated by the appellee's servants passed over the road crossing going north. At this time two reports of a gun at or near the crossing were heard by some of the witnesses who testified in the case, and immediately thereafter a train whistle and the sound of a bell was heard at or about the same point. In perhaps an hour or less time after this the body of the deceased, Luten, was found at the estimated distance of 40 or 45 feet north of the crossing and about 15 feet east of the railroad track. When found Mr. Luten was dead, his gun broken, and both barrels had been discharged. There was a wound on his right side below the arm and

shoulder blade, as described by the witness, "as big as your hand, just a cave-in, and the skin was broken farther around." The right leg was broken between the knee and ankle. The wound on the leg was "not exactly on the outside nor inside; more nearly on the outside than behind." He had some wounds on his face near his nose, on the right side of his face, also a cut place "kind of above his right ear." The deceased's hat was found on the ground about 15 feet north of the crossing and on the east side of the railroad bed. About 30 or 35 feet from the crossing and on the east side of the railroad track and bed and northeast of the road crossing, blood was found on the ground and at two or three places on the weeds. There was also at one place where blood was found an indentation in the ground as if some object had fallen there. There was another such place about 40 feet from the crossing. "The ground was awful wet and soggy," and there was mud and blood on the deceased's clothing." H. V. Ad-derhold, an undertaker, testified that he removed the clothing from the body of the deceased and examined the wounds on it. He said the deceased "had one wound on the right side, under the right arm on the right side, that it looked like something had struck it and made a wound there; that he noticed some wounds on the head, more in the temple, above the right ear and was in the hair running along the edge of the hair, and that he noticed another wound on his body, between the knee and the ankle; that his right leg was broken." The railroad bed or dump at the crossing was 10 or 12 feet high, and on the morning of the accident there was a very dense fog. Mrs. Luten heard the noise of the train as it passed and looked from the window of her house, but on account of the fog could not see the train. She saw no headlight. The deceased was a sober, industrious farmer. His hearing was defective, but if spoken to in a clear and distinct tone of voice he could carry on a conversation with another person a few feet away. No witness testified that he saw the accident or that he saw the deceased alive after he left home on the morning he was killed. No member of the train crew testified, and there is no direct or positive evidence showing that the presence of the deceased at or near the place of the collision was discovered by any one of them before the collision occurred.

[1, 2] It has been held more than once in this state that:

"A railroad company is guilty of actionable negligence in failing to exercise ordinary care to discover and avoid injuring persons upon the track at such places and upon such occasions as one of ordinary prudence would expect to find them; and whether such persons are trespassers or rightfully upon the track makes no difference in the determination of the issue of the company's negligence in that respect, considered separately and apart from issues of contributory negligence of the person injured." *Railway Co. v. Watkins*, 88 Tex. 20, 29 S. W. 232; *Railway Co. v. Malone*, 102 Tex. 269, 115 S. W. 1158;

Railway Co. v. Shiflet, 98 Tex. 326, 83 S. W. 677; Railway Co. v. West, 174 S. W. 287.

It is also well settled that the act of a person going upon a railroad track at a public crossing, or where the railroad has expressly or impliedly licensed the act, is not negligence per se. *Railway Co. v. Matthews*, 99 Tex. 160, 88 S. W. 192; *Washington v. Railway Co.*, 90 Tex. 314, 38 S. W. 764; *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63; *Railway Co. v. Crosnoe*, 72 Tex. 79, 10 S. W. 342; *Railway Co. v. West*, supra. The crossing in question in the case at bar had not been laid out or worked by authority of the commissioners' court of the county, and if it was not a public crossing in that sense, it was, it seems, recognized by the railway company as such, and, if not so recognized, it was, beyond controversy, a place where persons habitually crossed the railroad with the knowledge, and, so far as the record shows to the contrary, without objection of appellee, and where its employes operating its trains over such crossing might expect persons to be at any time of the day. That the deceased was struck by one of appellee's trains and his death caused thereby is placed beyond dispute, and if at the time he was so struck he was attempting to pass over the crossing he was not a trespasser.

[3] But did the facts and circumstances in evidence call for a submission of the issues of whether the deceased at the time of the collision was at the crossing and whether the operatives of the train in striking him were guilty of negligence which was the proximate cause of his death for the determination of the jury? We have reached the conclusion they did. From the location of the wounds found upon the body of the deceased and the proximity of his hat and body to the crossing, together with other circumstances in evidence to be considered, it may reasonably be inferred that he was at the crossing when struck by the train. The conclusion is warranted that he traveled east after leaving his home along the road leading to the crossing until he reached the railroad, and that he was going straight across the track from the west to the east side thereof when the collision occurred, and not walking north in the direction the train was moving, is a reasonable, and not an improbable, deduction from the facts and circumstances proved. The serious wounds, if not all of them, that were inflicted upon the deceased were on his right side. This is a strong fact or circumstance tending to show that he was standing facing the east or moving directly across the railroad track when struck. It is clear that if he was walking north along the railroad track when struck, the wounds inflicted upon him would have been more directly on his back, and the back part of his leg. The fact that the wounds were on his right side is entirely consistent with the idea that he was standing or walking with that side of his body toward the approaching train when the col-

lision that cost him his life happened. True, it is possible or even probable that he may have turned his right side towards the train just before the collision, but that he did so is no more to be inferred from the established facts and circumstances than that he was going straight across the track. And while it is possible it is not very probable, it occurs to us that the deceased attempted to cross the railroad track north of the dirt road crossing, at or near where his body was lying when found. The railroad bed or dump at that point was 10 or 12 feet high, and evidently more difficult to pass over than at the road crossing, and there is nothing to indicate why he may have left the traveled road to cross the track at such a place. Moreover, his hat, as has been stated, was found within 15 feet of the crossing and his body at the greater distance of 35 or 40 feet therefrom, indicating that after being struck by the train he was carried, before being cast to the side of the track, a distance of 20 or 25 feet. For it is an exceedingly fair inference that the deceased's hat was caused to fall from his head by the collision, and if it fell directly to the ground the location of the deceased's body indicates that it was pushed or thrown thereafter by the train the distance of 20 or 25 feet mentioned. Again, it is not without the range of probability that after the deceased was struck, his hat, after being dislodged from his head, was carried by the suction or agitation of the air produced by the running train some distance in the direction the train was moving, and this would suggest that he might have been at the crossing, or at least nearer to it than at the point where his hat was found when the collision occurred. At all events we think it cannot be said, from the facts and circumstances shown as a matter of law, that the deceased was not at the crossing when struck by the railway train.

[4] It has been repeatedly held in decisions of this state, that to authorize the court to take a material question from the jury, the evidence must be of such a character that there is no room for ordinary or reasonable minds to differ as to the conclusion to be drawn from it. Such was not, in our opinion, the character of the evidence adduced in this case. Whether the deceased, Luten, was at the road crossing when the collision causing his death occurred was an issuable fact for the determination of the jury.

[5-8] Likewise, whether the collision in question was the result of negligence on the part of the agents and servants of appellee in the operation of the train and the proximate cause of the death of E. E. Luten were also questions of fact for the decision of the jury.

"Negligence, whether of the plaintiff or defendant, is generally a question of fact, and becomes a question of law to be decided by the court only when the act done is in violation of some law, or when the facts are undisputed and

admit of but one inference regarding the care of the party in doing the act in question." *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63.

Now, "while the naked fact that an accident has happened may be no evidence of negligence, yet the character of the accident and the circumstances in proof attending it may be such as to lead reasonably to the belief that without negligence it would not have occurred"; and "where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care." *Washington v. Railway Company*, 90 Tex. 314, 38 S. W. 764. The train causing the death of Mr. Luten was under the management of appellee's servants. Some one of them may have seen the accident, but if so no explanation of how it occurred was made or attempted to be made. The crossing at which appellants claim it happened was from long-continued use a public crossing, or, if not, it was a place where the people in the neighborhood were constantly passing over appellee's road with the consent or without its objection, and where the injury to the deceased, or some injury of like character to some other person similarly situated, ought to have been foreseen by the agents operating its trains over said crossing, as a probable consequence of their negligence in failing to keep a lookout to discover and avoid injuring those about to pass over the crossing or otherwise to use proper care to prevent injury to them. At the time of the accident resulting in Luten's death a dense fog prevailed, and it is not unreasonable to conclude from the evidence that the train was being run without a headlight to enable the operatives thereof to discover objects on the railroad track. Mrs. Luten's testimony is to the effect on clear days trains passing over the crossing can be seen from her house; that on the day her husband was killed she looked but could not see the train on account of the fog, and that she did not see any headlight. The facts and circumstances in evidence also warrant the inference that the agents and servants of appellee in charge of the train failed to ring the bell or blow the whistle of the locomotive, or otherwise give notice or warning of its approach to the crossing. There was no testimony that the bell was rung or whistle blown before the train reached the crossing and two or three witnesses testified that if any such signal or warning of its approach was given they did not hear it. That they were in a position to have heard either the ringing of the bell or the blowing of the whistle at such time, if rung or blown, is conclusively shown by their testimony to the effect that they did hear the ringing of the bell and whistle of the locomotive immediately after hearing the re-

port of a gun, which the evidence clearly tends to show was the gun of the deceased, and that it was not discharged until the collision occurred. These were all questions, we think, for the jury, as was also the question whether the appellee's servants kept a proper lookout for persons about to use the crossing. The trial court was not authorized, under the facts and circumstances shown, to take either of them from the jury. In other words, we conclude that the evidence as a whole was sufficient on all material questions involved to require the submission of those questions for the decision of the jury, and therefore the trial court erred in directing a verdict for the appellee. We must not be understood, however, as intending that the jury, if the questions had been submitted to them, ought to have resolved either of the controverted issues in favor of the appellant. We regard the facts calling for a submission of the case to the jury as cogent, as were those in the case of *Washington v. Railway Co.*, supra, and it is mainly upon the authority of that case that we base our conclusions in this case. That the case is strongly analogous to *Washington's Case*, and distinguishable from those cited and relied upon by appellee, is clear to us.

The judgment of the court below is reversed, and the cause remanded.

On Motion for Rehearing.

[8-11] A careful reconsideration of this case upon appellee's motion for a rehearing has failed to convince us that we erred in holding that the evidence adduced was sufficient to require the submission of the issues presented by the pleadings to the jury impaneled for its trial for determination. The case, in our opinion, differs in important particulars from the case of *Missouri Pac. Ry. Co. v. Porter*, 73 Tex. 304, 11 S. W. 324, and is not ruled thereby, nor by either of the cases cited by counsel for the appellee. The well-settled rule that it may be established by circumstances that a person was killed by a railway train at a public crossing through the negligence of the railway company's servants, and that the person killed was, at the time, in the exercise of care for his own safety, is expressly recognized in the case mentioned. Such is simply the effect of our holding in the case at bar. That in such a case the circumstances must be shown by direct evidence, and cannot be inferred from other circumstances, and that "it is not admissible to go into the domain of conjecture, and to pile one presumption upon another, is not and has not by this court been questioned." The circumstances shown by the positive or direct testimony found in the record were sufficient, we think, to take this case to the jury on all material issues made by the pleadings. In other words, we hold that the probative force of the evidence is not so weak that it only raises a mere surmise or suspicion of the existence of the

facts sought to be established, but that the existence of such facts may be reasonably inferred from the circumstances shown. A presumption of fact is a probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other. If the fact in evidence usually accompanies the fact in issue, it gives rise to a probable presumption of the existence of the fact to be proved, and presumption of fact must always be drawn by the jury. *United States v. Searcey* (D. C.) 26 Fed. 435; *Kent v. People*, 8 Colo. 563, 9 Pac. 852; *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881. It cannot be said as a matter of law that the existence of the facts essential to appellant's right of recovery cannot reasonably be deduced from the facts and circumstances shown on the trial of this case. This being true, it was error to withdraw the case from the jury.

In our original opinion we stated, in effect, that a short time before the accident causing the death of E. E. Luten he left home carrying a gun, and appellee insists that such conclusion is not supported by any evidence. In carefully reviewing the testimony again, we fail to find any direct testimony to that effect; and if such conclusion is not a fair inference from the circumstances in evidence, then there is no evidence to support it. The absence of such evidence, however, is not of sufficient importance to require a change in the disposition we have made of the appeal.

[12] It is also contended that there is no evidence showing that the train which caused the death of the said Luten was going north. This is incorrect. The facts and circumstances in evidence make it very clear that it was. In addition to the facts pointed out in the original opinion it appears that the train that struck and killed the deceased carried his body to the town of Abbott. The witness T. E. Morgan testified that he lived at or near Abbott; that he knew Mr. Luten; that he passed the depot at Abbott the day Luten was killed; that he saw his body that day at Abbott; that the railroad company had it when he first saw it at the depot and that he assisted in unloading it. The witness H. H. Humphries testified that he lived south of Abbott in the neighborhood of and pretty close to where Mr. Luten lived; and that appellee's railroad track ran north and south at the point where the accident occurred is conclusively shown. The foregoing testimony, aside from other testimony in the record disclosing the facts and circumstances detailed in the original opinion, is amply sufficient to warrant the conclusion that the train in question was moving north.

We believe the proper disposition of the appeal has been made, and, so believing, the motion for a rehearing is overruled.

WOELFEL v. ROTAN GROCERY CO. et al.*
(No. 5605.)

(Court of Civil Appeals of Texas. Austin.
March 8, 1916. Rehearing Denied
April 5, 1916.)

1. GUARANTY — 38(2) — CONSTRUCTION OF CONTRACT—CONTINUING GUARANTY.

In a written guaranty by the stockholders of a mercantile corporation, unconditionally guaranteeing the payment of any indebtedness of the corporation to a wholesaler, made within certain time limits, not to exceed a certain sum, the limitation of amount clearly applies to the indebtedness, not to the payment, and therefore the guaranty is a continuing one and renders the guarantors liable for a balance due the wholesaler less than the limited amount, though the corporation had, since the execution of the guaranty, paid to the wholesaler more than that amount.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 47; Dec. Dig. 38(2).]

2. GUARANTY — 38(2) — CONSTRUCTION OF CONTRACT—CONTINUING GUARANTY.

The liability under a guaranty will be construed as continuing when it is evident the object was to give a standing credit to the principal debtor to be used from time to time.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 47; Dec. Dig. 38(2).]

3. GUARANTY — 61—DISCHARGE OF GUARANTOR — EXTENSION OF CREDIT—TAKING ADDITIONAL SECURITY.

One who signed a written guaranty expressly authorizing the extension of time for payment is not released by the taking of additional security as a consideration for such extension, since that is to his benefit.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 71; Dec. Dig. 61.]

Appeal from District Court, McLennan County; Tom L. McCullough, Judge.

Action by the Rotan Grocery Company against Nick Woelfel and others. Judgment for the plaintiff, and the named defendant appeals. Affirmed.

Wallace & Moore, of Cameron, for appellant. J. D. Williamson, of Waco, for appellee.

RICE, J. Prior to the 12th of April, 1912, the Rotan Grocery Company, who was engaged in the wholesale grocery business at Waco, had as one of its regular customers the German Mercantile Company, a corporation doing business at Thorndale and at Thrall, Tex. Hermann Unnasch, Ernst Richter, John Woelfel, John Schiwart, J. T. Johnson, F. W. Schwartz, A. E. Moerbe, J. C. Leschber, and Nick Woelfel were stockholders in the last-named company, and, desiring to secure appellee in the payment for merchandise to be sold to the German Mercantile Company, did on said date execute and deliver to the Rotan Grocery Company the following guaranty, to wit:

"In consideration of the sale of merchandise by the Rotan Grocery Company, to German Mercantile Company of Thorndale, Texas, I, we or either of us guarantee unconditionally the payment to the Rotan Grocery Company, at

Waco, Texas, any indebtedness of said German Mercantile Company to it made prior to November 1, 1912, and thereafter until further notice in writing, not to exceed the sum of \$12,000. And I, we or either of us consent to any extension of payment made between said parties, and that the form of such indebtedness may be changed from account to note, bill or other commercial paper, waive notice, protest and suit. And I, we or either of us agree to pay the rate of interest said parties agree upon, and 10 per cent. attorney's fees if said debt is sued upon, or placed in an attorney's hands for collection."

During the course of business appellee company sold to the German Mercantile Company certain merchandise, aggregating the sum of \$18,652.36, upon which there had been paid on January 20, 1913, the sum of \$7,652.36, leaving a balance of \$11,000, for which said company and guarantors, except Nick Woelfel, executed their promissory notes, one for \$6,000 and the other for \$5,000, and said Mercantile Company becoming insolvent, this suit was brought by appellee against all of said guarantors upon said notes, purporting to be signed by appellant and the other guarantors, as well as upon the written guarantee, to collect an unpaid balance thereon, amounting to \$5,792.91.

The appellant answered denying liability upon the notes, on the ground that his signature thereto was forged, and while admitting the execution by him of the guarantee, averred that he is not liable thereon for the reason that the guarantee had been exhausted by payment; and, in the alternative, that he had been released by reason of the extension of the time of payment of the indebtedness, without notice to him, in consideration of additional security.

The case was tried by the court without a jury upon an agreed statement of facts, who found against appellant upon all the issues submitted, except that of forgery, and rendered judgment against him jointly and severally with the other defendants by reason of the guarantee, for the sum of \$5,792.91, which was an agreed balance, with 10 per cent. interest thereon from date of judgment, from which judgment this appeal is taken.

[1] The principal controversy in this case on the part of appellant grows out of the fact that during the continuance of its business the Mercantile Company, who had purchased goods in excess of said guarantee, had paid during the progress of the business, from time to time, on its account with appellee more than the sum of \$12,000, the limit of said guarantee, whereby it was contended the guarantee had been exhausted, and appellee was not entitled to recover thereon. While appellee contends that the guarantee in question was a continuing one, and appellant became liable, notwithstanding such payments, for any balance that might be due thereon, not to exceed the sum of \$12,000.

In the case of Hill Mercantile Co. v. Rotan Grocery Co., 127 S. W. 1080, this court construed a guarantee in every respect similar to the one under consideration (except as to the names of the parties and the amount involved) to be a continuing guarantee. So that if the guarantee was a continuing one, as contended by appellee, then appellant became liable and judgment was properly rendered against him. But appellant insists that, under the authority of Lemp v. Armengol, 86 Tex. 691, 28 S. W. 941, the guarantee sued upon is not a continuing one, for which reason the court erred in rendering judgment against him thereon. In that case the following guarantee was given:

"Know all men by these presents, that we, J. Armengol, Raymond Martin, and Fred Werner, of the county of Webb and state of Texas, in consideration of goods sold and to be delivered to A. B. Krempkau, of the city of Laredo, by William J. Lemp, of the city of St. Louis, state of Missouri, do hereby guarantee full payment to said William J. Lemp of the value of \$ goods sold and delivered since the 1st day of March, 1889, or that may be hereafter sold and delivered to said Krempkau, not to exceed, however, the sum of \$3,000."

Judge Gaines, in construing that instrument, held it to be ambiguous, and therefore that it was competent to offer parol testimony to explain its meaning on the ground that it was not evident whether the limitation "not to exceed, however, the sum of \$3,000" qualified the words "full payment" or "value," saying, in discussing the case:

"Was it the intention to qualify the word 'payment' as found in the contract, or the word 'value'? If the former, then the writing should be construed as if it read, * * * 'We * * * hereby guarantee full payment, not to exceed, however, the sum of \$3,000, to William J. Lemp, of the value of all goods sold and delivered since the 1st day of March, 1889, or that may be hereafter sold and delivered to said Krempkau.' If the latter, then the contract would read, * * * 'We * * * hereby guarantee full payment to William J. Lemp * * * not to exceed, however, the sum of \$3,000 of all goods sold and delivered since the 1st day of March, 1889, or that may be hereafter sold and delivered to said Krempkau.' According to the latter construction, the guarantee would apply only to the first \$3,000 of indebtedness contracted by Krempkau under the contract; and when the indebtedness was paid, the obligation would have been discharged. The former construction would limit the amount of the liability to be incurred by the guarantors, but would leave no limitation upon the amount of the sales with reference to which the promise was made. This would make the contract a continuing guarantee."

The instant case is distinguishable from that in that it is clear that the expression in the present guarantee "not to exceed, however, the sum of \$12,000" was intended to qualify the word "payment," and not as a limitation upon the amount of goods to be purchased and meant that appellant and his coguarantors unconditionally bound themselves for the payment of any indebtedness of said German Mercantile

Company to the appellee, not to exceed the sum of \$12,000. It is evident, from the course of dealing of the parties, that this guarantee contemplated covering more than one transaction; and it was not limited in time, but provided for its continuance until further notice by the guarantors.

[2] In Cyc. vol. 20, p. 1440 et seq. it is said:

"When the amount of a liability is limited and the time is not expressly limited, the courts lean towards construing the guaranty as a continuing one. The liability under the guaranty will be regarded as continuing when by the terms of the contract it is evident that the object is to give a standing credit to the principal debtor, to be used from time to time, either indefinitely, or until a certain period. So a guaranty may be construed as continuing where attendant circumstances strongly indicate that more than a single transaction was contemplated, especially if the right to recall the guaranty is expressly reserved. So, words guaranteeing payment for 'any goods' which may be purchased by the third person, or the payment of any debt which may be contracted up to a certain amount, are almost invariably held to indicate that the liability is intended to be continuing."

See, also, notes thereunder and authorities. Also Trustees v. Gillford, 180 Ind. 524, 38 N. E. 404; Peoria Savings, Loan & Trust Co. v. Elder, 165 Ill. 55, 45 N. E. 1083; Dumont v. Fry (C. C.) 14 Fed. 293.

[3] There is no merit in appellant's contention that the taking of additional security and the extension of time of payment in consideration thereof, without notice to appellant, released him from liability thereon, because the guarantee itself authorized the extension of payment; and certainly the taking of additional security, as was held in Hill Mercantile Co. v. Rotan Grocery Co., supra, could work no injury to appellant, but was beneficial to him.

After a careful consideration of the record, we find no reversible error, for which reason the judgment of the court below is in all things affirmed.

Affirmed.

PALOMAS LAND & CATTLE CO. v. GOOD et al. (No. 545.)

(Court of Civil Appeals of Texas. El Paso.
March 30, 1916.)

1. APPEAL AND ERROR ⇐608(1)—TRANSCRIPT —COPY OF PROCEEDINGS—STATUTE.

Rev. St. art. 2100, provides that the transcript shall contain a full and correct copy of all the proceedings had in the case, and article 2110 provides that, if the pleadings or the judgment show an appearance of the defendants in person or by attorney, the citation and return shall not be copied in the transcript. A transcript showed the filing of the petition contained in the record, the jurisdiction of the trial court over the cause of action, that defendant was a nonresident, that its vice president could be found in one of three counties, and a prayer for citation and for an attachment against the property of the defendants and a judgment by default showing that defendant was duly served, that the affidavit for attachment was made and an attachment issued and returned, and the

property replevied by defendants on the replevin bond, the introduction of evidence to support the allegations in the petition, with the recital that they were proven to the court's satisfaction, but did not show the affidavit for the attachment, the writ, levy, or return of the attachment, or bringing up the replevin bond. Held not to show the facts necessary to authorize the default judgment against the sureties on the replevin bond, and hence made no case on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2673-2681, 2683, 2684; Dec. Dig. ⇐608(1).]

2. APPEAL AND ERROR ⇐598—TRANSCRIPT— SUBSTITUTE.

Such statutory requirements that the proceedings must be shown by the transcript cannot be supplied by the recitation in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2639-2644; Dec. Dig. ⇐598.]

Appeal from District Court, Pecos County; W. C. Douglas, Judge.

Suit by Walter Good and another against the Palomas Land & Cattle Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Turney & Burges, of El Paso, and O. W. Williams, of Ft. Stockton, for appellant. Jno. B. Howard, of Pecos, and Howell Johnson, of Ft. Stockton, for appellees.

WALTHALL, J. Walter Good and Ed Good, Jr., as plaintiffs, filed this suit in the district court of Pecos county, Tex., against the Palomas Land & Cattle Company, defendant, in which cause plaintiffs alleged that they were resident citizens of said Pecos county, and that the defendant "is a corporation created and existing by law, and has its principal place of business in Los Angeles, Cal., and with an office in Columbus, N. M." They further alleged:

"That the defendant is a foreign corporation and has no agent within the state of Texas; that one H. S. Stephenson is a vice president and general manager of said corporation; that the said Stephenson is now temporarily within the confines of this state, to wit, in Ford county, or Pecos county, or El Paso county, Tex., upon whom service may be had herein"—and ask citation to each of said counties.

Plaintiff's cause of action is based upon, or rather grows out of, two contracts; one of date November 18, 1913, between plaintiffs and defendant, for pasturing cattle in plaintiff's pasture near Monahans. The other, of date 20th of May, 1914, provides for the sale of cattle by defendant to plaintiffs in plaintiff's pasture, stating terms, etc. Both of said contracts are executed on the part of the corporation by said Stephenson as its vice president and general manager. Under the first contract, this stipulation occurs:

"The parties of the first part (plaintiffs) agree to receive the cattle at Monahans, Texas, and to return them back to Monahans, Texas, or to the nearest shipping point on the Orient Railroad, free of any and all charges to the party of the second part (defendant) at times designated by said party of the second part."

The second contract shows agreement to sell all of these cattle by the cattle company to the Goods, but the title to remain in the company until the cattle were delivered and paid for.

The petition alleges that on the 15th day of March, 1914, the cattle company informed the Goods that the cattle then being pastured had been sold, and that the company employed the Goods to round up the cattle about the 21st of April, 1914, and agreed to pay them for said service a reasonable compensation; that the plaintiffs, at their own costs, erected pens, cut the cattle into the several classes to which they belonged, and delivered them at Monahans, as provided in the first contract; and that to perform said service it required more time and expense than would have been necessary to have delivered said cattle in a body as contemplated and agreed in the first contract, and it was for the said additional services and expenses incurred that this suit was brought. They alleged demand and refusal to pay. Plaintiffs prayed for and procured an attachment to be issued and levied on certain cattle and horses, property of the cattle company. They prayed for citation to the counties named, judgment for their debt, foreclosure of the attachment lien, and general and special relief. The company made no answer to the suit, and judgment by default was entered in plaintiffs' favor on September 29, 1915. The judgment is quite lengthy, and we will state it only in outline and substance. It recited that defendant, "though duly cited to appear according to law, wholly made default." It recited the introduction of the evidence to prove the plaintiffs' claim. It stated that:

"It is ordered, adjudged, and decreed by the court that plaintiffs, Walter Good and Ed Good, Jr., do have and recover of and from the defendant, Palomas Land & Cattle Company, a corporation, the sum of \$2,275 and interest on the same at the rate of 6 per cent. per annum from the 1st day of January, 1915, to date of the rendition of this judgment and for all costs in this behalf incurred, of which recovery may be had upon the replevin bond as hereinafter provided, but otherwise execution shall not issue therefor."

It further recited the making of the affidavit for the attachment "so that the court might have jurisdiction over the person of the said Palomas Land & Cattle Company, a foreign corporation, without a permit to do business in the state of Texas"; stated the giving of the attachment bond, the issuance of the attachment writ, the levy of the writ and its return. It further recited:

"Therefore it is ordered, adjudged, and decreed by the court that the attachment lien be and the same is hereby foreclosed in satisfaction of said lien, and that an order of sale be issued, directed to the sheriff of Pecos county, Tex., to sell said property as under execution, if to be found in Pecos county, Tex., and that the proceeds of said sale, if any, be used and paid to the said plaintiffs, Walter Good and Ed Good, Jr., in satisfaction of their judgment and said lien and in satisfaction of all costs accrued herein."

The judgment further recited the replevin of the property by appellant, and the delivery of the property to appellant. The judgment further decreed that plaintiffs have and recover of and from the sureties, naming them, the amount of the judgment, and authorized execution against them.

[1, 2] On October 15, 1915, defendant cattle company filed its motion to set aside the judgment, and, same being overruled, defendant excepted and gave notice of appeal.

Article 2109, Revised Statutes, is as follows:

"The transcript shall, except in the cases hereinafter provided, contain a full and correct copy of all the proceedings had in the case."

Article 2110 provides:

"If the pleadings or the judgment show an appearance of the defendant, in person or by attorney, the citation and returns shall not be copied into the transcript."

The transcript shows the filing of the appellees' original petition, and the petition itself is contained in the record. The jurisdiction of the trial court over the subject-matter of the cause of action is manifest from the petition and the exhibits made a part of the petition. The cause of action stated in the petition is upon an unliquidated demand. The petition shows the appellant to be a nonresident of this state, alleges that the vice president and general manager, Stephenson, can be found in one of the three counties named, and prays for citation, and for an attachment against the property of the appellant. The judgment entered shows a judgment by default, that defendant was duly served but wholly made default, the making of the affidavit for the attachment, the issuance of the writ of attachment, the levy and the return of the writ, the replevin of the property by appellant, the giving of the replevin bond and the names of the sureties on the replevin bond, the introduction of the evidence to substantiate the allegations in plaintiffs' petition, and that the allegations were proven to the satisfaction of the trial court. The court thereupon entered the judgment set out above. The record before us does not conform to the two articles of the statute above recited, in that it does not contain "a full and correct copy of all the proceedings had in the case." It does not show the affidavit for the attachment, the writ, levy, or return. Nor does the record bring up the replevin bond nor show the release of the attached property on the giving of the replevin bond, other than the recitation in the judgment. Judgment is entered against what purports to be the sureties on the replevin bond. All of the attachment proceedings, and the replevin of the property, the giving of the replevin bond, were necessary parts of the proceedings had on the trial of the case. The citation and return, under the statute, must be shown unless the pleadings or judgment show appearance of the defendant. The courts have uniformly held that the recitation in the judgment of

proceedings had is not sufficient to supply the requirement of the statute that the proceedings must be shown by the transcript. It must be remembered that a judgment by default is an ex parte proceeding. In *Baum v. McAfee*, 117 S. W. 883, Chief Justice Rainey, speaking for the Fifth Court of Appeals, said that parts of the proceedings, although unnecessary to a disposition of the case, cannot be omitted from the record, unless the parties agree in writing with the approval of the judge, as provided in article 2112, R. S.

In *Glasscock v. Barnard*, 58 Tex. Civ. App. 369, 125 S. W. 615, Justice Speer for the Ft. Worth Court of Civil Appeals said that, where the record shows there was no appearance or waiver, the transcript should contain a copy of the citation duly served on the defendant, aside from the recitation in the judgment. To the same effect is the case of *McMickle v. Texarkana National Bank*, 4 Tex. Civ. App. 210, 23 S. W. 428; *Daugherty v. Powell*, 139 S. W. 625. In *Bomar et al. v. Morris et al.*, 59 Tex. Civ. App. 378, 126 S. W. 663, the court held that a judgment by default will be reversed unless the record shows a service of citation or appearance by defendant, even though the judgment contains a recital that the defendant was duly served with citation. To the same effect is *Mayhew & Co. v. Harrell*, 57 Tex. Civ. App. 509, 122 S. W. 959. If it is necessary to show jurisdiction over the person of the defendant, it is equally necessary to show jurisdiction over the property secured by attachment where the trial court enters judgment to foreclose the attachment lien. The same is true as to the replevin bond, where judgment is entered against sureties on the bond. The transcript must show the facts necessary to authorize the judgment entered against the sureties on the bond. *B. & B. Co. v. Moore Bros.* (Tex. Cr. App.) 16 S. W. 780; *Insurance Co. v. Friedman*, 74 Tex. 56, 11 S. W. 1046. The case on appeal is tried on the record, and the transcript must show the proceedings had in the trial court.

For the reasons stated, the case is reversed and remanded.

JEMISON et al. v. STATE. (No. 3988.)

(Court of Criminal Appeals of Texas. March 29, 1916.)

1. CRIMINAL LAW §721(6) — TRIAL — ARGUMENT OF DISTRICT ATTORNEY.

In a prosecution for hog theft, argument of the district attorney that, "If it is not true that the defendants did not kill the hog, why was there no evidence to the fact that they did not kill the hog, as was positively testified to," was improper, as a direct allusion to defendants' failure to testify in their own behalf.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1672; Dec. Dig. §721(6).]

2. LARCENY §60 — OWNERSHIP AND POSSESSION OF PROPERTY — SUFFICIENCY OF EVIDENCE.

In a prosecution for hog theft, testimony of the owner held sufficient to show ownership and

the possession of the hog, with actual control, care, and management of it, when stolen.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 156-158; Dec. Dig. §60.]

3. LARCENY §40(11) — POSSESSION OF PROPERTY — VARIANCE.

Where the indictment laid the ownership of the hog in one Smith, proof that Smith's ranch was in charge of his agent, who looked after his interests, did not constitute a variance in the proof as to possession of the hog.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 126; Dec. Dig. §40(11).]

4. LARCENY §73 — INSTRUCTION — POSSESSION AND OWNERSHIP.

Where it appeared that an animal was stolen from the alleged owner's ranch, which was in charge of his agent, the charge that possession of property of which a person is unlawfully deprived is constituted by the exercise of actual control, care, and management of the property, whether the same be lawful or not, and that, to warrant conviction, the jury must find beyond a reasonable doubt that the animal was taken from the possession of the alleged owner, and that, if it was in the possession of others when taken, or the jury had a reasonable doubt on the point, they should acquit, was sufficient.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 196; Dec. Dig. §73.]

5. CRIMINAL LAW §507½ — EVIDENCE — ACCOMPLICE — SUFFICIENCY OF EVIDENCE.

In a prosecution for hog theft, evidence held insufficient to make a state's witness a particeps criminis as principal, accomplice, accessory, or otherwise a party to the offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1097, 1264; Dec. Dig. §507½.]

Appeal from District Court, Anderson County; John S. Prince, Judge.

Lee Jemison and David Jackson were convicted of hog theft, and they appeal. Judgment reversed, and cause remanded.

J. E. Rose and O. J. Addington, both of Palestine, for appellants. C. C. McDonald, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellants were convicted of hog theft, and given two years' confinement in the penitentiary each; the ownership being alleged in W. C. Smith.

A question is presented as to proper allegation of ownership under the facts. This comes from an attack on the sufficiency of the evidence to support that charge in the indictment as well as refusal of the special requested instructions directing the jury to enter a verdict of not guilty on the variance between the proof and allegation of ownership. Smith, alleged owner, lived in the town of Malakoff, in Henderson county. He owned quite a lot of property, land, and stock about 15 miles from Malakoff; some of it being in Anderson county. The particular point at which the animal was stolen was in Anderson county; therefore the prosecution was had in Anderson county. Smith testified he had never lived on his ranch or farm; that he visited it occasionally; sometimes every week or two; sometimes it would be two months, and intervals between visits would be as much as three months. A man

named Farmer was his employé and lived on the ranch. Smith testified that he knew nothing of the hogs; that Mr. Farmer was looking after his interests, and after the hog disappeared Farmer so informed him. He said:

"I want to state that the man in charge of the place, Mr. Farmer, looked after the stock. I was there possibly once a month, and wouldn't look at the hogs at all. This is why I didn't miss the hog. I could not say that I know of my own knowledge that a certain hog is gone. I couldn't say who took it, because I wasn't there; what I know is hearsay. I do not know of what disposition Mr. Farmer may have made of that hog, nothing only what he told me. I said that sometimes I would go down there once a month, and possibly not see the hogs while I was there, but Mr. Farmer was there looking after the hogs, cows, and horses that were on the place. He had been there since 1908, in that capacity, in my employ. I lived in Malakoff, in the adjoining county. Malakoff is about 13 miles from the county line between Anderson and Henderson counties. This particular part of my ranch is in Anderson county, something like two miles below the line. Sometimes I would go down to the ranch once a week, and sometimes once in two months. I would be there every week for two or three weeks, and sometimes would not be there but every two months, have been away from there as high as three months."

On cross-examination, after having been recalled by the state, and after a conference with Mr. Bishop, the district attorney, he stated:

"I don't think that the particular hog in question was ever on my place at Malakoff; not since they were little pigs, if then. I never lived on that ranch individually. Mr. Crist has been with me off and on for about 12 years. I never did have that particular hog at Malakoff."

He further states:

"I don't remember of having seen the particular hog that was claimed to have been missing from my ranch. To say I ever saw the particular hog, I couldn't say; there was just a bunch of hogs in the hog pasture."

In another portion of his testimony on recall, which is relied upon by the state to prove ownership in Smith as alleged, and not in Farmer, he states:

"Mr. Fannie Farmer was working for me on the ranch, looking after things. He did anything I wanted him to do. About the 14th day of May, 1914, Mr. Farmer only had such control and management and interest in the stock on this ranch as I would tell him. I reserved control of everything to myself. Mr. Farmer was not my overseer. He was just a day-laborer. Mr. Farmer was just a day-laborer, and worked for so much a month. Sometimes he would collect his wages by the month, and sometimes it would be two or three months."

We are of opinion that the position of appellants is correct. The ownership should have been alleged in Farmer. The fact that he worked under the supervision or general control of the absent owner would not change that position. All owners control their business, sometimes in person, and sometimes through employed agencies. Here it is made to appear that the real owner of the property did not control the ranch except in a general way, visiting it at intervals, and that Farmer was really in possession and control of

things. Under the cases of *Bailey v. State*, 18 Tex. App. 432, *Frazier v. State*, 18 Tex. App. 440, *Conner v. State*, 24 Tex. App. 245, 6 S. W. 138, *McDonald v. State*, 70 Tex. Cr. R. 80, 156 S. W. 209, *Williams v. State*, 42 Tex. Cr. R. 18, 57 S. W. 93, *Bryan v. State*, 54 Tex. Cr. R. 59, 111 S. W. 1035, and *Overturf v. State*, 31 Tex. Cr. R. 10, 23 S. W. 147, it would seem that Mr. Farmer had the control and management of this property. The indictment should have alleged ownership and possession in Farmer, and could have added, if it was thought proper to do so, that while he was custodian and special owner, Smith was the real owner. In that case want of consent of both would have to be alleged and proved. If general ownership of stolen property is in one man, and possession, care, and control in another, the indictment may allege the ownership in the general owner, but must allege the possession in the party in possession, so far as criminal pleadings are concerned, and it may be sufficient to allege ownership and possession both in the person having the actual care, control, and possession of the property. In addition to quoted testimony, Mattie Speer testified that she lived on the ranch; that Farmer was boss and general overseer; that Mr. Farmer seemed to be and acted as the general manager and boss of the whole situation at the ranch; when tenants wanted anything, they went to Mr. Farmer; when the horses or cattle and hogs or anything was to be seen about, they went to Mr. Farmer for directions; they never went to Mr. Crist; that while she was on the ranch she was boarding with Jemison, one of the appellants. She further says that Mr. Farmer was their boss and superintendent, to whom all parties on the ranch went for instructions. Mr. Farmer had the care, control, and possession of the horses, cattle, and hogs about the place. There are quite a number of other authorities that might be mentioned in this connection, but those mentioned are sufficient. We therefore conclude that the allegation of ownership and possession and want of consent, etc., should have been alleged in Farmer, as contended by appellants.

It is also contended that the case should be reversed on account of remarks of one of the prosecuting counsel in which he used this language:

"If it is not true that the defendants did not kill the hog, why was there no evidence to the fact that they did not kill the hog as was positively testified to by Henry Jackson?"

It is contended that this was an allusion directly to the failure of the defendants to testify in their own behalf. An exception was taken. There was another remark made by prosecuting counsel also to which exception was taken. That remark was as follows:

"These two men have practically confessed their guilt, because they brought no evidence here to deny it."

In support of these propositions various authorities are cited which we think sustain appellants' contention. *Flores v. State*, 60 Tex. Cr. R. 25, 129 S. W. 1111; *Wallace v. State*, 46 Tex. Cr. R. 341, 81 S. W. 966; *Barnard v. State*, 48 Tex. Cr. R. 111, 86 S. W. 760, 122 Am. St. Rep. 736; *Shaw v. State*, 57 Tex. Cr. R. 474, 123 S. W. 691; *Williams v. State*, 48 Tex. Cr. R. 75, 85 S. W. 1144; *Huff v. State*, 103 S. W. 394; *Reinhard v. State*, 52 Tex. Cr. R. 63, 106 S. W. 128. And for authorities generally see Branch's Criminal Law, § 849, with the authorities already cited and there cited. Bearing upon this phase of the case, Henry Jackson testified for the state that he was present when the hog was killed, and connects the two appellants with the killing and cleaning of the hog and its appropriation. Quoting from his testimony, he says:

"Nobody else was there besides me and those two negroes. David Jackson was present when Lee hit the hog with a rock. They cleaned it with a knife—with David Jackson's knife."

He further states:

"Me and Lee and David were up there chopping corn. That was some time year before last in corn chopping time. We were all chopping corn in the same field. It was about 11 o'clock, just before dinner. They had fresh meat for dinner. I helped eat it. They put it on the table; I eat it. If they hadn't put it on the table, I wouldn't have eat it. I don't know right exactly when was the first time that I told this; I ain't talked nothing about this. I first told it to Mr. Smith and another fellow; I don't know his name now. He lives in Anderson county, one arrested him. They come down there and arrested Lee, a tall man. I don't know whether I would know him or not. It was the sheriff. He was a tall man. He and Mr. Smith were the only men that I ever spoke to about it, and that was about a year or over after the hog was killed. The reason that I never told it for a year or more afterwards and after these boys had left the farm, I ain't never told nobody nothing. How comes me to tell Mr. Smith and Mr. Guinn? Mr. Fannie Farmer had already told Mr. Smith, I suppose."

He further states:

"The men that had me up there promised me that I wouldn't be prosecuted if I would tell this like I have told it on the stand."

So it would seem that this witness, Henry Jackson, who testified for the state, was the only one who witnessed the killing of the hog, and made himself a *particeps criminis* in the transaction. The same day the hog was killed he testified he ate some of the alleged stolen hog, was present when it was done, and did not mention it for a long time. He excludes the presence of everybody except himself and the two defendants. This evidence raises the issue: First, that Jackson was a *particeps criminis*, and needed corroboration in order to prove the state's case; and, second, it excludes the presence of anybody and everybody to the taking of the hog at the time it was taken, except himself and the two defendants. So it will be seen that the court should have charged with reference to ac-

complice testimony; and it excludes the presence of everybody except himself and the two defendants. With this statement from the record it would seem to be practically evident that the two defendants were the only people who could contradict Henry Jackson, the state's witness, on any fact connected with the taking. This being true, the remarks of the prosecuting officer should be regarded as a reference to the failure of these defendants to testify. There was nobody else by whom they could prove anything except by themselves and the state's witness Henry Jackson. Under these authorities it is clear to our minds these remarks of the prosecuting officer was a reference to the failure of the defendants to testify. They could bring no witness to show they did not kill the hog except themselves. They did not testify in the case. Therefore these remarks were references to appellants' failure to take the stand and testify. There was nobody else by whom appellants could have proven to the contrary of what Jackson said.

For the reasons indicated, the judgment is reversed, and the cause remanded.

PRENDERGAST and HARPER, JJ. (concurring). [1] We concur in the reversal of the case on the sole ground of the argument of the district attorney alluding to the appellants' failure to testify.

[2-4] We are clearly of the opinion that the testimony of the owner of the alleged stolen hog was ample to show, not only that he was the real owner, but also in the possession of the hog, in that he was in the "actual control, care, and management" of it when it was stolen, if it was stolen, and that there was no variance in the proof and allegations as to the possession. The court specifically submitted the question to the jury in his charge as follows:

"Possession of the person so unlawfully deprived of property is constituted by the exercise of actual control, care, and management of the property, whether the same be lawful or not. In order to warrant a conviction in this case, the jury must find from the evidence beyond a reasonable doubt that the hog, when taken (if you find it was taken), was from the possession of W. C. Smith. If the hog was in the possession of Fannie Farmer or George Crist when taken (if it was taken), or if you have a reasonable doubt thereof, you will acquit the defendants."

—which was all that was necessary, and, having given that charge, should not have given those or either of them requested by appellant on the subject.

[5] We also think the testimony does not make the state's witness Henry Jackson a *particeps criminis* as principal, accomplice, or accessory, or otherwise a party to the offense.

The judgment will be reversed on the sole ground of the objectionable argument of the district attorney excepted to.

LAIRD v. STATE. (No. 3900.)

(Court of Criminal Appeals of Texas. Jan. 26, 1916. On Motion for Rehearing, March 1, 1916. Dissenting Opinion April 12, 1916.)

1. BAIL \Leftrightarrow 64—TIME FOR ENTRY—LOSS OF JURISDICTION.

Under Code Cr. Proc. 1911, arts. 901-904, where one convicted of perjury and appealing enters into a recognizance at the next term after the term at which convicted, and is allowed to go at large, his appeal should not be dismissed because the jurisdiction of the court is ousted by his having been allowed to go at large without a bail bond. (Prendergast, P. J., dissenting.)

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 278; Dec. Dig. \Leftrightarrow 64.]

2. INDICTMENT AND INFORMATION \Leftrightarrow 137(1)—QUASHING—JURISDICTION OF COURT.

It is not ground for quashing an indictment for perjury in defendant's suit for divorce that, because of his actual residence in the state for less than the statutory period, the court administering the oath had no jurisdiction. (Davidson, J., dissenting.)

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 480; Dec. Dig. \Leftrightarrow 137(1).]

3. WITNESSES \Leftrightarrow 64(1)—HUSBAND AND WIFE—DIVORCE—COLLATERAL ATTACK.

One obtaining a decree of divorce by perjury as to his residence cannot, when prosecuted for the perjury object, as to his former wife's being a witness against him, that she is still his wife, because the divorce decree is void because of the insufficiency of his period of residence. (Davidson, J., dissenting.)

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 180; Dec. Dig. \Leftrightarrow 64(1).]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

W. H. Laird was convicted of perjury, and appeals. Affirmed.

Robert B. Allen and Chas. A. Pippin, both of Dallas, for appellant. C. C. McDonald, Asst. Atty. Gen., and McCutcheon & Church, of Dallas, for the State.

PRENDERGAST, P. J. Appellant was convicted of perjury, and assessed the lowest punishment.

If this court had jurisdiction of this cause, some interesting, and perhaps difficult, questions would have to be decided. However, because we have reached the conclusion that this court has no jurisdiction, the decision of these questions is pretermitted.

The Assistant Attorney General has made a motion to dismiss this cause, because this court has lost, if it ever had, jurisdiction thereof. This motion is based upon an uncontroverted state of facts, shown by the transcript and various affidavits. These are the facts:

The term of court at which appellant was convicted, both as a matter of fact and as fixed by law, convened July 5th and adjourned October 2, 1915. The trial occurred, and the verdict was rendered and the judgment thereon entered, September 24, 1915. Within that term and in proper time appellant made his motion for a new trial, and by leave of the court within term time filed an amend-

ed motion. These were heard and overruled by the court on October 1, 1915, at which time the appellant gave notice of appeal to this court, which was duly then and there entered on the minutes of the court. Immediately thereafter he was properly sentenced. In overruling his said motions, the court, as a part of that order, fixed the amount of appellant's recognizance at \$2,000, and he, being present and in custody, was committed to jail until the decision of his case on appeal by this court. The sentence also is to the same effect.

Appellant did not enter into a recognizance at that term of court, nor attempt to do so, so far as this record discloses, but the sheriff, by virtue of said orders and the law then having him in custody, properly confined him in the county jail. The next term of that court convened on Monday, October 4th, and continued in session for that October term the time required and authorized by law. On October 8th, during that October term, in open court, appellant attempted to gain his liberty, and did so by on that date in open court entering into a recognizance pending his appeal here. That recognizance, both in substance and in form, follows the statute. C. C. P. 1911, art. 903. Under that recognizance he was discharged by the sheriff from jail and from his custody, and he has continuously since then been at liberty, and still is.

Under the statutory law of this state from the organization thereof continuously down to the act of March 15, 1907, page 31, an appellant on a felony conviction, was required to be committed to jail, and held therein pending his appeal and until his appeal was decided by this court (Wh. An. C. C. P. art. 876), and, if he secured his liberty from custody in any way the statute prescribed (Wh. An. C. C. P. art. 880): "The jurisdiction of the Court of Criminal Appeals shall no longer attach in the case," but this court was required, on the motion of the attorney representing the state, "to dismiss the appeal."

Said act of 1907 was carried into the Code of Criminal Procedure, under proper sections, by the revisions of 1911. By the provisions thereof (article 901, C. C. P. 1911) an appellant in a felony case, where the punishment assessed is 15 years or less, is given the right to remain on bail during the pendency of his appeal by entering into a recognizance in said court at the term of conviction in the sum fixed by the court. The next article expressly requires that, when a defendant appeals from a felony conviction, he be committed to jail unless he enters into such recognizance, and further provides that, "if he be in custody, his notice of appeal shall have no effect whatever to release him from custody until he enters into recognizance," and that no recognizance shall be taken or allowed unless he is in custody of the sheriff at the time. Article 904 provides that if,

for any cause, he fails to enter into and make said recognizance "during the term of court but gave notice of and took an appeal from such conviction during such term, he shall, notwithstanding such failure, be permitted to give bail and obtain his release from custody by giving, after the expiration of such term of court and in vacation, his bail bond to the sheriff, with two or more good and sufficient sureties," in which he, together with his sureties, shall acknowledge themselves severally indebted to the state in the sum fixed by the court, upon the conditions provided for a recognizance, "but before such bail bond shall be accepted and the defendant released from custody by reason thereof, the same must be approved by such sheriff and the court trying said cause, or his successor in office. That when said bond is so given, approved and accepted, the defendant shall be released from custody." Said act and our laws all the time have expressly provided for both recognizances and bail bonds. They are entirely separate and distinct. The statute makes them so. Articles 316, 317, 320, 321, C. C. P. 1911. This court has no right to legislate and enact that one is the same as the other, or that one can take the place of the other. The statute has at all times specifically and particularly enacted when and how either one or the other may be executed. That, when either is so separately executed at the time and under the circumstances fixed by the statute, it may have the same effect so far as authorizing the discharge of the appellant from custody is concerned, but does not make them the same instrument, and cannot do so, under the express provisions of our statute.

It has always been held by this court and our Supreme Court, when it had criminal jurisdiction, that a bail bond or recognizance is strictly statutory, and to entitle the state to a forfeiture thereon it must contain all the requisites prescribed by the statute. The principles of equity, as applied to private contracts, cannot be invoked in the construction of a bail bond or recognizance. *Wallen v. State*, 18 Tex. App. 414; *Turner v. State*, 14 Tex. App. 168; *La Rose v. State*, 29 Tex. App. 215, 15 S. W. 33.

Where a change of venue is had, a bond taken by the sheriff of the county a quo for the appearance of the defendant in the new county is void. *Harbolt v. State*, 39 Tex. Cr. R. 133, 44 S. W. 1110.

A bail bond taken in a misdemeanor case, of which the district court had no jurisdiction, under process issued by the district clerk, is void. *Cassaday v. State*, 4 Tex. App. 96.

A bail bond not signed is void even though an affidavit thereto is signed. *Nelson v. State*, 44 Tex. Cr. R. 595, 73 S. W. 898.

If such bond be not signed by the principal, it is void. *Price v. State*, 12 Tex. App. 235; *Scarborough v. State*, 20 S. W. 584; *Tierney v. State*, 31 Tex. 41.

One fair criterion for determining whether a recognizance or bail bond is sufficient would be if upon a forfeiture thereof the sureties could be held and a judgment had against them in a *scire facias* proceeding. We take it it would be clear that, if this court had jurisdiction and should affirm this case and appellant should not appear in the court below as required by said recognizance, the sureties herein could successfully defeat any judgment against them by showing, as the facts herein unquestionably are, that neither they nor their principal entered into any recognizance at the term of court at which he was convicted and appealed, but instead unlawfully and illegally entered into a recognizance at another and different term of court, and that that court, at a subsequent term had no power or authority to take his recognizance.

We think it unnecessary to cite a large number of cases. The statutes alone are amply sufficient. Cases are cited by Judge White in his *Ann. Crim. Proc.*, by Mr. Branch in his *Crim. Law*, and by Vernon's *Ann. Crim. Proc.*, under the various articles of the statutes applicable to this question.

We have concluded that the jurisdiction of this court has been ousted by the action of appellant, and the cause must therefore be dismissed.

DAVIDSON, J., absent.

On Motion for Rehearing.

HARPER, J. [1] On a former day of this term this cause was dismissed because appellant, after the adjournment of the term of court at which he was convicted, entered into a recognizance at the next term of the court, it being held that after the adjournment of the court for the term, at which appellant was tried, the statute only authorized the giving of a bail bond, and he having given a recognizance, the jurisdiction of this court was ousted when he was allowed to go at large after giving a recognizance—he would, in law, be regarded as having escaped confinement. At the time the case was originally before the court the writer at that time suggested this was not the construction that should be given the statute, but, instead, the proper construction of it was that if the court was in session, a recognizance was authorized to be taken, and a bail bond could be given only when the court was in vacation. The articles governing this matter are articles 901, 902, 903, and 904. That the recognizance given is in accordance with article 903 is not questioned, but it is contended that the proper construction of these articles is that, if a recognizance is given, it must be at the term at which the trial was had, and, if not then given, a person can secure his release only by giving a bail bond, in lieu of a recognizance, and it is claimed this is the proper construction of article 904, which reads:

"If, for any cause, the defendant fails to enter into and make the recognizance mentioned in article 903 during the term of court, but gave notice of and took an appeal from such conviction during such term, he shall, notwithstanding such failure, be permitted to give bail and obtain his release from custody by giving, after the expiration of such term of court and in vacation, his bail bond to the sheriff, with two or more good and sufficient sureties," etc.

To the writer's mind, this article was clothed in such language as to be subject to either construction, and while he thought that perhaps the better construction would be that if the court was in session, a recognizance should be given, and a bail bond was only authorized to be taken when the court was in vacation, and, therefore, no recognizance could be entered into, yet after discussing it with the other members of the court, as it was only a matter of procedure, he said he would not dissent from such holding, as he thought it better to get a settled construction. Since the original opinion has been handed down, we have been led to a further study of the question, and we find that, when the criminal procedure required, when the court was in session, that a defendant, when arrested for a felony, enter into a recognizance in open court, and a sheriff was authorized to take bond only when the court was in vacation (articles 325, 326, White's Ann. Proc.), it was held that if the court be in session, either at the term at which the indictment was returned or at a subsequent term, the sheriff could not take a bail bond, but the defendant was required to enter into a recognizance. *Kiser v. State*, 13 Tex. App. 201; *Gragg v. State*, 18 Tex. App. 295; *La Rose v. State*, 29 Tex. App. 215, 15 S. W. 33. The Legislature, apparently on account of these decisions and the inconvenience sometimes caused, in 1907 (Acts 30th Leg. c. 71) amended this article of the statute, now article 337, and authorized the sheriff to take a bail bond even though the court be in session, but it took an act of the Legislature to authorize a sheriff to take a bail bond when the court was in session, whether at the term at which the indictment was returned or a subsequent term. At the same session of the Legislature, in 1907, the act was passed which, for the first time, authorized a person convicted of a felony to give a recognizance or bail bond on appeal, if the punishment assessed did not exceed 15 years' confinement in the penitentiary. Chapter 19, Sess. Acts 1907. In the emergency clause to this bill the Legislature declares:

"The large amount of costs incurred by keeping the defendant in the custody of the sheriff during a trial when he is charged with felony, and during the appeal taken from felony convictions, and the frequent hardships endured by the defendants who are not guilty of a violation of law, and the liberty of the citizen; as well as the interests of the state, create an emergency and an imperative public necessity requiring that the constitutional rule requiring bills to be read on three several days be and the same is hereby suspended, and that this act take

effect from and after its passage, and it is so enacted."

The purpose of the Legislature is made manifest by this act, to save costs of keeping the prisoners confined to the counties, and to keep innocent people from being punished by confinement in the county jails. But in thus providing they wanted the court to have a supervision and see that adequate sureties were given, and if the court was in session, a recognizance must be given so that he might investigate the solvency of the sureties; if the court was not in session, a bail bond could be executed, but the amount of this bail bond must be fixed by the trial judge, and he must approve the bond, in addition to the sheriff; that he might inquire of the sheriff as to the investigation he had made as to the solvency of the sureties. At this session of the Legislature they dealt with both bail bonds and recognizances before conviction and after conviction, and in one instance (before conviction) they provided that a sheriff might take a bail bond even though the court was in session, but, after conviction, the only instance in which a sheriff was authorized to take a bail bond was (and they use the words) "in vacation," and then provided before the prisoner is released, the bond must be presented to the court trying the cause, and be approved by him. To the mind of the writer, it was the clear intent and purpose of the Legislature, after conviction, to only authorize the sheriff to take a bail bond while the court was in vacation, and if the court was in session, even though at a subsequent term, a recognizance must be entered into in open court. This construction is in accordance with the construction of the former act, which applied to prisoners before conviction, and which the Legislature amended at this session, and which it must, in consequence, have had in mind, and for this reason the writer thinks the cause should be reinstated; but, as hereinbefore stated, it is but a matter of procedure, and if a majority of the members of this court think the proper construction is that even though the court at which one is convicted is in session at a subsequent term, a bail bond only will confer jurisdiction on this court, he will acquiesce in such construction and dissent no further, and, being of the opinion that the case should be reinstated, he will proceed to pass on the questions raised in the record.

[2] In the first place, we do not think there was any error in overruling the motion to quash the indictment. The defendant, as plaintiff, brought suit in the civil district court of Dallas county for a divorce from his wife, Mrs. Jessie Laird, alleging that, at the time of the institution of the suit, he had been a resident of Texas for 12 months. In the indictment in this case this is alleged to be false and untrue, and appellant seemingly contends that if he had not been in fact a resident of Texas 12 months, the district

court of Dallas county would have no jurisdiction of the cause of action, and therefore if he swore falsely in such a suit, no indictment for perjury would lie. The petition was introduced in evidence, in which it is alleged—

"that plaintiff is a resident of Dallas, Dallas county, Tex., and has been for more than 12 months next preceding the filing of the petition."

If the defendant, Mrs. Jessie Laird, had appeared in that cause and filed a plea to the jurisdiction of the court and in abatement of the suit, alleging that appellant, plaintiff in that cause, had not been a resident of this state for 12 months, the court would have had jurisdiction to hear and determine that question and if appellant on the hearing of that plea had been sworn and testified he had been a resident of Texas for 12 months, yet upon hearing the other testimony the court had found his testimony false and dismissed the suit for want of jurisdiction to hear the cause, an indictment for perjury would lie, because the testimony was given in the course of a judicial proceeding in a court which had jurisdiction to hear and determine that question. And inasmuch as Mrs. Laird did not appear, and in order to get the court to hear and entertain the suit and grant him a divorce, if appellant testified he had been a resident of Texas for 12 months in order to obtain a decree of divorce from his wife, and such testimony was in fact untrue, an indictment for perjury based thereon will lie, and the court did not err in so holding. *Cordway v. State*, 25 Tex. App. 405, 8 S. W. 370; *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40; *Higgenbotham v. State*, 24 Tex. App. 505, 6 S. W. 201; *Waddle v. State*, 73 Tex. Cr. R. 501, 165 S. W. 591; *Etheridge v. State*, 173 S. W. 1031. And it has been held that assignment of immaterial matter, in connection with material matter, does not vitiate the indictment. *Dorrs v. State*, 40 S. W. 311; *Jefferson v. State*, 49 S. W. 88.

[3] But the next question presented is one of more difficulty. Appellant contends that, even though perjury could be assigned on his testimony given on the divorce trial, the judgment and decree of divorce entered herein is absolutely void, and, if void, the woman from whom he was adjudged a divorce in that decree is his legal wife, and she cannot therefore be used as a witness against him. Appellant, according to this record, came to Texas from New York in December, 1913, leaving a wife and child in New York. In September, 1914, following he filed a suit for divorce in the Sixty-Eighth district court of Dallas county, Tex., alleging that he had been a resident of Texas for 12 months, and making allegations in respect to his wife. In the petition he alleged he did not know her address of his wife, and she was cited by publication. When the case came on to be heard, Judge Whitehurst testifies appellant took the stand as a witness and testified he had been a resident of Texas for 12 months

immediately preceding the filing of the petition for divorce, and testified to the truth of the allegations upon which he sought a divorce. Judge Whitehurst, on the testimony of appellant, granted the divorce, and a decree was entered, granting him an absolute divorce from Mrs. Jessie Laird, the decree reading:

"A jury being waived, the court, having heard the pleadings and the evidence and the argument of counsel, is of the opinion that the material allegations in plaintiff's petition are true. It is therefore ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing between said plaintiff, Jessie Laird, and defendant W. H. Laird, be, and the same are hereby, annulled and dissolved, and that each party hereto is hereby restored to the status of single persons."

Appellant's contention is that, although he may have brought this suit, testified as stated above, and obtained to be decreed and entered this decree of divorce, as he had not been in Texas 12 months, the decree is a nullity and void, and therefore Mrs. Jessie Laird was not, and is not, a competent witness against him. One must bear in mind, in passing on this question, that there is nothing in the record of the proceedings in the Sixty-Eighth district court which would render the judgment void, or tend to show that he had not been a resident of Texas for 12 months. On the face of the pleadings and by the entire record made in that case, the jurisdiction of the district court is shown, and the regularity of its decree. If the decree is either void or voidable, it must be shown by evidence allunde the record. Now so long as this record stands and no suit is brought to set it aside, can it be collaterally attacked, and especially can it thus be attacked by the person who caused and at whose instance it was entered? Upon the decision of this question rests the question of whether or not Mrs. Jessie Laird was a competent witness against appellant. If she was not a competent witness the case must be reversed, because she gave very material testimony to show the falsity of the testimony said to have been given by appellant on the trial of the divorce suit. Now, the evidence, and all the evidence, shows that appellant brought the divorce suit and procured that judgment of divorce to be entered. Under the Constitution and laws of this state, the district court of the Sixty-Eighth district had jurisdiction of the subject-matter of the suit—the granting of divorces. Const. art. 5, § 8. Having jurisdiction of the subject-matter, the appellant in his petition alleged a state of case which invoked that jurisdiction, and on the record as made in that court the decree is valid and binding on all the world, and especially binding on appellant. In the case of *Martin et al. v. Robinson*, 67 Tex. 375, 3 S. W. 550, Judge Stayton, speaking for the Supreme Court, says:

"Such a court must determine whether the facts exist which make it lawful for administration to be granted, * * * and if in this re-

spect, having power to make the inquiry, it comes to an erroneous conclusion, its decree, founded on such conclusions, is voidable, but not void" (citing *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Burdett v. Silsbee*, 15 Tex. 604; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 836).

So in this case, when appellant's petition in the district court, he being plaintiff in the action for divorce, came on to be heard, he having cited his wife by publication, the court, in accordance with the provisions of law, appointed an attorney to represent the defendant, the absent wife. This attorney filed a general denial, which put plaintiff to strict proof of his allegations. After this evidence the court may have erred in the conclusion he came to, yet under the evidence offered the court came to the conclusion that plaintiff had been a resident of Texas for 12 months, and such judgment cannot be collaterally attacked, but the only way to nullify it is to bring a direct suit for that purpose. As said by our Supreme Court in *Crawford v. McDonald*, 88 Tex. 631, 33 S. W. 325:

"The general rule is well established that a judgment, rendered by a court even of general jurisdiction is void if it had, at the time of the rendition of the judgment, no jurisdiction of the person of the defendant or the subject-matter of the litigation. This principle is self-evident, because until the court acquires jurisdiction it has no power to proceed to investigate and determine private rights. Logically it can make no difference as to the validity of the judgment whether the lack of jurisdiction of the person or the subject-matter appears from the face of the record, or is made to appear by evidence aliunde. For if, for instance, no service was had upon the defendant, he not appearing in the case, the court, having no jurisdiction whatever over his person, is absolutely without power to bind him by an adjudication that he had been in fact duly served; and logically this want of power is the same whether the lack of jurisdiction appears on the face of the record or not. There is, however, another rule of law equally well settled upon principles of public policy, which precludes inquiry by evidence aliunde the record, in a collateral attack upon a judgment of a domestic court of general jurisdiction, regular on its face, into any fact which the court rendering such judgment must have passed upon in proceeding to its rendition. Therefore it is well settled that where a personal judgment has been rendered against a defendant by a domestic court of general jurisdiction, and under the same his property has been seized and sold, he will not, in a contest over the title to the property, be allowed to show, by evidence dehors the record, that the judgment was rendered without any service whatever upon him. Logically the judgment is in fact void, but on grounds of public policy the courts, in order to protect property rights, apply the rule aforesaid, which precludes inquiry into facts dehors the record for the purpose of showing the invalidity of the judgment; and therefore for all practical purposes, in such collateral attack, the judgment is held valid. This rule is analogous to, and probably as important as, the rule forbidding the introduction of verbal testimony to vary or contradict the terms of a written contract, except in a proceeding instituted for the purpose of correcting, reforming, or annulling the same. These principles have long been acted upon by this court, as applicable to judgments of the district, probate, and justice courts, and have become settled rules of property in this state. *Murchison v. White*, 54

Tex. 78; *Williams v. Ball*, 52 Tex. 608 (36 Am. Rep. 780); *Brown v. Christie*, 27 Tex. 73 (84 Am. Dec. 607); *Heck & Baker v. Martin*, 75 Tex. 469 (13 S. W. 51, 16 Am. St. Rep. 915); *Fowler v. Simpson*, 79 Tex. 611 (15 S. W. 682, 23 Am. St. Rep. 370); *Martin v. Burns, Walker & Co.*, 80 Tex. 677 (16 S. W. 1072); *Hardy v. Beatty*, 84 Tex. 562 (19 S. W. 778, 31 Am. St. Rep. 80). Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in *Pennoy v. Neff*, 95 U. S. 714 (24 L. Ed. 585), and, if so, what is the effect thereof, is foreign to this discussion. *Martin v. Burns et al.*, 80 Tex. 676 (16 S. W. 1072); *Hardy v. Beatty*, 84 Tex. 564 (19 S. W. 778, 31 Am. St. Rep. 80).

"Since the rule of public policy above referred to precludes inquiry in a collateral attack into even a jurisdictional fact, when the evidence thereof does not appear from the face of the record, it must follow, for stronger reasons, that the judgment in this case, affirming the sale, cannot be attacked collaterally by evidence dehors the record, to the effect that the sale was not in fact made at the place required by law. The court, in confirming the sale, will be conclusively presumed, in this collateral attack, to have investigated and determined correctly that the sale was made at the proper place, and no evidence aliunde to the contrary will be permitted to impeach the correctness of the judgment. The only relief, if any, permitted by the rules of law against an improper determination of such question by the court in rendering such judgment of confirmation is to be found in a direct attack upon the judgment, where the court has full power to adjust the equities of the parties litigant. We are therefore of the opinion that this judgment cannot be attacked by the evidence dehors the record of the probate court that the sale was not made at the courthouse door of Grayson county. *Brown v. Christie*, 27 Tex. 73 (84 Am. Dec. 607)."

But were the above not the general rule, our Supreme Court has settled the question that appellant, having instituted the civil suit, and prosecuted it to judgment, cannot collaterally attack it. In *Heffron v. Cunningham*, 76 Tex. 313, 13 S. W. 259, it was held:

"One in whose favor a judgment is rendered in a suit brought in his name by counsel employed by him to sue cannot be heard, in a collateral proceeding, to attack the jurisdiction of the court, so long as he resorts to no means to correct or annul the judgment."

This is not only the rule in this state, but Cyc. vol. 23, page 1067, says:

"The rule forbidding the collateral impeachment of judgments applies to all persons who were parties to the action in which the judgment was rendered" (citing cases from many different states).

In Cent. Digest, vol. 30, under title, Judgments, § 931, is cited a list of authorities which hold that a collateral attack on a judgment for want of jurisdiction of a party thereto, which must be shown by facts outside the record, can only be made by one not a party to the judgment. *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; *Valentine v. McGrath*, 52 Miss. 112; *Hess v. Smith*, 16 Miss. Rep. 55, 37 N. Y. Supp. 635; *People's Bank of Springfield v. Williams* (Tenn.) 36 S. W. 98, and cases cited.

It is thus seen that the rule of law is that, if the court rendering the judgment has ju-

isdiction of the subject-matter, and the record as made would show that its jurisdiction had been properly invoked, the judgment is not void, but voidable only, and cannot be collaterally attacked by the person securing the judgment to be entered, but must be set aside by direct proceedings, if it is to be avoided. And, as in this case appellant had procured a decree of divorce to be entered in a court having jurisdiction of divorce proceedings, annulling the bonds of matrimony existing between him and Mrs. Jessie Laird, he cannot collaterally attack that judgment, and, as the divorced wife is permitted, under our law, to testify, the court did not err in permitting her to do so.

The only other question presented in the brief is one of some difficulty to the writer. The petition filed by appellant to obtain the divorce and the answer of the attorney appointed by the court to represent the absent defendant, whose residence was alleged to be unknown, and who was cited by publication, and the judgment decreeing a divorce, were properly admitted in evidence, and the admissibility of this testimony is not contested by appellant, but he contends the court erred in not limiting the purpose for which the jury might consider such testimony. The general rule is as contended by appellant. He says:

"On the trial of the defendant herein the state introduced in evidence the original petition for divorce filed in the district court for the Sixty-Eighth judicial district of Texas in the case of W. H. Laird v. Jessie Laird, No. 18000C, and also introduced in evidence the judgment entered in said cause as of March 1, 1915. Said petition and said judgment were competent and admissible to show inducement in the matter assigned as perjury, and for the purpose of showing that a trial was had in the district court for the Sixty-Eighth judicial district of Texas of matters over which said court had jurisdiction, and for the purpose of showing the materiality of the particular matters assigned as perjury in this case. While said testimony was admissible for the purposes stated, it is well settled, by an unbroken line of decisions in this state, that the court in its charge must limit and restrict the purpose or purposes for which same can be considered by the jury in arriving at their verdict. 'Wherever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might be taken, if not explained, to exercise a wrong and undue or improper influence on the jury as injurious and prejudicial to the rights of the party, then it becomes the imperative duty of the court to so limit and restrict it as that such unwarranted results cannot ensue; and a failure to do so will be radical and reversible.' 'In perjury, the judgment and record of the trial in which the perjury was committed are legitimate as evidence by way of inducement, though not to prove the perjury, and it is error for the charge not to limit and restrict said evidence' (citing Davidson v. State, 22 Tex. App. 372, 3 S. W. 667; Washington v. State, 23 Tex. App. 336, 5 S. W. 119; Maines v. State, 23 Tex. App. 568, 5 S. W. 123; Littlefield v. State, 24 Tex. App. 167, 5 S. W. 650; Higgenbotham v. State, 24 Tex. App. 505, 6 S. W. 201; Kitchen v. State, 26 Tex. App. 165, 9 S. W. 461; Foster v. State, 32 Tex. Cr. R. 39, 22 S. W. 21; Estill v. State, 38 Tex. Cr. R. 255, 42 S. W. 305)."

The writer thinks these cases correctly announce the law in holding that when the record of the proceedings in the case in which it is contended the perjury was committed is introduced, such evidence must be limited, as contended by appellant, when that is the only purpose for which such testimony is legitimately admissible.

But appellant, by objecting to Mrs. Laird testifying when called as a witness, rendered the testimony admissible for another purpose. It became compulsory on the state to show that a decree of divorce had been granted, and under said decree she was no longer the wife of appellant, and when he sought to collaterally attack this decree as being void, on the ground that the court had no jurisdiction it became compulsory on the state to show that the decree was entered in a court having jurisdiction to grant divorces at the instance and request of appellant, and the record in that cause became admissible for that purpose, as well as a matter of inducement, and to show the materiality of the alleged false testimony. Appellant, by objecting to Mrs. Laird testifying, compelled the state to procure and introduce this testimony to render her a competent witness, and he cannot be heard to complain that such testimony was only admissible as a matter of inducement. He by his objection had rendered it admissible for another and different purpose, and compelled its introduction to render a witness a competent witness, and this, perhaps, is the reason the trial court did not in his charge seek to limit the testimony.

However, appellant contends that the testimony was of such a nature that it could be used by the jury in establishing his guilt, and it was not admissible for that purpose. Appellant is correct in his contention that the petition and judgment were not admissible on the issue of his guilt of the charge of perjury; but would or could it have an undue influence in establishing appellant's guilt? The petition was an ordinary petition for divorce, in which it alleged appellant's residence; that the residence of Mrs. Laird was unknown, and, among other grounds, alleged that Mrs. Laird was an immoral woman, and had been guilty of immoral conduct. The charge of perjury is based on the allegation that appellant on the trial of the divorce suit testified to the truth of such allegations, and that the testimony so given by him was false, and known by him to be untrue when he so testified. The petition nor the judgment could and would have no bearing in proving the falsity of such testimony. In fact, if such testimony had any bearing on that issue, which we doubt, its tendency would be to show that such testimony was in fact true, because the court had so found in the divorce suit, and adjudged a divorce on those grounds. So on that issue the falsity of his testimony could not have any bearing

to the hurt of appellant, but would rather have been helpful.

On another issue in the case, however, we cannot say such testimony would have no tendency to establish its truth. The indictment alleged that on the trial of the divorce suit appellant had testified:

"(1) On September 11, 1914, I did not know the address or whereabouts of the defendant, Mrs. Jessie Laird. (2) On March 1, 1915, I did not know the address or whereabouts of the defendant Mrs. Jessie Laird. (3) On September 11, 1914, I had been a resident of the state of Texas for 12 months next preceding the filing of my suit for divorce. (4) On September 11, 1914, I had been an actual bona fide inhabitant of the state of Texas for 12 months next preceding thereto. (5) From the 11th of September, 1913, to December 1, 1913, I was not an inhabitant or resident of the state of New York. (6) On or about September 1, 1913, I came to Texas accompanied by my wife, Mrs. Jessie Laird, who lived with me in Texas until on or about December 1, 1913, at which time she, the said Mrs. Jessie Laird, left me at San Marcos, Tex., and left with another man for parts unknown to me." "(10) Mrs. Jessie Laird was unfaithful to me, and associated with immoral people."

It was incumbent upon the state to prove: First, that appellant had so testified in the trial of the divorce case; and, second, that said testimony was false, and known by appellant to be untrue when he so testified. As before said, on the second of these issues, the falsity of such testimony, the petition and judgment, could and would have no bearing to the detriment of appellant, but on the first of these issues, that he had so testified, the petition and decree might, and probably would, have some tendency to prove that he had so testified. When appellant pleaded not guilty to the charge of perjury, before he could be adjudged guilty, the state was required to prove beyond a reasonable doubt, both that appellant had so testified, and that such testimony was false, and as the petition and judgment could and might have some tendency to prove that appellant had so testified, or might be so construed by the jury, the court in his charge should have instructed the jury that such testimony could not be considered by the jury in passing on the guilt of appellant on the charge of perjury.

Having said that much, we come now to consider whether or not a failure to so instruct the jury requires a reversal of the case at our hands. If it could have worked any injury to appellant, we should not hesitate to reverse the case, and upon this issue the writer has hesitated and been slow to arrive at a conclusion. Had the appellant on the trial of the perjury case offered any testimony that he had not so testified in the trial of the divorce case, the writer would not agree to an affirmance of this case, because the petition and judgment in that case might have had some tendency to prove that he had so testified. But inasmuch as appellant offered no testimony that he did not so testify, and the testimony and all the testimony introduced on that issue in the per-

jury trial was that appellant had so testified in the divorce suit, the jury, without the introduction of the petition and judgment, would not have been authorized to find that he had not so testified, or have grounds, under the evidence on the perjury trial, for a reasonable doubt that he had so testified. Under such circumstances we have come to the conclusion that, in the absence of any testimony he had not so testified, we, under the decisions of this court, are not justified in reversing the case because the court failed to limit such testimony. The testimony was admissible, as admitted by appellant, on some issues in the case, and as to the issue on which he claims it should not have been considered by the jury, appellant offers no testimony, while the state offered testimony upon which the jury could not have found otherwise, if the petition and decree had not been introduced in evidence. *Trent v. State*, 31 Tex. Cr. R. 251, 20 S. W. 547; *Elliott v. State*, 30 Tex. Cr. R. 242, 45 S. W. 711; *Marsden v. State*, 59 Tex. Cr. R. 38, 126 S. W. 1160; *Fitzpatrick v. State*, 37 Tex. Cr. R. 20, 38 S. W. 806. In the case of *Franklin v. State*, 38 Tex. Cr. R. 348, 43 S. W. 85, the court held that if the record introduced would not tend to show the falsity of the testimony alleged to have been given, it was not error to fail to limit the testimony.

In this case, after a careful review of the decisions of this court, we have arrived at the conclusion as the petition and judgment were admissible, not only for the purposes of showing inducement and materiality of the testimony alleged to be false, but were also admissible for another purpose, to show the competency of the witness, Mrs. Laird, and as said testimony would and could have no bearing on whether the alleged testimony, if given, was false, and from the further fact that the testimony and all the testimony adduced on the trial of this case shows that appellant did testify as alleged in the divorce suit, no such error is presented by the failure of the court to limit the purposes for which the petition and judgment were admitted as to authorize a reversal of the judgment.

In my opinion the case should be reinstated and affirmed.

DAVIDSON, J. I agree to the reinstatement of the appeal, but do not agree to the affirmance. The judgment ought to be reversed. I may write later.

PRENDERGAST, P. J., dissents from the reinstatement, but concurs in the affirmance.

PRENDERGAST, P. J. The opinion dismissing this cause was correct, and was agreed to expressly by both my Associates before it was handed down, though Judge DAVIDSON was absent the day it was handed down. But, as it is merely a matter of

practice for the first time established, though wrong, I will not further discuss it.

In my opinion the petition in the divorce case was admissible in this, as an admission or statement by appellant, just as any other admission or statement by him would have been, and the court did not err in not limiting, as it is claimed by appellant it should have been. Judge HARPER'S opinion otherwise is correct, and unquestionably the law of and applicable to this case.

The authorities and principles cited by Judge DAVIDSON in his dissenting opinion are wholly inapplicable to this case and the questions decided therein.

DAVIDSON, J. (dissenting). I do not purpose to discuss the question of reinstatement, but wish to say that I agree with the conclusion reached by Judge HARPER that the dismissal was error. I deem it unnecessary to give my own views in regard to the reasons. His conclusion is correct.

I am persuaded that this judgment ought to have been reversed. Making a brief statement, the record discloses that appellant came to Texas from New York, leaving there on the 11th day of December. On the 11th of the following September he filed his petition for divorce in one of the district courts of Dallas county, being in Texas only 9 months. This case was one of perjury, based upon appellant's testimony in that case, in which he stated that he had been a bona fide resident of Texas for the required 12 months, and in the county of Dallas for the requisite 6 months. A divorce judgment was thereupon entered. It seems, further, that the wife had not been in Texas, but was a resident of New York at the time the petition for divorce was filed. She was cited, it seems, by publication. Article 4632, Revised Statutes 1911, as amended by Acts Leg. 1913, p. 183, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4632), provides that no divorce shall be granted in this state unless the party is a bona fide resident of this state, and has been for 12 months prior to instituting divorce proceeding, and of the county in which the suit is filed for 6 months prior to filing the suit. So far as the writer has been able to ascertain, a judgment of divorce obtained in this state is a nullity, and therefore void without the necessary residence. I do not purpose to discuss the case cited by Judge HARPER wherein the judgment was had in a probate court, and under which subsequently a sale of property occurred and that property became involved in litigation. The court held the probate judgment could not be attacked in collateral proceedings under the facts stated in that case. Those interested in reading the opinion he cites may do so, but it has no application to this case, as will be evidenced by its perusal. It has been always regarded an essential difference between the judgments of those courts of competent jurisdiction which in some way

improperly act and those courts which have no jurisdiction. Such judgments are placed on different footings. I do not purpose now to discuss that question.

It is the law that wherever a citizen of one state seeks to secure a divorce in another state, he must become a bona fide resident of the state in which he seeks the divorce for the length of time and under the circumstances provided by the statutes of that state, and until this has been done no divorce proceedings can be instituted, and if instituted and judgment is obtained, it is a nullity. I will cite some of the authorities along this line: 9 Am. & Eng. Ency. of Law, p. 784, and for cases collated see note 2. I also refer to 9 Am. & Eng. Ency. of Law, pp. 741, 742, and notes for collated authorities. I also refer to 7 Standard Encyclopedia and Procedure, pp. 739, 740, as to what it takes to constitute a resident and citizenship. I also refer to 7 Am. & Eng. Pleading and Practice, 146, as to what it takes to constitute an appearance. I also cite *Emery v. State*, 57 Tex. Cr. R. 423, 123 S. W. 133, 136 Am. St. Rep. 988; *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, same case reported in 45 L. Ed. 805; *Andrews v. Andrews*, 188 U. S. 15, 23 Sup. Ct. 237, 47 L. Ed. 366; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. In addition I cite *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Lutcher v. Allen*, 43 Tex. Civ. App. 102, 95 S. W. 572; *Morgan v. Morgan*, 1 Tex. Civ. App. 316, 21 S. W. 154; *Chunn v. Gray*, 51 Tex. 114; *Redus v. Burnett*, 59 Tex. 581; *Norwood v. Cobb*, 24 Tex. 554; 2 Black on Judgments, 927; 2 Freeman on Judgments, 580; *State v. Fleak*, 54 Iowa, 429, 6 N. W. 689; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Davis v. Commonwealth*, 13 Bush (Ky.) 318; *State v. Armington*, 25 Minn. 29; *Fay v. Ry. Co.*, 196 Mass. 829, 82 N. E. 7; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 146; *Folger v. Ins. Co.*, 90 Mass. 267, 96 Am. Dec. 747. These matters were pretty thoroughly investigated and discussed in *Emery v. State*, supra, in an opinion by this court, and the same conclusion reached there that the writer believes to be correct and here maintains.

It will be observed, with reference to such divorce matters, that they must be governed by state laws. The acts of Congress have no force and are not applicable—I mean as applying to granting divorces. It may be further stated that the state control of these matters is limited to citizens. The courts of Texas cannot grant a divorce to citizens of other states. There must be, not only residence, but a bona fide domicile. On this question see cases collated in 9 Am. & Eng. Ency. of Law, pp. 741, 742, in note 1. Also as to domicile being the test, see page 742, supra, and page 743, and also 7 Standard Encyclopedia & Procedure, pp. 739, 740. It may also be stated in this connection that appearance

merely does not confer jurisdiction. Statutory requirements must be fully met and complied with, or the judgment is a nullity. 9 Am. & Eng. Ency. of Law, p. 746, and notes. It would be useless to follow this question as to what it takes to constitute appearance. Consent cannot confer jurisdiction. Such decrees are void. *Douglas v. State*, 58 Tex. Cr. R. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Stuart v. Cole*, 42 Tex. Civ. App. 478, 92 S. W. 1040; 7 Standard Encyclopedia & Procedure, 807, note 23.

Without amplifying this phase of the matter further, I turn to another line of authorities which ought to be deemed now as fully settling the question adversely to the state. *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111, where a great number of cases are collated, the opinion having been written by Presiding Judge White. *Ex parte Taylor*, 34 Tex. Cr. R. 591, 31 S. W. 641; *Ex parte Kearby*, 35 Tex. Cr. R. 531, 34 S. W. 635; *Ex parte Kearby*, 35 Tex. Cr. R. 634, 34 S. W. 962; *Ex parte Duncan*, 42 Tex. Cr. R. 661, 62 S. W. 758; *Ex parte Tinsley*, 37 Tex. Cr. R. 517, 40 S. W. 306, 66 Am. St. Rep. 818; *Ex parte Lake*, 37 Tex. Cr. R. 656, 40 S. W. 727, 66 Am. St. Rep. 848; *Parker's Case*, 35 Tex. Cr. R. 12, 29 S. W. 480, 790; *Juneman's Case*, 28 Tex. App. 486, 13 S. W. 783; *Ex parte Snodgrass*, 43 Tex. Cr. R. 859, 65 S. W. 1061. These cases lay down the proposition that three things must concur and are absolutely necessary to the jurisdiction of the court or as jurisdictional matters: First, the court must have jurisdiction of the person; second, of the subject-matter; and, third, power to render the particular judgment rendered; otherwise prosecution will be void, as will also the judgment. All of these cases hold the jurisdiction of the person is essential to the validity of the proceedings; otherwise it is a nullity and void. This rule has been followed in Texas in all its history, commencing with *Fleming v. Nall*, 1 Tex. 246. See, also, *Tulane v. McKee*, 10 Tex. 335; *Glass v. Smith*, 66 Tex. 548, 2 S. W. 195; *Mitchell v. Runkle*, 25 Tex. Supp. 132; *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Foster v. Andrews*, 4 Tex. Civ. App. 429, 23 S. W. 610. In 12 Encyclopedia of Pleading and Practice, page 179, this rule is stated:

"It is an elementary principle, recognized in all the cases, that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as of the subject-matter, and that a judgment, which appears upon the face of the record to have been rendered without jurisdiction of the subject-matter or of the person, or which may be shown to have been so rendered in cases where evidence upon the question is admissible, is absolutely void, no matter in what proceeding or in what action it may thereafter be set up or relied upon."

This is supported by a great number of cases cited in the footnotes from many of

the states in the federal Union. Some of these are collated in *Emery v. State*, supra. This rule has been held to apply also where the court has not acquired jurisdiction of the person under necessary process or pleading, although in fact the accused was tried, citing *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Garrett v. State*, 37 Tex. Cr. R. 193, 38 S. W. 1017, 39 S. W. 106; *Lawrence v. State*, 2 Tex. App. 479. This is the settled rule where the court has not the authority to try the case. Cases supporting this proposition are also collated in *Emery v. State*, supra.

Under all these authorities the proposition may be safely asserted that, if the court had not acquired jurisdiction of the person or the subject-matter, the judgment will be void. Article 4632, Revised Statutes 1911, as amended by the Legislature of 1913 (*Vernon's Sayles' Ann. Civ. St.* 1914, art. 4632), says that no judgment for divorce shall be granted in this state unless the party seeking the divorce is a bona fide inhabitant for 12 months in the state, and in the county 6 months. The evidence in this case demonstrates that appellant had not been in the state but 9 months at the time the suit was instituted; therefore the court was without jurisdiction as to his person and subject-matter, and, of course, could not render a judgment.

There is another case I might notice in this connection against the proposition that the judgment is only voidable and cannot be attacked in collateral proceedings. *Ex parte Parker*, 35 Tex. Cr. R. 12, 29 S. W. 480, 790. It is unnecessary to review that case at length, or to state the matters in full. *Parker* was tried in Nueces county and convicted of homicide; his punishment being confinement in the penitentiary for the term of his life. In that case it was held that a writ of habeas corpus could be used to attack the validity of the judgment of the court, and that it is competent, notwithstanding the recitals in the judgment, to go behind the judgment and probe into the very truth of the matter as to whether an act done during the term was in fact done during the time recited by the record. *Parker* had been convicted, and the contention was made on trial of the writ of habeas corpus that the verdict was rendered after the adjournment by law of the term at which he was convicted. The writ was granted, the case tried, and the matter investigated, all of which is shown by the report of the case.

These matters I have set out a little more fully than I anticipated. One of the main questions in the instant case turned on whether the wife of the defendant, who testified in this case, was a competent witness against him. The majority opinion is based upon the theory that the court did not have jurisdiction—that is, appellant had not been a citizen for 12 months—and therefore the testimony of appellant to that effect before

the court granting a divorce was false, and constituted a basis for perjury. If the court had jurisdiction, it was not perjury, because appellant would have lived the requisite 12 months in Texas before exhibiting his application for a divorce. The perjury is predicated on appellant's testimony in the divorce case to the effect that he had lived in Texas the necessary statutory time in order to get the divorce. If it was true he had been a citizen of Texas as required by statute, the state has no case; there could be no perjury. The majority opinion holds that his testimony was false in showing jurisdictional facts; that the court had no jurisdiction to try the divorce case, or to entertain it, and yet it holds that the party is guilty of perjury in a proceeding over which the court had no authority or jurisdiction. If the judgment was valid, the divorce was properly granted, and the wife could testify, because no longer his wife. Her competency as a witness against her husband is predicated alone upon the proposition that appellant's testimony was the basis of the judgment. This being true, the wife was not divorced. There could be no divorce under the facts. She still labored under the incapacity as a witness, being the wife of the accused. Objection was interposed on the trial of the perjury case for the reasons stated. The court below should have sustained these objections, and this court should have reversed the case because the court below did not sustain objections to the wife's competency as a witness. The wife cannot testify in Texas against her husband in perjury cases. She did not testify in the divorce case. She was not in Texas. She was in New York. The judgment is a nullity: First, because the court had no jurisdiction of the person, and his voluntary appearance under all the authorities did not confer jurisdiction. Consent could not confer jurisdiction. The *sine qua non* was the requisite residence. In order to have jurisdiction in this case the facts must be true that appellant had lived in Texas the necessary time. Second, it had no jurisdiction of the subject-matter. The divorce proceedings were not maintainable in the district court until the party had lived here the necessary time. The court did not have jurisdiction of the subject-matter. There was no cause of action, and none could exist until the expiration of the 12 months. And, third, not having jurisdiction of the person or subject-matter, the court was powerless to render a judgment on the facts. The authorities all sustain these propositions, so far as I am aware, and the question of the judgment being voidable does not enter into this case. It was void.

These are some of the reasons upon which I base my conclusions that the majority opinion is wrong in the affirmance.

I therefore respectfully enter my dissent.

KLINE v. STATE. (No. 3663.)

(Court of Criminal Appeals of Texas. Oct. 13, 1915. On Motion for Rehearing, Feb. 2, 1916. Dissenting Opinion, April 12, 1916.)

On Motion for Rehearing.

1. CRIMINAL LAW \S 1169(6) — APPEAL — HARMLESS ERROR—ADMISSION OF EVIDENCE — CURE BY VERDICT.

In a prosecution for arson, error, if any, in the admission of a letter written by defendant, over the objection that statements made therein were prejudicial to him, does not require a reversal of the conviction where the jury assessed the minimum punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3143; Dec. Dig. \S 1169(6).]

2. ARSON \S 37(1)—PROSECUTION—SUFFICIENCY OF EVIDENCE—ALIBI.

In a prosecution for arson, evidence held not to show that defendant was in a different city when his building was burned.

[Ed. Note.—For other cases, see Arson, Cent. Dig. \S 71; Dec. Dig. \S 37(1).]

Davidson, J., dissenting.

Appeal from District Court, Clay County; J. W. Akin, Judge.

P. J. Kline was convicted of arson, and he appeals. Affirmed.

G. H. Culp, of Gainesville, and Arnold & Taylor, of Henrietta, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of arson, and his punishment assessed at the lowest prescribed by law.

He has several bills of exceptions. The state objects to these, claiming they are wholly insufficient to authorize or require this court to consider them. As a sample of them, we will state the substance in full of his first bill, quoting part:

It gives the style and number of the cause, the court and term, and states that upon the trial the state offered in evidence this letter:

"Henrietta, Tex., August 17, 1914. Mr. C. W. Martin, Omaha, Neb.—Dear Sir: Inclosed you will find a check, \$25.00, the balance due on the insurance policy of our school. I have had great difficulty with our school in order to get it on a running basis, and hope by the first of November to be able to have a good little school for our children. *I have a great obstacle to contend with, or we few Catholics have here, as we are surrounded by Protestant bigots and they seem to hate a Catholic school, and have done all in their power to check us.* However, I hope with God's grace and help we will be able to overcome this prejudice. Thanking you for the favors you have extended us, and with best wishes, I am, Yours in X D, Rev. Philip J. Kline. Henrietta, Texas, Box 273." [Ex. No. 45.]

That he objected to it being introduced in evidence, and especially to that part which we have italicized above, on these grounds: (1) It was wholly irrelevant and immaterial. (2) It did not prove or tend to prove any issue in the case. (3) It was highly prejudicial to his rights. That the court overruled his objections and permitted the letter to be read

in evidence, to which he excepted. The court approved it with these qualifications and conditions:

"The objections urged in this bill were made at the time the district attorney was reading said letter to the defendant on cross-examination, while said defendant was testifying in his own behalf, and before said letter had been offered in evidence by the state. Before said letters, including this one, were offered in evidence, the following proceedings were had, while the defendant was still testifying in his own behalf on redirect examination by Hon. R. E. Taylor, attorney for defendant: Mr. Taylor, after interrogating the defendant about the amount of improvements he had placed on the burned building, asked the following questions: Q. State whether or not you now say, since you have gone over and read these letters, about what you would say was the amount of money in the aggregate, that you spent on this building? A. I would figure between \$2,500 and \$3,000. Mr. Taylor: I want to offer in evidence the letters you read here. (It is claimed by counsel for defendant that this offer was made for the purpose of showing his expenditures on the building, only; and I accept his version of his offer.) Said letters, including the one here in question, were thereupon offered in evidence, and read to the jury by district attorney. This qualification applies also to all the other letters introduced."

The rules prescribing the requisites of bills of exceptions have been so long and clearly established and reiterated again and again in the books and decisions that we will not again state or quote them here. We merely will again cite some of the cases and the authorities on the subject. Section 857, p. 557, White's Ann. C. C. P., and section 1123, p. 732; James v. State, 63 Tex. Cr. R. 75, 138 S. W. 612; Conger v. State, 63 Tex. Cr. R. 312, 140 S. W. 1112; Ortiz v. State, 151 S. W. 1058; Best v. State, 72 Tex. Cr. R. 201, 164 S. W. 997; Arnold v. State, 74 Tex. Cr. R. 269, 108 S. W. 125. Measured by these rules, there can be no question but that this bill is so wholly deficient as not to authorize or require this court to consider the point attempted to be raised by it.

No facts are given to enable us to understand whether the ruling is correct or not. It sets out none of the proceedings so that we can tell anything about it. All it tells is the state introduced said letter in evidence over his said objections: (1) How or why it was irrelevant or immaterial is in no way shown or intimated by the bill. (2) It in no way shows what "any issue in the case" was, so we can possibly tell whether or not it tended to prove them or any of them. (3) It in no way shows how or why it wrongly prejudiced his rights. A mere assertion by him of said several objections in no way shows or tends to show they or any of them are true or good. We are forbidden by the rules to go to the record or statement of facts to aid or defeat his bill. It, of and within itself, must give us all necessary information. The qualification of the judge controls the bill, and it in no way aids, but is against, his bill. It shows appellant himself regarded the letter as material and relevant, and as tending to prove some issue in the case, because he

introduced it in evidence before the state did, and before he objected to the state doing so. All pertinent and relevant evidence, if incriminating, necessarily injures an accused's rights as tending to show him guilty, or rebut some claimed defense he may assert. That is the very reason it is admissible, and should be introduced. If we could resort to inferences, which the rules forbid, and judging by appellant's brief, we might infer appellant thought the jurors might not be Catholics, "but Protestant bigots," and influenced against him by his particular language in his letter specially objected to. But, if so, the bill in no way shows it, nor that the jurors are not Catholics. It shows nothing on the subject. Nor does the record otherwise show that any or all the jurors were Protestants, whether bigots or not, or that they were not Catholics.

But suppose we should consider the bill. Then it must be considered in the light of the whole record. It would be but fair to both sides to do this, if it is to be considered at all. Then what do we find the record to show in connection with this bill? We will state some of the salient features which are in no way stated by the bill.

The indictment charged that appellant burned his own house, it being insured at the time. The testimony showed it had been an old school building of the city of Henrietta long since abandoned, and unoccupied for any purpose, years before, and all the time it was owned by appellant, and at the time it was burned. That he bought it and the more than two blocks of ground on which it was situated from said city about two years before it was burned, for \$2,200, paying only \$200 cash, and giving his three notes in about equal amounts for the balance due in 6, 12, and 18 months thereafter. That during the time he owned it he made certain alterations in the internal arrangement of the building at a cost claimed by him to be about \$2,500 to \$3,000. These alterations by no means added the costs thereof to the value of the building, for one of the doctors to whom appellant offered to sell it for a hospital, very shortly before it was burned, testified said alterations injured the building for hospital purposes. It was shown appellant offered to sell it to some doctors, at first pricing it to them at about \$6,000. They declined to buy at that price. One real estate agent testified that \$2,500 was a fair market value for the building and ground at the time the building was burned. Mr. Peninger, assistant state fire marshal, who talked to appellant very soon after the fire, testified appellant then told him he had offered to take \$3,500 from the doctors for the building and ground for a hospital, and his faint recollection was appellant also at that time said the ground alone, without the building, was worth \$2,000 to \$2,500. Appellant did not deny any of this. That in order to get a loan on said

building and ground from the Marquett Life Insurance Company for about \$1,800, which he did, on March 1, 1913, he took out a fire insurance policy in his favor on said building from a local agent at Henrietta in the Commercial Insurance Company for \$2,500 with loss payable to said life insurance company to also secure it in said loan, and that one year later, March 1, 1914, he had that policy renewed for another year. That on March 19, 1913, he also for himself insured said building for three years in the Catholic Mutual Relief Society of Omaha, Neb., through its secretary, Mr. Martin, at Omaha; for \$8,000 additional. Said relief society was exclusively owned and controlled by Bishops of the Catholic Church, and Mr. Martin was a Catholic. Appellant was a Catholic priest, and had resided at Henrietta and had his home and church building and organization, and ministered there, for about five years before and at the time of said fire. The evidence tends strongly to show, if it does not clearly do so, that appellant did not tell either of said insurance companies at the time he took out said insurance policies, and renewed said \$2,500 one, of the insurance he was taking out from the other company, and that neither company, nor any agent of either, had any notice or knowledge thereof until long after said fire. That when appellant was first interviewed by Mr. Peninger and others soon after said fire he repeatedly and specially and positively stated to them that he had no insurance whatever on said building except said \$2,500 policy, and that when said house was burned he was in Ohio, telling particularly the route and railroad he went and the cities he passed through and a certain priest he had seen in Ohio on the trip. All his said statements were conclusively shown to have been false. Mr. Easley, the adjuster for said Catholic Relief Society, swore that, when he first saw appellant after the fire, appellant told him he had no insurance whatever except in said Catholic Relief Society, and he found out about said \$2,500 policy later. Said building was shown to have been burned—entirely consumed by fire—just after nightfall on Friday, October 9, 1914. The evidence was wholly circumstantial, but tended very strongly, if it did not conclusively, to show that appellant himself burned his building; at least, it was amply sufficient for the jury to so believe and find. His defense was alibi.

Evidently the state's theory and contention was that appellant burned his own building to get said very large and excessive amount of insurance, and that his scheme was, even before the fire, to represent to Mr. Martin, the secretary of said relief company, a Catholic, and prepare and induce him to believe that, when he himself should burn it, it was not he, but some "Protestant bigot," his or his church's enemy; and the state's further theory and contention was that, also, after the fire he continued such representations to

thereby induce said Martin, and relief association, to pay him said \$8,000 insurance before said Martin or said relief society knew of said other \$2,500 policy, or suspected him of burning his house to get the insurance. In other words, the state's theory and contention evidently was that appellant was attempting to divert suspicion from himself by false representations both before and after the fire—clearly fabricating his defense, or attempting to do so.

Under these issues, if we could consider his bill, clearly said letter was admissible as tending to show his attempted fabricated defense, and his attempt to divert suspicion from himself, and also induce said Martin and relief society to pay him said \$8,000 before they could learn the full truth. This evidence was just as admissible as was his false statements that he was in Ohio when his house burned, thereby attempting to falsely fabricate an alibi. *Baines v. State*, 43 Tex. Cr. R. 497, 66 S. W. 847; section 1052, sub-div. 6, *Wh. Ann. C. C. P.*, and authorities there cited; 2 *Wh. on Crim. Ev.* pp. 1752, 1753, and page 1485; sections 1070 and 1072, *Wh. Ann. C. C. P.*, and authorities cited. All the authorities are to the same effect. The statement of facts shows appellant himself testified:

"Personally I do not think there was any prejudice or ill feeling towards me as a Catholic priest before this fire. I do not think there was any prejudice or ill feeling here towards the Catholic Church; I should not think there would be."

The jury certainly were not in the slightest influenced by his said language in said letter, even if it should be held inadmissible, for they assessed the lowest penalty authorized by law.

What we have said and held as to appellant's first bill equally applies to his second, and others objecting to letters.

Appellant's third bill shows that, while the district attorney was commenting on one of his letters in evidence, he said he wondered if appellant did not know it was a violation of the federal law to send it through the mail. Appellant objected to this. The court promptly sustained his objection, and instructed the jury not to consider said argument. This presents no error. *Miller v. State*, 31 Tex. Cr. R. 636, 21 S. W. 925, 37 Am. St. Rep. 836; *Hatcher v. State*, 43 Tex. Cr. R. 239, 65 S. W. 97; *Martoni v. State*, 74 Tex. Cr. R. 90, 167 S. W. 351; and other cases there cited.

The district attorney had the right to comment, as he did, on appellant's letter and his testimony as complained in appellant's fourth bill.

We must assume, and it is no doubt a fact, that the court prepared his charge and furnished it to appellant's attorneys before the argument and before he read it to the jury, as the law requires. They had ample opportunity to make objections thereto in writing, as the law also requires.

They made none. However, while said letters were being introduced in evidence, they "verbally requested the court to limit said letters and the matters contained therein for the purpose for which the same were admitted." The court then informed them, if they would write such charge he would give it to the jury. They did not write nor request such charge in writing. Appellant's bill on this subject does not indicate what limit should have been placed on the letters, etc. Clearly, under the law as it now is—not as it formerly was—the burden is not wholly on the judge, but is also on the appellant and his attorneys to see that a correct charge is prepared and given. It appears to us that even if any charge on the subject should have been given at all, then it was appellant's fault, and not the court's, that it was not given, and as the matter is presented no error was committed.

Appellant complains of the court's refusal to let Mr. Coughanour answer a certain question. The bill in no way shows what his answer would have been, and hence presents no error even if the question had been such as was proper for him to have answered.

It was shown that appellant had a clergyman's certificate from the railroads. This authorized him, when purchasing a ticket, by filling out a blank, giving the name of the place to which he wanted the ticket, and signing his name, to get the ticket at half price; the selling ticket agent stamping on the back of both ticket and stub the place and date of the purchase. He would keep the stub or application and present that and his ticket when the conductor or train auditor would collect tickets or fares. The conductor and train auditor had to and did, at the end of their runs, send to the proper railroad officials reports of these stubs and tickets, and all other tickets, and the tickets and stubs with them, indicating the train and time such were used on their trains. The state procured, produced, identified, and introduced in evidence, among others, appellant's stubs showing that he purchased at Dallas a ticket from Dallas to Bridgeport October 8, 1914, on the Rock Island Railroad. That on the same day at Bridgeport in his stub 41 he bought another ticket from Bridgeport to Bowie from the same railroad. Bowie is where said railroad and the Ft. Worth & Denver cross. The Rock Island does not run from Bowie to Henrietta; the Ft. Worth & Denver does. That on the night of October 8th, after midnight, which would make it in the early morning of October 9th, on his stub 42 he bought at Bowie, from the Ft. Worth & Denver, a ticket from Bowie to Henrietta. The Rock Island night train from Dallas through Ft. Worth to Bridgeport arrived at Bridgeport, schedule time, 11:45 p. m. and remained there five minutes, and reached Bowie after midnight—more than an hour after leaving Bridgeport. The

ticket sold to appellant on stub 42 was sold in the early morning October 9th for train No. 7, north or west bound, which was due to leave Bowie at 1:55 a. m. on the morning of October 9th and would arrive at Henrietta about an hour later, and was used on that train, as the evidence clearly shows. Night trains passing through Henrietta and Bowie south or east are shown to do so in the early morning after midnight. The Missouri, Kansas & Texas (Katy) Railroad is shown to run from Wichita Falls through Henrietta, and to and through Ringgold on to Ft. Worth. Ringgold is where the Katy and Rock Island cross. The exact distance between Bridgeport and Bowie, and Bridgeport and Ringgold, and Bowie and Henrietta, and Henrietta and Ringgold, are not given; but clearly such data is given, which shows these distances are short—taking from a short time over, to under an hour for trains to run. Neither is schedule time for trains passing through Henrietta south or east on the Katy at night given, but such data is given as satisfies us they, like trains on said other railroads, pass through in the early morning—after midnight. Appellant's stub 44 and ticket show he bought and used, on October 10th, a ticket from Ringgold to Bridgeport, and stub 43 a ticket on October 11th from Bridgeport to Ft. Worth. All these canceled stubs, 40, 41, 43, and 44, the canceled tickets accompanying them respectively, were procured from the Rock Island Railroad, and stub 42 from the Ft. Worth & Denver by said state's witness Peninger, who swore that, when he told appellant he would or had procured them, appellant said "they did not exist," that "there were no such tickets."

There is no merit in appellant's last two bills to Mr. Lingenfelder's testimony which shows any reversible error. Besides what he testified to is abundantly proven by other trainmen, and appellant himself, to which there was no objection.

As stated, appellant's defense was alibi. When he first talked about the burning of his house after the fire, he told several parties positively he was in Ohio at the time of the fire. Later, that he was in Ft. Worth at the time. His attorneys now claim that he was in Bridgeport. At first after the fire, he likewise positively told those inquiring about said \$2,500 policy that that was the only insurance he had, and, to those inquiring about the \$8,000 insurance in the Catholic Relief Society, that that was the only insurance he had. Both his statements that he was in Ohio, and about his insurance, were conclusively shown to have been false. If the jury had believed his testimony on the trial, that he was in Ft. Worth when the fire occurred, they would have acquitted him. They were clearly justified, from all the evidence, in not believing him, but to believe.

as was in effect demonstrated by the evidence, that he was in Henrietta and himself set fire to and burned his house to get said insurance. We deem it unnecessary to further state the testimony. We have carefully read and studied the record and statement of facts more than once, and are thoroughly convinced that the evidence is clearly sufficient to sustain the verdict.

The judgment will be affirmed.

On Motion for Rehearing.

The original opinion was prepared, and on full consultation with every member of the court was assented to at the time and before it was handed down. It was prepared after a most careful and thorough study of the whole record, the questions raised, and the authorities applicable thereto.

There are but few things further to be said at this time. An extensive argument is made wherein it is contended that appellant's first bill of exceptions was sufficient under the rules not only to authorize, but to require, this court to consider the question therein attempted to be raised. Under the authorities, there can be no shadow of doubt but that said bill of exceptions was wholly insufficient under all the rules to require consideration by this court. There is not a case in all the books but that hold it insufficient, and not one that would hold it sufficient. But it is wholly unnecessary to discuss that question, because, as the original opinion clearly shows, we did consider said bill fully and completely and passed upon the question therein attempted to be raised. So that whether the bill was sufficient to require a consideration, or not, is wholly immaterial. It was considered. In the consideration of it, however, we did so in connection with the whole record, and stated all the material matters which the record showed, so as to pass upon the question raised with reference thereto, and we held that the letter was admissible.

[1] We also specifically held therein as follows:

"The jury certainly were not in the slightest influenced by his said language in said letter, even if it should be held inadmissible, for they assessed the lowest penalty authorized by law."

This feature only of the matter will now be further treated.

It may be conceded for the sake of argument that the letter was inadmissible and the court erred in admitting it; but, if so, under the authorities, it would not require or authorize a reversal, for it was harmless error.

The rule on this subject is specifically stated by this court in *Hester v. State*, 15 Tex. App. 573, as follows:

"If the illegal testimony was immaterial and irrelevant, and there was sufficient other evidence to support the conviction, such conviction would not be disturbed because of the error in admitting the illegal evidence. We believe such to be the correct rule of practice for this court in all cases except capital ones."

As stated by this court in *Haynie v. State*, 2 Tex. App. 168, which is quoted in the *Hester Case*, supra, that it is when "illegal evidence of an important fact, material and pertinent to the issue," is admitted over objections which will require a reversal. The court in the *Hester Case* further says that, if the evidence admitted over objections was immaterial and irrelevant to the issue, this court should not reverse, stating this position is "correct in all cases except capital ones." To the same effect is *Post v. State*, 10 Tex. App. 594, in an opinion by Judge Hurt, wherein he quotes *McWilliams v. State*, 44 Tex. 116, for the rule that it is only where illegal and erroneous evidence is admitted over objections which goes to establish a material and pertinent issue in the case that it requires reversal, and in that case held that certain testimony admitted over the objections of the defendant did not authorize a reversal, because no injury therefrom occurred to the accused. He further holds:

"If this court must reverse for every irregularity, though objected to, whether it tended to injure defendant or not, it would be almost impossible in a great many cases to legally convict. The action of the court in this matter was wrong, but no injury appearing therefrom we cannot make it a ground for reversal."

Again, this court, through Presiding Judge White, in *Bond v. State*, 20 Tex. App. 438, said:

"The erroneous admission of evidence is no ground for reversal when the appellant could not have been prejudiced by the evidence admitted. *State v. Hallett*, 63 Iowa, 259 [19 N. W. 206]; *Evans v. State*, 18 Tex. App. 225; *Goss v. State*, 6 Tex. App. 121."

To the same effect is *Saddler v. State*, 20 Tex. App. 196.

In *King v. State*, 42 Tex. Cr. R. 109, 57 S. W. 840, 96 Am. St. Rep. 792, Judge Davidson said:

"The admission of irrelevant or inadmissible testimony will not require a reversal unless its effect upon the defendant's case was probably injurious. * * * If the punishment allotted had been above the minimum, this error would have required a reversal, for in that event its operation might have been prejudicial."

Presiding Judge Hurt and Chief Justice Roberts said:

"To reverse in the absence of probable injury would be contrary to principle." *Davis v. State*, 28 Tex. App. 560, 18 S. W. 994; *Bishop v. State*, 48 Tex. 390; *Alexander v. State*, 63 Tex. Cr. R. 134, 138 S. W. 721.

This rule that immaterial evidence erroneously admitted over objections is not ground for reversal and is harmless error is fully discussed in *Tinsley v. State*, 52 Tex. Cr. R. 95, 106 S. W. 350, wherein Judge Brooks, in substance, said:

"One of the safe rules in ascertaining whether the evidence prejudiced appellant is the question: Did the evidence in any sense strengthen the state's case?" If it did not, it would not present reversible error. *Knight v. State*, 64 Tex. Cr. R. 552, 144 S. W. 973.

This has so many times been held, and in such a variety of cases, that it would practically be impossible to cite all of the cases

so holding and wherein this court has refused to reverse, and a waste of time. However, we will cite some of the other cases so holding. *Coleman v. State*, 53 Tex. Cr. R. 581, 111 S. W. 1011; *Arnwine v. State*, 54 Tex. Cr. R. 218, 114 S. W. 796; *Underwood v. State*, 55 Tex. Cr. R. 605, 117 S. W. 809; *Boyd v. State*, 57 Tex. Cr. R. 250, 122 S. W. 393; *Ray v. State*, 60 Tex. Cr. R. 138, 131 S. W. 542; *Gray v. State*, 61 Tex. Cr. R. 454, 135 S. W. 1179; *Leggett v. State*, 62 Tex. Cr. R. 101, 136 S. W. 784; *Sparks v. State*, 64 Tex. Cr. R. 611, 142 S. W. 1183; *Davis v. State*, 68 Tex. Cr. R. 261, 151 S. W. 313; *Moore v. State*, 65 Tex. Cr. R. 461, 144 S. W. 598; *Thompson v. State*, 70 Tex. Cr. R. 611, 157 S. W. 494; *Bailey v. State*, 65 Tex. Cr. R. 11, 144 S. W. 996; *Cameron v. State*, 69 Tex. Cr. R. 442, 153 S. W. 867; *Douglas v. State*, 73 Tex. Cr. R. 388, 165 S. W. 933.

Appellant's objection to said letter being introduced in evidence is specifically stated as: (1) That it was wholly "irrelevant and immaterial." (2) It did "not prove, or tend to prove, any issue in this case." Surely, if these objections are true, then the admission of said letter, under the authorities, should in no event result in reversal. (3) His third and only other objection is that "it was highly prejudicial to his rights." How it was prejudicial is in no way intimated by the bill. It did not tend in the slightest under his theory to prove him guilty of the offense. And the only effect it could possibly have had would have been to have caused the jury to fix his punishment at greater than the least, but, as shown, the jury fixed his punishment at the lowest prescribed by law. Hence the conclusion is certain and inevitable that he was not prejudiced thereby, and no injury resulted to him.

[2] Appellant still contends that he established an alibi; that he was in Ft. Worth on the Friday night when his insured building was burned. It is true he so testified, and he further testified that he did not burn his building, and that he was not in Henrietta when it was burned. Even if he did so testify, the jury did not have to believe him, and unquestionably did not believe him. He had told so many falsehoods as to his whereabouts and various other material matters connected with the insurance of his said burned building, which were unquestionably shown to have been false and some so admitted by him on the stand, that it is no wonder that a jury would not believe him. Under the facts, they should not have believed him. The court gave a correct charge on alibi in his favor. There is no complaint whatever to this charge.

As to his claim that he was in Ft. Worth when his building was burned, he attempted to prove by only two witnesses that he was there at the time. These two witnesses were Sister St. Dennis and the priest, Rev. E. J. Cussen. Of course, we cannot copy the whole

of the testimony of either of these witnesses, but we think no one can read their testimony and for a moment doubt that, upon the whole, neither testified that he was at Ft. Worth when his building was burned, when their whole testimony is considered.

Sister St. Dennis swore that appellant was at the St. Joseph's Infirmary at Ft. Worth, on the 7th of October, and that he was there also on the 11th of October. She swore:

"He was there some time during the week; I could not tell you the date." "I cannot tell this jury the date on which he was there."

On cross-examination, she swore that he was there on October 11th. "I don't remember the date he was there before that." (Statement of Facts, p. 166.)

Rev. Mr. Cussen was examined with reference to trying to fix the time that appellant was at said infirmary and tried to show that he was there on the evening and early part of the night of October 9th, the night the house was burned; but nowhere in his direct testimony does he specifically state that he was there at that time. On cross-examination (page 168, Statement of Facts) he swore:

"I have not got an idea where Father Kline was on the night of October the 8th. I don't know whether he was in Fort Worth or Bowie on the night of October 8th. * * *"

It is true that, in his further cross-examination, he stated in substance that he believed he was there on the evening and early night of October 9th, but at the wind-up and conclusion of his whole testimony on cross-examination he swore:

"He (appellant) was there Wednesday night, and he went to Dallas Thursday morning; at least, he told me he went to Dallas. He came back, but I cannot say where he came from. He told me he was going to Dallas Thursday morning. I have said that time and again. He did not come back from Dallas or the place where he went on that same day, October 8th. He didn't stop at the St. Joseph's Infirmary on the night of October 8th, to the best of my belief, but he did stay the night of the 7th, or Wednesday night, and the next time he stayed there was on the night of the 11th." (S. of F. p. 170.)

Appellant swore he went to Dallas late in the evening of October 8th, and not in the morning, and returned to Ft. Worth from Dallas, and stayed at St. Joseph's Infirmary in Ft. Worth that night (the night of the 8th), and all the next day and until after supper, and left on the 9:30 train.

No other witness was offered or testified that he was at Ft. Worth on October 9th at any time, day or night.

Now, let us see what the state proved as to his whereabouts on the night of October 8th, the early morning of October 9th, about the middle of the evening on October 9th, and at night, October 9th.

Mr. Devoss, the ticket agent of the Rock Island Railroad at Dallas, swore that, on October 8th, as such agent, he sold to appellant a railroad ticket over the Rock Island from Dallas to Bridgeport, on his stub No. 40, which appellant swore he signed for that

ticket. They were produced, and the stub and the ticket both identified and introduced in evidence. Appellant swore that he bought that ticket late in the evening of October 8th. The train left Dallas for Bridgeport at 7:50 that evening or night. Mr. Black, the ticket agent at Bridgeport for the Rock Island, swore that that Dallas 7:50 train arrived at Bridgeport at 10:45 at night. The state produced, and Mr. Black identified, appellant's stub No. 41 and a ticket from Bridgeport to Bowie, which unmistakably shows was purchased at Bridgeport by appellant that night. He swore that he signed the said stub applying for the ticket. The Rock Island Railroad crossed the Ft. Worth & Denver Railroad at Bowie. It did not run to Henrietta from Bowie, but the Ft. Worth & Denver did. Mr. Stephenson, the ticket agent of the Ft. Worth & Denver at Bowie, swore that, on the night of October 8th, after midnight, which would be on the morning of October 9th, he sold to appellant a ticket from Bowie to Henrietta; that the train from Bowie to Henrietta left Bowie at 1:55 in the morning, after midnight; and that it would reach Henrietta about one hour later. The state produced, and the witness identified, appellant's stub No. 42 for said ticket from Bowie to Henrietta, and appellant swore that he signed that stub for that ticket. The state introduced the train conductors, or ticket auditors, who took up tickets from passengers on the train, and other trainmen, and, without reciting the testimony of these respective witnesses, it shows with all reasonable certainty that appellant traveled on said tickets procured by his clergy certificates Nos. 40, 41, and 42 from Dallas to Henrietta on the night of October 8th, reaching Henrietta about 3 o'clock on the morning of October 9th.

This evidence links up and with certainty shows that appellant left Dallas for Henrietta at 7:50 on the night of October 8th; that he reached Bridgeport at 10:45 that night; and that, upon his arrival there, he bought a ticket from Bridgeport to Bowie and continued on that train from Bridgeport to Bowie, arriving at Bowie about an hour later; that he then and there bought a ticket at Bowie for Henrietta, took the train leaving Bowie at 1:55 a. m., and arrived at Henrietta the next morning, the morning of October 9th, at about 3 a. m., some hours before daylight. There can be no question that he then slipped to his home in Henrietta in the dead hours of the night.

Mrs. Flannigan, a resident of Henrietta, and who lived between appellant's residence and said schoolhouse which was burned that night, swore that she had known appellant for some time; that she saw him pass her house going towards said schoolhouse about 2:30 or 3 o'clock the evening the house was burned that night. She swore:

"I am familiar with his figure and personal appearance. I was very sure that I saw Father Kline in Henrietta on the day that the schoolhouse was burned. I saw him go by the house

(her house), and then in the evening, about supper time, I went to close the door (the door of her house). I won't say—I don't think it was an hour or more than an hour, perhaps in half an hour, before the fire, that I taken it to be him that passed our door on the sidewalk. He was going towards the building, the schoolhouse building."

She then shows that her front door was only 25 or 30 feet from the sidewalk where she saw appellant passing. She swore:

"I just watched him until he got up to the next street. I could not say how far that was; and I went back in the house."

On cross-examination, her testimony may have been somewhat weakened by the appellant's skillful attorneys having her testify that she might be mistaken in swearing that it was appellant that she saw on these two occasions. On redirect examination, she swore:

"I recognized the party that I saw about 2:30 or 3 o'clock on the day the house was burned to be Father Kline, also that night; though, as I said before, any one might be mistaken after night, seeing him. But I was so sure it was Father Kline, because he had passed our house so many times, and because I had saw him so many times. I think I could not be mistaken, and for that reason I said it was Father Kline."

On recross-examination, she said:

"I say that any one could be mistaken, but I was so sure I recognized him was the reason I had spoke about it. * * * I saw the side of his face on these occasions."

The testimony unquestionably shows that there was a night train on the Missouri, Kansas & Texas Railroad from Henrietta to Ringgold, a distance of about 16 miles. Ringgold is where the Rock Island and Missouri, Kansas & Texas cross. Appellant turned up at Ringgold on the morning of October 10th. There can be no question but that the jury were clearly authorized to believe from all the facts that, after appellant burned his house at Henrietta on the early part of the night of October 9th, if he did, he, that night, took the night train on the Katy, or some other method of transportation, and went from Henrietta to Ringgold, where he turned up the next morning.

Appellant attempted to prove that he arrived at Bridgeport from Dallas or Ft. Worth on the night of October the 9th on said train, which reached there at 10:45 at night, and that he remained there at Mr. Cage's hotel that night and went to Ringgold on the Rock Island the next morning, whereby he attempted to account for his being at Ringgold on the morning of October 10th. He testified that in effect. He attempted to establish that he arrived at Bridgeport at 10:45 on the night of October 9th, and remained there that night, by Mr. Cage, the hotel man, and his wife, and Mr. McDaniel, who ran a restaurant and coffee stand. He attempted to show by Mr. Cage that he was there on the night of October 9th, by showing that the Sunday following he (appellant) attended the funeral ceremony of a child who had died there, and superficially Mr. Cage's testimony

on direct examination might apparently have that tendency; but on cross-examination he swore that appellant did stay all night with him some Friday night and was there the next day and stayed also the following Saturday night, and that on Sunday following he attended the funeral of a child, but he could not be certain as to the time. He swore:

"I cannot tell this jury the date upon which that child's funeral was held. I don't tell this jury whether it was Sunday, October 11th, or Sunday a week later, or a week earlier. I don't know anything about that, only I heard the child was buried. I don't know the date. I don't know what day the child was buried, and, consequently, I don't know what date Father Kline was at my place at that time."

Mrs. Cage's testimony was more uncertain than that of Mr. Cage as to the particular time when appellant was there. Mr. McDaniel, the restaurant man, from whom appellant claimed to have bought a cup of coffee after his arrival at Bridgeport at 10:45 at night on October 9th, swore that he could not tell the date on which Father Kline got a cup of coffee at his restaurant. He swore:

"I do not know the night of the week or the night of the month. * * * I could not tell you how long it was before the funeral that Father Kline was in my restaurant drinking that coffee."

Taking the testimony of these witnesses, separately or together, it utterly fails to fix the time that appellant was at Bridgeport drinking the coffee and staying all night at the hotel as the night of October 9th. Any one reading and studying the testimony would come to the conclusion that it was not on that night, but that it was either the week before or the week after; and, especially, when taken in connection with the tickets and stubs, which do not lie, but speak the truth, there can be no question but that he did not stop off at Bridgeport on the night of October 9th and remain there that night, but that it was some other night when he did this. It is also a very significant fact that he bought no ticket from Bridgeport to Ringgold on the morning of October 10th, but did buy and use one from Ringgold to Bridgeport on said morning. The stubs and tickets clearly show this.

It is wholly unnecessary to discuss the testimony of the whereabouts of the appellant on Tuesday night, October 6th, when the first attempt was made to burn his building. Probably he is then shown to have been at Wichita Falls. It is a significant fact, however, that, while he testified that at the instance of one of the insurance companies he had agreed and in fact did have a watchman, who was his cousin, for his said school building, he was not accounted for and was not produced and his evidence introduced by appellant on this trial. The jury could well conclude from all the facts that he was instrumental in having some one else to attempt to burn the house on Tuesday night, when he could establish an alibi; but, as

that effort failed, that he himself afterwards, on the Friday night following, undertook the job himself and succeeded in burning it in order to get \$10,500 insurance on an old schoolhouse that was worth not exceeding \$2,500 or \$3,500 at the very outside, including the more than two blocks of ground on which it was situated. But whether he had anything to do with the attempt to burn his house on the night of the 6th of October has nothing to do with the facts which show the burning on the night of October 9th, and he may have been entirely innocent of any connection with said previous attempt.

There are many inconsistencies and contradictions in his own testimony on cross-examination. Thus, at one place he testified:

"I might have bought a ticket from Bridgeport to Bowie on October 8th. I might have done that. I might have run up—I tell this jury that I might have run up to Bowie on October 8th from Bridgeport."

In another place, in testifying about the signed stub by him No. 41 and the ticket from Bridgeport to Bowie procured thereby, he said:

"I might have taken the evening (train) if the ticket is there. Yes, sir; I think I have gone up to Bridgeport. I have a definite recollection of going from Bridgeport to Bowie on October 8th and purchasing a ticket from Bridgeport to Bowie on October 8th. I might have taken that 10:45 train from Bridgeport to Bowie on October 8th in the evening. That would bring me into Bowie about 11:30 or 11:40 that night." (S. of F. p. 137.)

It is true that he claimed that, if he did that, he went back to Ft. Worth that night and reached there early the next morning before day, all of which from his own statement is wholly unreasonable, and expressly disputed by his stubs and tickets. Again, he said:

"Here is a ticket here and a credential ticket from Bowie to Henrietta dated October 9th, No. 42. It is possible that I bought that ticket in Bowie on October 9th. If I went up there, I possibly did. I think that would be the evening of October 8th." (S. of F. p. 139.)

Again, he said:

"The reason why I bought a ticket at Bowie on the night of October 8th, or morning of October 9th, to Henrietta was, well, with the intention, I suppose, of coming to Henrietta, but I found that I did—I thought, what is the use of coming up to Henrietta. I have nothing to do there. I might as well go back to Ft. Worth, and I was to be at Bridgeport Sunday anyhow. I changed my mind." (S. of F. p. 140.)

It is a very significant fact that he did not buy nor use any ticket that night from Bowie back to Ft. Worth, for his stubs show the next ticket he bought was on the morning of October 10th, from Ringgold to Bridgeport.

No statement of any of the testimony, or the inference to be clearly drawn therefrom, in the original opinion, was placed therein because of any inadvertence. They are based unquestionably on the testimony introduced on this trial, after a most thorough and careful study of it. The testimony about what he paid for the old schoolhouse, what he is shown to have stated was its value, with the

changes that he had made on it and the value with the improvements placed on it, was an accurate statement from the testimony itself, and not a single statement in the original opinion in that connection but which was borne out strictly by the testimony. Mr. Squires swore positively that appellant did not make any representations whatever to him at the time he issued the \$2,500 policy that there was any other insurance upon the building, and that he knew nothing about any additional insurance on the building until months after the fire, and learned that from another, and not from appellant. The policy that Mr. Squires issued was dated on March 1, 1913. The \$3,000 and \$5,000 policies issued by the Catholic Mutual Relief Society were not issued until March 19, 1913. It is true that appellant swore that he did tell Mr. Squires, at the time Squires issued his \$2,500 policy, that he had this other insurance of \$3,000 and \$5,000. The policy Squires issued was issued and dated on March 1, 1913. The said two policies of \$3,000 and \$5,000 issued by said relief society were not issued and dated until 19 days later, March 19, 1913. (S. of F. p. 206.)

There is nothing else necessary to be discussed as to appellant's motion for rehearing.

It is overruled.

DAVIDSON, J., not present at consultation.

HARPER, J. (concurring). I have very thoughtfully studied this record, and deeming the letters dated August 17, 1914, and January 15, 1915, inadmissible, I have been at some difficulty in arriving at a conclusion in the premises. The court, in his qualification to the bills, says the only objections offered were made when the district attorney was cross-examining appellant in regard to these two and the other letters in evidence; that subsequently counsel for appellant offered, at least, the letters bearing on the expenditures, and after this the district attorney read all the letters, including the above two, and no objection was made at that time by appellant to the introduction of these two letters. If the bills showed that an objection was then made, we might feel inclined to sustain appellant's contention; but the court says none was then made, and, as appellant accepted the bills as thus qualified, we must so conclude, and under such circumstances the objection made at the time of cross-examination could not be made to relate to the time when later they were read to the jury without objection.

Another matter to which the writer has not heretofore, and cannot now, give his full concurrence is that if the letters were inadmissible as appellant received the lowest punishment, their introduction over objection would not be ground for reversal. The letters themselves could not and would not have

any tendency to show that appellant burned the house, but the language in the letters might prejudice a Protestant jury against appellant, and, if so, they would give but little credence to his testimony, and upon his testimony he relied to create at least a doubt in the minds of the jury as to his guilt. However, the writer's views have not heretofore prevailed, and he believes in one rule of law for all. In the case of *Miller v. State*, from Travis county, decided last week, the court in the opinion admitted the testimony in that case was improperly admitted, and that it was prejudicial, but, inasmuch as the jury assessed the lowest penalty, they would not disturb the verdict. The writer dissented most vigorously, but if that is to be the rule of decision in this court, if the objection had been urged when the letters were offered in evidence (which the court says was not done), the error would not be reversible, as appellant received the minimum punishment. See *Miller v. State*, recently decided, and authorities cited. Under the rule in that case, this case should also be affirmed, considering the bills as ample to present the question.

DAVIDSON, J. (dissenting). The state relied, first, upon the fact that Mrs. Flannigan recognized, or thought she did, appellant in the town of Henrietta on the evening prior to the burning of the house at night. This recognition was not by his face, but by his general manner and dress, he being some distance from her walking along the street. The first time she recognized him was in the early evening, and the second time late in the evening. No other witness was produced who saw defendant or was aware of his presence in Henrietta, the town in which the house was burned. Her testimony was sought to be reinforced by circumstances growing out of railroad tickets which were used, or supposed to have been, by appellant, covering some days before and just after the alleged burning. It is unnecessary for what I have to say to enter into a statement of these different transactions. The state also sought to reinforce its side by showing appellant had made different statements as to his whereabouts on the night of the alleged burning of the house. There are explanations offered by him, and the main ticket used by the state, known as No. 42, in such a way that it amounted to but little, if anything, as evidence to show his presence in Henrietta on that particular night. The changes on the ticket rendered it fully doubtful on the part of the conductor, who testified about taking up that ticket, as to whether he did in fact take it up that night, and whether appellant rode on his train that particular night. The state's theory was that, if he rode on that particular ticket, he could have been in Henrietta on the morning of the 9th; the house being burned on the night of the 9th. Appellant met this by proving a complete alibi by various and sundry witnesses as well as

by his own testimony. Three witnesses, for instance, locate him at Ft. Worth, at the time of the alleged burning, he leaving Ft. Worth about the hour or little before the house was burned at Henrietta, and going thence to Bridgeport in Wise county on that night, reaching there about 10 o'clock. His presence at that place at that time was proved not only by himself but by other witnesses who lived in Bridgeport. I do not care to go into the details of the evidence.

While appellant, who is a Catholic priest, was being interrogated, letters were introduced by the state over the objection of appellant. There are several of these bills of exception, but one will be enough to illustrate what I have to say about it, known as bill of exceptions No. 1. It recites:

"Be it remembered that upon the trial of the above styled and numbered cause, and while the state of Texas, through her district attorney, was offering the testimony in chief upon the trial of said cause, the district attorney offered in evidence the following letter, to wit: 'Henrietta, Tex., August 17, 1914. Mr. C. W. Martin, Omaha, Neb.—Dear Sir: Inclosed you will find a check, \$25.00, the balance due on the insurance policy of our school. I have had great difficulty with our school in order to get it on a running basis, and hope by the first of November to be able to have a good little school for our children. I have a great obstacle to contend with, or we few Catholics have here, as we are surrounded by Protestant bigots and they seem to hate a Catholic school, and have done all in their power to check us. However, I hope with God's grace and help we will be able to overcome this prejudice. Thanking you for the favors you have extended us, and with best wishes, I am Yours in X D, Rev. Philip J. Kline. Henrietta, Texas, Box 273.' (Ex. No. 45.)

"And thereupon, and at the time said letter was offered in evidence, the defendant's counsel then and there in open court objected to the introduction of said letter, and especially that part which reads as follows: 'I have a great obstacle to contend with, or we few Catholics have here, as we are surrounded by Protestant bigots and they seem to hate a Catholic school, and have done all in their power to check us.' First, because the same was wholly irrelevant, and immaterial. Second, because said letter did not prove, or tend to prove, any issue in this case. Third, because the same was highly prejudicial to the rights of the defendant. And the court overruled each and all of said objections, and permitted the district attorney to read in evidence and in the presence and hearing of the jury trying this said cause, said letter. To which action and ruling of the court in overruling said objections and permitting said letter to be read to and in the presence and hearing of the jury trying this said cause, the defendant then and there in open court duly and legally excepted, and here now tenders this his bill of exceptions No. 1, and asks that the same be approved, signed, and ordered filed as a part of the record herein."

This bill of exceptions is thus qualified by the court:

"The objections urged in this bill were made at the time the district attorney was reading said letter to the defendant on cross-examination, while said defendant was testifying in his own behalf, and before said letter had been offered in evidence by the state. Before said letters, including this one, was offered in evidence, the following proceedings were had, while the defendant was still testifying in his own behalf on redirect examination by Hon. R. E. Taylor,

attorney for defendant: Mr. Taylor, after interrogating the defendant about the amount of improvements he had placed on the burned building, asked the following questions: Q. State whether or not you now say, since you have gone over and read these letters, about what you would say was the amount of money, in the aggregate, that you spent on this building. A. I would figure between \$2,500 and \$3,000. Mr. Taylor: I want to offer in evidence the letters you read here."

Here the court further stated:

"It is claimed by counsel for defendant that this offer was made for the purpose of showing his expenditures on the building only; and I accept his version of his offer.

"Said letters, including the one here in question, were thereupon offered in evidence, and read to the jury by district attorney.

"This qualification applies also to all the other letters introduced."

The grounds of objections urged in the bill, as will be seen from an inspection of it, and especially to that part of it which reads as follows, "I have a great obstacle to contend with, or we few Catholics have here, as we are surrounded by Protestant bigots and they seem to hate a Catholic school, and have done all in their power to check us," are: First, the same was wholly irrelevant and immaterial; second, said letter did not prove or tend to prove any issue in this case; third, the same was highly prejudicial to the rights of the defendant. I have set out the bill fully so that the matters can be seen as verified in the bill.

The bill of exceptions was disposed of in the opinion mainly upon the ground that it was wholly insufficient to present the issue, and that it did not sufficiently state the matters to authorize a consideration of the bill. To this I cannot agree. Usually when the grounds of objection state that it was irrelevant and immaterial, it may be considered in the light of a general demurrer, and, if in the light of such objection the testimony is admissible for any purpose, the objection might not be sufficient. But if the evidence was not admissible for any purpose on the trial, then the general demurrer is sufficient. It is useless to cite authorities, I think, upon this proposition; but I will cite Branch's Crim. Law, §§ 45, 46, and 49. On the second proposition, that it did not prove or tend to prove any issue in the case, it will only be considered in the light of the bill itself. If this objection is well taken to the matters set forth in the bill itself, it would be sufficient. Whatever may be contained in the bill, if upon an inspection of it it does not prove or tend to prove any issuable fact, then such objection is sufficient. Taking the bill as it is presented, I do not understand how the fact that this letter contained the expressions referred to, that he was surrounded by Protestant bigots, or the Catholics of the town were surrounded by Protestant bigots, could possibly prove any issue in a case of burning a house for the insurance on it; so far as appellant is concerned. I believe this exception is good under the state-

ments of the bill itself. As to the third ground, it will not be questioned the letter was of a very prejudicial nature. As a general proposition, a bill should be sufficiently full and certain in its statements so that in and of itself it will disclose what is necessary to show the supposed error. Mr. Branch collates numerous authorities in section 45 of his Criminal Law supporting this proposition. In section 46 of his Criminal Law, he condenses the law forcefully that bills of exception to testimony will not be held defective for failure to state what objection was made, if the testimony is obviously hurtful and inadmissible for any purpose, citing *Beil v. State*, 2 Tex. App. 220, 28 Am. Rep. 429; *Guajardo v. State*, 24 Tex. Cr. App. 606, 7 S. W. 831; *Brown v. State*, 57 Tex. Cr. R. 269, 122 S. W. 565; *Tyson v. State*, 14 Tex. App. 391. Objection to evidence admitted, that it was immaterial and irrelevant, is too general to be considered unless obviously the evidence would not be admissible for any purpose. He cites a great number of cases, commencing with *McGrath v. State*, 35 Tex. Cr. R. 422, 84 S. W. 127, 941, down to and including *Lamb v. State*, 55 Tex. Cr. R. 825, 116 S. W. 588.

Sometimes a statement of facts will be looked to in aid of a bill of exceptions, but that phase of it is not here discussed. Some cases deal with the question as to whether or not the bills are sufficient, and in this connection authorize a reference to the statement of facts to explain, verify, or make plain the difference between the bill of exceptions as given by the court and that taken by bystanders. This bill was not taken by bystanders, but was given by the court and qualified as above stated. The court certified the statement that the defendant offered certain letters which speak of the amount of improvements put upon the property by appellant. This letter had nothing to do with that matter and in no way referred to expenses, as do some of the letters mentioned in bills of exception. But it will be noted that appellant did not read any of the letters to the jury; he simply offered them as stated. If the bill of exceptions had shown they were offered, but failed to show they were read in evidence before the jury, the bill of exceptions would not have been sufficient to show that they were introduced. The authorities are clear upon that proposition, at least since *Burke v. State*, 25 Tex. App. 172, 7 S. W. 873. The court in his qualification says defendant offered no letters but those which referred to the amount of improvements placed upon the property by appellant. These appellant did not introduce in evidence. This letter does not refer to hose and had nothing to do with them. The judge certified that fact. That this testimony was damaging and hurtful would hardly be a question or subject of debate. It was not withdrawn from the jury; therefore no

question is presented from that standpoint vel non. The writer has heretofore stated, and now states, that he has not been in harmony with his Associates upon the question of explicitness in bills of exception. His view is, and has been, if a bill is sufficient to present the supposed error so the court may understand the proposition asserted in it and can pass upon it, that the bill is sufficient, and that it is not necessary to repeat all the evidence which explains in detail the particular point. It is the opinion of the writer that this bill of exceptions is amply sufficient and full to show and manifest that the testimony introduced in the letter which is set out was not authorized. It had no application whatever to any improvements made by appellant upon the property, but was merely intended to get before the jury, and did get before them the prejudicial matter, that he was surrounded by what he termed "Protestant bigots," or the few Catholics who were there were so surrounded. That this could find no place in the trial of this case ought not to be debatable.

I want to say further that, whatever may have been the old rule with reference to the explicitness of a bill of exceptions, before the Legislature enacted what is known as the stenographer's law, ought not now to obtain. Prior to that time, the lawyers of the case made up the statement of facts from memory without stenographic aid. The Legislature has provided that a stenographer shall be employed and sworn as an officer of the court, that he shall be fully qualified, and that he shall take down everything that occurs during the trial and make a transcript of the matters occurring on the trial. In this case the stenographer did so. He certifies at the end of the transcript that this was a correct statement of facts and matters occurring on the trial. The judge so certifies, and the attorneys on both sides so agree. The writer wishes to emphasize the fact where now under this stenographer's law these matters occur, that wherever the stenographic report is signed and approved by the judge and the attorneys in the case, and verified by the stenographer, its contents should not be permitted to be contradicted by the qualification to a bill of exceptions. If the bill of exceptions is not sufficient, it may be that it would be proper to qualify the bill so as to make the matter plain, but that qualification, whatever it may be, must be in accordance with the stenographic report of the trial made by the sworn officer, and especially so when that record is approved by the court and the attorneys on both sides. So from any viewpoint, the writer is of the opinion that this bill is amply sufficient to manifest error, and the objections are sufficient. So far as this bill is concerned, we need go no further than the face of the bill itself. It is not necessary to go to the stenographic report to ascertain this fact.

In this connection, I desire to say further that two propositions ought not to be controverted, or at least seem to be well-settled: That where the errors complained of conduce to bring about an erroneous conviction, or concede the guilt of the party, that it brought an enhanced punishment, it is reversible. In the attitude of this testimony and the more than serious doubt as to whether the defendant was in town at the time of the burning, but that he was in Ft. Worth, or en route to Bridgeport, this character of testimony contained in this and some of the other letters is of sufficient importance to turn the jury against appellant. It was not withdrawn, but remained with and was considered by the jury. In this connection, one other fact I desire to state. This house was burned on the night of the 9th, about dusk or dark, which was Friday. On the previous Tuesday the same house was set on fire by somebody. This was a Catholic schoolhouse in Henrietta. It was proved beyond question, if not a conceded fact, that appellant was not in Henrietta on Tuesday night when the house was first sought to be burned, but was in Wichita Falls. It was a serious question, met by evidence both ways, that he did not return to Henrietta until after the second burning, and therefore could not have been guilty of the second burning. Some one else set the house on fire the first time. It was not defendant. This character of testimony set forth in this letter may have induced the jury to find appellant guilty. We cannot tell, in cases of this character, just what may or may not influence a jury. From any viewpoint, this testimony was clearly inadmissible, and the writer believes that the bill of exceptions is ample under the authorities, and especially under the present law, to manifest error without reference to the statement of facts. If we were permitted to go to the statement of facts, it would not show the defendant even offered any of these letters in evidence, but the state did, and it is shown by the bill of exceptions it was introduced by the state as original evidence. The bill of exceptions shows the state of Texas was offering this testimony in chief on the trial of the case and this letter was read as evidence.

It is unnecessary to discuss the other letters, in view of what has been stated. They are signed by the judge and qualified in the same manner as was the bill already discussed.

I cannot agree altogether with the statement made as to some of the evidence introduced. As I understand the original opinion, it indicates that the evidence shows that the property at the time of the alleged burning was only worth \$2,500. I think this was an inadvertence. I think the testimony will show conclusively that at the time appellant bought it it was worth \$2,500, and the witness does not state what it was worth at the

time appellant offered to sell him the property, but stated that quite a lot of improvements had been made on the building after purchase in order to make it suitable for a school building, and appellant offered a state's witness the property at the time for \$6,000 or \$6,600; appellant stating, also, at the time he was willing to make some sacrifice on it. This was a physician who was speaking of buying it for some purpose connected with his practice, but the trade was not consummated.

At the time the insurance was granted through the county insurance agent, Mr. Squires, Squires testified that appellant did not inform him that he had taken out insurance in another company. Appellant says he did so inform him, and told him the name of the company and incidental matters, and this in the presence of Mr. Wantland. So it was not a conceded fact, but a decidedly contested issue, as to whether appellant did or did not make the statement to Squires at the time he took out the insurance in the company represented by Mr. Squires. Wantland was not introduced as a witness. Therefore we have got the issue between the testimony of Squires and that of appellant as to this matter. I do not care to pursue this matter further. I am of the opinion upon a review of the case and reading of the record, bills of exception, and statement of facts, that these matters were of such an erroneous nature as requires a reversal of the judgment and awarding appellant another hearing before a jury. To this end, I believe the affirmance should not have occurred, the rehearing ought to be granted, and the judgment reversed.

ROGERS v. STATE. (No. 4030.)

(Court of Criminal Appeals of Texas. April 5, 1916.)

CRIMINAL LAW §1090(1)—APPEAL—STATEMENT OF FACTS—BILLS OF EXCEPTION—NECESSITY.

In the absence of statement of facts and bills of exception, nothing is presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2905; Dec. Dig. §1090(1).]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Harry Rogers was convicted of forgery, and he appeals. Judgment affirmed.

O. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a conviction of forgery, with no statement of facts nor bills of exceptions, in the absence of which, nothing is raised which can be reviewed.

The judgment is therefore affirmed.

MURRELL v. STATE. (No. 3844.)

(Court of Criminal Appeals of Texas. Dec. 1, 1915. On Motion for Rehearing, April 19, 1918.)

1. CRIMINAL LAW §1128(1)—APPEAL—RECORD—MATTERS OCCURRING AFTER TERM.

A record in criminal proceedings cannot be varied or qualified by matters occurring after the adjournment of court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2951; Dec. Dig. §1128(1).]

2. CRIMINAL LAW §598(3)—CONTINUANCE—DILIGENCE.

Where accused, instead of sending interrogatories to an officer authorized to take depositions, mailed them to the postmaster of the town where witness resided, with the request that the postmaster deliver them to an officer authorized to take depositions, and sent no money to pay for taking the depositions, he did not use diligence to secure the testimony, and he is not entitled to a continuance to obtain it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1336; Dec. Dig. §598(3).]

3. SEDUCTION §34—CRIMINAL LIABILITY—ELEMENTS OF OFFENSE.

To constitute the offense of seduction, it is not necessary that prosecutrix must have yielded solely in reliance on the promise of marriage, and not partly through love for the accused.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 58-60; Dec. Dig. §34.]

4. CRIMINAL LAW §789(1)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

An instruction held to clearly apply the rule of reasonable doubt in favor of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904, 1905, 1960, 1967; Dec. Dig. §789(1).]

Appeal from District Court, Coryell County; J. H. Arnold, Judge.

Baity Murrell was convicted of seduction, and appeals. Affirmed.

Mears & Watkins, of Gatesville, and Williams & Williams, of Waco, for appellant. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of seduction, and his punishment assessed at two years' confinement in the penitentiary.

[1] The first contention of appellant is that the court erred in overruling his motion for a continuance. In this motion he states he expects to prove by Sherman Hale that on one occasion he slept with the prosecutrix, Miss Mary Hale, and during said night had sexual intercourse with Miss Hale, and had had intercourse with her on various occasions prior to the time of the alleged seduction. The materiality of such testimony in this character of case cannot and will not be questioned. The court, in approving the bill, attaches the affidavit of Sherman Hale to his qualification of the bill, in which Sherman Hale swears that appellant could not make such proof by him; that he never at any time slept with Miss Mary Hale, and had never at any time had sexual intercourse with her; but he says,

on the other hand, not only that such proof could not be made by him, but that Miss Mary Hale's reputation for virtue and chastity is good. This affidavit was made after the adjournment of court for the term, and appellant's insistence that we cannot consider same is correct. Such an affidavit would have been admissible when the hearing on the motion for a new trial was had, but a record cannot be varied nor qualified by matters occurring after the adjournment of court.

[2] So the only question is: Did appellant use diligence in an effort to secure the attendance of the witness? If he did, he would be entitled to a reversal of the case. If not, the court committed no error in overruling the motion for a continuance and refusing to grant a new trial on that ground. Sherman Hale had lived in Coryell county a number of years, but moved from that county to Oklahoma in November, 1914. A complaint was filed against appellant in May, 1915, charging him with having seduced Miss Hale in December, 1914. He was bound over to the grand jury, and when that body met he was indicted, and his cause set for trial on the 26th day of July, 1915. Appellant, prior to that time, and after indictment, had a subpoena issued to Coryell county for Sherman Hale. The least diligence on his part would have ascertained that Sherman Hale had left Coryell county for Poteau, Okl., some six months prior to that time. However, when the case was called on the 26th of July, on motion of appellant the case was postponed for one week to give appellant an opportunity to take the depositions of the witness. He propounded interrogatories, time was waived by the district attorney, and he agreed that the depositions might be taken in answer to the original interrogatories by any officer authorized to take depositions. Appellant, instead of sending the interrogatories to an officer authorized to take depositions, mailed them to the postmaster at Poteau, Okl., with the request that the postmaster deliver them to an officer authorized to take depositions. No answers to the depositions were received, and it is not shown they were ever delivered to an officer authorized to take depositions. The postmaster was under no obligations to hunt up such an officer, and appellant admits he sent no money to pay for taking such depositions.

Was this diligence? There is no showing made that an officer authorized by law to take such depositions lived in Poteau, Okl., and as only a judge of the Supreme Court of that state, or a commissioner of deeds for this state who resides in Oklahoma, could take such depositions (Poteau not being the capital of that state), it is hardly probable such an officer lived in Poteau, and, if not, could appellant reasonably expect the post-

master of Poteau to look up such an officer and turn over the depositions to him, when no money was sent with which to pay for taking the depositions, or to pay the expenses of the postmaster. In *Adams v. State*, 19 Tex. App. 260, it is held by this court that, notwithstanding the waiver of the district attorney, the affidavit required by law in taking such depositions must be filed, or the appellant will be lacking in diligence. This question is also discussed in *Swofford v. State*, 3 Tex. App. 82, and holds appellant lacking in diligence for not placing the depositions in the hands of an officer authorized to take the depositions. All the decisions of this court hold that it is not only the duty of appellant to sue out the process, but it is his duty to place it in the hands of an officer who is authorized to execute the process. *Dove v. State*, 36 Tex. Cr. R. 107, 35 S. W. 648, and cases cited in section 601, page 395, *White's Ann. Code Cr. Proc.* As the application does not show that the depositions had been placed, or that the postmaster ever would place them, in the hands of an officer authorized to take the depositions of the witness, the court did not err in overruling the application for a continuance.

Again, if we consider the evidence heard on the trial of the case, which in ruling on the motion for a new trial the court had a right to consider, this evidence would show that *Sherman Hale* had a very limited acquaintance with *Miss Mary Hale*, and comparatively no association, and under such circumstances it would be remarkable if the facts stated in the application were true, unless she was a prostitute, and this the testimony most emphatically negatives, for the record discloses that her reputation for virtue and chastity was good in the community where she lived prior to the date of this alleged seduction. And under such circumstances we cannot say the court would err in holding that the witness would not probably so testify if his depositions had been secured. *Carver v. State*, 36 Tex. Cr. R. 552, 38 S. W. 183, and subdivision 2 of section 643, *White's Ann. Code of Criminal Procedure*.

[3] The prosecutrix, *Mary Hale*, testified on the trial, in answer to questions:

"Q. What caused you to yield to him? A. Because I loved him, I reckon. Q. What did you say? A. Because I thought he loved me and would be true to me. Q. What, if anything, did the fact you were going to be married five days after that—state what effect did that have on you in allowing him to have intercourse with you? A. I thought he would be true to me. Q. Would you have yielded to him, but for the fact of his promise to marry you five days after that? A. No, sir."

Appellant insists that the court should have instructed the jury, under this testimony, that if the prosecutrix yielded her person to appellant partly through love for appellant he was entitled to be acquitted. He contends

that she must have yielded solely in reliance on the promise of marriage, and if her love for appellant was any part of her reasons for yielding it would not be seduction under our statute. We have frequently held that, if the act of intercourse took place in exchange for a promise of marriage, without evidence of association, love, and affection, it would be but a matter of barter and sale. Seduction necessarily implies that one has won the affection of the young lady and obtained her confidence. That he has done so would not, in and of itself, make a case of seduction, as there must have been an engagement to marry upon which she had a right to rely. But without love and affection there could hardly be a case of seduction. It is the fact that one has won the love and confidence of a young lady, and by reason of such facts under a promise of marriage, he brings about her undoing, that renders him criminally liable. The court, in approving the bill, says:

"The proposition asserted by appellant is that, if prosecutrix yielded her virtue to appellant partly because she loved him and partly because he promised to marry her, appellant would not be guilty of seduction. If this is the law, then it would be hard to imagine how a case of seduction would arise. As I understand the law of seduction, it was intended to punish a man who would first win the love and confidence of a girl, and then by promise of marriage induce her to have intercourse with him, and then fail or refuse to carry out his promise of marriage. Necessarily, the first step in the offense is to win the love of the injured female, because it is her love for the man who promises to marry her that gives her faith in such a promise and causes her to rely upon it, and inspires confidence in the maker of such promise and belief that he will carry it out."

The court has a correct conception of the law, and he did not err in refusing to charge the jury as requested.

[4] The next contention of appellant, as made by appellant in this court, is that the court erred in failing to apply the reasonable doubt to that paragraph of the charge of the court wherein his affirmative defense was presented. The record we have before us is not clear whether or not the court had or had not instructed the jury to give the appellant the benefit of a reasonable doubt on this issue. In approving the bill of exceptions the court inserted the paragraph on this issue in his qualification of the bill, and in it the reasonable doubt was applied to that, as well as all other issues. But, as appellant insisted this did not comport with the true facts, the court required the clerk to send us the original charge of the court, and in it we find the court thus instructed the jury on that issue:

"If you should find from the evidence that one *Roebuck* had carnal intercourse with *Miss Mary Hale* before the defendant had intercourse with her, if he did so, or that the defendant had intercourse with her without a promise of marriage before he had intercourse with her under a promise of marriage, if he did, or if you have a reasonable doubt thereof, then in that event you need consider the case no further, but will acquit the defendant."

This clearly and succinctly applied the reasonable doubt to that issue and we cannot understand why appellant makes such contention, when the record discloses that the court so instructed at his request, and amended his charge in conformity with appellant's objection thereto.

The only other contention is that the evidence is insufficient to sustain the verdict. Both appellant and the prosecutrix testify to acts of intercourse. She testifies to a promise of marriage. This he denies. The prosecutrix, however, is corroborated on this issue by Mrs. Maud Furmenter and other witnesses.

The judgment is affirmed.

On Motion for Rehearing.

The only question discussed in the application for a rehearing is the one relating to the motion for a continuance. One of counsel for appellant in his argument states:

"We cannot agree with the court that there was any duty of diligence incumbent on the defendant until after indictment."

If there is any expression in the original opinion indicating such holding, it was not intended. His duty as to diligence to get his witnesses began when he was arrested on the indictment. Appellant says there is no question as to diligence up to July 26th. To this we cannot agree. In the application for a continuance appellant states:

"Defendant shows that he has learned that the witness [Sherman Hale] moved from this county to Oklahoma in September, 1914, but he did not know his residence at the time he had a subpoena issued to this county."

If appellant knew that Hale had left Coryell county at the time he had the subpoena issued to that county, even if he did not know his exact place of residence in Oklahoma, certainly causing a subpoena to issue would not be diligence, when he knew he had left the county nine months prior to the issuance of the subpoena, and gone to Oklahoma. The case would stand as if he had had no process issued, and no diligence used up to that time. It was his duty, instead of issuing a subpoena, to then make an effort to secure the depositions of the witness. However, the court did grant him a postponement of the case from July 26th to August 2d. The district attorney that day waived notice and service and copy of the interrogatories, and

agreed that commission might issue at once, and commission did issue on that day. It then became the duty of appellant to see that the interrogatories were placed in the hands of an officer authorized to take the depositions.

Appellant insists that we should take judicial notice of the difficulty of securing an officer to take depositions of a witness in a sister state. If we should take such notice, then appellant must also be construed to be in possession of the same information, and yet he made no effort to see that the interrogatories reached the hands of an officer authorized to take depositions. He had seven days. Poteau, Okl., is not so distant but that the interrogatories could have been taken and returned in that time by diligence; at least, the duty to endeavor to do so was incumbent on him, and if he failed, after using due diligence, there would be merit in his contention. When this court was first organized it was held in *Bule v. State*, 1 Tex. App. 455:

"It has been repeatedly decided by this and the Supreme Court that it must be shown what was done with the process obtained for a witness; that it should be made to appear that it was placed in the hands of the proper officer if the witness resided in the county, and if he resided out of the county then that it was forwarded, and how and when, to the proper officer there."

Appellant states in his application that when he had the subpoena issued to Coryell county he knew the witness had moved to Oklahoma. This was July 16th. For 10 days, or until July 26th, when the case was called for trial, he had made no effort to take the depositions of the witness. On this day the court granted a postponement until August 2d, that he might take the witness' depositions. The district attorney waived notice and time, and a commission was issued on that date, and the showing that appellant makes is that he mailed the depositions to the postmaster, with the request that the postmaster turn the depositions over to an officer, sending no money to pay for taking the depositions. The commission never reached the hands of an officer authorized to take the depositions. See *Dove v. State*, 36 Tex. Cr. R. 105, 35 S. W. 648, and a long list of authorities cited in subdivision 2, § 600, White's Ann. Code Cr. Proc.

The motion for rehearing is overruled.

WALLACE v. DAVIS, Bank Com'r.
(No. 287.)

(Supreme Court of Arkansas. March 20, 1916.)

DEPOSITARIES \S 8—**INSOLVENCY**—**DISTRIBUTION**—**PREFERENCE**—**PUBLIC FUNDS**.

Under Kirby's Dig. \S 1990, authorizing collectors of taxes to deposit public funds in incorporated banks, but making them and their sureties and the bank and its stockholders liable for such funds which the bank shall fail to pay on demand, which has been construed to authorize a general deposit of such funds whereby the bank becomes a debtor to the collector and not a trustee, the collector has no preference after the bank becomes insolvent over other creditors for the amount of public funds so deposited.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. \S 8.]

Appeal from Cleburne Chancery Court; Geo. T. Humphries, Chancellor.

Suit by J. R. Wallace, as Collector of Cleburne County, against Jno. M. Davis, Bank Commissioner, to recover funds deposited by plaintiff in an insolvent bank. Decree for the plaintiff as a general and not a preferred claim, and plaintiff appeals. Affirmed.

J. M. Brice, of De Witt, for appellant. W. L. Thompson, of Heber Springs, for appellee.

HART, J. Appellant instituted this action in the chancery court against appellee. The complaint alleges substantially the following facts: The plaintiff, J. R. Wallace, was duly elected sheriff and ex officio collector of Cleburne county, Ark. During his term of office he collected taxes to the amount of \$1,387.65 and deposited the same in the Bank of Higden, an incorporated bank with its place of business in Cleburne county. The officials of the bank at the time they received the deposit knew that the moneys were public funds arising from the collection of taxes and that they were deposited by the collector as such. The bank became insolvent and was placed in the hands of the bank commissioner pursuant to our statutes. The bank commissioner refused to pay over to the plaintiff said public funds. The county court called on the plaintiff for a settlement, and the plaintiff paid into the treasury out of his own funds said sum of \$1,387.65. He asked for judgment against the defendants, and that his claim and judgment be declared a preferred claim over the general creditors of the insolvent bank, and that he should be subrogated to the rights of the county. The court found that the claim of plaintiff for the sum of \$1,387.65 was correct, but that he was not entitled to preference over general creditors out of the assets of the insolvent bank. Judgment was accordingly rendered in favor of the plaintiff for the amount of his claim. It was allowed as a general claim, and the bank commissioner was directed and ordered to pay the claim pro rata out of the assets of the bank in his hands. The plaintiff has appealed.

Section 1990 of Kirby's Digest, among other things, provides that collectors of taxes may deposit the public funds in their custody in incorporated banks for safe-keeping; and that the said officials and the sureties on their official bonds, the bank, and the stockholders of the bank shall be liable for the funds that such bank on demand shall fail to pay to the person entitled to receive the same.

It is conceded that the plaintiff, as collector of Cleburne county, deposited the public funds in an incorporated bank of that county; that the bank became insolvent and failed to pay the same over to him on demand.

It is contended by counsel for the plaintiff that the circumstances under which the deposit was made in the bank by plaintiff were such as to create the relation of trustee and cestui que trust, rather than that of debtor and creditor. Cases are cited by counsel in support of their contention, but we do not deem it necessary to cite them; for we have already decided adversely to their contention in cases which we shall presently cite. The theory upon which the decisions referred to by counsel are based is that the public funds are held by the insolvent bank charged with a trust, and on that account the county is entitled to a preference over the claims of general creditors unless the identity of the deposit has been destroyed and its proceeds can no longer be traced.

From the reasoning of these cases, it follows that, where public funds are legally placed in a bank as a general deposit, the relation of debtor and creditor exists, and the deposit does not become a trust fund, and in case of the failure of the bank a claim for public money has no preference over the claims of the general creditors of the bank, but stands on the same footing with them. In the case of *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896, we held that, under section 1990 of Kirby's Digest, tax collectors are authorized to make a general deposit of the public funds in his hands in an incorporated bank. The writer concurred in the judgment in that case because he believed that public funds deposited under section 1990 did not become a debt of the bank, but that they were a trust fund, and on the bank becoming insolvent became no part of the bank's estate. From the opinion of the court, however, the deposit of the money by the tax collector created the relation of debtor and creditor and the deposit became a general one and did not become a trust fund.

The tax collector in the instant case, under the statute, was authorized to make a general deposit of the public funds in his hands in the bank, and the funds then became a part of the estate of the bank to be distributed to its creditors according to law. In the case of *Talley v. State*, 180 S. W. 830, it was

held that a county has no preferential right to the assets of a county depository bank by reason of the fact that its funds had been deposited there. The reason given is that no preference was created by the statute authorizing the deposit and that there was no general statute giving the county a preference over general creditors. It is true the court in that decision was construing a depository statute, but the reasoning of the court applies with equal force to the construction of section 1990 of Kirby's Digest now under consideration.

It follows that the decision of the chancellor refusing to allow the claim of the plaintiff as a preferred claim was correct, and the decree will be affirmed.

JOHNSON v. WALLACE. (No. 288.)

(Supreme Court of Arkansas. March 20, 1916.)

1. DEPOSITARIES \S 6—PUBLIC FUNDS—STATUTES—REPEAL.

Acts 1913, No. 116, p. 504, providing for the selection of a county depository in a certain county and requiring the county treasurer to deposit all public funds coming into his hands in such depository, but making no provision with reference to deposits by the collector of tax, did not repeal Kirby's Dig. \S 1990, authorizing the county collector to deposit public funds in any incorporated bank and making the stockholders of the bank liable for the amount so deposited.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. \S 20; Dec. Dig. \S 6.]

2. BANKS AND BANKING \S 47(2)—LIABILITY OF STOCKHOLDERS—STATUTE—DEMAND.

Under Kirby's Dig. \S 1990, authorizing the tax collector to deposit public funds in any incorporated bank and making the stockholders liable for any funds not repaid by the bank on demand, no demand on an insolvent bank for the public funds deposited therein is necessary to fix the liability of the stockholders, since such demand could serve no useful purpose.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 66; Dec. Dig. \S 47(2).]

3. SUBROGATION \S 21 — TAX COLLECTOR—LOSS OF DEPOSIT—PAYMENT—EFFECT.

A collector of taxes who had paid the amount deposited by him in an insolvent bank as required by the county court is entitled to subrogation to the county's rights against the stockholders of the bank.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. \S 47; Dec. Dig. \S 21.]

Appeal from Cleburne Chancery Court; G. T. Humphries, Chancellor.

Suit by J. R. Wallace, as Collector of Taxes for Cleburne County, against E. F. Johnson. Decree for the plaintiff, and defendant appeals. Affirmed.

Brundidge & Neelly, of Searcy, for appellant. J. M. Brice, of De Witt, for appellee.

HART, J. J. R. Wallace, as collector of taxes for Cleburne county, instituted this action against E. F. Johnson and others to recover the sum of \$1,387.65, the amount of taxes collected by him and deposited in a bank of which Johnson was a stockholder.

This is a companion case to that of J. R. Wallace, Collector, v. John M. Davis, Bank Commissioner, 184 S. W. 834, this day decided. At the trial of the case it was admitted by the defendant that the plaintiff was collector of taxes for Cleburne county; that he, as such collector, had deposited taxes collected by him to the amount of \$1,387.65 in a bank in which the defendant was a stockholder; that the officers of the bank accepted the deposit of the funds with full knowledge that they were public funds; that the bank subsequently became insolvent and was placed in the hands of the bank commissioner to be wound up as an insolvent bank.

The action was based on section 1990 of Kirby's Digest, which gave the collector authority to deposit the funds in the bank, and which made the stockholders liable therefor for all funds that the bank on demand failed to pay to the person entitled to receive the same.

[1] The defense of Johnson was that section 1990 of Kirby's Digest was repealed by Act 116 of the Acts of 1913, creating a county depository of Cleburne county, Ark. The court found against the contention of the defendant and rendered a decree in favor of the plaintiff. The opinion of the chancellor was correct. The act creating a county depository for Cleburne county was approved March 3, 1913. See Acts 1913, p. 504. Under the terms of that act, the collector of taxes had no authority whatever to deposit public funds in a bank. By the terms of that act, the county treasurer alone was authorized to deposit public funds in a bank. The tax collector was authorized to deposit public funds in an incorporated bank by section 1990 of Kirby's Digest.

The special act creating a depository for Cleburne county does not by express terms repeal section 1990 of Kirby's Digest. There is no repugnancy between the two statutes. There are no provisions in the special depository act relating to the authority of the collector of the taxes to deposit the public funds in a bank. It confers such authority solely on the county treasurer. The depository act was not intended to cover the subject of section 1990 of Kirby's Digest. As we have already stated, there is no repugnancy between the two statutes, and we hold that the former is not repealed by the latter.

[2] Under section 1990, the stockholders of the bank are liable for public funds deposited in the bank that such bank on demand shall fail to pay to the person entitled to receive the same. See *Roberts v. State*, for Use of Logan County, 116 Ark. 410, 172 S. W. 1039. The bank was admittedly insolvent, and on that account a demand upon it would have served no useful purpose. In such cases, a demand for payment of public funds which had been deposited in a bank under

statutes authorizing such deposits is unnecessary. *Talley v. State*, 180 S. W. 830.

[3] The collector was required to settle with the county court and paid the amount sued for into the county treasury out of his own funds. Therefore he was entitled to be subrogated to the rights of the county. *Bank of Midland v. Harris*, 114 Ark. 344, 170 S. W. 67; *Steed v. Henry*, County Treasurer, 180 S. W. 508, 48 L. R. A. 444.

The decree will be affirmed.

STUTTGART RICE MILL CO. v. REINSCH. (No. 288.)

(Supreme Court of Arkansas, March 27, 1916.)

1. MORTGAGES—§546—FORECLOSURE—RIGHTS ACQUIRED—CROP.

Where a crop had been removed from the land before its sale under a deed of trust which did not cover the growing crops, the purchaser at the sale did not acquire the crop.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1564; Dec. Dig. §546.]

2. FRAUDS, STATUTE OF—§72(2)—SALE OF CROPS.

A parol sale of growing crops is valid.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 118, 146; Dec. Dig. §72(2).]

3. ESTOPPEL—§68(4)—DEFENSES—INCONSISTENT DEFENSES.

A rice mill company, to whom rice grown on plaintiff's land had been delivered by his tenant, is not estopped by claiming that the rice was acquired by one who had purchased the land under trust deed after removal of the crop from also defending on the ground that the owner of the land had sold the growing crop to that purchaser in satisfaction of a debt.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 168; Dec. Dig. §68(4).]

Appeal from Circuit Court, Arkansas County; Thos. C. Trimble, Judge.

Action by E. G. Reinsch against the Stuttgart Rice Mill Company. Judgment for the plaintiff on directed verdict, and defendant appeals. Reversed and remanded.

Robert E. Holt, of Stuttgart, for appellant. J. El. Ray, of Stuttgart, for appellee.

SMITH, J. Appellee was the plaintiff below, and alleged in his complaint that on February 2, 1914, he leased to Charles Dahne a tract of land on which to grow a crop of corn and rice. The contract was for an agreed share of the crop, which was to be one-half of the rice and one-third of the corn. The contract was later so changed that Dahne agreed to furnish everything relating to the crop and to pay only one-fourth of the rice. When the crop had been harvested Dahne delivered appellee's share to the Stuttgart Rice Mill Company, and this suit was brought for the value of the rice so delivered, upon the refusal of the mill company to pay appellee therefor. Proof was offered in support of these allegations.

On behalf of the mill company it was shown that on June 27, 1912, appellee had conveyed the land on which the crop was

grown to one J. G. Hoyt, as trustee, to secure an indebtedness there described. A decree of foreclosure of this deed of trust was rendered on September 10, 1914, and a sale was had under this decree on October 30, 1914, which was reported to and approved by the court at its February term, 1915.

The commissioner who was appointed to make the sale under the decree executed a bill of sale, which contained a recital of the rendition of the decree of sale of the land and of the purchase of J. I. Porter at the sale had thereunder, and that at the time of the rendition of said decree of sale there was growing on the land a crop of rice, which constituted a part of the real estate, and that the rice crop had been severed from the soil and was then in the warehouse of the rice mill company at Stuttgart. In consideration of these recitals, and of the sum paid by Porter at the commissioner's sale of the land, the bill of sale was executed by the commissioner to Porter on February 10, 1915. It was further contended by the mill company that appellee had directed Porter to apply the proceeds of his share of the rice to the payment of a second mortgage held by the German-American Bank, of which Porter was president, and that when the check for the value of the rice was given Porter, he had applied this check to that indebtedness pursuant to the agreement made at the time the car of coal was paid for. Appellant mill company offered at the trial to introduce in evidence the report of the commissioner showing the sale of the rice, and that this report had been indorsed, examined, and approved by the chancellor; but the court excluded this evidence. Appellant offered evidence to the effect that appellee found himself unable to comply with his contract with Dahne in regard to the cultivation of the land and applied to Porter for assistance, and agreed that Porter, if he would buy the coal required in the farming operations, might apply appellee's interest in the rice crop to the payment of the indebtedness due by appellee to the bank. The court also excluded this evidence, and at the conclusion of the evidence directed the jury to return a verdict for the admitted value of the rice, and this appeal has been duly prosecuted from that judgment.

[1] The deed of trust foreclosed did not cover the growing crops, and the proof is that the rice was cut and removed from the land by October 15th, before the commissioner's sale on the 30th. Under these circumstances the court below was correct in his view that the purchaser did not acquire the crop, which had been removed from the land before his purchase, and might very well have directed the verdict, as was done, if this had been the only question raised by the evidence.

[2] But such was not the case. The mill

company presented the defense that appellee had applied this rice to the satisfaction of his debt due the bank when he induced Porter to pay for a car of coal required in Dahne's farming operations. Although this result was alleged to have been consummated by a parol sale of the growing crop, such agreement was valid, if made. *Cannon v. Matthews*, 75 Ark. 336, 87 S. W. 428, 69 L. R. A. 827, 112 Am. St. Rep. 64, 5 Ann. Cas. 478.

[3] It is argued that this defense is contradictory to the one that Porter acquired the title at the commissioner's sale. But inasmuch as the mill company appears to have been acting for Porter, who seems to be the real party in interest, we think making one of these defenses did not estop the mill company from also making the other, and as appellee would have no right to recover the value of this rice if he had, in fact, sold it to Porter for the benefit of the bank, the court should have submitted that issue to the jury, and for the failure so to do, the judgment will be reversed, and the cause remanded.

PIERCE v. WHIPPLE. (No. 275.)

(Supreme Court of Arkansas. March 27, 1916.)

1. SALES §472(3) — CONDITIONAL SALE—TITLE OF SUBSEQUENT PURCHASER.

Where property sold by an administrator to decedent's son was delivered on condition that title should not pass until the purchase price, represented by a note, was paid in full, a purchaser from the son before payment acquired no title as against the administrator.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1371; Dec. Dig. §472(3).]

2. EXECUTORS AND ADMINISTRATORS §158—SALE OF CHATTELS OF ESTATE—SECURITY REQUIRED—STATUTE.

An administrator, who sells chattels of the estate and only reserves title as security, does so at his own peril, there being no statutory authority therefor, and if loss occurs to the estate by reason of his failure to comply with the statute (*Kirby's Dig.* § 85) which directs that the administrator take notes with good security for the purchase price, he is responsible for the loss.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 634, 635, 646½; Dec. Dig. §158.]

3. EXECUTORS AND ADMINISTRATORS §167—SALE OF CHATTELS — ESTOPPEL OF PURCHASER.

The purchaser of chattels from an administrator who accepts delivery or possession of the property on condition that he shall acquire no title until payment of the price is estopped to repudiate the conditions upon which the delivery is made, and the fact that only a security of another kind is authorized by statute does not benefit the purchaser or his vendee, as no title passes until the condition is complied with.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 644; Dec. Dig. §167.]

Appeal from Circuit Court, Craighead County; W. J. Driver, Judge.

Action by J. H. Whipple, administrator of the estate of W. H. Keith, deceased, against J. C. Pierce. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith & Gibson, of Walnut Ridge, for appellant. Baker & Sloan, of Jonesboro, for appellee.

McCULLOCH, C. J. The plaintiff sold the personal property of the estate of his intestate pursuant to an order of the probate court which directed that he take notes with good security for the purchase price, as provided by statute. *Kirby's Digest*, § 85. Among the property thus sold was two mules, which were purchased by John Keith, a son of the decedent, who executed to plaintiff, as such administrator, his note for the purchase price of the mules; said note containing a stipulation that the title and ownership of said property should remain in the plaintiff until the note should be paid in full. Keith subsequently sold one of the mules to defendant Pierce, and this is an action to recover possession from Pierce; it appearing that said purchase note executed by Keith has not been paid. The circuit court rendered judgment in favor of the plaintiff, and the defendant has appealed.

[1] It is insisted that, as the statute authorizes an administrator to take "notes with good security from the purchaser," this sale was void because the form of the security taken was in derogation of the terms of the statute. The property was delivered, however, on condition that the title should not pass until the purchase price be paid in full, and under those circumstances a subsequent purchaser acquired no title from his vendor, who had none to convey, as against the original vendor. *Andrews v. Cox*, 42 Ark. 473, 48 Am. Rep. 68; *McIntosh v. Hill*, 47 Ark. 363, 1 S. W. 680; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Simpson v. Shackelford*, 49 Ark. 63, 4 S. W. 165.

[2, 3] There is no statutory authority for an administrator to sell chattels of the estate and reserve the title as security, and, when an administrator does that, it is at his own peril. If loss occurs to the estate by reason of his failure to comply with the terms of the statute, he is responsible for the loss. But the purchaser who accepts delivery of possession of the property on those terms is estopped to repudiate the conditions upon which the delivery was made. The fact that only security of another kind was unauthorized by statute does not help the purchaser or his vendee, for no title passed until the condition was complied with.

That is the only question involved in this appeal, and, as the case was correctly decided by the circuit court, the judgment is affirmed.

BOYD et al. v. BOYD et al. (No. 279.)

(Supreme Court of Arkansas. March 27, 1916.)

1. EVIDENCE ⇨596(1)—DEGREE OF PROOF—MENTAL CAPACITY.

The issue of fact as to whether the grantor at the time of his execution of a deed and the alleged transfer of personal property had sufficient mental capacity to understand the nature and effect of the transactions, must be determined by a preponderance of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2446; Dec. Dig. ⇨596(1).]

2. DEEDS ⇨109—SUFFICIENCY OF EVIDENCE—INTENTION OF GRANTOR.

Evidence in a suit by the representatives of a decedent, to cancel his warranty deed to defendants and his transfer of personal property and for a surrender of the personal property to the administrator for distribution, held not to show the decedent's intention to vest absolute title thereto in defendant his wife, and to show an intention to convey only a life estate to her with remainder over to a son and grandson.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 239, 280, 598-600; Dec. Dig. ⇨109.]

3. EVIDENCE ⇨588—WEIGHT—CONFLICTING STATEMENTS.

As between apparently conflicting statements of a witness what he stated without the prompting of a leading question and without suggestion, should have a greater weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ⇨588; Witnesses, Cent. Dig. § 2437.]

4. EVIDENCE ⇨269(2)—DECLARATIONS—PERSONS SINCE DECEASED—INTENTION OF GRANTOR.

The previous declarations of defendant's grantor as to how he expected to dispose of his property at his death and as to his intention that his wife should have a life estate therein with remainder to his son and grandson, was competent to impeach the validity of his warranty deed to the wife.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1064; Dec. Dig. ⇨269(2).]

5. DEEDS ⇨196(1)—VALIDITY—MENTAL CAPACITY.

A deed and transfer of personal property executed by a grantor greatly weakened by the ravages of disease, and who had been kept alive by drugs, should be scrutinized with the greatest care, and the grantee has the burden of proving its validity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-591, 649; Dec. Dig. ⇨196(1).]

6. DEEDS ⇨68(1½)—VALIDITY—MENTAL CAPACITY.

Where one, although not positively non compos or insane, is yet so weak of mind as to be unable to guard against imposition or to resist importunity or undue influence, his deed and sale of personal property under such circumstances will be set aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 151; Dec. Dig. ⇨68(1½).]

7. CANCELLATION OF INSTRUMENTS ⇨59—RELIEF—REFORMATION.

In a suit for the cancellation of a warranty deed alleged to have been obtained from the grantor when he was without mental capacity to execute it and to set aside a transfer of personal property, the court was not warranted in decreeing a reformation of the instruments.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119-125; Dec. Dig. ⇨59.]

Appeal from Searcy Chancery Court; T. H. Humphreys, Chancellor.

Suit by S. G. Daniels, as administrator of the estate of W. F. Boyd, deceased, and another, against C. A. Boyd, S. J. Boyd, and others. Decree for plaintiffs in part as against the named defendants, and cause dismissed as against other defendants, and plaintiffs and the named defendants appeal. Reversed and remanded, with directions.

W. F. Boyd died on the 2d day of April, 1912, leaving surviving him his widow, S. J. Boyd, and his son, C. A. Boyd, and his grandson, Haco Boyd, a youth about 10 years of age.

This suit was instituted by S. G. Daniel as administrator of the estate of W. F. Boyd, and by Haco Boyd, through his mother as next friend. The complaint alleged that W. F. Boyd died seised of certain lots and parcels of land in Searcy county, which are described, and also that he owned certain personal property consisting of bank stock in the First National Bank of Leslie, worth \$2,500, and money on deposit in that bank in the sum of \$800; that John Norman was indebted to him in the sum of \$2,000, P. P. Boyd in the sum of \$1,500, and Marion Dickens in the sum of \$1,600, and various other parties in varying amounts, which were assets of the estate and should be turned over to the administrator thereof. They alleged that:

"On the night before the death of W. F. Boyd, and when he was greatly weakened from fever and the ravages of his disease, and while he was unconscious and in the very shadow of death, the defendants C. A. Boyd and S. J. Boyd, by fraud, misrepresentations, concealment, overreaching, and undue influence, procured the signature, by mark, of the said W. F. Boyd to an instrument of writing which purports to be a warranty deed conveying from W. F. Boyd and S. J. Boyd to C. A. Boyd all the above-described property; that W. F. Boyd at the time did not have the mental capacity to execute a deed or to transact any business of any kind whatever or to understand the effect of the transaction."

The plaintiff Haco Boyd alleged that the pretended deed was an attempt to defeat him of his right to said property as heir, and was a cloud upon his title; that he was the owner of an undivided one-half of all the lands left by his grandfather, subject to the rights of the widow under the law, in said property.

And they further alleged that C. A. Boyd and S. J. Boyd wrongfully and fraudulently took possession of the money and bank stock and appropriated the same to their own use. Plaintiff Haco Boyd prayed that the deed be canceled, and plaintiffs both prayed that the shares of stock, the money and all other personal assets in the hands of the defendants be surrendered and turned over to the administrator for proper distribution.

Appellants C. A. Boyd and S. J. Boyd denied the allegations of the complaint, and set up that W. F. Boyd "at the last practical

time prior to his death sold and delivered to S. J. Boyd all his personal property, including moneys, bank deposits, bonds, and notes," and that when he executed the deed described in the complaint he acted upon his own free will and accord, and that he had full mental capacity to execute the same, having "full understanding of the effect of said deed; that at the time of the execution of said deed and the assignment of his personal property it was agreed and understood by and between the said W. F. Boyd, deceased, C. A. Boyd and S. J. Boyd, that the deed above referred to was to be executed to said C. A. Boyd to hold the same in trust for the said S. J. Boyd, and that the said C. A. Boyd was to execute a deed to all the property conveyed to him by the said W. F. Boyd to the said S. J. Boyd, which deed had been duly executed in accordance with said agreement, thereby investing the said S. J. Boyd with all the real and personal property which said W. F. Boyd possessed in his lifetime, and that W. F. Boyd died intestate and without any estate whatever."

The court below found that "at the time the transfer of all of said property by the deceased it was done at impending death, and that he was so weak mentally and physically that the court has grave doubts of his mental capacity to make said transfer, but finds that there is not sufficient evidence to warrant the cancellation thereof; but the evidence warrants a finding that the deed and transfer should be reformed so as to pass a life estate only to S. J. Boyd," and further found that the personal property amounted in value to \$6,427.68; that S. J. Boyd had turned all of said personal property over to C. A. Boyd, who had taken the same out of the jurisdiction of the court and had invested it in the state of Utah recklessly and in speculative securities which was more likely to result in waste. Upon this finding the court rendered a decree as follows:

"That all conveyances and transfers be and are reformed so as to convey to S. J. Boyd a life estate only in said real estate and personal property; and that said defendants C. A. Boyd and S. J. Boyd are ordered to return one-half of all of said personal property either in kind or in money to this jurisdiction and invest same in safe and sound securities for the benefit of S. J. Boyd during her natural life, and after her death to Haco Boyd, her grandson."

And it dismissed the cause as to all other defendants. Both parties have appealed.

A. Y. Barr, of Marshall, for appellants. Bratton & Bratton and Garner Fraser, all of Little Rock, for appellees.

WOOD, J. (after stating the facts as above).

[1] The first question is whether or not William Boyd, at the time of the execution of the deed and of the alleged transfer of personal property, had sufficient mental capacity to understand the nature and effect of these transactions. This is purely an issue of fact

which must be determined by the preponderance of the evidence.

William Boyd, for over a year before his death, had been afflicted with cancer. This disease gradually preyed upon his vitals until he finally died from exhaustion. The testimony is conflicting but the finding of the chancellor that Wm. Boyd had sufficient mental capacity to execute the instrument is not clearly against the preponderance of the evidence.

[2-4] The next question is whether or not Boyd executed the deed conveying the land and transferring the personal property in controversy with the intention of vesting absolute title therein to S. J. Boyd, his wife. This is also peculiarly a question of fact, depending upon a preponderance of the evidence.

C. A. Boyd was the only son and the only child of William Boyd. He had been living away from his father some 15 years, in Idaho and Utah. He stated that during these years he had seen his father only for brief periods some five or six times; that his personal association with his father had not been close for some 15 years. Appellee Haco Boyd, whose father was dead, was the grandson of William Boyd. C. A. Boyd was a lawyer, and testified that he had prepared the papers to carry out his father's wishes; that his father signed all instruments by mark because of his weak physical condition, and requested two or three of those present to sign as witnesses; that his mind was good and he appeared to understand his business and his own condition and the condition in which his mother would be left at his death as well as at any time in former and healthier years. He stated that he never suggested to his father at any time what to do or urged him to make the disposition of the property that he did make; that his father asked him to arrange his property so that if he should die that his mother would have it all. He then suggested a will, but his father stated that he would rather turn it right over to her and that he would know that it was done. Witness then prepared all the papers and made the transfers that were made. He suggested to his father that the better way to convey the real estate would be for him and his mother to join in a deed to some third person, with the understanding that such person should then make a deed direct to his mother, and that accordingly the instrument was prepared and executed.

Mrs. S. J. Boyd, the wife of William Boyd, testified on this branch of the case, in part, as follows:

"We talked the matter over several times. I don't know how many times. During his last illness he seemed to be interested in my condition, and wanted me to have a living out of what he had worked and made."

She was asked these questions:

"Q. You say he wanted you to have a living during your life and after your death, he want-

ed Berry and Haco to have the property equally divided between them? A. It is. Q. You were present and saw and heard what took place, isn't it a fact that what he wanted to do, and attempted to do, was to fix his property so you could have the use of it during your life and at your death Berry and Haco could have the property in equal parts? A. Yes, sir."

On redirect examination she was asked these questions:

"Q. Is it, or is it not, a fact that the understanding was that the property was to be deeded to Berry and by Berry to you without any limitations or restrictions, and that you have the property now, both real and personal, in your own name, and in your own right to dispose of it as you see fit? A. Yes, sir. Q. Then when you say that it was your husband's intention that the property should be divided at your death, you mean to say that your husband trusted you with the property under Berry's management to do right both between Haco and Berry when you die? A. Yes, sir."

C. A. Boyd testified, and it was undisputed, that in carrying out the intention of his father the deed was executed to him (C. A. Boyd), and that he had since executed a warranty deed to his mother. Now it will be seen that Mrs. S. J. Boyd, the beneficiary of these transfers, when testifying as to what the intention of her husband was as to the disposition of his property, stated that he wanted her to have a living out of what he had worked and made. It is true, in answer to a leading question, she stated that the understanding was that the property was to be deeded to Berry and by Berry to her, and that she was to have the property, both real and personal, without limitation or restriction, and that her husband trusted her with the property, under Berry's management, to do right both between Haco and Berry when she died.

Now as between her apparently conflicting statements, the statement that she made without the prompting of a leading question and without suggestion should have the greater weight, and that was to the effect that it was her husband's wish that she was to have a living out of the property; that is, as she afterwards explained, to have the use of it during her life, and that after her death Berry and Haco should have the property in equal parts.

No one corroborates the testimony of C. A. Boyd to the effect that it was the intention of his father to transfer the property to S. J. Boyd without restriction. But, on the other hand, there is much testimony tending to show that it was the intention of William Boyd that his wife, S. J. Boyd, should have a life estate in all of his property, which, at her death, should descend to the son, C. A. Boyd, and the grandson, Haco Boyd. Mrs. Boyd herself stated that her husband's feelings were in no way estranged towards Haco's father or Haco himself, and C. A. Boyd testified that his father was very proud of and very fond of Haco. Haco testified that his grandfather told him the last Thursday before his death that he wanted him (Haco)

to share equally with his grandmother and his uncle Berry; that the summer before he died he was with him every time he could get a chance, and that his grandfather had great affection for him. The mother of Haco testified that Haco was a favorite with his Grandfather Boyd; that she heard the grandfather frequently say that he was going to educate Haco just as he had his own sons, Berry and Roy (Haco's father); and that he wanted Haco to have the same share in his property as Berry and his grandmother. She stated that she heard the conversation between Haco and his grandfather on Wednesday before he died, and that Grandfather Boyd ended the conversation by saying:

"When grandpa died he wanted him [Haco] to share equally with his grandmother and Uncle Berry."

Several other witnesses who were not relatives and who were disinterested, stated that the Grandfather Boyd manifested great affection for his grandson, Haco. Several of these stated that he seemed to think as much of Haco as of his own child, and they heard him so express himself time and again. Several of these stated that they heard William Boyd say that after his death and his wife's death that he wanted his son and grandson to share equally.

J. M. Boyd, a brother of William Boyd, testified:

"I was present Sunday and Sunday night when William Boyd disposed of his property. Well, I heard the conversation, and, as I understood, the property was to be made over to Berry and from him made over to his mother during her lifetime, and then be divided between Berry and Haco, his grandson."

True, in answer to a leading question, witness stated that he (witness) understood that William was giving to his wife an absolute right and trusting to her to do what was right between Berry and Haco.

The testimony in regard to the previous declarations of William Boyd as to the manner in which he expected to dispose of his property at his death and of his intention that his wife should have a life estate therein, and that after her death it should be divided equally between his grandson, Haco, and his son, Berry, was competent.

In *Howe v. Howe et al.*, 99 Mass. 88, it is held:

"To impeach the validity of a deed, evidence of declarations of the grantor, while of sound mind, prior to the execution of it, as to his intentions concerning the disposal of the granted premises, is admissible, when offered 'among other circumstances tending to prove unsoundness of mind, undue influence and fraud'; especially if it is a deed of gift disposing of the grantor's estate among his children and omitting any provision for the issue of a deceased child."

Now a clear preponderance of the evidence shows that in making final disposition of his property it was the intention of William Boyd to convey to his wife a life estate with remainder over to his son and his grandson. While the deed itself is not set forth in the

abstract, the complaint alleges that it was an instrument of writing which purported to be a warranty deed, conveying from William F. Boyd and S. J. Boyd to C. A. Boyd the real estate described in the complaint. Such a deed was not the instrument, according to the preponderance of the evidence, that Wm. F. Boyd intended to execute.

The justice of the peace who took the acknowledgment testified, among other things, that the deed which C. A. Boyd had first prepared, and which had been read, and the deed which he supposed was being acknowledged by William Boyd, was not complete; that it described only one of the lots and "all other real estate." None of the witnesses who were present at the time it is alleged that the deed was executed testified that the same was read over to Wm. Boyd, and that he stated in their presence that he understood the instrument. The justice of the peace himself, while stating that he took the acknowledgment, does not state that the deed was read over to Boyd and that Boyd stated that he understood it. On the contrary, as before stated, the testimony of the justice tends to show that the deed which he thought was being acknowledged, was incomplete in that it failed to describe the real estate.

As we view the record, there is no testimony, except the testimony of C. A. Boyd, which tends to prove that William F. Boyd knew and understood at the time he executed the deed and made the transfers that he was making an absolute conveyance of the real estate and transfer of the personal property to C. A. Boyd. The preponderance of the evidence shows that it was not his intention to make such a disposition of his property, and therefore it must be held that these deeds and transfers were not the acts of Wm. F. Boyd.

It is shown that the mother and father both reposed great confidence in C. A. Boyd, but there is nothing in the record, or even in the testimony of C. A. Boyd, himself to justify the conclusion that William Boyd intended to have the instruments evidencing the transfers drawn in such a way as to in-trust C. A. Boyd with the duty of disposing of his property after his death in such a manner as to effectuate his declared purposes during life. While there is some testimony to show that William Boyd intended to transfer the absolute title to his wife, S. J. Boyd, in trust to carry out these purposes, there is no testimony whatever to show that he intended to put the absolute title in C. A. Boyd. Yet that was the effect of the transfers in controversy, and, as such, the intention of William Boyd was not carried out. The deed and the transfers that were made did not even vest the title in trust in Mrs. S. J. Boyd. But the absolute title, by the purported transfers of Wm. F. Boyd, was vested in C. A. Boyd. Nothing that C. A. Boyd could do after the death of his father would

validate these transfers and make them the acts and deeds of his father.

Now the testimony shows that Mrs. Boyd and C. A. Boyd were dealing with the property as if the absolute title was vested in Mrs. S. J. Boyd. C. A. Boyd, it appears from her testimony, "has the absolute management and control" of her money, property, and financial affairs. She stated; "He is taking care of it for me and handling it for me." The chancellor found, and the testimony shows, that C. A. Boyd had taken the personal property, amounting to nearly \$8,000, outside of the state and invested the same. It thus appears that Mrs. S. J. Boyd, through C. A. Boyd, was exercising absolute dominion over the property.

[5, 6] Now, even though a preponderance of the evidence may not show that William F. Boyd was positively non compos or insane at the time the purported instruments were alleged to have been executed by him, yet he was so weakened by the ravages of disease that, as one of the witnesses said:

"He could turn his head only; he could not raise his hands. He was not able to trace the signature; they had to hold his hand and do that for him."

The doctor testified that he had been kept alive for several days on strychnine and caffeine; that his mind was weak in proportion as his body was weak.

A deed executed under such conditions, when challenged, should be scrutinized with the greatest care. Mr. Pomeroy says:

"Finally, in a case of real mental weakness, a presumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party." 2 Pomeroy, Eq. Jur. § 947.

See *Graves v. White*, 63 Tenn. (4 Baxt.) 88.

After appellees had shown the extreme weakness of body and mind under which the transfers in controversy were alleged to have been executed, it then devolved upon C. A. Boyd, who was named as the beneficiary and grantee in those instruments, to prove their validity. This he has not done by the testimony which preponderates over the testimony on behalf of appellees tending to prove that C. A. Boyd drafted the instruments not in a way to effectuate the declared purpose of William Boyd in the disposition of his property. The case comes well within the doctrine announced in *Kelly's Heirs et al. v. McGuire*, 15 Ark. 555-603, as follows:

"If a person, although not positively non compos or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside."

Since the preponderance of the evidence shows that there was no intention upon the part of William Boyd to execute a deed to the real estate and the transfers of the personal property to his son, C. A. Boyd, these instruments are not the acts of Wm. F. Boyd

at all and are not susceptible of reformation.

[7] Moreover, the pleadings did not warrant the court in decreeing a reformation of the instruments, and the proof was not sufficient to warrant such relief under the prayer for general relief. The court should have found the instruments void and entered a decree to that effect.

The judgment will therefore be reversed and remanded, with directions to enter a decree canceling the deed and transfers of personal property, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

RUSSELL et al. v. SUDDOTH et al.
(No. 287.)

(Supreme Court of Arkansas. March 27, 1916.)

1. HOMESTEAD §214—ACTIONS—BURDEN OF PROOF.

In an action by children of decedent to recover as a homestead land sold by the administrator to pay the debts, the burden is on the plaintiffs to prove that the land in question was the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 397-399; Dec. Dig. §214.]

2. HOMESTEAD §214—ESTABLISHMENT—EVIDENCE.

In an action by children of a decedent to recover as a homestead land sold by the administrator to pay the debts, a petition of the widow claiming other property as the homestead, and testimony by the administrator and the attorneys that such property was set off by the court as the homestead, are admissible, though not conclusive on the children.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 397-399; Dec. Dig. §214.]

3. EVIDENCE §208(2) — WITNESSES — ADMISSIONS AGAINST INTEREST — CONTRADICTION OF TESTIMONY—INCONSISTENT STATEMENTS.

Where one of the heirs, who was suing to set aside a sale of decedent's real estate under a claim of homestead, was of age when her mother filed a petition purporting to be by the widow and all the children, claiming other property as the homestead, that petition is admissible as an admission by such child against interest and as a statement contradictory to her testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 714, 721; Dec. Dig. §208(2).]

4. HOMESTEAD §143 — RIGHTS OF SURVIVORS—SELECTION BY WIFE.

Though a wife may, under Kirby's Dig. § 3902, during the lifetime of her husband, claim the homestead as exempt from execution, if he refuses to do so, and select from lands exceeding the amount allowed as exempt, she cannot after the death of her husband impress any lands with the homestead character or abandon the homestead in any way affecting the rights of the minor children.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 270; Dec. Dig. §143.]

5. HOMESTEAD §216—RIGHTS OF SURVIVORS—INSTRUCTION.

In an action by the children of a decedent to set aside a sale of land claimed as a homestead, an instruction that, after the death of the father, the mother, acting for the children, has

the right to set up for them the claim of homestead, where the tract may be either of several tracts of land, depending on the intention of decedent, and where such claim was made in good faith and a homestead located, the children are bound thereby, was not erroneous as an instruction that the widow had the right to select for the minors a homestead out of the lands of deceased, but merely meant that she had the right, acting for them, to set up a claim of homestead and have determined what was in fact the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 400-403; Dec. Dig. §216.]

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Suit by Georgia Russell and others against L. B. Suddoth and others to recover a tract of land alleged to have been the homestead of plaintiffs' deceased father. Judgment for the defendants, and plaintiffs appeal. Affirmed.

Appellants, children of P. T. Baugh, brought this suit to recover possession of 2 3/20 acres of ground in the village of Turner, alleged to have been the homestead of the deceased, their father, and occupied by him as such at the time of his death.

The answer denied that the land in controversy was the homestead of the father of appellants at his death, and alleged that appellees were the owners of the north half thereof, through different mesne conveyances from J. C. Terry, who purchased the same at the administrator's sale thereof, by order of the probate court, for the payment of the debts of the estate of their said father. They disclaimed any interest in the south half of the block, and pleaded the five and seven year statute of limitations, and also set up a claim for betterments.

It appears from the testimony that P. T. Baugh, the father of appellants, owned a farm about five or six miles from the village of Turner and resided thereon with his wife and family as his homestead; that he purchased the block of ground in controversy in the little village of Turner for \$250, and moved his family to the small house on the south end thereof, in order to obtain better school facilities for his minor children. He, also, while living in said village, had a contract for carrying the mail. The family lived there from 1894 to the death of said Baugh in 1897, and they thereafter moved back to the farm. Testimony was introduced tending to show that the residence in Turner was only temporary and in order that better educational advantages might be enjoyed by his children, and that it was not the intention of the deceased to change his homestead from the farm to the block of ground in the village of Turner. The testimony on this point was in conflict, however, there being some from which it could have been inferred that such was the case. The court permitted the introduction in evidence, over appellant's objection, of a certain petition of the widow

and children of said Baugh in the probate court, stating that the farm was the homestead of the deceased, and claiming the rents upon the adjoining lands thereto, her dower not having been assigned; and also the statement of two witnesses, the administrator and his attorney, of the action of the court in sustaining the petition.

The court in instructing the jury gave, over appellant's objection, instruction numbered 5, as follows:

"The jury are instructed that, upon the death of the father owning a homestead, the mother, acting for the children, has the right to set up for them a claim of homestead, where the homestead might be either of several tracts of land, depending upon the intention of the father as to the location of the family home at the time of his death; and where such claim is in good faith made, and a homestead located, the children are bound thereby."

From the judgment on the verdict in appellee's favor, this appeal is prosecuted.

Fink & Dinning, of Helena, for appellants.
Bevens & Mundt, of Helena, for appellees.

KIRBY, J. (after stating the facts as above). [1] It is contended that the court erred in allowing the introduction of said testimony and in the giving of said instruction numbered 5. The question at issue in the case was whether or not the probate sale of the lands in controversy to appellees' grantor was void, on account of same being the homestead of their father, the deceased, at his death, and the burden of proof was upon appellants to show that fact.

[2] The petition introduced in evidence purported to be by the widow and all the children of the deceased, naming them, and the statements of the witnesses, the administrator and his attorney, who resisted the claim made in the petition of the court's action thereon, were competent, as tending to show the location of the homestead of the deceased.

[3] It was also admissible as against the heir whose name appeared in it as a petitioner, who was of age at the time it was filed, as an admission against interest, and as a statement contradictory of her testimony herein; and there was no attempt to show an adjudication by the probate court that the farm was the homestead of the deceased, claimed to be conclusive of the question herein. These facts were only introduced to throw such light as they might shed upon the question at issue, and the testimony was competent.

[4] The widow cannot, of course, impress the lands of the deceased after his death with the homestead character, nor can she abandon the homestead and thereby in any wise affect the homestead rights of the minor children. *Martin v. Connor*, 115 Ark. 365, 171 S. W. 125. The wife has the right in the lifetime of the husband to claim the homestead exempt from execution sale, if he

falls or refuses to do so, and select the homestead where the debtor has more land subject to the claim than the law allows to be claimed exempt as a homestead. *Kirby's Digest*, § 3902.

[5] The court did not mean to tell the jury by the instruction complained of, as contended by appellant, that the widow had the right to select for the minors a homestead out of the lands of the deceased, but only that she had the right, acting for them, to set up a claim of homestead of land upon which the homestead character had been impressed, and have determined what was in fact the homestead, the matter being in doubt.

We find no error in the record, and the judgment is affirmed.

OLIVER v. ROUTH et al. (No. 284.)

(Supreme Court of Arkansas. March 27, 1916.)

1. JUDGMENT \S 17(9)—DEFECTIVE PROCESS—SEAL.

The omission of the official seal of the clerk from a writ of summons will not invalidate a decree based on service of such summons.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 31; Dec. Dig. \S 17(9).]

2. JUDGMENT \S 501—COLLATERAL ATTACK—EFFECT.

A judgment foreclosing the vendor's lien will not, on collateral attack, be set aside save for fraud, and proof of facts showing it was erroneous does not warrant vacation.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 941; Dec. Dig. \S 501.]

3. COURTS \S 33—PROBATE COURTS—ENFORCEMENT OF CONTRACT.

The authority granted by Kirby's Dig. §§ 209-214, to probate courts to grant specific performance of a decedent's executory contract to convey land is a special power, and in exercising it a probate court is not proceeding according to the course of the common law, so that its jurisdiction must appear from the face of the record.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 135, 136, 138; Dec. Dig. \S 33.]

4. EXECUTORS AND ADMINISTRATORS \S 135—ENFORCEMENT OF CONTRACTS OF DECEDENT.

Under Act March 18, 1887 (Laws 1887, p. 90), requiring the joinder of a wife before a deed to the marital homestead will be effective, the probate court is without authority to specifically enforce a contract by deceased for the conveyance of his homestead, such contract not being binding, the wife not having joined.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 551-556; Dec. Dig. \S 135.]

5. EXECUTORS AND ADMINISTRATORS \S 135—POWERS OF PROBATE COURT—ENFORCEMENT OF CONTRACTS OF DECEDENT.

As Kirby's Dig. §§ 209-214, authorizing probate courts to specifically enforce contracts of a decedent to convey land, contemplate the existence of a valid contract, a parol contract to convey land cannot be enforced.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 551-556; Dec. Dig. \S 135.]

Appeal from Madison Chancery Court; T. H. Humphreys, Chancellor.

Action by George Thomas Oliver, by next friend and mother, Prindle Arrington, against E. A. Routh and others. From a decree for defendants, plaintiff appeals. Reversed and remanded, with directions.

Appellant instituted this action in the chancery court against appellees and set up two causes of action:

(1) Appellant seeks to set aside a decree of foreclosure of a vendor's lien on real estate made in the Madison chancery court several years ago in a suit wherein the Madison County Bank was plaintiff and Percie and Geo. Thos. Oliver were defendants, on the grounds that it is void. The First National Bank was the successor of the Madison County Bank.

(2) Appellant seeks to set aside as void an order of the Madison probate court for the specific performance of an undivided interest in the same land.

The material facts are substantially as follows: On October 6, 1904, Geo. B. Oliver, died, owning the land in controversy, situated in Madison county, Ark., which was his homestead. He left surviving him his widow, Prindle Oliver, now Prindle Arrington and Geo. Thos. Oliver, his minor child and sole heir at law. Prior to his death G. B. Oliver and T. G. Gamble owned the land in controversy, each owning an undivided one-half interest therein. On the 20th day of May, 1903, Gamble by warranty deed, conveyed his interest in the land to G. B. Oliver. The deed recites that a vendor's lien is retained for \$500 of the purchase money, evidenced by a promissory note of even date. The note was transferred by Gamble to the Madison County Bank, and in December, 1904, after the death of Oliver, the Madison County Bank instituted proceedings in the chancery court against the widow of G. B. Oliver, who was named as Percie Oliver, and Geo. Thos. Oliver, the minor child, to foreclose a vendor's lien on the lands in controversy. Service was had upon the widow and minor child of Geo. B. Oliver, deceased, in the manner required by statute, but the clerk failed to put the seal of the court on the summons. The court found there was a balance due of the purchase money on the said land in the sum of \$537, and a decree of foreclosure of the vendor's lien of plaintiff was entered of record. The land was duly sold under the decree, and the purchaser at the commissioner's sale conveyed the land by deed to E. A. Routh.

In the present action appellant introduced evidence tending to show that some of the installments of the purchase price sued on in that case were not due at the time the decree of foreclosure was entered of record. Testimony was also introduced by appellant tending to show that certain payments had been made which were not taken into account by the court in rendering the decree of foreclo-

sure. Evidence was introduced by appellees tending to show that no such payments had been made. The views we shall hereinafter express, however, renders it unnecessary to set out this testimony in detail. It is undisputed that the land in controversy was the homestead of Geo. B. Oliver at the time of his death, and that Geo. Thos. Oliver was still a minor at the time of the institution of this suit. The suit was brought by his mother as next friend.

After the death of Geo. B. Oliver, administration was had upon his estate. A petition was filed in the probate court setting up that Thos. J. Oliver, the twin brother of Geo. B. Oliver, had purchased one-half interest in the land in controversy from his brother prior to his death. No written contract of purchase was had between the brothers. It was shown, however, to the probate court that Thos. J. Oliver had made a verbal contract with his brother for the purchase of an undivided one-half interest in the land, and had paid him therefor the sum of \$400 as part of the purchase money. The balance of the purchase money was paid to the administrator, and an order was made pursuant to sections 209-214 of Kirby's Digest for the specific performance of the contract.

The chancellor entered a decree dismissing appellant's complaint for want of equity as to the decree of foreclosure in the Madison chancery court. It was also decreed that his cause of action seeking to set aside the judgment in the Madison probate court should be dismissed without prejudice to any proceeding appellant might hereafter institute in the probate court in relation thereto. The case is here on appeal.

S. H. Sornberger, of Sapulpa, Okl., for appellant. W. N. Ivie, of Rogers, for appellees.

HART, J. (after stating the facts as above). [1] It is claimed by counsel for appellant that the decree of foreclosure in the case of the Madison County Bank against the widow and minor child of Geo. B. Oliver, deceased, was void, because the writ of summons was without the official seal of the clerk; but this court has decided adversely to him in regard to this contention. In the case of *Rudd v. Thompson & Barnes*, 22 Ark. 363, the court held that a writ of summons is not void for want of the official seal of the clerk, and that it may be amended on application to the court. The court further held that, if no application to amend has been made, the defect is ground of reversal of a judgment rendered by default, but that the writ cannot be treated as void.

[2] Again, it is contended that the judgment of the Madison chancery court foreclosing the vendor's lien on the property in controversy should be set aside because certain installments of the purchase money for which the decree of foreclosure was had were not then due, and for the further reason that certain credits were not allowed which should

have been allowed in that case. It must be remembered, however, that this is a collateral attack on the decree. In the case of *Whitford v. Whitford*, 100 Ark. 63, 139 S. W. 653, the court held:

"In determining the validity of a judgment upon collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and subject-matter and those quasi jurisdictional facts, without allegation of which the court cannot properly proceed, and without proof of which a decree should not be made; absence of the former renders the judgment void upon collateral attack, but not so as to the latter."

To the same effect see *Citizens' Bank v. Commercial National Bank*, 107 Ark. 142, 155 S. W. 102; *McDonald v. Ft. Smith & Western R. Co.*, 105 Ark. 5, 150 S. W. 135; *Crittenden Lumber Co. v. McDougal*, 101 Ark. 390, 142 S. W. 836. So the decree in the chancery case referred to might have been erroneous, but this would depend upon the facts before the court. If it was erroneous, it could have been set aside on appeal; but the validity of it cannot be attacked collaterally except on the ground that it was procured by fraud. There is no allegation or proof in the present action that the decree in the chancery case was procured by fraud. It follows that the decree of the chancellor on this branch of the case was correct, and must be affirmed.

[3] We now come to the question of the judgment of the Madison probate court ordering the administrator of the estate of Geo. B. Oliver, deceased, to execute to Thos. J. Oliver a deed to an undivided one-half interest in the homestead of decedent.

The property in controversy was the homestead of Geo. B. Oliver. An order of the probate court directed the administrator of his estate to specifically execute a contract which the decedent had made with his brother before he died. The authority to grant specific performance of an executory contract to convey land against the executor or administrator of a decedent is a special power conferred upon the probate court by sections 209-214 of Kirby's Digest. It is to be exercised in a special manner, and not according to the course of the common law. In cases falling within the usual powers of the probate court the rule is that, where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction. *Massey v. Doke*, 185 S. W. 271. But where special powers conferred or exercised in special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption or jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. *Beakley v. Ford*, 185 S. W. 796.

See, also, *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. This distinction was pointed out in *Massey v. Doke*.

[4] As we have already seen the land in controversy was the homestead of Geo. B. Oliver at the time of his death, and the probate court had no power to render a judgment of specific performance of an executory contract to convey the homestead. Under the act of March 18, 1887 (Laws 1887, p. 90), a deed purporting to convey the homestead by a married man is void unless his wife joins in the execution of the deed. *Davis v. Hale*, 114 Ark. 426, 170 S. W. 99, and cases cited; *Stephens v. Stephens*, 108 Ark. 53, 156 S. W. 837; *Newman v. Jacobson*, 108 Ark. 297, 158 S. W. 134. In the case of *Waters v. Hanley*, 179 S. W. 817, in discussing this statute, we said that it is clear that, if a husband cannot make a conveyance of the homestead without the concurrence of his wife, he cannot make a contract to convey the homestead which will be obligatory upon his wife. The reason given was that, if he could do so, the statute could be easily evaded and would be of no force. See, also, *Jarrett v. Jarrett*, 113 Ark. 134, 167 S. W. 482. Therefore we are of the opinion that the probate court had no power to make an order for specific performance of the contract made by the decedent in his lifetime to convey his homestead to another.

[5] We think the order was void for an additional reason. Section 209 et seq. contemplates that there should be a valid executory contract to convey land made by the decedent before the probate court can order it to be specifically performed. The contract in question was an oral one, and no possession was taken under the contract prior to the death of the vendor. The contract, then, could not have been specifically enforced had Geo. B. Oliver lived and the purchaser had brought suit against him. Under the rule before announced the judgment of the Madison probate court could only be supported by a record which shows jurisdiction, and no presumption as to its jurisdiction will be indulged.

From the views we have expressed it follows that the court erred in not setting aside the order of the Madison probate court, and for that error the decree will be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

MARTELS v. WYSS. (No. 283.)

(Supreme Court of Arkansas. March 27, 1916.)

TAXATION §—836—PENALTIES—STATUTES—CONSTRUCTION—REPEAL BY IMPLICATION.

Kirby's Dig. §§ 7083, 7084, provide that the collector of taxes shall file his return by the second Monday in May, and that the clerk of court shall add a penalty of 25 per cent. on all delinquent taxes. Under section 7069 taxpayers were allowed until the 10th of April to pay taxes or

until the collector closed his books after that time. The act approved May 31, 1911 (Laws 1911, p. 361), provides that all taxes unpaid after the 10th day of April shall be considered delinquent, that the collector shall extend the penalty of 10 per cent. against all delinquent taxpayers, and that the clerk of the court shall charge the collector with 10 per cent. on all receipts recorded after April 10th, except in case of error in recording. *Held* that, as there was no express repeal in the act of 1911, and since where two statutes are apparently conflicting the former will not be repealed by implication, if by applying all rules for judicial construction the two statutes can be reconciled, the act of 1911 did not repeal Kirby's Dig. §§ 7083, 7084, but, construed with sections 7083 and 7084, its meaning is that, where taxes are paid after the 10th of April and before the 25 per cent. penalty is assessed by the clerk, the collector is required to extend and collect a penalty of 10 per cent.

[*Ed. Note.*—For other cases, see *Taxation*, Cent. Dig. § 1651; Dec. Dig. § 836.]

Appeal from Polk Chancery Court; Jas. D. Shaver, Chancellor.

Action by L. G. Martels against Caesar Wyss. From a decree for the defendant, plaintiff appeals. Affirmed.

L. G. Martels instituted this action in the chancery court against Jeff McKinnon to foreclose vendor's lien on a quarter section of land in Polk county, Ark. Caesar Wyss filed an intervention, claiming the land under a tax deed executed to one R. P. Harris. Harris deeded the land to Wyss. The land was sold at a tax sale on the second Monday in June, 1911; that being the 13th day of the month. Plaintiff, Martels, filed a reply to the intervention of Wyss in which he alleged that the land was sold for a penalty of 25 per cent., when only a 10 per cent. penalty should have been added; that the overcharge in penalty amounted to 73 cents and avoided the sale. The court found that the tax sale was valid, and that Caesar Wyss was the owner of the land. The lien of the plaintiff, Martels, was therefore denied, and the recital thereof in the deed was canceled as a cloud upon the title of Caesar Wyss. From the decree entered of record, the plaintiff, Martels, duly prosecuted an appeal to this court.

Wright Prickett and J. I. Alley, both of Mena, for appellant. Minor Pipkin, of Mena, for appellee.

HART, J. (after stating the facts as above). It is contended by counsel for appellant that the act approved May 31, 1911, fixing a uniform date for paying taxes without penalty, and providing for such penalty, repeals section 7083 and 7084 of Kirby's Digest. Section 1 and 2 of the act of 1911 reads as follows:

"Section 1. All taxes levied on real estate and personal property by the several county courts of the state, when assembled for the purpose of levying taxes, shall be deemed to be due and payable at any time from the first Monday in January to and including the tenth day of April in each year, and all such taxes remaining unpaid after the tenth day of April shall be considered

as delinquent, and it is hereby made the duty of the collector to extend a penalty of ten per cent. against all such delinquent taxpayers that have not paid their taxes within the time limit above specified, and the collector shall collect said penalty in the same manner and at the same time he collects other delinquent taxes.

"Sec. 2. The clerk of the county court, at the time of making settlement with the collector, shall carefully examine the record of tax receipts as kept by the collector and shall charge said collector with a sum equal to ten per cent. of all tax receipts recorded subsequent to the tenth day of April: Provided, all errors or omissions of the collector in recording any tax receipt shall be exempt from the penalties herein prescribed."

General Acts of 1911, page 361.

Sections 7083 and 7084 of Kirby's Digest read as follows:

"Sec. 7083. The collector shall, by the second Monday in May in each year, file with the clerk of the county court a list or lists of all such taxes levied on real estate as such collector has been unable to collect, therein describing the land or city or town lots on which said delinquent taxes are charged as the same described on the tax books, and the collector shall attach thereto his affidavit to the correctness of such list. The clerk of the county court shall carefully scrutinize said list and compare the same with the tax book and record of tax receipts, and shall strike from said list any tract of land, city or town lot upon which the taxes shall have been paid, or which does not appear to have been entered upon the tax book, or that shall appear from the tax book to be exempt from taxation.

"Sec. 7084. No taxes returned delinquent as aforesaid shall be paid into the state treasury, except by the collector. It shall be the duty of the clerk of the county court to add a penalty of twenty-five per centum upon all taxes so returned delinquent, which penalty shall be collected in the manner provided for the collection of delinquent taxes."

Prior to the passage of the act of 1911 in question taxpayers were allowed to the 10th day of April to pay taxes on all classes of property without a penalty. After that time, under section 7069, the collector might distrain to pay taxes on personal property which had not been collected and a penalty of 25 per cent. thereon. Under section 7063 he was required to make a list of real property on which taxes had not been paid to the 10th of April, and was required to file such list with the county clerk by the second Monday in May of each year. Owners of land might pay taxes thereon at any time before the list was filed without a penalty, but there was no duty upon the collector to keep the tax books open for that purpose after the 10th of April. In other words, under the old act, the tax collector might close the books after the 10th day of April and refuse to receive payment of taxes by the owners, but, if he chose to keep open the tax books until he filed the list with the clerk, the owner might pay his taxes without paying a penalty. *Boles v. McNeill*, 66 Ark. 422, 51 S. W. 71.

There is no express repeal of sections 7063 and 7084 by the act of 1911; but it is insisted that they are repealed by implication. The Legislature of 1911 did not take up the whole subject-matter. If they had intended to do

so, it is probable that some reference would have been made to the prior acts on the subject. Counsel do not point specifically to any invincible repugnancy between the old and the new statutes.

Repeals by implication are not favored, and, when two statutes covering the whole or any part of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible, to both. It is only where two statutes relating to the same subject are so repugnant to each other that both cannot be enforced that the last one enacted will supersede the former and repeal it by implication. *Carpenter v. Little Rock*, 101 Ark. 238, 142 S. W. 162; *Benton v. Willis*, 76 Ark. 443, 88 S. W. 1000; *Coats v. Hill*, 41 Ark. 149; *Blackwell v. State*, 45 Ark. 90. Tested by this cardinal rule of construction, we cannot say that the repugnancy between the new statute and the old one is plain and unavoidable. The conflict is more seeming than real; and in case of a seeming conflict between two acts all rules for judicial construction are to be applied to the end that they may be reconciled before reaching a conclusion that the one repeals the other.

The act of 1911 does not cover the whole subject-matter of the prior statutes on the subject. No reference is made in it to the prior statutes. If we should hold that the later act repeals the former, there would be a radical change in the method of extending delinquent taxes on real estate and collecting the same and this too without any language being used in the later act that would indicate that the Legislature contemplated such a sweeping change. As the old act was construed by this court, the collector was not required to keep the tax books open after the 10th of April of each year, but, if he did keep them open, the owner of real property might pay his taxes at any time before the collector was required to file his delinquent list with the county clerk without being subject to a penalty.

Under the provisions of the new act the collector is required to extend a penalty of 10 per cent. against all taxpayers who have not paid their taxes to and including the 10th day of April in each year. We think the obvious meaning of the statute is that, where the owner pays his taxes after the 10th day of April and before the 25 per cent. penalty is added by the clerk under section 7084 of Kirby's Digest, the collector is required to extend the penalty of 10 per cent. against such delinquent taxpayer and collect the same. The old law remains as it was; that is to say, it is still the duty of the collector to file with the county clerk a delinquent list of real estate on or before the second Monday in May, and it is still the duty of the county clerk to carefully scrutinize said list and compare it with tax books and record of tax receipts, etc., as required by

section 7083 of Kirby's Digest. It is still his duty under section 7084 to add a penalty of 25 per cent. upon all taxes so returned delinquent. When so construed, the two acts are harmonious, and present a complete system for collecting taxes from delinquent taxpayers. This construction is borne out by section 2 of the act of 1911. Under it the county clerk at the time of making settlement with the collector, is required to carefully examine the record of tax receipts as kept by the collector, and is required to charge the collector with a sum equal to 10 per cent. of all tax receipts recorded subsequent to the 10th day of April. Before the passage of the act the collector, at his option, might keep the tax books open after the 10th day of April, but he was not required to do so and could not collect any penalty from the delinquent taxpayer. No penalty could be added until the clerk added it pursuant to section 7084 of Kirby's Digest. We think it is evident that the Legislature only intended to require the sheriff to extend and collect a penalty of 10 per cent. on all taxes collected by him subsequent to the 10th day of April, and before the time the 25 per cent. penalty was added by the county clerk, under section 7084 of Kirby's Digest.

It is conceded by counsel for Martels that the tax sale was in all respects valid, except as to the amount of the penalty. They contended that the penalty charged should have been 10 per cent., and not 25 per cent. They admitted that, if the penalty is 25 per cent., then the judgment is correct. In other words, they conceded that the judgment is correct unless the act of April, 1911, under consideration repeals sections 7083 and 7084 of Kirby's Digest.

Having held that the later act does not repeal the prior one, the judgment must be affirmed.

WILLIAMS et al. v. PRIOLEAU. (No. 285.) (Supreme Court of Arkansas. March 27, 1916.)

1. MORTGAGES \S 38(1)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY.

The chancellor's finding that a deed absolute on its face was intended as a mortgage to secure the grantees for advances made held not contrary to the preponderance of the testimony.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 108; Dec. Dig. \S 38(1).]

2. JUDGMENT \S 747(6) — CONCLUSIVENESS — MATTERS CONCLUDED.

Under Kirby's Dig. \S 8648, declaring that, in an action of unlawful detainer, title to the premises shall not be adjudicated, save to show the right of possession and the extent thereof, a judgment in an action of unlawful detainer is not an adjudication as to title, precluding subsequent action of ejectment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. \S 1291; Dec. Dig. \S 747(6).]

3. EQUITY \S 86 — MAXIMS — DUTY TO DO EQUITY.

Where defendants contended that plaintiff's deed, which was absolute on its face, was in

reality a mortgage, and prayed that it should be so declared, they cannot, the court having found the deed to be a mortgage, defeat recovery of the debt on the ground of limitations, for having sought equitable relief, defendants are bound to do equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 188-190; Dec. Dig. ¶¶ 66.]

4. WITNESSES ¶149(1) — COMPETENCY — TRANSACTIONS WITH DECEASED PERSONS.

Under Kirby's Dig. § 3093, providing that in an action by or against an administrator, in which judgment may be rendered for or against him, neither party may testify as to any transaction with decedent, plaintiff, in an action of ejectment against the widow and heirs of the grantor, may testify as to the transactions with the grantor.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 651; Dec. Dig. ¶¶ 149(1).]

5. MORTGAGES ¶125—RIGHTS OF MORTGAGEE—COSTS.

Deceased conveyed land to plaintiff by deed absolute on its face, under an agreement that plaintiff should make certain advances and should free the land from all valid incumbrances. There were several mortgages, and plaintiff instituted an action to determine their validity. *Held*, that the costs and attorney's fees so expended by plaintiff were properly charged against the land.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 244, 245; Dec. Dig. ¶¶ 125.]

6. PARTIES ¶7(1)—NECESSARY PARTIES—OBJECTIONS.

In such case, as plaintiff, although the deed was on its face absolute, was really a mortgagee, and had no interest unless the mortgages were valid, the suit was properly brought in the name of the deceased grantor.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 9; Dec. Dig. ¶¶ 7(1).]

Appeal from Lonoke Chancery Court; John E. Martineau, Chancellor.

Action by Louise Prioleau against Lincy Ann Williams and others. From a decree for plaintiff, defendants appeal. Affirmed.

Appellee brought suit in ejectment against appellants, the widow and children of Gabe Williams, deceased, alleging that she was the owner of the lands described, which had been conveyed to her by a warranty deed executed by Gabe Williams and Lincy Ann Williams on the 14th day of March, 1908. Appellants moved to dismiss the complaint upon a plea of *res adjudicata*, setting out the record in the unlawful detainer suit in *Prioleau v. Williams*, 104 Ark. 322, 149 S. W. 101. This motion being overruled, they answered, denying the allegations of the complaint; alleged that they had been in the open, notorious, and adverse possession of the lands for 30 years, paying taxes thereon, and that the alleged deed of conveyance from Gabe Williams and Lincy Ann Williams was a forgery, never having been signed by either of them, and that, if such a deed was made, it was fraudulently procured, neither of the alleged grantors being able to read or write; and pleaded as *res adjudicata* the decision in the above-styled case. They then filed a motion to transfer to equity, stating that the

alleged deed upon which plaintiff relied was not executed as a deed, but was intended as a mortgage to secure certain indebtedness, and never intended to operate as a deed; that the consideration for said deed was so grossly inadequate as to show fraud on its face, and that it constituted a cloud on the title of defendants, which should be removed; that it should be canceled as a deed, and considered only as a mortgage to secure the amount of \$800, a debt to the American Freehold Mortgage Company. The case was transferred to the chancery court.

It appears from the testimony that the lands were conveyed by a warranty deed of the date alleged for a recited consideration of \$200 "and the assumption of a mortgage held by the Freehold Land & Mortgage Company of London for \$700, and the assumption of any valid mortgages now on record." The deed purports to be signed by Gabe Williams and Lincy Ann Williams, by their mark, witnessed by Miss Jennie Pickett, and duly acknowledged before Milton B. Rose, a notary public. Appellee's husband, who was her agent in the entire transaction, stated that Gabe Williams approached him to borrow some money on the lands, telling him of the indebtedness to the mortgage company, and of various mortgages having been executed to Baum, and of the deed of trust from Baum to his trustee in bankruptcy, and that he thought there was more against the land than it was worth, and declined to lend the money; that they kept insisting upon it, and he finally agreed to buy it for the consideration recited, which he stated was paid by a small amount of cash, and a mare of the value of \$125, and an old account due him from Williams. He said that the grantors in the deed came in together, and made no objection about signing the deed whatever, and that the acknowledgment of it was taken before the notary, who read it to them. The notary also testified that the deed was written, and the parties came into his office with it and acknowledged the same; that no complaint or objection to it was made when it was read to them.

A great many of other things were testified to by R. R. Prioleau as to all the transactions he had had with the deceased, Gabe Williams, and the litigation with Baum and Comer, trustee, in clearing up the title to the land and having an adjudication of the amount due upon the different mortgages, and also the amounts paid for attorney's fees and cost of the litigation, amounting to something over \$600. Lincy Ann Williams denied ever having executed a deed to the lands at all to appellee, and stated that she never signed but one paper, and understood it was a mortgage for supplies. She said, also, that she had paid the taxes for certain years, and exhibited the receipts, some of which were after the transfer of the lands to appellee,

and receipts from the agent of the Freehold Mortgage Company for interest, which she claimed to have paid. There were some contradictory statements in the testimony for appellee, and her husband explained that the money with which the interest had been paid to the Freehold Mortgage Company was furnished Lincy Ann Williams by himself, and that the taxes were paid by appellant while they were occupying the premises rent free, as agreed between himself and Gabe Williams, during the pendency of the suit against Baum, Comer, Storthz, and others to ascertain the amount due under the different mortgages executed to Baum.

The chancellor found the deed was intended as a security for certain indebtedness and moneys, and held it to be a mortgage, and continued the case until the next term of court for further proof of the indebtedness secured by it. He then found that the amount finally adjudged to be due under the Baum and Comer mortgages, with the expense of the litigation and attorney's fees in the determination of the amount, together with the amount paid by appellee to discharge the mortgage of the American Freehold Mortgage Company and interest, with the \$200 furnished at the time of the execution of the instrument, was secured by the mortgage, and that the amount advanced for supplies for cultivating the land did not constitute a lien against it under the mortgage, and decreed that appellants were indebted in the sum of \$2,812.80, for which the land was security under the mortgage, and that same constituted a lien thereon for said amount, for which the land was ordered sold; and from this decree the appeal is prosecuted.

Jas. B. Reed and Chas. A. Walls, both of Lonoke, for appellants. Trimble & Williams, of Lonoke, and Blackwood & Newman, of Little Rock, for appellee.

KIRBY, J. (after stating the facts as above). [1] The undisputed testimony shows that the instrument as executed by Gabe Williams and Lincy Ann Williams is in form a warranty deed conveying the lands in controversy, but after a consideration of the whole testimony, which we do not regard altogether clear and convincing, we are unable to say that the chancellor's finding that the instrument executed was only intended as a mortgage and security is clearly against the preponderance of the testimony.

[2] No error was committed in denying the plea of res adjudicata, since the former suit was an action of unlawful detainer, in which the title to the premises could not be adjudicated. *Prioleau v. Williams*, 104 Ark. 822, 149 S. W. 101; *Kirby's Digest*, § 8648.

[3] The statute of limitations could not avail against the indebtedness held to be secured by the mortgage, in form a deed, even if the testimony had shown that sufficient

time had expired to bar the claim. Appellants were asking equitable relief, and that an instrument in form a deed be declared to be a mortgage only for the security of certain indebtedness, instead of the conveyance of the title to the lands, and were bound to do equity; and the court would not intervene to declare such instrument a mortgage, and then hold that it did not constitute a lien on the land for the debt it was given to secure, on account of the statute of limitations. In other words, as said in *Sturdivant v. McCorley*, 83 Ark. 278, 103 S. W. 732, 11 L. R. A. (N. S.) 825:

"The statute of limitations * * * as to mortgages does not apply [with full force] to equitable mortgages of this kind evidenced by absolute deeds without any written defeasances."

[4] The objection that the testimony of Prioleau is incompetent, as relating to transactions with deceased, Gabe Williams, is without merit; the suit not being against the executor or administrator of his estate. Section 3093, *Kirby's Digest*; *Bird v. Jones*, 37 Ark. 200; *Mohawk Lbr. Co. v. Mosely*, 183 S. W. 187.

[5] It is strenuously urged that the court erred in holding the lands security under the mortgage for the amount of the attorney's fees and costs of the suit brought for an accounting and ascertainment of the amounts due under the mortgages from Williams to Baum, etc., none of which were satisfied of record, in view of the "assumption of any valid mortgages now on record" as part of the consideration for the execution of the instrument. The different mortgages from Williams to Baum aggregated an amount of more than \$3,000, and there was in addition a deed of trust to secure notes amounting to \$800 to the American Freehold Mortgage Company, and the record also showed a deed of trust from Baum and wife to Storthz to secure \$1,000. Appellee was only bound to pay the amount secured by valid mortgages existing against the lands in addition to the debt in the said mortgage; but the instrument held to be a mortgage charged the lands with a lien for such payment, and it was to the interest of appellant to reduce the lien of all of said mortgages to the amount that was justly due thereunder, and the chancellor correctly held the lands subject to a lien for the payment of the cost of ascertaining said sum, as well as the amount thereof.

[6] Appellee had not assumed the payment of the mortgages to Baum or his trustee, and, having agreed with Williams to assume the payment of valid mortgages against the land, we see no merit in the objection that the suits to determine the amount due under such mortgages were brought in the name of Williams, the grantor in the instrument or conveyance to appellee. 30 Cyc. 50.

After a careful consideration of the whole record, we find no prejudicial error therein, and the decree is affirmed.

BUNCH v. PITTMAN. (No. 239.)

(Supreme Court of Arkansas. March 13, 1916.)

1. VENDOR AND PURCHASER — 233 — BONA FIDE PURCHASERS — RECORDATION — CONSTRUCTIVE NOTICE.

A conveyance of timber standing on land, if never recorded, is not good as against a subsequent innocent purchaser for value and without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563-566; Dec. Dig. —233.]

2. VENDOR AND PURCHASER — 232(2) — BONA FIDE PURCHASERS — CONSTRUCTIVE NOTICE — EVIDENCE — SUFFICIENCY.

Proof that the purchaser of timber sent one man upon a large tract of land to cut the timber therefrom, within a few days after he bought it, is insufficient to establish constructive notice to the subsequent purchaser of the land within a few days after such sale of the timber, when such purchaser lived in another county and the land so conveyed was remote and difficult of access.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 541-543, 548; Dec. Dig. —232(2).]

3. VENDOR AND PURCHASER — 239(5) — BONA FIDE PURCHASERS — RIGHTS AS AGAINST TRESPASSEES.

A bona fide purchaser of land without notice of an unrecorded conveyance by his grantor conveying timber rights in the land is entitled to recover from the purchaser of such timber rights for trespasses committed on the land after receiving notice of plaintiff's purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 590; Dec. Dig. —239(5).]

4. DAMAGES — 112 — MEASURE OF DAMAGES — WRONGFUL CUTTING OF TIMBER.

Where the purchaser of timber from land cuts it in good faith, believing himself to be the owner, whereas a subsequent purchaser of the land, without notice of such sale of the timber, is the true owner, the measure of damages for the cutting is not the enhanced value of the product, but the value of the standing timber.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. —112.]

5. REPLEVIN — 77 — MEASURE OF DAMAGES — WRONGFUL CUTTING OF TIMBER.

Such rule is applicable both to suits for recovery of the value of the timber and for possession of the worked and merchantable timber.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 308; Dec. Dig. —77.]

Appeal from Circuit Court, Monroe County; Thos. C. Trimble, Judge.

Consolidated actions by Beck L. Pittman against T. W. Bunch. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

G. Otis Bogle, of Brinkley, and Manning, Emerson & Morris, of Little Rock, for appellant. C. F. Greenlee, of Brinkley, for appellee.

McOULLOCH, C. J. J. M. Morgan owned a tract of timber land consisting of 205.74 acres, situated in Monroe county, Ark., a few miles from Brinkley, and on March 1, 1913, he sold and conveyed the merchantable

timber on the land to the defendant, T. W. Bunch, and on March 4, 1913, he sold and conveyed the land to the plaintiff, Mrs. Pittman. The sale of the timber to defendant was made through Edmonds, who was acting for Morgan, either as agent or broker. Morgan and Mrs. Pittman both lived in Oklahoma, where the sale of the land to Mrs. Pittman was negotiated, and when she purchased the lands she had no knowledge of the sale of the timber to defendant and did not receive any information that the timber had been sold until her husband went to Monroe county in December, 1913, and ascertained that the defendant was cutting the timber on the land and claimed to be the owner.

Defendant commenced cutting the timber soon after his purchase and continued to do so after he was notified, according to the testimony of the plaintiff, that Morgan had sold the land to plaintiff and that she was the owner of the timber as well as the land. Plaintiff instituted three actions against the defendant, two for the recovery of the value of timber cut from the land, and the other a replevin suit for ties made from timber cut on the land. The three cases were consolidated and tried before a jury, and after the testimony was introduced the court gave to the jury a peremptory instruction to find for the plaintiff in each of the cases, and in the amount which the undisputed testimony showed was the enhanced value of the timber in its manufactured state. The defendant asked for instructions submitting the issue to the jury whether the plaintiff or the defendant had title to the timber, and also as to the measure of damages in case there should be a verdict on that issue in favor of the plaintiff.

[1] The conveyance of the timber to the defendant was prior in point of time to the conveyance executed by Morgan to the plaintiff, but it was never recorded, and was therefore not good as against an innocent purchaser for value and without notice. Cooksey v. Hartzell, 179 S. W. 506.

[2] The proof is undisputed that plaintiff, Mrs. Pittman, paid a valuable consideration, and that she had no actual notice of the sale of the timber to defendant. She never received any notice until December, 1913, when, as before stated, her husband went to Monroe county to look after the land. The only effort made by defendant to show constructive notice to the plaintiff was to prove that he entered upon the land and commenced cutting timber as soon as he made the purchase. Defendant testified that he took a man out to the land on March 2d, the day after he purchased the timber, and started the man cutting on the land and preparing roads over which to haul the timber, and that the man continued to work there until some time in

June, when he sent a force of men there on the land to work.

It is claimed that the fact that one man entered upon the land for the purpose of cutting timber was sufficient to put strangers upon notice of occupancy so as to charge the purchaser with notice of the rights asserted under such occupancy. Ordinarily it is a question for the determination of the jury whether or not the character of occupancy is sufficient to amount to such hostile acts as would be sufficient to give notice to the world of a claim of ownership, but we are of the opinion that the asserted acts of ownership shown in the present case were not sufficient to warrant a submission of that issue to the jury. This is true when we consider the size of the tract of land, its remoteness, and the fact that only one man entered upon the land for the purpose of cutting timber, and that his entry was too short a time before the purchase made by plaintiff to be sufficient to give notice to the world that there was an occupant. When all those circumstances are considered, it is plain that the occupancy was not sufficient to give notice to the world of a claim of ownership.

In *Earle Improvement Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84 (quoting from the syllabus), we said:

"In order to acquire title to wood land by adverse possession, there must be actual use and occupancy of it of such unequivocal character as will reasonably indicate to the owner visiting the premises during the statutory period, not a mere occasional trespass, but exclusive appropriation and ownership."

[3] In that case there was involved the question of adverse possession for the statutory period of limitation, but the same principle applies in testing the sufficiency of the acts of possession as notice to the world of a claim of ownership so as to prevent acquisition by an innocent purchaser. It would be unreasonable to hold that occupancy of a 200-acre tract of wild land by one man, manifesting no other act of ownership except cutting timber for a short period of two or three days, would be sufficient to put strangers upon notice that there was an assertion

of title by such occupant. We are of the opinion, therefore, that the court was correct in refusing to submit to the jury the question of the right of the plaintiff to recover, for under the undisputed evidence she was an innocent purchaser of the land without any notice of defendant's prior purchase of the timber, and was entitled to recover the value of the timber.

[4] We think, though, that the court erred in instructing the jury to fix the damages at the enhanced value of the timber, for it is undisputed that defendant cut the timber, at least the greater portion of it, if not all, under the honest belief that he was the owner and without any actual knowledge that Morgan had sold the land to the plaintiff or to any other person. Under those circumstances he was liable only for the value of the timber as it stood on the land; in other words, what is called the stumpage value, and not the enhanced value in the manufactured state.

In *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474, the following rule was laid down as the measure of damages:

"In replevin for standing timber cut by an innocent trespasser and converted into cross-ties, the owner is entitled to judgment for delivery of the timber so converted, notwithstanding its value has been increased six times; but, if delivery cannot be made, the measure of the damages recoverable is the value of the cross-ties less the labor expended on them, provided such expense does not exceed the increase in value."

[5] One of these suits was replevin for the possession of the cross-ties; therefore the rule stated above is applicable. The same rule is applicable to the other two suits for the value of the timber which had been cut from the land and sold in its manufactured state. There are numerous decisions of this court on that subject, the last being the recent case of *Forman v. Holloway*, 183 S. W. 763, and according to the rule announced there the instruction of the court fixing the measure of damages was erroneous.

For that reason the judgment will be reversed, and the cause remanded for a new trial.

ACKER et al. v. DEVORE. (No. 276.)

(Supreme Court of Arkansas. March 27, 1916.)

1. FRAUDULENT CONVEYANCES — 199—BONA FIDE PURCHASER—RECORDATION OF DEED—CONSTRUCTIVE NOTICE—SUFFICIENCY.

A landowner conveyed to his brother, who reconveyed to the grantor's wife, in apparent fraud of creditors. Thereafter execution issued on a judgment in another county against the husband, and the land was sold thereunder and the sheriff's deed recorded. *Held*, that a subsequent grantee of the wife could not be charged with constructive notice of the sheriff's deed, which was not directly in his line of title.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 616, 617; Dec. Dig. —199.]

2. QUIETING TITLE — 30(1)—PARTIES—MATTERS AT ISSUE.

The question of the right of a grantee under a sheriff's deed cannot be considered in a suit to quiet title, involving such deed, where such grantee is not made a party.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 64; Dec. Dig. —30(1).]

3. FRAUDULENT CONVEYANCES — 199 — CONSTRUCTIVE NOTICE—SUFFICIENCY.

Mere constructive notice of a sheriff's deed under execution against a fraudulent grantor, and of a quitclaim deed by the sheriff's grantee, is insufficient to put a subsequent purchaser from the alleged fraudulent grantee on notice of, or make him a privy with, the alleged fraudulent conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 616, 617; Dec. Dig. —199.]

4. FRAUDULENT CONVEYANCES — 198 — CONSTRUCTIVE NOTICE—INNOCENT PURCHASER.

Although prior conveyances of property may have been made to defraud creditors, the defendant, a subsequent grantee, having no knowledge of, and being in no way connected therewith, and having no knowledge that his grantor was indebted to any one, would be protected as an innocent purchaser for value.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 612; Dec. Dig. —198.]

5. JUDGMENT — 768(1)—LIENS—COMPLIANCE WITH STATUTE.

A judgment in one county is not a lien against land in another, where no copy of the judgment was filed for record in the county of the situs of the land, and the sheriff of such county who held the execution failed to comply with Kirby's Dig. §§ 5149-5154, inclusive, providing procedure for the perfecting of such liens.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1325; Dec. Dig. —768(1).]

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Action by Clinton Acker, trustee, and others against William A. Devore. From a decree dismissing the complaint and quieting title in defendant, plaintiffs appeal. Affirmed.

W. N. Carpenter, of De Witt, and Manning, Emerson & Morris, of Little Rock, for appellants. Botts & O'Daniel, of De Witt, for appellee.

WOOD, J. This suit was brought by the appellants against the appellee, to quiet ti-

tle to a certain tract of land in Arkansas county. Plaintiffs alleged that the land in suit was sold by I. W. Ingram, trustee, and W. N. Carpenter to C. M. Farmer on October 10, 1908; that subsequent to that time a judgment was obtained against C. M. Farmer and W. N. Carpenter in the Monroe circuit court; that the land in suit was sold under an execution issued on that judgment, and purchased by Hattie O. Carpenter; that Hattie O. Carpenter conveyed the land to Clinton Acker, as trustee for the children of W. N. Carpenter, the plaintiffs; that the defendant Wm. Devore claimed an interest in the land. Plaintiffs alleged that the claim of Devore was a cloud upon their title; that Devore deraigned title from the same source as plaintiffs; and they asked that Devore's title be set aside and canceled as a cloud upon their title. The defendant, in his answer, denied every allegation of the complaint, and set up that the judgment mentioned in the complaint was not a lien upon the land in controversy, that no lis pendens notice was filed in Arkansas county, and that defendant was an innocent purchaser. The court found that appellee was an innocent purchaser for value, and entered a decree dismissing appellants' complaint and quieting title in appellee. Was this finding and decree of the court correct? is the only question we need consider on this appeal.

[1-3] Appellants, the trustees, and the beneficiaries deraigned title through a deed from Hattie O. Carpenter, who purchased the land in controversy under an execution issued against C. M. Farmer. The deed of W. N. Carpenter and Hattie O. Carpenter to Acker, the trustee, under which appellants claim, was executed December 30, 1905, and was recorded in Arkansas county, where the land was situated, January 1, 1907. As early as 1904 C. M. Farmer conveyed the land in controversy to Fred Farmer, and in about three months thereafter Fred Farmer conveyed the land to Mrs. C. M. Farmer. The deed from C. M. Farmer and wife, under which appellee claims title, was executed March 28, 1906, and was filed for record and recorded in the county where the land is situated the 31st of March, 1906. It therefore appears that the deed under which appellants claim title was not recorded until about one year after appellee's deed was recorded.

The deed from Farmer and wife to appellee Devore recited a consideration of \$3,840, and it is not contended by the appellants that he was not a purchaser for value. True, the sheriff's deed to Hattie O. Carpenter was executed January 2, 1906, and recorded January 23, 1906, in the county where the land was situated, and was therefore executed and placed on record before appellee obtained his deed from Farmer and wife. But this sheriff's deed to Hattie O. Carpenter, although

placed on record before appellee obtained his deed, did not affect the rights of appellee as an innocent purchaser for value. There is no allegation and proof that appellee knew, at the time he purchased from Farmer and wife, that his grantors were indebted to Ack-er, or to any one else. The question of the rights of Hattie O. Carpenter as a grantee in the sheriff's deed cannot be considered here, for she was in no way a party to this suit. There is no evidence in the record to warrant a finding that appellee was in any manner connected with the alleged fraud in the conveyance by the Farmers of the lands in controversy to defraud their creditors. If there was in fact such conveyance, constructive notice of the sheriff's deed to Hattie Carpenter and her quitclaim deed would not have put appellee on notice, or have made him a party to any conveyances made by the Farmers or Carpenter to defraud creditors. See *Kerr v. Birnie*, 25 Ark. 225. O. M. Farmer having conveyed the land to Fred and he to Mrs. C. M. Farmer before the sale under execution, the sheriff's deed was not in the line of title of appellee, and he did not have to take notice thereof.

[4] Conceding, without deciding, that appellee's vendor had made prior conveyances of the property in controversy to defraud creditors before appellee purchased, still appellee, having no knowledge of, and being in no manner connected with such fraud, and having no knowledge that his vendor was even indebted to any one, so far as the proof in this record shows, would be protected as an innocent purchaser for value. See *South Omaha National Bank v. Boyd*, 79 Ark. 215, 97 S. W. 288; *Hoskins v. Fayetteville Gro. Co.*, 79 Ark. 399, 96 S. W. 195.

[5] The judgment against C. M. Farmer, rendered in the circuit court of Monroe county, in May, 1903, and under which the lands were sold and purchased by Hattie Carpenter, was not a lien against the land in controversy, because the same was situated in Arkansas county, and no copy of the judgment was filed for record in Arkansas county, and the sheriff of Arkansas county who held the execution did not comply with the lis pendens statute. *Kirby's Dig.* §§ 5149 to 5154, inc.; *Hudgins v. Schultice*, 179 S. W. 528.

The decree is therefore correct, and it is affirmed.

BOWMAN et al. v. SIMS. (No. 277.)

(Supreme Court of Arkansas. March 27, 1916.)

MORTGAGES *See* 463 — **FORECLOSURE** — **PAROL AGREEMENT—SUFFICIENCY OF EVIDENCE.**

In a suit to foreclose mortgages, evidence held to sustain the chancellor's finding that the money furnished by plaintiff to defendant, evidenced by the notes which the mortgages in suit were given to secure, was not with the verbal understanding and agreement that the notes were not to be paid nor the mortgages foreclos-

ed until 1,500 acres, included in one of the mortgages, were sold by defendant.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1361, 1363-1368; Dec. Dig. *See* 463.]

Appeal from Prairie Chancery Court; John M. Elliott, Chancellor.

Suit by John Sims against C. L. Bowman and another. From a decree for plaintiff, defendants appeal. Decree affirmed.

Appellee instituted two suits against the appellant to foreclose mortgages on tracts of land in Prairie county, one on a tract of 200 acres, owned by appellant individually, and the other on an undivided one-half interest in 1500 acres owned by appellant and appellee jointly. The suits were consolidated, by agreement, and were tried together. Appellee's contention, as shown by his complaint, was that the notes and the mortgages given to secure them were bona fide notes and mortgages, that the amounts were past due, and he therefore asked judgment on the notes and that the mortgages be foreclosed and the lands sold to satisfy the judgment.

The appellants, in their answer, which they made a cross-complaint, set up substantially that the notes and mortgages sued on were a part of a partnership agreement entered into between appellant O. L. Bowman and appellee John Sims, by the terms of which appellee was to furnish the money and appellant the skill and ability to buy and sell certain tracts of land; that thereafter they did buy and sell lands in pursuance of said agreement; that the profits were divided; that the appellee in each instance furnished the money and credited the appellant for his share until the lands were sold; that in each instance it was agreed that the appellant was not to become liable for his half of the money furnished by the appellee for the purchase of lands until the lands so purchased were sold; that the notes and mortgages on which the suits were based were executed under such agreement; and that the amounts involved were not to be paid until the lands mortgaged were sold. The appellant further set up that, as a consideration for the agreement on the part of the appellee to credit appellant for his half of the money advanced by the appellee until the lands could be sold, the appellant agreed to handle the land, pay all the expenses in advertising, livery hire, showing the land, etc., and guaranteed appellee at least 8 per cent. on the investment, and to secure this guaranty the appellant mortgaged the 200-acre tract, which he owned individually, and which was not involved in any partnership deal with the appellee.

Appellant, over the objection of appellee, testified to two transactions prior to the ones in controversy, in which he bought, in the month of June, 1902, a certain tract of land for \$1,032; that he borrowed from appellee on this land the sum of \$1,100 at 10 per cent.; that he sold the land in June, 1904, for \$2,-

580, and paid off the mortgage to appellee; that appellee told appellant that he would furnish money to buy land if appellant knew of any bargains, and that they would divide the profits. On April 6, 1903, he bought a tract of 240 acres for \$2,400, and appellee furnished the money. They sold it for \$4,800, dividing the profits with another agent. The title was taken in the name of appellee. He testified to another transaction of the same character, in which he bought some tracts of land, paying for same the sum of \$1,992.75, and taking the title in appellee's name. These tracts sold for \$7,000 cash, and he and appellee divided the profits equally. Appellant then testified concerning the purchase of the 1,590-acre tract, on his half of which the mortgage is sought to be foreclosed, as follows:

"The owner only offered to take \$17,000 for the land. I had a talk with Mr. Sims in regard to buying this property, and he said he would not do the same in this deal as he had been doing, but said if he went into it he would have to have interest on my part should he decide to buy the part. It was agreed that we should take an option on the land until January 1, 1906, by paying \$500. In this deal I was to have the exclusive sale of the property. I was to do the advertising, furnish livery, and was to guarantee Mr. Sims 8 per cent. on his investment, and in addition to that I was to put in some money, about \$2,000 or \$2,500. In addition to that, I was to give Mr. Sims a mortgage as security on 200 acres of my own land, and he was to pay the owner all the balance due on the land, and when the land was sold he was to have his money and interest, and we were to divide the profits. I advanced one-half of the \$500 option. The land was purchased and title taken in the name of John Sims and C. L. Bowman. Part of the consideration was paid in cash, and Sims and I gave a note for the balance. All that I agreed to pay of the \$17,000 was the amount I paid Letchworth at the time of making the deed. There was no written agreement as to the amount I was to pay. I think I paid about \$2,500 on the land—of the \$17,000. A cash payment of \$5,000 was made, and a mortgage of \$12,000, payable in one and two years. When the notes came due, Sims was to pay them and carry me until I sold the land. When the notes came due, Mr. Sims paid them, and I gave Mr. Sims the notes and mortgages in suit to show him the amount that would be his when the tract was sold."

On cross-examination he stated that he approached Sims with the intention of getting him to furnish money to buy the lands in controversy on the same terms that they had bought and sold in two previous transactions, but he declined to do this. He was further asked on cross-examination if there was an agreement to the effect that appellee was to pay the entire purchase money and was not to have the money advanced for appellant back until the land was sold, why it was he made the two notes, one payable two years after date and the other one year, and he answered that if the lands were not sold in that time the loan "would be renewed, interest would be added, and the amount carried." He was further asked why he did not have it stipulated in the mortgage

that his part of the money was to be paid when the land was sold, and he answered:

"Simply because Mr. Sims and myself agreed to do otherwise, and relying upon his representations that, when it was due, if the land was not sold it would be carried."

Appellant Mrs. Bowman, the wife of appellant C. L. Bowman, who, with her husband, executed the mortgage on the 200-acre tract, said that the note which this mortgage was given to secure was to be paid at the time of the sale of the ranch land; that is, the 1,590 acres. She also signed her dower interest in the mortgage on her husband's half of the ranch lands under the understanding that it was to be paid when the ranch was sold. She would not have signed these mortgages except upon such representations; that the representation was made by her husband, Bowman. She never heard the agreement between appellee and her husband as to the transaction. All she knew was what her husband told her.

Appellee, in his own behalf, testified substantially as follows:

"Appellant asked me to go into the deal with him to buy the 1,590 acres of land, stating that we could buy it for \$17,000 and hold it for a year on an option of \$1,000, and then we could make arrangements to either lose, the \$1,000 paid for the option or to take the land up for an additional \$4,000 at the end of the option; that he would put up \$500; and that he knew he could sell the land before the option expired. When the option was about to expire, he had not sold the land. I told Mr. Bowman that I was going to lose my \$500 and quit, as I did not think it was a good trade. He insisted that we go ahead with the trade, as he knew he could sell it the next year; that he would put up \$2,000, and, if I would put up \$2,000, that would give us another year. When it came time to put up the \$4,000, he said that he had failed to get the money, and if I would loan him \$2,000 to make the first payment on the land he would give me a mortgage on his 200 acres to secure the \$2,000, so I did it. He told me that he was satisfied that he could sell the land before next year, and I said, 'Now, Cal, I am not able to carry this land and pay for it, and you must make arrangements to get your half.' He told me he would do it, but when the next payment became due he still had no money, and I loaned him \$3,000 to make his second payment, and took a mortgage on his half interest to secure me. The deal was closed under the option with Letchworth on January 9, 1906. We were to pay \$17,000, \$5,000 when we closed the deal, and the balance in one and two notes at 8 per cent. There were four notes, of \$3,000 each, two payable one year and two two years after date. A mortgage was given to secure the notes. The mortgage of January 10, 1906, on the 200 acres of land belonging to Mr. Bowman, was given to secure the \$2,000, which was his part of the \$4,000. When this mortgage was given, there was no agreement of any kind with reference to the payment of the note other than as stipulated in the mortgage, nor was there at this time, or any time prior to the execution of the mortgage, any verbal agreement between Bowman and myself that this note and mortgage was not to be paid until the Letchworth land was sold. I expected him to pay the \$2,000 and interest at the time stipulated in the mortgage. When the two notes for \$3,000, payable in one year, became due, I paid them, loaned Bowman \$3,000 and took his note for it, with accrued interest, and I paid the other \$3,000 myself. I expected Mr. Bowman to take

care of the notes of Letchworth when they became due. I never gave Mr. Bowman to understand at any time that I would pay the notes and carry them until the land was sold."

A witness by the name of Proctor testified that he dealt in lands, and that he and Sims had bought and sold lands together; that on a certain tract the arrangement was that witness was to buy the land and sell it and Sims was to furnish the money. Witness was to pay half of the purchase price and interest on the same, and the money furnished witness by Sims was to be paid when the land was sold, and they were to divide the profits. The title was taken in Sims' name. They had another transaction of a similar nature.

The above states substantially the testimony upon which the court entered a decree dismissing appellant's cross-complaint, and entered a decree in favor of the appellee on the notes, and ordering the lands embraced in the mortgages sold to satisfy the same, etc., from which decree this appeal has been duly prosecuted.

Tellier & Biggs, of Little Rock, for appellants. Thweatt & Thweatt, of De Valls Bluff, for appellee.

WOOD, J. (after stating the facts as above). It could serve no useful purpose to discuss in detail the evidence set forth in the statement. It was purely a question of fact as to whether the money furnished by the appellee to the appellant C. L. Bowman, evidenced by the notes which these mortgages were given to secure, was with the verbal understanding and agreement that the notes were not to be paid nor the mortgages foreclosed until the 1,500 acres included in one of the mortgages were sold.

Conceding that the oral testimony introduced to show such agreement was competent, there was nevertheless a sharp conflict in the testimony as to such alleged agreement; the testimony on behalf of the appellant showing that such an agreement was entered into, while the testimony on behalf of the appellee showed that there was no such agreement. In view of this conflict, it cannot be said that the finding of the chancellor is clearly against the preponderance of the evidence. On the contrary, we are convinced, from a careful consideration of the circumstances, as detailed, showing the particular transaction which gave rise to these notes and mortgages, that the testimony on behalf of the appellee is more reasonable, and that the finding of the chancellor is sustained by a preponderance of the testimony.

The decree is therefore in all things correct, and it is affirmed.

STEARNS COAL & LUMBER CO. v. PATTON.

(Supreme Court of Tennessee. April 1, 1916.)

1. QUIETING TITLE §12(1) — BILL — POSSESSION.

In Tennessee, possession is not necessary to maintain a bill to remove a cloud on title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 8; Dec. Dig. §12(1).]

2. CANCELLATION OF INSTRUMENTS §4 — POWER OF EQUITY.

Equity has the power to cancel a void instrument, whether its character as such appears from the face of the instrument or otherwise.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. §4.]

3. JUDGMENT §388—EXPIRATION OF TERM—FINALITY.

On a bill to clear up title, a decree for a party defendant, finding him to be the owner in fee of part of the land involved, after the term at which it was entered became final, and the court could not thereafter vacate or modify its decree without notice, and such proceedings as would give it jurisdiction anew.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 747-749; Dec. Dig. §888.]

4. LIMITATION OF ACTIONS §5(3) — REMOVING CLOUD FROM TITLE—POSSESSION.

The statute of limitations has no application to an action to remove a cloud from title where the owner is in possession or is not out of possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 15; Dec. Dig. §5(3).]

5. LIMITATION OF ACTIONS §36(1)—REMOVAL OF CLOUD ON TITLE.

The 7-year statute of limitations, applying where there is an adverse holding of real estate, did not apply in an action to remove a cloud on title affecting the marketability of the land or under which an adverse possession might be attempted, thus endangering the rights of the complainant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 168-170, 176, 178-181; Dec. Dig. §36(1).]

6. QUIETING TITLE §29—DEFENSES—LACHES — "OUT OF POSSESSION."

Laches is not available as a defense to an action to remove a cloud on title, except where the plaintiff is out of possession, and "out of possession" does not mean a mere failure of the owner to be in actual possession of wild or unoccupied lands.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. §29.]

For other definitions, see Words and Phrases, First and Second Series, Possession.]

7. PROPERTY §10—"CONSTRUCTIVE POSSESSION."

The true owner, in legal contemplation, is in constructive possession of his unoccupied land if no one else is holding adversely, and he does not have to maintain actual possession to assert his rights.

[Ed. Note.—For other cases, see Property, Dec. Dig. §10.]

For other definitions, see Words and Phrases, First and Second Series, Constructive Possession.]

8. ESTOPPEL §58—DISADVANTAGE.

In an action to remove a cloud from title to real estate, defendant, purchasing before the decree alleged to be a cloud was entered and not

on the faith of the decree, could not set up estoppel, as he must have been put in a worse attitude or some advantage must have been gained by a delay before estoppel could arise.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. ¶58.]

9. QUIETING TITLE ¶35(2)—PLEADING—TITLE.

The statement by complainant in an action to set aside a cloud on its title to realty of its vendor's actual, open, notorious, and adverse possession for 22 years under a registered deed, showing substantial inclosures and actual occupation of the land and a conveyance to it, sufficiently averred its title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 73; Dec. Dig. ¶35(2).]

10. ABATEMENT AND REVIVAL ¶6(4)—PENDENCY OF ANOTHER SUIT.

A bill to set aside a decree in a former case as a cloud on complainant's title to real estate would not be abated by the pendency of a suit filed by the defendant against complainant in an attempt to deraign title to the land claimed by defendant under the same decree, as complainant's right to cancel the decree as a cloud was not involved in the other suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 50, 52, 54-56, 61; Dec. Dig. ¶8(4).]

Certiorari to Court of Civil Appeals.

Suit by the Stearns Coal & Lumber Company against Jesse Patton to set aside a former decree as a cloud on complainant's title to real estate. From a judgment of the Court of Civil Appeals affirming a decree of the chancellor dismissing the bill on demurrer, complainant brings certiorari. Writ of certiorari granted, and cause reversed and remanded.

L. T. Smith and S. M. Turner, both of Jamestown, and J. N. Sharp, of Knoxville, for complainant. Conatser & Case, of Jamestown, and E. C. Knight, of Livingston, for defendant.

FANCHER, J. A decree in a former case at Jamestown is sought to be set aside as a cloud on complainant's title to real estate. The former case was *Malissa Williams et al. v. S. H. Pile, Tillman Crabtree, et al.*, and it is alleged to have been a suit to remove cloud on title and to sell for partition a tract of 123,889 acres of land covered by a grant issued by the state of Kentucky to F. P. Stone et al. on the 6th day of October, 1848. The bill was against very many defendants.

Defendant, Patton, in the present case, claims under a conveyance from Tillman Crabtree, dated the 17th of August, 1885, and recorded July, 1898.

This 75 acres lies within the boundary of the Washington Young tract of 10,000 acres claimed by complainant herein under a deed from S. H. Pile. The latter as defendant, in the case of *Malissa Williams v. Pile* answered therein and set up by answer his claim of title to this 10,000 acres. After issue was made this title was referred to the clerk and master for report as to owner-

ship. The clerk and master heard proof and reported that this 10,000 acres had been held by S. H. Pile under a deed from John W. Frogge, tax collector, executed October 4, 1875, and registered October 21, 1875, and that two possessions were held and maintained by said Pile on the land for 22 years by his tenants, showing the nature and extent of the possessions, from which it appears that these possessions were sufficient to perfect title in S. H. Pile under his tax deed. This report was confirmed by the court.

Complainant, Stearns Coal & Lumber Company, avers these facts, and, further, that at the time defendant took his deed in 1885 from William Crabtree, the latter was holding as tenant of S. H. Pile on the Washington Young tract of land. Complainant avers its title, not in general form, but by stating the color of title of S. H. Pile, the facts as to his 22 years' open, notorious, and adverse possession and a chain of conveyances from Pile on down to complainant, its deed having been executed August 17, 1910.

It is averred that defendant, Patton, also relies on a decree in the case of *Williams v. Pile et al.*, and the deed of the clerk and master made thereunder to Crabtree.

The bill further shows that Tillman Crabtree answered in the *Malissa Williams* case and claimed to own the 75 acres now sued for. It was found on report of the clerk and master that Crabtree was not the owner of the 75 acres, and the same was sold for partition among the owners of the 123,889-acre tract in 1899, when Tillman Crabtree purchased and the court undertook to vest title to the 75 acres in him.

Thus the bill in the present suit presents the anomalous situation of a finding by the court in favor of S. H. Pile that he was the owner of the Young 10,000 acres of land, but 6 months thereafter by another decree the court undertook to vest title to this 75 acres, which is part and parcel of the 10,000 acres in Tillman Crabtree.

Complainant takes the position that the decree confirming the report of the clerk and master that the Young tract of land was owned by S. H. Pile, effectively put the issue as between Pile and the complainants at rest and beyond the jurisdiction of the court, both as to the subject-matter and the parties; and that the decree afterward divesting title out of all parties as to the 75 acres and vesting it in Tillman Crabtree is coram non iudice and void as to S. H. Pile. It is this decree, the chain of title, and claim of defendant under it, which is sought to be removed as a cloud.

The chancellor dismissed the bill on demurrer, and his decree was affirmed by the Court of Civil Appeals. The demurrer in substance was:

(1) Want of equity on the face of the bill, and that it is a bill to amend the decree in the *Malissa Williams* case, attacking the

decree on the ground of fraud, accident, or mistake, and that the right of action is barred.

(2) Want of necessary parties. That no one who was a party to that case is a party here.

(3) Suit to set aside decree barred by 3 and 7 years' statute of limitations.

(4) That the bill shows there is another suit pending in Pickett county of Jesse Patton v. Stearns Lumber Company, in which the questions here made are at issue.

(5) Complainant accepted deed from S. H. Pile, knowing of the decree and is estopped.

(6) Complainant has no title because it bought from Pile, who had no title.

(7) Bill does not allege fraud, accident, or mistake.

The chancellor sustained the demurrer for the reason, stated in the decree, that the bill as a bill of review was not filed within the time required by the statute; and as a bill to impeach the decree for fraud, accident, or mistake, it is too general and does not explain the delay of 16 years in filing. Also, because the bill is framed upon the idea that the decree complained of is void, and that its invalidity can be relied upon in any proceeding and attacked collaterally.

The Court of Civil Appeals sustained the first, third, and seventh grounds of demurrer.

The opinion of the Court of Civil Appeals proceeds upon the ground that the suit is barred by the statute of limitations, and that complainant will be repelled because of laches if it be considered a bill to annul a decree for fraud, accident, or mistake; that there is no distinct averment of title, holding neither laches nor the statute of limitations will bar a party in possession but not so if he is out of possession—citing *Sage v. Railway Co.*, 58 Fed. 297, 7 C. C. A. 240.

[1] In this state possession is not necessary to maintain a bill to remove cloud. *Almony v. Hicks*, 3 Head, 39.

Pomeroy holds that while the rule by the weight of authority is that where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the party claiming under it, in order to enforce it must necessarily offer evidence which will inevitably show its invalidity and destroy its efficacy, in each of these cases, the court will not exercise its jurisdiction either to restrain or to remove a cloud, for the assumed reason that there is no cloud; yet the author observes that the doctrine often operates to produce a denial of justice—of judges deciding that the court cannot interfere, because the deed or other instrument is void, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself

who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. "This doctrine," says the writer, "is, in truth based upon mere verbal logic, rather than upon consideration of justice and expediency." Pomeroy, § 1390.

[2] Our court has adopted the more reasonable rule suggested by Mr. Pomeroy, and it is settled in this state that equity has the power to cancel a void instrument whether its character as such, appears from the face of the instrument or otherwise. *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Jones v. Nixon*, 18 Pickle, 95, 50 S. W. 740; *Porter v. Jones*, 6 Cold. 318; *Almony v. Hicks*, 3 Head, 41.

Judge Wright, in *Almony v. Hicks*, says:

"A bill to remove a cloud is a head of equity by itself. It will lie, although the defendants are in possession, and complainants have the legal title, and might sue at law for the recovery of the property, that not being esteemed adequate relief. * * * A simple statement that the instrument is void, or voidable, with the proper prayer, is sufficient."

It fairly appears from the averments in this bill that complainant is the owner in fee of the land; that a decree was rendered in a former proceeding selling a part of a tract of land which, 6 months before, at a former term, the same court, in the same case, had decreed was the property of complainant's vendor, a defendant to that case.

[3] Was the decree vesting and divesting title void as to defendant S. H. Pile so that no direct attack is necessary? If so, the present bill may be treated purely as a bill to remove cloud.

S. H. Pile was the owner of the 75 acres, according to the bill in the present case, and it was so determined in the former case. The *Malissa Williams* case was, first, to clear up title, and second, to sell for partition. S. H. Pile was before the court on that phase of the case, the purpose of which was to clear up title. He was not interested in the sale sought by complainant, for purposes of division; and we may assume that complainant did not in the pleadings seek to sell land which should be adjudged to be owned by the defendants, in which complainant had no interest. After final decree had been rendered so far as the case applied to him, confirming the report of the clerk and master finding he was the owner in fee of the 10,000 acres of land, the court, without correcting the decree on the report, six months afterward, ordered 75 acres of the land sold, and vested title in the purchaser, divesting title out of all the parties to the suit but without naming S. H. Pile.

The term of court had closed at which decree was entered in favor of S. H. Pile. When the decree was entered in his favor, there was nothing left under the issues for the court to further adjudicate as to him. When the term closed the decree became final. The court had then exhausted its jurisdiction as to Pile and could neither vacate

nor modify its decree afterward without notice, and such proceedings as would give it jurisdiction anew. *Works on Courts and their Jurisdiction*, 674; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97; *Prater v. Hoover*, 1 Cold. 544; *Allen v. Barksdale*, 1 Head, 238.

It was therefore not only in the face of the former decree recognizing S. H. Pile as the owner and antagonistic to that decree without correcting it, but was rendered after the case had terminated so far as S. H. Pile was concerned, and therefore void as to him.

[4] The following authorities hold that the statute of limitations has no application to an action to remove cloud from title where the owner is in possession, or as in some, where the owner is not out of possession: *Cooper v. Rhea*, 82 Kan. 109, 107 Pac. 799, 29 L. R. A. (N. S.) 930, 136 Am. St. Rep. 100, 20 Ann. Cas. 42; *Miner v. Beekman*, 50 N. Y. 337; *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139; *Mutual Life Ins. Co. v. Corey*, 54 Hun, 493, 7 N. Y. Supp. 939, reversed on other grounds in 135 N. Y. 326, 31 N. E. 1095; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741; *Meler v. Kelly*, 22 Or. 136, 29 Pac. 265; *Katz v. Obenchain*, 48 Or. 352, 85 Pac. 617, 120 Am. St. Rep. 821; *Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569; *Quinn v. Kellogg*, 4 Colo. App. 157, 35 Pac. 49; *Peck v. Sexton*, 41 Iowa, 566; *Combs v. Combs*, 99 S. W. 919, 30 Ky. Law Rep. 873; *Cameron v. Lewis*, 59 Miss. 134; *Kennedy v. Sanders*, 90 Miss. 524, 43 South. 913; *Am. Emigrant Co. v. Fuller*, 83 Iowa, 599, 50 N. W. 48; *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409. See note in 29 L. R. A. (N. S.) 930.

In *Haarstick v. Gabriel*, 200 Mo. 237, 98 S. W. 760, it was said that since a suit to determine and quiet title to land falls under the head of real actions, the limitations applicable thereto govern, and the suit is not governed by the statute of limitations which relates to personal actions.

In *Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569, it was said that a landowner cannot be expected to bring action against every man who, while not in possession, shall declare he claims an interest in the property, under penalty to the owner after the lapse of 10 years of being barred of action for a later assertion of title.

In *Cameron v. Lewis*, 59 Miss. 134, *Kennedy v. Sanders*, 90 Miss. 524, 43 South. 913, *American Emigrant Co. v. Fuller*, 83 Iowa, 599, 50 N. W. 48, and *Combs v. Combs*, 99 S. W. 919, 30 Ky. Law Rep. 873, the law is properly stated that if the plaintiff or the one through whom he holds has never been out of possession, the statute of limitations has no application.

We quote the following from *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139:

"Where a plaintiff out of possession brings the statutory action to quiet title, it is undoubtedly true that the statute begins to run from

the time when defendant's possession became adverse. But, while a cause of action clearly accrues to the owner of real property in possession thereof whenever a cloud upon his title is created or an adverse title asserted, we do not think it necessarily follows that such cause of action accrues then once for all, so as to start the statute of limitations from that date. A cloud upon a title must always continue to operate as such during the period of its existence, and, as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud remains. *Miner v. Beekman*, 50 N. Y. 337. 'The cause of action is not the creation of the cloud, but its existence, its effect upon the title of the owner, and his right to have it removed.' *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741. Hence there would seem good ground for holding that lapse of time after the creation of a cloud upon a title will not bar an action by an owner in possession to have it removed."

The court when making the foregoing observations was considering a statute of limitation of 4 years for commencing actions not otherwise provided for.

The statute of limitation begins to run against a suit to quiet title from the time defendant takes possession of the land. *Moore v. Miller* (O. C.) 43 Fed. 347.

The statute of limitation does not apply as respects the acquisition of title to property to any one not in possession. A mere claim, for whatever time, unaccompanied by actual possession, can give no right under the statute. 25 Cyc. 1012; 1 Cyc. 982, note 11 et seq.; *Smith v. Lee*, 1 Cold. 551; *Snoddy v. Kreutch*, 8 Head, 301.

In the case of *Anderson v. Akard*, 15 Lea (83 Tenn.) 182, Judge Cooper delivered the opinion. That was a bill in equity to set up a lost deed and to enjoin the heirs of the alleged grantor from prosecuting a suit for the recovery of the land. The statute of limitations was a defense. The argument was that the right of action accrued at the time the deed was lost. The court said:

"The suit is not for the recovery of land, or the enforcement of a debt, contract, or liability of the ancestor. It is simply the assertion of an equitable remedy which the party is entitled to resort to at any time when the exigency may arise."

The court further said:

"Their right to set up their lost deed is one of those continuing equities, they being in legal possession, and holding against any adverse claim, of which we have several cases in our books, where the statutes of limitations have no application. 'Neither the statutes of limitations,' this court has said, 'nor lapse of time have any application to a bill in chancery, in which the complainant is not seeking to recover anything, but only resisting the demand of the defendants which they have been constantly opposing.' *Lewis v. Brooks*, 6 Yer. 167; *Kirtland v. Railroad Co.*, 4 Lea, 414, 418; *Caldwell v. Palmer*, 6 Lea, 352."

See *Alsobrook v. Orr*, 3 Thompson (130 Tenn.) 120, 169 S. W. 1165, Ann. Cas. 1915B, 627.

Our statute of limitations of 10 years applicable to "all other cases not expressly provided for," originated with the Code of

1858, and was embraced in the chapter entitled "Limitations of Actions Other Than Real." It does not apply here.

There is to be found in the syllabus of one of our reports an expression as follows:

"Excepting alone suits between trustees and cestui que trust upon causes of action arising out of express trusts and cognizable alone in courts of equity, our general statutes of limitation apply to every cause or form of action, whether cognizable exclusively in courts of law, or concurrently in courts of law and equity, or exclusively in courts of equity." *Hughes v. Brown*, 4 Pick. (88 Tenn.) 578, 13 S. W. 286, 8 L. R. A. 480.

A careful reading of Judge Lurton's opinion will show that it contains no statement so broad, sweeping, and unqualified as the syllabus. The opinion deals with the subject of whether the remedy of complainant, being purely equitable, against a trust estate, was subject to the bar of the statute. It was held that:

"There is no more reason for holding that a bill to charge the payment of an equitable claim upon a trust estate should be taken out of the statute which bars all suits upon contracts within 6 years, than there was for holding that a suit upon an equitable title, or to declare and enforce a constructive or implied trust was without the statute."

The question of a continuing equity to which a party may resort when the exigency may arise, and which involves no question of recovery of land nor the enforcement of a debt, contract, or liability, was not being discussed.

[5] Our statute of 7 years applies where there is an adverse holding of real estate. There is no question of adverse holding in the present suit. This is an action to remove a cloud on title which affects the marketability of the land, or under which an adverse possession might be attempted and thus endanger the rights of complainant. It is to remove this apprehended future danger that complainant invokes the aid of the court of equity. The realty has not been touched.

We apprehend that it was never the intention to enact a statute of limitations in this state preventing an owner from removing or canceling an instrument or record which casts a cloud upon the title. Spurious claims have arisen in the past during the period when our wild and unoccupied lands were of little value and not actively looked after by any one. These consist of void grants and colors of title created for speculative purposes. Our Legislature has not enacted any statute of limitation which will prevent a clearing up of titles as against these void claims, where no sufficient adverse possession has been maintained by the adverse claimant.

Laches will not be imputed to one from a mere failure to watch the record to guard against the recording of a forged or undeclared deed purporting to be a conveyance of his real estate. *Palmer v. Mizner*, 2 Neb.

(Unoff.) 899, 90 N. W. 637; *Hodges v. Wheeler*, 126 Ga. 848, 58 S. E. 76.

Until there is an interference with the possession of land no occasion arises for resort to legal remedies, and where land has remained wild until shortly before the commencement of the plaintiff's action, his claim is not stale. *Penrose v. Doherty*, 70 Ark. 256-261, 67 S. W. 398.

The Arizona court on the question applied the law as stated in the following:

"To hold, in an action to quiet title, that the plaintiff may not recover against a defendant who has been in possession for less than three years, for no other reason than that the plaintiff has failed to pay his taxes, or list his property for taxation, for a period of 11 years, while the defendant, holding a void tax deed to the property, has paid the taxes during the 11 years, and has, within 3 years, expended \$780 in improvements, extends the doctrine of laches to a degree not supported by any precedent cited to us. We are unwilling so to extend it. Plaintiff is not precluded by laches from maintaining this suit, unless by reason of his course defendant has been misled to his injury, or the property has, at defendant's risk and expense, been greatly enhanced in value while plaintiff lay by waiting the turn of events to assert his claim, or unless some other facts exist, not now disclosed in this record, showing inequity in the plaintiff's position." *Costello v. Muheim*, 9 Ariz. 422-430, 84 Pac. 908.

The case of *Sage v. Winona, etc., Railroad Company*, 58 Fed. 297, 7 C. C. A. 237, cited by the Court of Civil Appeals as authority that laches applies, holds that while a person out of possession under authority of the Minnesota courts may maintain action to remove cloud, this does not preclude a defendant from pleading laches or limitations; that no period of delay will bar the owner who is in possession, because the cloud is a continuing injury like a public nuisance. But where the person filing the bill is out of possession and the person proceeded against is in possession, the latter may plead either laches or limitations.

The particular decision on the facts was:

A land-grant railroad company, having both actual and constructive notice, was guilty of laches in delaying 14 years to assert title to lands lying within its grant limits, which had been selected as indemnity lands by another land-grant company, certified as such by the state, and by it conveyed to the company, and large portions of which had been openly sold by the latter to purchasers and settlers, who had taken deeds and settled on the lands, making valuable improvements thereon, believing they were acquiring good titles; that for many years the railroad company had actual as well as constructive notice of all these matters; that through this lapse of time the defendants had lost certain documentary evidence which would probably have rendered their title unassailable.

[6] In 32 Cyc. 1345, it is said:

"Excepting where plaintiff is in possession, laches is available as a defense to the action."

We have examined the authorities there cited. In many of them it is held that laches did not apply. In those cases where the doctrine did apply it was upon some real and valid reason, and not merely a case of lapse of time only. The cases cited support the general statement of the text, that the defense is *available* in such cases. By "available" we understand that where the doctrine *should* properly apply and within its proper sphere and reasoning, it is open to the parties who are affected by it; and "out of possession," as we gather from these authorities, is not meant a mere failure of the owner to be in actual possession of wild or unoccupied lands.

[7] The true owner, in legal contemplation, is in constructive possession of his unoccupied land if no one else is holding adversely. He does not have to maintain actual possession to assert his rights.

[8] Estoppel cannot arise, and therefore the rule of laches cannot apply here because the defendant did not purchase on the faith of the decree of sale in this case, but purchased before the decree alleged to be a cloud was entered.

Complainant purchased the land in question in 1910. It is now averred that defendant is claiming that the former decree was effective, as against complainant's vendor, and this claim under the void decree may be said to cast a cloud on complainant's title. Certainly mere lapse of time will not give validity to a void instrument or proceeding. Some one must be put in a worse attitude or some advantage gained by a delay before estoppel can arise. If time will cut off the right to remove a cloud on title to land not adversely held, then it is incumbent on owners of real estate to be vigilant in looking for and removing void instruments or void proceedings, or else their title will be embarrassed by the failure. No man is called upon to attack a proceeding or instrument not effective against him. If at any time some one uses it as a means of claiming title or beclouding the right or title of another, it then becomes a menace and danger. While the owner may sue in advance of such actual danger, the fact that he does not know of the cloud on his title or does not apprehend the danger, and waits, should not preclude his right when the injury becomes apparent, if the instrument is void, and no rights have become fixed under it.

The bill in the present case is not a bill of review, but purely a bill to remove a void decree as a cloud on complainant's title. This land is in the mountain section of this state where titles in the past have in many instances lain dormant, and our courts have pursued a liberal policy in permitting removal of clouds, so as to clear up the titles. If laches should be applied strictly to such matters it would hinder, rather than assist, in making titles to these wild lands secure.

[9] The point is urged that no averment of title is made. The statement by complainant of 22 years' actual, open, and notorious, adverse possession of land by S. H. Pile, its vendor, under a registered deed, showing substantial inclosures and actual occupation on the land, and conveyances from Pile to complainant, is a sufficient averment of title.

[10] The bill avers that a suit is pending in the chancery court of Pickett county, Tenn., filed by Jesse Patton, against the Stearns Lumber Company, in which he attempts to deraign title to this 75 acres of land under the decree in the Malissa Williams case. It is said that the proceeding, if void, can be relied on there. This is true; but, nevertheless, complainant's right to cancel the proceeding as a cloud is not involved there, and that case is no hindrance to the assertion of complainant's right to remove the cloud here.

All the facts stated herein are only from averments in the bill, and of course are subject to controversy if denied by answer. The writ of certiorari is granted, the cause reversed and remanded to the chancery court at Jamestown for further proceedings in accord with this opinion.

RIGGINS et al. v. TYLER, County Judge.

(Supreme Court of Tennessee. March 11, 1916.)

1. STATUTES \Leftarrow 120(4)—TITLE OF ACT—SUFFICIENCY.

The title of Priv. Acts 1915, c. 28, reciting that it was "An act to authorize counties in this state having a population of not less than 33,500 nor more than 34,000 to issue bonds for highway purposes; to provide for the disposition of the fund thus raised; and also for prompt payment of principal and interest when due"—is not invalid under Const. art. 2, § 17, declaring that no bill shall become a law which embraces more than one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 172; Dec. Dig. \Leftarrow 120(4).]

2. STATUTES \Leftarrow 109—CONSTRUCTION—TITLE OF ACT—INDEFINITENESS.

Acts 1915, c. 28, entitled "An act to authorize counties having a population of not less than 33,500 nor more than 34,000 to issue bonds for highway purposes; to provide for the disposition of the fund thus raised; and * * * for prompt payment of principal and interest," declares that the quarterly court of any county having the population mentioned may, when regularly in session, issue bonds for highway purposes. The act nowhere provides a standard to measure the population of counties. *Held* that, as the Legislature will not be presumed to have done a vain thing, and as the language of statutes may be construed to give effect to the intent, the title must be deemed sufficient on the theory that the population of counties shall be ascertained from the last federal census; that being the established method.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. \Leftarrow 109.]

Appeal from Chancery Court, Montgomery County; J. W. Stout, Chancellor.

Bill by W. W. Riggins and others against C. W. Tyler, County Judge. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed.

H. N. Leech, Austin Peay, and C. Tate, all of Clarksville, for appellants. Savage & Fort and Daniel & Daniel, all of Clarksville, for appellee.

NEIL, C. J. [1] The validity of chapter 28 of the Acts of 1915 is called in question. The act is as follows:

"An act to authorize counties in this state having a population of not less than 33,500 nor more than 24,000 to issue bonds for highway purposes; to provide for the disposition of the fund thus raised; and also for prompt payment of principal and interest when due.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that the quarterly court of any county in this state having the population mentioned in the caption is hereby authorized when regularly in session to issue bonds for highway purposes.

"Said bond issue shall not exceed in any one year two-thirds of one per cent. of the taxable values of the county as shown by the assessment for the preceding year; and shall never in the aggregate exceed three per cent. of the taxable values of such county. The bonds shall bear not more than 6 per cent. interest; shall be negotiable at not less than par; and shall mature not more than thirty years from date of issue. The quarterly court may make such orders as to bond issue and as to the management and disposal of the fund arising therefrom as they may deem proper; it being the purpose of this act to vest the court with full authority in the matter. Quarterly reports shall be made by the court and spread on the minutes, showing the manner in which the fund is disbursed and giving in detail the work done so that a complete record of same may be kept. Suitable provisions shall be made by the quarterly court to pay interest promptly and to retire the bonds at maturity or when subject to call; and the court is hereby authorized to make such orders as it may deem necessary for this purpose.

"Sec. 2. Be it further enacted, that this act take effect from and after its passage the public welfare requiring it.

"Passed January 26, 1915."

[1, 2] The objection made is that the title is not in compliance with article 2, § 17, of the Constitution. However, if the title is void at all, it is not for the reason stated, but because too indefinite as to the county, or counties to which the act is applicable.

But it is not void, if there is any standard of sufficient general publicity to which it can be justly held the Legislature had reference. Is there such a standard? There are hundreds of acts on our statute books in which reference to the last preceding federal census is made for the purpose of applying the population basis fixed in such acts, and in this manner ascertaining the county or counties to which the act was intended to apply. The uniform history of our legislation for more than 40 years, in acts rested on a population basis, makes it certain that if the Legislature had in mind any source at all for obtaining the means for applying the figures, contained in the act to any county or counties of the state, that source was the

last preceding federal census of 1910. It could not have been contemplated that a trial census of the whole state or of several counties would be made for such purpose. That would be highly absurd, and would convict the Legislature of gross folly, as well as of a purpose to inflict on the state an unwarrantable and needless expense. If they had in mind therefore any standard at all, it was the federal census of 1910. If this be not true, they had no standard at all. But this latter supposition would fasten on the Legislature a purpose to pass an act so vague and general as to be insensate and therefore void. Yet the recognized rule is that where of two constructions one would make the act void and the other valid, the latter is to be chosen, even though it be not the most obvious, or the most probable. This latter construction must therefore be adopted, and we must hold that the Legislature had in mind the federal census of 1910.

But this census was not specially referred to in the caption, or title, or anywhere in the act. Is it therefore unavailable? Although we feel sure they could have had in mind no other standard, and are morally certain they had in mind that particular standard, are we precluded from making effective the legislative purpose because there was no reference in direct terms to that standard?

We think not. A very liberal rule of construction has been adopted in this state, on questions of this kind. The substance of this rule is shown in the following excerpts from decided cases:

"The Legislature cannot be supposed to intend its own stultification. When, therefore, to follow the words of an act leads to absurdity in its consequences, that constitutes sufficient authority to depart from them." *Wise & Co. v. Morgan*, 101 Tenn. 273, 282, 48 S. W. 971, 973 (44 L. R. A. 548). "Statutes must be construed, if possible, so as to make them sensible, and to effect and carry out the purposes for which they are enacted. It is not to be presumed that the lawmakers will pass a defective or insensible act, or one in conflict with the organic law. * * * The legislative intent will prevail over the strict letter or literal sense of the language used, and, in order to carry into effect this intent, general terms will be limited, and those that are narrow expanded." *Maxey v. Powers*, 117 Tenn. 381, 408, 404, 101 S. W. 181. "In order to effectuate the legislative intent 'words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention.'" *Ashby v. State*, 124 Tenn. 684, 691, 139 S. W. 872.

A résumé of this subject appears in *Palm-er v. Express Co.*, 129 Tenn. 116, 158-161, 165 S. W. 236, as follows:

"The rule of law applicable to this subject is that, if there be two constructions to which an act is susceptible, one of which will make it unconstitutional and the other of which will save it, the duty of the court is to adopt the latter, although it is not the most obvious or natural construction. *Manufacturing Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S. W. 1083, 78 Am. St. Rep. 941; *Samselson v. State*, 116 Tenn. 470, 498, 95 S. W. 1012, 115 Am. St. Rep. 805; *Railroad v. Byrne*, 119 Tenn. 278, 291, 292, 104 S. W. 490; *Darnell*

v. State, 123 Tenn. 663, 184 S. W. 307; Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239. In *Samuelson v. State* it is said: "While it is true that, in arriving at the meaning of the Legislature, primarily, the grammatical sense of the words used is to be adopted yet if there is any ambiguity, or if there is room for more than one interpretation, the rules of grammar will be disregarded where a too strict adherence to them would raise a repugnance or absurdity, or would defeat the purpose of the Legislature." *Garby v. Harris*, 7 Exch. 591; *Met. Bo. Wks. v. Steed*, L. R. 82, B. Div. 445; *George v. B. of E.*, 83 Ga. 344; *State v. Heman*, 70 Mo. 441. Many cases might be cited in which the future tense has been read as including the present and the past, where that was necessary to carry out the meaning of the Legislature. Thus an enabling act relating to married women who 'shall come into the state' may apply to one who came into the state before the passage of the law. *Maysville & L. R. Co. v. Herrick*, 18 Bush (Ky.) 122. Where an act provided that certain land 'shall be allotted for and given to' an individual named, it was held that the words passed an immediate interest. *Rutherford v. Greene*, 2 Wheat. 196, 4 L. Ed. 218. In *Babcock v. Goodrich*, 47 Cal. 488, the phrase 'current expenses of the year' was made to read, 'expenses of the current year'; it being evident that the latter form of words more correctly expressed the legislative intent. These cases are but a recognition of an old and well-established rule of the common law, applicable to all written instruments, that 'verba intentioni, non e contra debent inservire'; that is to say, 'words ought to be made subservient to the intent, and not the intent to the words.' The case of *Darnell v. State*, supra, furnishes a strong example in close analogy. In that case the court, after mentioning the fact that there were only two assignments that needed to be considered, said: 'The first of these is that the act under which the jury was impaneled, commonly known as the "jury law of Franklin county" (Acts 1905, c. 233) is unconstitutional, because the body of the act is broader than its title. The contention is based upon the following: The act is entitled "An act to create a board of jury commissioners for counties in this state having a population of not less than 20,292, and not more than 20,400 inhabitants according to the federal census of 1900, or that may have that number of inhabitants by any subsequent federal census." After making various and sundry provisions to carry out the purposes indicated by the title, section 19 follows, near the close, in this language: "Be it further enacted, that the provisions of this act shall apply to all grand and petit juries in circuit and criminal courts of this state." The same question was decided against plaintiff in error's contention in the case of *Allen Damron v. State*, from Bedford county, at the December term, 1909. *Damron's Case* involved the jury law of Bedford county (chapter 355 of the Acts of 1907), which was a substantial copy of the Franklin county jury law involved in the present case. That case was thoroughly considered by the court, after full argument, oral and written, and a second time on petition to rehear filed by the plaintiff in error. The court held, upon a consideration of the whole statute, that it was the evident intention of the Legislature that the section just quoted should be construed as if it read as follows, viz.: "That the provisions of this act shall apply to all grand and petit juries in all circuit and criminal courts of this state in counties of the population herein prescribed." We are of the opinion this was a sound construction, and we adhere to it."

In *State ex rel. v. Turnpike Co.*, 2 Sneed, 88, it appeared that the act under which the turnpike company was incorporated author-

ized it to erect a tollgate "within two miles of the town of Clarksville." This language, taken literally, authorized the location of a gate at any point less than two miles from the town of Clarksville. The court, however, held that the words "but no nearer" should be supplied, and the act made to read "may erect a tollgate within two miles of Clarksville, but no nearer."

In *Wright v. Cunningham*, the court had under consideration an amendment to a former statute concerning the adoption of a stock law in certain counties. In dealing with this amendment it was necessary to construe the following language, which was insisted by counsel to be fatally obscure, viz.:

"The ticket shall provide for those favoring the small stock law, 'for the small stock law' and those 'against said law.'"

The court said:

"Evidently there was an omission between the words 'and' and 'those' of the word 'for,' and after the word 'those' an omission of the expression 'opposing the small stock law.' As thus corrected, the sentence would read: 'The ticket shall provide for those favoring the small stock law, "for the small stock law," and for those opposing the small stock law, "against the small stock law."' The word 'said' in the expression 'against said law,' of course refers to the small stock law, and the intention of the act was that the ticket of those opposing the law should read 'against the small stock law.' It is a well-known canon of construction that an ambiguous or meaningless clause in a statute may be rejected, or words supplied by intent to express the obvious intention of the Legislature." 115 Tenn. 445, 452, 453, 91 S. W. 293.

In *Maxey v. Powers*, supra, the court had under examination an act of the Legislature which abolished certain civil districts in Knox county. The act provided on its face that it should not go into effect until September 1, 1906, but on that day all of the justices went out of office by expiration of their terms, and the act in question did not contain any provisions for the election of the justices for the new districts made by the enlargement of certain of the old ones, and the abolishment of others. The regular August election was the first Thursday in August, 1906. The question was whether the justices of the peace for these new districts could be elected at such August election. The county authorities undertook, through the county court, to redistrict the county, just as the Legislature had done, and to fix the change to become effective the third Monday in July; so the August election was held under this arrangement, and the title of these offices was subsequently contested in the case referred to. It was contended against this title that the county court was without jurisdiction; and, inasmuch as the act did not go into effect until September 1, 1906, no election could be held under it; hence it was contended that the election was wholly void. The court, however, was of a different opinion. It was held that, inasmuch as the Constitution and the general law fixed the first Thursday in August pre-

ceding the expiration on September 1, 1906, of the constitutional term of 6 years of the then incumbents of the office of justice of the peace—

"it must be presumed that the General Assembly had these provisions in mind when it provided that the act in question should not go into effect until September 1, 1906, and intended that an election be held under them for election of officers for the newly created districts." 117 Tenn. page 400, 101 S. W. 181.

In *Railroad v. Byrne*, supra, it was said that the same principles apply in the interpretation of the titles of statutes. 119 Tenn. 278, 291, 292, 104 S. W. 460. An interesting illustration of the principle is shown in the interpretation in that case of the title of chapter 76 of the Acts of 1895 establishing the Court of Chancery Appeals, showing how the subject-matter of chapter 82 of the Acts of 1907, amending the former statute, were included within the title of such former act. 119 Tenn. 294-315, 104 S. W. 460. A briefer illustration is found in *Nichols & Shepherd Co. v. Loyd*, 111 Tenn. 145, 76 S. W. 911. The title of the act there examined was:

"An act to amend sections 2, 3 and 4 of an act passed March 21, 1891, being chapter 122 of said acts, and providing for the authentication of copies of charters to be filed with the secretary of state, registering abstracts of same in the register's office in each county in which the company desires, or proposes to carry on business." Acts 1895, c. 81.

Referring to the objection made the court said:

"The objection refers to the last clause of the caption, 'registering abstracts of same in the register's office in each county in which the company desires or proposes to carry on business.' The clause referred to, as it stands, is ambiguous, and does not, indeed, make good sense, and as such it may be rejected as surplusage. We think, however, that by oversight the words, 'and doing away with the,' were left out. With these words inserted before the words 'registering,' the clause quoted would make sense. * * * These words, if necessary, would be supplied by intendment, being, as they are, perfectly obvious." 111 Tenn. 148, 149, 76 S. W. 911.

The general doctrine is well stated in the following quotation from *Lewis' Sutherland on Statutory Construction*, § 377, as follows:

"Uncertainty of sense does not alone spring from uncertainty of expression. It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the Legislature. Hence if, viewing a statute from the

standpoint of the literal sense of its language, it is unreasonable or absurd, and obscurity of meaning exists, calling for judicial construction, we must, in that event, look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purposes; and, if such purposes can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law, the same as if it were plainly expressed by the literal sense of the words used. In that way, while courts do not and cannot properly bend words out of their reasonable meaning to effect a legislative purpose, they do give to words a liberal or strict interpretation within the bounds of reason, sacrificing literal sense and rejecting interpretation not in harmony with the evident intent of the lawmakers, rather than that such intent shall fail."

Further, on the general subject, see *Boro v. Hidell*, 122 Tenn. 80, 96, 120 S. W. 961, 135 Am. St. Rep. 857, and *Kirk v. State*, 126 Tenn. 7, 13, 14, 150 S. W. 83, Ann. Cas. 1913D, 1239.

Construing the title of the act here in question as necessarily referring to the federal census of 1910, it is beyond question that the county intended was Montgomery county. There is no doubt that this, or any other county, in the state, might have been designated in direct terms, and the power conferred to issue bonds for public purposes. *Todtenhausen v. Knox County*, 132 Tenn. 169, 172, 173, 177 S. W. 487, and cases cited. For other cases to same effect, see *Burnett v. Maloney*, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541, and *Lauderdale County v. Fargason*, 7 Lea (75 Tenn.) 153.

There was an amendatory act (chapter 330) passed at the same session of the Legislature purporting to amend the title of chapter 28, so as to embrace counties having the population basis referred to, "under the last or any subsequent federal census"; but, having held the original act valid, it is unnecessary for us to consider whether the amendment of the title merely would enable it to embrace counties that may hereafter have the same population. No county is involved in the present controversy except Montgomery, the bill having been filed to enjoin the issuance of certain bonds authorized to be issued by that county for road purposes, under chapter 28 aforesaid.

The chancellor sustained a demurrer to the bill, and we think his decree was correct, and it is therefore affirmed.

GILL v. STATE.

(Supreme Court of Tennessee. April 8, 1916.)

1. HOMICIDE \S 300(13) — INSTRUCTIONS — SELF-DEFENSE—MUTUAL COMBAT.

In a prosecution for homicide, a charge that when both parties willfully engage in mutual combat, and one of them slays the other in such combat, he cannot successfully invoke the law of self-defense, but would be guilty of at least voluntary manslaughter, is erroneous as excluding the right of one who entered into a combat without intent to do great bodily harm, and whose adversary thereupon resorted to a deadly weapon, to defend himself against an attack with such weapon by resorting to a similar weapon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 623; Dec. Dig. \S 300(13).]

2. HOMICIDE \S 340(1) — APPEAL — PREJUDICIAL ERROR—INSTRUCTIONS.

The giving of such charge was prejudicial where defendant, who was the only living witness to the homicide, testified that when deceased stated that he would get down from his wagon and settle the difficulty defendant was walking away and replied, "Get off," not knowing there was to be a fight, but supposing so, and that he thereupon looked around and saw deceased picking up rocks to throw at him, and picked up one himself and threw it just as deceased was in the act of throwing, which rock struck and killed deceased, since under that evidence it was for the jury to determine whether there was a mutual intent to fight with rocks.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 715; Dec. Dig. \S 340(1).]

3. INDICTMENT AND INFORMATION \S 144 — MISCONDUCT OF PROSECUTING ATTORNEY—EMPLOYMENT BY PROSECUTING WITNESS.

The acceptance by the Assistant Attorney General, who appeared before the grand jury and prepared and submitted the indictment for homicide, of employment from the prosecuting witness on a contingent fee to recover damages from defendant for the killing of deceased, is contrary to public policy, and, if the objection is seasonably raised, will result in the dismissal of the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 488; Dec. Dig. \S 144.]

4. CRIMINAL LAW \S 279—PLEA IN ABATEMENT—TIME OF FILING.

An objection to an indictment for homicide because the prosecuting attorney had accepted employment by the prosecuting witness to recover damages for the homicide is waived, where the plea in abatement was not filed until after the first continuance had been granted and its averments do not give sufficient reason for the delay or show that it was filed at the earliest possible moment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 643, 644; Dec. Dig. \S 279.]

Error to Criminal Court, Moore County; Ewing Davis, Judge.

C. A. Gill was convicted of voluntary manslaughter, and he brings error. Reversed.

Parks & Bean, of Lynchburg, and Geo. W. Sutton, of Fayetteville, for plaintiff in error. W. H. Swiggart, Jr., Asst. Atty. Gen., for the State.

FANCHER, J. Plaintiff in error, herein-after called "defendant," was convicted of voluntary manslaughter for the killing of

Odie Raby, and given an indeterminate sentence in the penitentiary of from two to ten years.

[1] The charge of the court on the subject of mutual combat is as follows:

"When one man invites another to combat and the other accepts the invitation, and they both willfully engage in a mutual combat, and one of them slays the other in such combat, he cannot successfully invoke the law of self-defense, but would be guilty of at least voluntary manslaughter."

The instruction in its effect, applied to the facts, holds that if one willingly entered into a mutual combat with another without any intent to do great bodily harm, and thereupon his adversary resorted to a deadly weapon and was about to assault him therewith, he would not have the right to defend himself or resort to such a weapon in his necessary self-defense. Such is not the law. *Irvine v. State*, 104 Tenn. 148-150, 56 S. W. 845; *Tom and Robert Smith v. State*, 105 Tenn. 317, 60 S. W. 145; *Daniel v. State*, 10 Lea (78 Tenn.) 262; *Foutch Case*, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 637.

In *Irvine v. State*, supra, the rule is reannounced that the mere unlawfulness of an attack does not deprive the aggressor of his right to slay the assailed party if this party, in his turn, in a manner disproportioned to the character of the assault, put in jeopardy, or on reasonable grounds appeared to do so, the life of the assailant. A charge was approved that if the defendants, or either of them, made a simple assault upon the deceased, intending little or no violence, and not of such character or under such circumstances as to give to the deceased reasonable grounds to apprehend death or great bodily harm, and this assault was met by the deceased with a counter deadly assault with a deadly weapon, the right of self-defense was not lost to the defendants.

This principle is also fully stated in the *Foutch Case*, supra.

In the case of *Daniel v. State*, supra, the charge was malicious shooting. The judge charged the jury as follows:

"It is proper for the court to say to you further that a person cannot be allowed to provoke a difficulty by his own improper conduct, or join willingly and voluntarily in a combat, and then escape under the plea of self-defense; and, if done willingly and voluntarily, it would make no difference which in fact struck the first blow, as both would be guilty, if both joined in the combat voluntarily and mutually."

Commenting upon this charge, the court said:

"The charge in this case holds, in effect, that a person who may, by improper conduct, provoke an assault, cannot be allowed to rely upon the plea of self-defense, nor can he rely upon such defense if he willingly engage in a fight, even if first assaulted and stricken."

The court held that there was error in the charge given in these unqualified terms.

[2] Defendant insists that he did not provoke a difficulty, but acted in a lawful man-

ner in asking deceased about a hayrake, and why he had not brought it home; that deceased became angry and used violent words, saying that he had not hurt the "damned rake," and that he did not aim to bring the "damned rake" home, and, seeing that deceased was becoming angry, defendant turned and walked away toward the front gate of his yard, saying as he did so, "Odle, you will pay for this;" that thereupon deceased replied, "You are a God damned rascal, wait till I get off this wagon and we'll settle it now;" that while yet walking away defendant looked back over his shoulder, saying, "Get off," and saw deceased getting over the front bolster of his wagon to alight; that deceased jumped from his wagon and reached for two rocks; that defendant also reached for two rocks at the same time, and, recovering first, threw just as deceased was regaining his balance with his arm raised to throw, striking deceased in the head, from which wound he died. Defendant said that he did not understand right, when deceased said, "Wait till I get off this wagon and we'll settle it now," that it meant a fight, and that when defendant said, "Get off," he did not know there was to be a fight, but supposed there was to be something of the sort. From this, his counsel insist that there was no mutual agreement to fight with rocks, but that deceased was in all respects the aggressor.

On the other hand, the state insists that defendant entered into a mutual combat; that, when deceased proposed to settle it as he was getting off the wagon, defendant invited him to get off, which meant a fight; that both parties mutually and with one accord went after rocks at the same moment, which evinced a mutual agreement to fight with deadly weapons.

If deceased was the aggressor and defendant did not intend to enter into a mutual combat with rocks or other deadly weapons when he told deceased to get off, but said this as a retort and while he was retreating, and then, seeing that deceased was getting off his wagon and observing deceased's effort to reach for the rocks, defendant went down when deceased did and grabbed up two rocks and threw as deceased was in the act of throwing, and did this only in order to defend himself from an imminent and deadly or dangerous assault from the deceased, or what appeared to him upon reasonable grounds to be such at the time, he would not

be deprived of his right of self-defense. The intent and purpose of defendant in mutually agreeing with deceased to settle the difficulty, if he so agreed, must determine whether defendant is deprived of the right of self-defense. If he meant to settle it with rocks or other dangerous or deadly weapons and engaged in mutual combat with such intention, he could not successfully invoke the law of self-defense.

The charge of the court is unqualified, and the jury was instructed that defendant cannot successfully invoke the law of self-defense if he accepted an invitation or invited his adversary to combat, which was accepted and they both willfully engaged in mutual combat. This charge deprived defendant of his insistence before the jury that his invitation to "get off," and other actions, did not imply an agreement to engage in a deadly or dangerous fight. This was the vital question in the case. Defendant is the only living eyewitness to the fight, and the error in the charge was not innocuous.

[3, 4] There is also an assignment of error because of the refusal of the trial judge to sustain a plea in abatement to the indictment. This plea, in substance, avers that the Assistant Attorney General, who appeared before the grand jury at and before the time the indictment was found and prepared and submitted the indictment, was in the employ of the prosecutor in a damage suit brought against the defendant herein for the unlawful killing of deceased, and was to receive a contingent fee in that case. This, if true, is against public policy. The Attorney General and his assistant are officers of the state. If either accepts a fee from a private individual in any matter about which he is to act officially, he is guilty of the most reprehensible conduct. The indictment would be dismissed if the plea had been seasonably interposed and sustained by the proof. However, it was waived because defendant allowed one continuance to pass and only filed his plea at the next term, when the case was called for trial, without giving sufficient reason for the delay. He averred he had discovered the facts since the last term. It must appear from the averments of the plea in abatement that it was filed at the earliest possible moment. *Chairs v. State*, 124 Tenn. 644, 139 S. W. 711.

For the error in the charge, the judgment is reversed, and the case is remanded for a new trial.

SCOTT v. SPURR.

(Court of Appeals of Kentucky. April 21, 1916.)

1. REFORMATION OF INSTRUMENTS \Leftrightarrow 45(2)—
OMISSION OR INSERTION BY MISTAKE—DE-
GREE OF PROOF.

To justify reformation of a written contract for an omission or insertion by mistake, the evidence must be clear, convincing, and satisfactory.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 158, 184-188, 190; Dec. Dig. \Leftrightarrow 45(2).]

2. REFORMATION OF INSTRUMENTS \Leftrightarrow 45(2)—
OMISSION OR INSERTION BY MISTAKE—SUF-
FICIENCY OF EVIDENCE.

Whether evidence of an omission from or insertion in a written contract by mistake is such as to justify reformation depends on the character of the testimony, the coherency of the entire case, and the documents, circumstances, and facts proven.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 158, 184-188, 190; Dec. Dig. \Leftrightarrow 45(2).]

3. REFORMATION OF INSTRUMENTS \Leftrightarrow 45(9)—
LEASE—OMISSION—SUFFICIENCY OF EVI-
DENCE.

In an action to reform a lease of a farm for omission of a stipulation as to its cultivation, evidence held sufficient to justify judgment for plaintiff.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 170; Dec. Dig. \Leftrightarrow 45(9).]

4. EVIDENCE \Leftrightarrow 397(1)—PAROL EVIDENCE AF-
FECTING WRITING—FRAUD AND MISTAKE.

Parol evidence is not admissible to vary or contradict the express terms of a written instrument unless its execution was procured by fraud or mistake.

[Ed. Note.—For other cases, see Evidence Cent. Dig. §§ 1756, 1763-1765; Dec. Dig. \Leftrightarrow 397(1).]

5. REFORMATION OF INSTRUMENTS \Leftrightarrow 16 —
POWER OF EQUITY.

A court of equity has power, on satisfactory parol evidence, to reform a written instrument, from which a stipulation has been omitted by mistake or fraud, to make it conform to the real terms of the contract between the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. \Leftrightarrow 16.]

6. REFORMATION OF INSTRUMENTS \Leftrightarrow 47—SPE-
CIFIC PERFORMANCE—REFORMED CONTRACT.

A court of equity having power to reform a written contract which fails by mistake or fraud to conform to the real contract between the parties can enforce specific performance thereof.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 195-198; Dec. Dig. \Leftrightarrow 47.]

7. REFORMATION OF INSTRUMENTS \Leftrightarrow 20 —
OMISSION BY MISTAKE—MUTUALITY—FRAUD-
ULENT AND INEQUITABLE CONDUCT.

The owner of a farm whose son negotiated its lease, the lessee presenting to such son, who was under pressure of business and anxious to get away, a writing for his signature which omitted a stipulation as to how the farm should be cultivated, could have reformation of the instrument in equity to embody the stipulation, for the requirement that the mistake in an instrument must be mutual in order that reformation may be had in equity has no application to a case where there is mistake on one side and

fraudulent or inequitable conduct on the other, causing omission of a stipulation agreed to and intended to be embraced in the instrument, or insertion of a stipulation not agreed to.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 79, 80; Dec. Dig. \Leftrightarrow 20.]

Appeal from Circuit Court, Fayette County.

Action by Ruth W. Spurr against D. C. Scott. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. G. Hobbs, of Lexington, for appellant. S. S. Yantis, of Lexington, for appellee.

HURT, J. This is an action in equity instituted in the Fayette circuit court by appellee, Ruth W. Spurr, against the appellant, D. C. Scott, for the purpose of reforming the written evidence of a contract which had been entered into by them, by which appellee had rented to appellant a farm of about 260 acres of land which was situated in Fayette county, for a term which began March 1, 1914, and ended March 1, 1915. The contract was made and the writing signed by the appellee on the 1st day of August, 1913. The appellee claimed that it was agreed upon between them to the effect that the farm should be cultivated and used by the appellant as follows: Twenty acres to be cultivated in oats; 55 acres which had been cultivated in corn to be cultivated by the appellant in wheat; and 20 acres to be cultivated in cow peas and millet—and that the remaining portion of the farm should be used for grazing purposes alone, and that these stipulations as to the manner of its cultivation were omitted from the writing which was entered into by oversight and mistake, and asked that the writing be reformed and these stipulations be embraced in it. The appellant interposed a general demurrer to the petition, which being overruled, he answered. The answer was simply a traverse of the averments of the petition, and with the further averment that the writing embraced the contract entered into, and that it provided that the farm was leased for general farming purposes, and that he had so used the farm. The affirmative averments of the answer were controverted by reply.

The depositions of a number of witnesses were taken, and upon submission of the case the court adjudged that the appellee was entitled to the relief sought, and that the writing which evidenced the contract should be reformed as prayed for, and from this judgment the appellant has appealed to this court.

The evidence showed that appellee was an aged lady, and resided several miles from the leased farm, adjoining to which the appellant resided. The contract between appellant and appellee was not negotiated by appellee in person, but in the transaction she was represented by her son, who had authority to make the contract for her as her agent.

The terms of the contract were agreed upon between appellant and the son of appellee late in the afternoon of August 1, 1913. One of the terms of the lease was that appellant should pay for the use of the farm during the period of the lease the sum of \$1,000, one-half of which should be paid upon the day of the making of the contract, and the remainder at the end of the period of the lease. The son of appellee was a candidate at an election which was to be held on the following day, and had an appointment to meet a number of his friends on that evening. The appellant proceeded from the place of making the contract to secure the money with which to make the cash payment, and before returning secured the services of a lawyer and caused him to reduce a part of the terms of the contract to writing. The writing embraced all the terms of the contract, except the stipulations in regard to the quantity of the lands which were to be cultivated and the character of the crops to be grown. At the place in the written lease in which the omitted stipulations should have been inserted there were several lines left blank. When appellant returned to the room of appellee's son with the money to be paid, he requested him to subscribe the appellee's name to the writing, which the son did after a partial examination of the paper, and, being hurried to meet his friends who were managing his candidacy for him, he subscribed appellee's name, received the money, and delivered the writing back to appellant, who promised to send him a copy of it, but never did so. The appellee did not learn that the contract was attempted to be put into writing until in the month of July of the following year. When she learned that the contract between appellant and her son had been put into writing, she endeavored to see the writing or to secure a copy of it, but failed to do so until the 22d day of September, 1914. After taking possession of the farm, appellant proceeded to put into cultivation in wheat and oats the portion of it which, according to the appellee, he was to cultivate under his contract, and also put into cultivation 8 or 10 acres of it in tobacco, and 90 to 100 acres in corn, and some other portion of it in other crops. The evidence conduces to show that, when cultivated as appellant cultivated it, the reasonable rental of the farm should have been about \$2,000, instead of \$1,000. According to the terms of the lease as written, the appellant could use any or all of the farm for general farming purposes, and was at liberty to cultivate any part or all of it in any kind of crops which he desired.

The appellant insists that the court below was in error when it adjudged that the terms of the contract which provided that appellant should cultivate 55 acres of the farm in wheat, 20 acres in oats, and 20 acres in peas and millet, and the remainder of the farm was to be used only for grazing purposes,

constituted a part of the agreement and were omitted from the writing signed by the agent of appellee by oversight and mistake, and insists that the evidence did not justify the court in arriving at such a conclusion.

[1-3] The rule in such cases which requires that the evidence, before justifying a reformation of a written memorial of a contract, because something has been omitted or something inserted in it by mistake, must be clear, convincing, and satisfactory, is a well-established doctrine in equity. *Crabtree v. Sisk*, 99 S. W. 268, 30 Ky. Law Rep. 572; *French v. Asher Lumber Co.*, 41 S. W. 261, 46 S. W. 701, 20 Ky. Law Rep. 380; *McMee v. Henry*, 163 Ky. 732, 174 S. W. 746. As to whether the evidence is such as the above rule demands before relief is granted depends upon the character of the testimony, the coherency of the entire case, and the documents, circumstances, and facts which are proven. Without undertaking to set out the evidence which was before the chancellor below, but considering the character of the testimony, and all the facts and circumstances proven, we conclude that the chancellor did not err in the conclusion at which he arrived as to what were the actual facts of the case.

[4] The appellant seriously insists that parol evidence cannot be admitted to explain, add to, or vary the terms of a written instrument, and therefore that all of the evidence heard by the court below was inadmissible. That parol evidence is not admissible to vary or contradict the express terms of a written instrument in the absence of a plea of fraud or mistake there is no doubt, but such evidence has always been held to be admissible to impeach a written instrument where its execution has been procured by fraud or by mistake. Really there is no other way of proving a mistake in a written instrument, except by parol evidence. The parol evidence is not admitted to contradict the face of the instrument, but to prove that there is a mistake in it.

[5] The contention that a court of equity has not power to reform a written instrument so as to make it conform to the real terms of the contract between the parties is likewise untenable. It is elementary that a court has no authority to make a contract for parties, but can only enforce such contracts as they have themselves made. The written instrument is, however, not the contract between the parties, but it is simply the memorial and convenient evidence of it. The contract is the terms and stipulations which have been agreed upon, and, if the writing does not contain all the terms and stipulations, or if stipulations are embraced in it to which the parties have not agreed, the writing does not contain the contract. It would be manifestly unjust and inequitable to enforce the terms of a writing to which a party has never agreed, and to which his signature has been secured by a

mistake. When a court of equity reforms a written instrument, it merely puts into it the real contract which the parties have made theretofore, and which was attempted to be included in it when it was executed, but there was a failure to do so because of fraud or mistake.

[6] It has become a doctrine too well established to be now called in question that when, by mistake or fraud, the written memorial does not conform to the real contract of the parties, a court of equity can reform the written memorial upon satisfactory parol evidence, and then may enforce a specific performance of it if desired, according to the real terms of the real contract existing between the parties. *McMee v. Henry*, 163 Ky. 732, 174 S. W. 746; *Bronston's Adm'r v. Bronston's Heirs*, 141 Ky. 640, 133 S. W. 584; *Worley v. Tuggle*, 4 Bush, 168; *Logan v. Langan*, 145 Ky. 601, 140 S. W. 1031; *Gregory v. Copeland*, 107 S. W. 768, 32 Ky. Law Rep. 1153; *Merchants' & Farmers' Bank v. Cleland*, 77 S. W. 176, 719, 25 Ky. Law Rep. 1169; *Mercer v. Hickman Ebbert Co.*, 105 S. W. 441, 32 Ky. Law Rep. 230; *Mattingly v. Speak*, 4 Bush, 316; *May v. May*, 96 S. W. 840, 29 Ky. Law Rep. 1033; *Pickett v. Taylor*, 96 S. W. 1111, 29 Ky. Law Rep. 1219; *Scales v. Ashbrook*, 1 Metc. 358; *Athey v. McHenry*, 6 B. Mon. 59; *Thomas v. McCormack*, 9 Dana, 108; *Anderson v. Bacon*, 1 A. K. Marsh. 48; *Dean v. Hall*, 105 S. W. 98, 31 Ky. Law Rep. 1306; *Thomas v. Conrad*, 114 Ky. 841, 71 S. W. 903, 24 Ky. Law Rep. 1630; *Id.*, 114 Ky. 841, 74 S. W. 1084, 25 Ky. Law Rep. 169; *Ky. Citizens' Bldg. Association v. Lawrence*, 106 Ky. 88, 49 S. W. 1059, 20 Ky. Law Rep. 1700; *Inskoe v. Proctor*, 6 T. B. Mon. 311; *Nutall v. Nutall*, 82 S. W. 377, 26 Ky. Law Rep. 671; *Wood v. Porter*, 4 Ky. Law Rep. 361.

[7] A mistake which is mutual is not the only mistake which will authorize the reformation of a written instrument, as is insisted for appellant. Where a written instrument does not embrace terms of the contract which are omitted from the instrument by the mistake of one of the parties only, and the other party is free from fraud or inequitable conduct, the instrument cannot be reformed so as to omit or embrace other terms, because to do so would be to make a contract for the parties which they have never made; but a written instrument may be reformed where the grounds for it is a mistake upon one side and fraud or inequitable conduct upon the other side by which there has been omitted from the instrument a stipulation which the parties have agreed to and intended to be embraced in the instrument, or where a stipulation not agreed to by the parties has been inserted in the instrument. The reformation was to be made so that the instrument may embrace

the actual contract made between the parties. If one party is laboring under a mistake, and the other party knows of such mistake at the time and conceals it, this conduct of the latter party is unconscionable, and equity will give relief, or, if the failure to correct a written instrument would be to allow a fraud to be perpetrated upon the other party, equity will grant the relief.

Criticism is made of the petition, in the case at bar, and, while the averments in regard to the mistake upon one side and inequitable conduct upon the other which are relied upon for the reformation of the instrument, and which are necessary to state a good cause of action, are not aptly stated, but, considering all the averments of the petition when taken together, it appears to be sufficient to support the action.

The judgment is affirmed.

SWANN v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 20, 1916.)

1. CRIMINAL LAW §400(6) — EVIDENCE — BEST AND SECONDARY — INCORPORATION — PAROL PROOF.

Proof of incorporation may be made by parol evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 879-886; Dec. Dig. § 400(6).]

2. CRIMINAL LAW §304(9) — JUDICIAL NOTICE.

The courts will take judicial notice of an act of the Legislature incorporating a fraternal order.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 706, 2951½; Dec. Dig. § 304(9).]

3. EMBEZZLEMENT §11(1) — PROSECUTION — EVIDENCE.

Where the treasurer of a fraternal order was not authorized to disburse any of its money, but only to deposit same upon collection, no settlement is necessary before he can be convicted of embezzlement; it appearing that he did not deposit all funds collected.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 9; Dec. Dig. § 11(1).]

4. CRIMINAL LAW §741(1) — TRIAL — INSTRUCTIONS.

Where there was much evidence tending to show accused was guilty of the crime charged, his motion for peremptory instruction is properly denied.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1705, 1713, 1728; Dec. Dig. § 741(1).]

5. EMBEZZLEMENT §48(4) — PROSECUTION — INSTRUCTION.

In a prosecution for embezzlement, where accused denied any intent to embezzle and contended that he had at all times been ready to make settlement with the order of which he was treasurer, although he did not deposit moneys collected as required, and evidence of the attempts of the order to obtain a settlement was received to show felonious intent, an instruction that, if accused did convert to his own use money of the order, with intent to permanently deprive the order, he was guilty of embezzle-

ment, regardless of whether he subsequently offered to make a settlement, was proper under the evidence.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 73; Dec. Dig. 48(4).]

Appeal from Circuit Court, Marion County. Ed. Swann was convicted of embezzlement, and he appeals. **Affirmed.**

Ben Spalding, of Lebanon, for appellant. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CLARKE, J. Appellant was indicted, tried, and convicted under section 1202 of the Kentucky Statutes of embezzling money, the property of Lodge No. 53 of the "United Brothers of Friendship and Sisters of the Mysterious Ten for the State of Kentucky and its Jurisdiction," a Kentucky corporation, of which appellant was the treasurer.

Appellant insists that the commonwealth failed to prove that the society, whose property the embezzled funds were, was a corporation; and that, as it was necessary for this fact to have been proven, it was error in the trial court to refuse the peremptory instruction asked for by appellant.

[1, 2] This contention upon the part of appellant is based upon the assumption that the fact of incorporation could not be proven in any way other than by record evidence, but this is not the rule. In *Morris v. Commonwealth*, 129 Ky. 294, 111 S. W. 714, 33 Ky. Law Rep. 831, it was held by this court that the fact of incorporation can be proven by parol evidence, and authorities are cited therein fully supporting this rule. In the instant case, counsel for appellant on cross-examination asked the commonwealth's witness Walter Roberts the following question: "Now you say your institution is incorporated?" To which witness replied, "Yes, sir." This alone, if there had been no other evidence upon the question, was sufficient proof of the fact of incorporation. Moreover, this society was incorporated in 1868 by act of the Legislature of which judicial notice will be taken. *L. & N. R. Co. v. Commonwealth*, 154 Ky. 294, 157 S. W. 369.

[3] Appellant next insists that there was no evidence showing that he had misappropriated any of the funds of said society; but we are unable to understand how, upon this record, such an assertion could have been made. The uncontradicted evidence shows that as treasurer it was appellant's duty to take charge of the receipts of the society at each meeting and deposit same in a certain bank to the credit of the society, from which they could be withdrawn only upon check of the society executed by the president and secretary. Appellant had no power to pay out or withdraw said funds from said bank in the absence of such authority, which was not given; and his duty as treasurer with reference to the funds committed to his care,

as shown by the proof, consisted solely in taking charge thereof from the time of their receipt until they could be deposited to the credit of the society in the bank.

Appellant was treasurer from January 1 until October 13, 1914, during which time sums were turned over to him as treasurer aggregating \$461.70, and during which time he deposited in the bank sums totaling only \$300.30, showing that he had failed to deposit in the bank, and appropriated to his own use, the sum of \$161.40, the property of the society. It is shown that on January 14, 1914, at probably the first meeting of the society after appellant's election as treasurer, there was turned over to him for deposit the sum of \$40.15, of which sum he deposited in the bank to the credit of the society only \$30.15, and that at nearly every meeting thereafter the sum deposited in the bank was less than the amount collected and turned over to appellant. Counsel for appellant insists that this does not show that appellant had misappropriated any of the funds; that that fact could not be made to appear until after a settlement was had. This contention is entirely without merit. No settlement was necessary or required under the proof here. Appellant had no authority to pay out or dispose of a single cent of the funds intrusted to his care; his only duty in reference thereto being to take charge of same at the society's meeting and convey them safely within 24 hours thereafter to the bank, the designated depository of the society.

[4] These are the only objections pointed out by counsel for appellant to the sufficiency of the evidence, and it is apparent that the court did not err in overruling appellant's motion for a peremptory instruction, as there was much evidence tending to show that appellant was guilty of the crime charged. *Gordon v. Commonwealth*, 136 Ky. 508, 124 S. W. 806.

[5] The only other ground relied upon by appellant for reversal is that the court erred in giving the following instruction to the jury:

"(3) If you believe from the evidence beyond a reasonable doubt that the defendant did in fact convert to his own use the money of the said lodge with the intention to permanently deprive the said lodge of its property therein as fully set out in instruction No. 1, then it is immaterial whether or not he afterwards offered or attempted to make settlement thereof."

We do not think that the giving of this instruction under the evidence was error. Appellant practically admitted in his testimony, as the proof shows he had admitted to the trustees of the society, that there was a shortage in his accounts. He, however, contended that he had at all times been willing to make good this shortage, but that he had not been afforded a reasonable opportunity to do so. Considerable evidence with reference to the efforts of the officers of the society to get appellant to make satisfactory settlement of his shortage before the indict-

ment was returned and of his statements in reference thereto was introduced. All of this evidence was material and competent only upon the question of intent, and the instruction of the court objected to, in effect, only excluded from the jury the consideration of that testimony as an avoidance or bar. There can be no question but that said instruction properly states the law, and without it the evidence heard by the jury with reference to the attempted settlement might have been confusing, in view of which the giving of the instruction by the court, it seems to us, was proper and necessary; but, however that may be, appellant certainly was not prejudiced in any way thereby, for, if the fraudulent conversion had been completed, restitution would not have avoided its effect, and certainly the mere offer to restore could not have done so. 15 Cyc. 507.

No substantial error having been pointed out or discovered in the trial of appellant, the judgment is affirmed.

HENRY v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 19, 1916.)

1. INDICTMENT AND INFORMATION ⚡30—ACCUSATORY PART—VARIANCE IN BODY OF INDICTMENT.

No discrepancy between the accusatory part and the body of an indictment will be fatal to the sufficiency of the indictment unless the discrepancy be of such a substantial and material character as to be misleading.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 120; Dec. Dig. ⚡30.]

2. INDICTMENT AND INFORMATION ⚡147 — DEMURRER—GROUNDS.

Under Ky. St. § 1164, punishing shopbreaking, an indictment in which the allegation of felonious taking is insufficient is not demurrable; the gravamen of the offense being the felonious breaking with intent to steal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490-494; Dec. Dig. ⚡147.]

3. BURGLARY ⚡25—INDICTMENT—SUFFICIENCY—BREAKING AND ENTRY.

Under Ky. St. § 1164, punishing shopbreaking, an indictment not alleging an entry by defendant is sufficient; the statute requiring only felonious breaking with intent to steal.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 48-50; Dec. Dig. ⚡25.]

4. CRIMINAL LAW ⚡1090(14), 1122(5)—APPEAL—BILL OF EXCEPTIONS—INSTRUCTIONS.

Where there is no bill of exceptions and no order making the instructions a part of the record, they cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2818, 2948, 3204; Dec. Dig. ⚡1090(14), 1122(5).]

Appeal from Circuit Court, Franklin County.

Frank Henry was convicted of crime, and appeals. Affirmed.

Dulin Moss, of Frankfort, for appellant. M. M. Logan, Atty. Gen., O. S. Hogan, Asst. Atty. Gen., Wiley O. Marshall, of Frankfort, and Victor A. Bradley, of Georgetown, for the Commonwealth.

OLAY, C. Frank Henry was convicted of housebreaking, and his punishment fixed at confinement in the penitentiary for not less than two years nor more than two years and one day. He appeals. Appellant challenges the sufficiency of the indictment, which is as follows:

"The grand jury of the county of Franklin, in the name and by the authority of the commonwealth of Kentucky, accuse Frank Henry of the crime of housebreaking, committed as follows: The said Frank Henry, in the said county of Franklin, on the 10th day of September, A. D. 1915, and within 12 months before the finding of this indictment, did unlawfully and feloniously, and with intent to steal therefrom, break that certain shop in county of Franklin, belonging to the George T. Staggs Company, a corporation, and did take and steal therefrom certain brass values and fittings, property of said company, with the fraudulent intent then and there to convert the same to his own use and to permanently deprive the owner of its property therein, against the peace and dignity of the commonwealth of Kentucky."

[1] It is first insisted that the indictment is defective because it charges two offenses, that of housebreaking under section 1162 of the Kentucky Statutes, and that of shopbreaking under section 1164 of the Kentucky Statutes. In the case of Overstreet v. Commonwealth, 147 Ky. 471, 144 S. W. 751, we had occasion to consider a similar question. There the offense charged in the accusatory part of the indictment was arson, while the facts set out in the descriptive part of the indictment showed that the defendant had committed the offense of houseburning. In holding the indictment good on demurrer the court laid down the rule that no discrepancy between the accusatory part of an indictment and the body of the indictment will be fatal to the sufficiency of the indictment, unless the discrepancy be of such a substantial and material character as to be misleading. We see no reason why the same rule should not apply to the facts of this case. While the accusatory part of the indictment does charge the offense of housebreaking, the body of the indictment contains a statement of the acts constituting the offense of shopbreaking in language sufficiently clear, concise, and certain to enable a person of common understanding to know the offense charged, and to enable the court to pronounce judgment on conviction according to the rights of the case. Drury v. Commonwealth, 162 Ky. 123, 172 S. W. 94.

[2] The point is also made that the indictment fails to charge a felonious taking. Whether the language employed with reference to the taking is sufficient or not we deem it unnecessary to decide. The gravamen of the offense is the felonious breaking

with intent to steal. This the indictment sufficiently charges. The indictment being good in this respect, it is not bad on demurrer, even though the allegation with reference to the taking be insufficient.

[3] Another ground of attack is that the indictment does not allege an entry by defendant. All that the statute requires is that there shall be a felonious breaking with intent to steal. It is not necessary either to allege or prove that the defendant actually made an entry into the warehouse or shop. For the reasons indicated, we conclude that the indictment is sufficient.

[4] There being no bill of exceptions and no order making the instructions a part of the record, they cannot be considered. *Hollin v. Commonwealth*, 163 Ky. 392, 173 S. W. 1106.

Judgment affirmed.

SINGLETON v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 18, 1916.)

WITNESSES §48(4) — COMPETENCY — PERJURY — STATUTE.

Under Ky. St. § 1180, providing that if any person be convicted of the crime of false swearing, he shall ever afterwards be disqualified from giving evidence in any judicial proceeding or from being a witness in any case whatever, a witness convicted of the crime of false swearing is disqualified from testifying either for himself or in behalf of another person.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 114; Dec. Dig. §48(4).]

Appeal from Circuit Court, Mercer County.

Action between the Commonwealth of Kentucky and Thomas Singleton. From the judgment, Singleton appeals. Affirmed.

E. H. Gaither, of Harrodsburg, for appellant. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The only question in this case is the correctness of the ruling of the lower court in refusing to allow one Buell Singleton to testify on behalf of appellant in the trial of the case. The evidence of this offered witness was rejected because he had been convicted of the crime of false swearing.

Section 1180 of the Kentucky Statutes provides that if any person be convicted of the crime of false swearing, "he shall ever afterwards be disqualified from giving evidence in any judicial proceeding, or from being a witness in any case whatever."

The argument of counsel for the appellant is that in the enactment of this section it was only the intention of the Legislature to disqualify the person so convicted from testifying for himself, and that it should be so construed.

The obstacle in the way of this construc-

tion is that the language of the statute excludes it. It peremptorily disqualifies a person who has been convicted of false swearing from giving evidence in any judicial proceeding or from being a witness in any case whatsoever. And there is no constitutional limitation that we are aware of on the power of the Legislature to impose a disqualification like this.

In *Hinton v. Commonwealth*, 184 Ky. 511, 121 S. W. 434, and *Roberson v. Woodfork*, 155 Ky. 206, 159 S. W. 793, the court held that a person who had been convicted of false swearing and who had not been pardoned, could not testify for himself; and it is conceded that it was competent for the Legislature to disqualify a person convicted of crime from testifying for himself, but insisted that this prohibition should not be extended as to exclude a person from testifying when his testimony is offered in behalf of another person. There might be some reason for making a distinction like this, but the Legislature did not see fit to do so. As we look at the matter, the question is one that addressed itself to the law-making department, and it saw proper to impose the additional punishment directed by the statutes on persons convicted of certain offenses.

The judgment is affirmed.

TROTTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 19, 1916.)

LARCENY §7—FRAUDULENT PURCHASE.

One who buys and takes possession of a horse under an agreement to execute a mortgage thereon the next day for the price is not guilty of stealing it, though he then sells it, instead of executing the mortgage; one not being guilty of larceny where he obtains title as well as possession, whatever fraud he may have practiced in obtaining it.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 19; Dec. Dig. §7.

For other definitions, see *Words and Phrases*, First and Second Series, *Larceny*.]

Appeal from Circuit Court, Campbell County.

George Trotter was convicted and appeals. Reversed, with directions for new trial.

Howard M. Benton, of Newport, for appellant. Lawrence J. Diskin, of Newport, M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

TURNER, J. Appellant was indicted in the Campbell circuit court charged with horse stealing, and upon his trial was convicted and sentenced to the penitentiary for not less than two nor more than three years, and from this judgment he has appealed.

The evidence shows that the prosecuting witness, McKenney, in September, 1915, was the owner of a small fruit store in Ft. Thomas, Ky., and a horse, wagon, and harness

which he used in that business; that on the 13th day of September he entered into a contract of sale with one Moore by which Moore was to pay him \$100 for the business and the horse, wagon, and harness, \$25 to be paid down, and the balance in installments of \$5 per week. But the trade with McKenney was only a tentative one, and Moore was to take the business on trial for a week, and determine at the end of that time whether he would conclude the trade. The next day after the trade between McKenney and Moore, and after the business, horse, wagon, and harness had been turned over to him, Moore took the appellant, Trotter, into partnership with him in the venture, and turned over the store, horse, wagon, and harness to Trotter. Moore went off, and during the week was engaged in another occupation; Trotter remaining in custody of the store and the other property, including the horse, and during that week conducted the store and drove the horse. On the following Saturday night Moore concluded that he would not enter into the deal with McKenney, and that night went to McKenney and told him that he would not carry out the trade, but told him that Trotter would take the store, and talked to McKenney about the contemplated deal with Trotter. Prior to that time, however, and when the deal was first made between McKenney and Moore, and after McKenney had taken Trotter into partnership with him, and had turned over the store and horse and wagon to Trotter, the latter took the horse, removed it from the stable where McKenney had kept it to another stable rented by him for the purpose, and bought feed and cared for the horse.

On the Sunday morning after Moore had notified McKenney that he would not enter into the deal, and constructively, as he testifies, turned back to McKenney the possession of the store and the horse, which were then both in the custody of Trotter, McKenney and Trotter entered into an agreement by the terms of which, as testified to by McKenney and his wife, Trotter bought the store for \$25, and made a payment of \$15 thereon, and was to pay the other \$10 in a day or two; and they both testified that Trotter agreed to execute on the following day (Monday) a mortgage for \$75 on the horse and wagon, the mortgage to be payable at the rate of \$15 per week. Although these two witnesses in their evidence undertake to separate the transaction between McKenney and Trotter as to the store from the transaction as to the horse, wagon, and harness, the written receipt given by McKenney at the time recites the payment of \$15 "on deal."

The evidence of the defendant is that he bought the store and the horse, wagon, and harness used in connection therewith all in one transaction, and was to pay \$100 for them, that he paid the \$15, as shown by the receipt, on the whole deal, and agreed to pay \$10 in the next day or two, and to pay the

remaining \$75 at the rate of \$5 per week, and that nothing was said about the execution of any mortgage. This trade was made on Sunday morning, and on that same day appellant took the horse from the stable, the same having been actually in his custody since the Tuesday before, used it and drove it publicly, and on the following day drove it to Cincinnati in the conduct of his business, and there on about noon of that day sold the horse, wagon, and harness for \$35, but the lower court declined to permit him to state what he did with the money. That night he returned to Ft. Thomas, saw and talked with the wife of the prosecuting witness, and on the following day went to the home of his father in Indianapolis, and was gone for several weeks.

Giving to the evidence of the prosecuting witness and his wife the fullest effect, and drawing from it every reasonable inference, it can mean nothing more nor less than that on that Sunday morning McKenney sold the store to Trotter for \$25, and received a \$15 payment thereon, and sold to him at the same time the horse, wagon, and harness for \$75, which was to be secured on the following day by the execution of a mortgage on the horse, wagon, and harness to secure the latter payment. The very fact that he agreed to execute a mortgage on this property is inconsistent with any other theory than that it had been sold to him. The agreement of McKenney to accept the mortgage on this property is conclusive of the fact that the minds of the parties had met, and that the title to the property was in Trotter. Surely he would not have agreed to accept as security a mortgage on property which he knew did not belong to the mortgagor.

Assuming for the sake of the argument that at the time of this agreement McKenney in law had possession of the property, and that Trotter at the time did not in good faith intend to execute the mortgage, as it is said he agreed to do, is it horse stealing? The title and possession passed with the closing of the trade, Trotter already being the custodian of the horse, and there is nothing to indicate he forcibly or otherwise took the possession from McKenney. The case is in no wise different from one in which a purchaser bought and took possession of a horse and agreed to pay for it on the following day. Here he bought it and took possession of it under an agreement to execute a mortgage on the following day to secure the purchase price.

It is true that one who by trick or artifice fraudulently obtains only possession of personal property of another with the purpose of appropriating it to his own use is guilty of larceny; but, if he at the time he obtains such possession also obtains title to the property, he is not guilty of larceny, no matter what fraud or trickery he may have practiced in obtaining such title. *Elliott v. Commonwealth*, 12 Bush, 176; 25 Cyc. 83.

The directed verdict of acquittal asked for by the appellant should have been given.

The judgment is reversed, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

LITTLE v. CONSOLIDATION COAL CO.

(Court of Appeals of Kentucky. April 18, 1916.)

1. ACTION \S 47 — MISJOINDER — CONTRACT AND TORT.

Civ. Code Prac. § 83, providing for the joinder of actions on contracts growing out of the same transaction, does not authorize the joinder of actions on contract and tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 469, 470, 472-489; Dec. Dig. \S 47.]

2. MASTER AND SERVANT \S 205(5) — INJURIES TO SERVANT—LIABILITY OF MASTER—CONTRACT.

An injured employé cannot recover against his master on the promise of a boss to protect him from danger, where the evidence does not show that the boss had authority to bind the master by such agreement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 548; Dec. Dig. \S 205(5).]

3. MASTER AND SERVANT \S 276(2) — INJURIES TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.

Where there is no evidence from which it could be determined whether a mine switch was set against plaintiff's car by a fellow employé or by a stranger or was misplaced by plaintiff's car striking it, there can be no recovery, since plaintiff has failed to establish negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. \S 276(2).]

4. MASTER AND SERVANT \S 265(12) — INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE.

Evidence by plaintiff that so far as he knew there was no one in the mine except defendant's employés, of whom there were between 75 and 125, at the time a mine switch was set against plaintiff's car, does not justify the presumption that the switch was changed by an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 891, 906; Dec. Dig. \S 265(12).]

5. MASTER AND SERVANT \S 141 — INJURIES TO SERVANT—DUTY OF MASTER—RULES.

A master whose business is dangerous, complicated, and carried on by a great number of servants, owes them the duty to make, publish, and enforce reasonable rules to protect them from the negligence of each other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. \S 141.]

6. MASTER AND SERVANT \S 278(19) — INJURIES TO SERVANT—NEGLIGENCE OF MASTER—FAILURE TO ENFORCE RULES.

Where a master had made and published rules governing its employés, evidence that one of the employés on one occasion violated a rule is not sufficient to show that the master had knowledge that the rules were being habitually violated, without which knowledge it cannot be held liable for failure to enforce its rules.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 969; Dec. Dig. \S 278(19).]

Appeal from Circuit Court, Letcher County.

Action by Sylvan Little against the Consolidation Coal Company. Judgment for the defendant on directed verdict, and plaintiff appeals. Affirmed.

Roscoe Vanover, of Pikeville, for appellant. W. G. Dearing and D. D. Fields, both of Whitesburg, Jesse Morgan, of Hazard, and A. W. Young, of Morehead, for appellee.

CLARKE, J. Appellant, who was plaintiff below, filed this suit against appellee, his employer, seeking to recover \$3,000 damages for injuries sustained by him on June 8, 1913, when a loaded coal car that he was running out of the mine on a track laid for that purpose jumped the track at one of the several switches which connected the main track with tracks leading to different parts of the mine. He alleges that the accident was caused by the negligence of some other servant of appellee working in a different department negligently setting the switch where the accident occurred so as to throw the car off the track. He also alleges that said accident was caused by the negligence of appellee in failing to establish, publish, and enforce rules among its employés against tampering with the switches. The allegations of the petition were denied, and contributory negligence and assumed risk pleaded, which affirmative pleadings were traversed by reply. Thereafter appellant filed an amended petition alleging that a short time before the accident he knew the switch had been left open; that he informed appellee's bank boss who had charge of same, and whose duty it was to furnish appellant a reasonably safe place to work and safe appliances, that the switches were being left open by appellee's servants; that said bank boss promised appellant to see to it that said switches were not left open any more; and that appellant relied upon this promise. Appellee objected to the filing of this amended petition, and, his objections having been overruled, it was filed and by consent traversed of record. Upon the trial, at the close of appellant's testimony, the court sustained appellee's motion for a directed verdict, and entered a judgment dismissing the petition. Appellant contends that under the proof he was entitled to have his case submitted to the jury upon each of the following propositions: (1) Negligence of the appellee in failing to publish and enforce reasonable rules and regulations for the safety of its numerous employés. (2) Negligence of a fellow servant working in a different department of appellee's services from which appellant was engaged. (3) That the assurances given him by the bank boss that he would see to it that the switches were not set against him any more constituted a contract binding upon the company.

. It is contended for appellee that the amended petition was a departure, in that it sought to recover on contract, and that it could not therefore be joined with the causes of action set up in the original petition which were upon tort; and that, even if the filing of the amended petition was proper, the appellant was not entitled to recover upon said promise as a contract, because the evidence failed to show authority upon the part of the servant who made this promise to him to make a contract on behalf of the company.

[1] 1. We will first dispose of the question arising in connection with the amended petition. It has been so frequently held by this court that action to obtain relief on both contract and tort cannot be joined under section 83 of the Civil Code that we deem it unnecessary to do more than to cite the following authorities upon the question: *C. & O. R. Co. v. Patton*, 146 Ky. 656, 143 S. W. 25; *Willis v. Tomes*, 141 Ky. 431, 132 S. W. 1043; and *Newman on Pleading and Practice*, § 372.

[2] However, the evidence here is not sufficient to show any authority upon the part of the bank boss, who is alleged to have made this assurance to appellant, to bind the company upon a contract, and, even if the amended petition was properly filed, it cannot avail appellant as a contract.

[3] 2. The evidence for appellant shows that about five minutes before the accident, as he was going into the mine for the purpose of running the car out, he set the switch so as to lead his car from the head of the entry, where he got it, off of that track and on to the main track; that there was a sufficient grade to cause the car to run of its own weight from the place where appellant took charge of it onto the main track where he was to leave it, to be taken on out of the mine by a motor; that a brake was on the rear end of the car where appellant had to stand to operate the brake and control the car; that after he had started the car, and while he had it under control, and as it turned off of the switch track onto the main track at the switch, it jumped the track, and appellant was injured in the wreck. The testimony shows that after the accident the switch was set against appellant, but there is no evidence to show how or by whom the condition of the switch had been changed since appellant had set it as he went into the mine about five minutes before, and from the evidence it might have been negligently done by some other of appellee's employes, or purposely by some one who had a spite against the appellant, or it possibly might have been done by the force and manner in which the car struck the switch.

[4] Appellant attempts to account for the changed condition of the switch by the fact that a few days before the accident he had seen an Italian, whom he did not know, change it after he had fixed it so as to let

his car out in safety. Appellant testifies that, so far as he knew, there was no one in the mine at the time of the accident except employes of appellee, of whom there were between 75 and 125. He contends that therefore it must be assumed that the change in the switch was the negligent act of some employe of appellee, but to this contention we cannot agree. Where from the evidence it is equally as consistent to believe that the accident resulted from the want of negligence upon the part of the defendant as to believe it resulted from his negligence, the plaintiff has failed to prove negligence and cannot recover. *Woodburn v. Union Light, Heat & Power Co.*, 164 Ky. 33, 174 S. W. 730; *C. & O. R. Co. v. Adkins*, 167 Ky. 329, 180 S. W. 517; *Caldwell's Adm'r v. C. & O. R. Co.*, 155 Ky. 609, 160 S. W. 158; *L. & N. R. Co. v. Chambers*, 165 Ky. 736, 178 S. W. 1101; *L. & N. R. Co. v. Mink*, 168 Ky. 394, 182 S. W. 188.

[5, 6] 3. Appellant contends that since appellee's business is dangerous, complicated, and carried on by a great number of servants, it was its duty to make, publish, and enforce reasonable rules and regulations to protect its employes from the negligence of each other, citing 4 *Thomp. Neg.* 4135, and section 4161. Assuming that this correct rule was applicable in the instant case, the testimony of appellant shows that this company had such a rule in reference to the conduct of its employes with reference to the switches, but the proof fails to show that this rule which the company had made and published was not enforced. Appellant only proves that upon a single occasion when he says the Italian set this same switch against him that this rule was ever violated by an employe of the company, unless it happened again at the time of this accident. Section 4161 of *Thomp. Neg.*, cited by appellant, after stating the duty of the company to enforce such a rule when it is its duty to make and publish same, is as follows:

"If therefore it comes to the knowledge of the employer that the rules which he has devised for the protection of his servants are habitually disobeyed by a particular servant, and he takes no step to remedy such misconduct, he will be liable to a fellow servant of such disobedient servant for an injury happening through the violation of such a rule."

And section 4162 of the same volume reads thus:

"But, whatever the sound view on this question may be, it is clear, upon all the analogies, and upon good authority, that the employer is not an insurer of the observance of his rules, but that the measure of his duty is discharged when he exercised reasonable care to the end of enforcing them."

From which it will be seen that appellant totally failed to show a failure upon the part of appellee to so enforce said rule as to render it liable for the accident in this case.

Appellant having failed to make out a case upon any of the propositions upon which

he based his right of recovery, the lower court properly sustained appellee's motion for a peremptory instruction.

Wherefore the judgment is affirmed.

STARK v. COMMONWEALTH,

(Court of Appeals of Kentucky. April 19, 1916.)

1. INDICTMENT AND INFORMATION \S 110(6)—UNLAWFUL DETAINING—INDICTMENT.

Though exercise of force must be proven, an indictment, charging, in the words of Ky. St. \S 1158, denouncing the crime, merely that defendant did "unlawfully detain" the female "against her will," for purpose of carnal knowledge, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 291-294; Dec. Dig. \S 110(6).]

2. ABDUCTION \S 16—UNLAWFUL DETAINING—INSTRUCTION.

An instruction, on a prosecution under Ky. St. \S 1158, for detaining a female against her will, need not charge that the detention was forcibly accomplished; detention necessarily implying force.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. \S 24; Dec. Dig. \S 16.]

3. ASSAULT AND BATTERY \S 91—CONSENT—EVIDENCE.

Evidence that the female fled after defendant kissed her and put his hand on her person warrants the conclusion that his advances were without her consent, and so constituted an assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. \S 136; Dec. Dig. \S 91.]

Appeal from Circuit Court, Warren County.

J. Will Stark was convicted, and appeals. Affirmed.

T. W. & R. C. P. Thomas, of Bowling Green, for appellant. M. M. Logan, Atty. Gen., and Charles H. Morris, Asst. Atty. Gen., for the Commonwealth.

MILLER, C. J. The appellant J. Will Stark, was indicted by the grand jury of Warren county upon the charge of having detained a woman against her will. The jury found appellant guilty of an assault, and fined him \$500. He appeals, and asks a reversal upon three grounds: (1) That the indictment was insufficient, because it failed to charge that the detention of the woman was accompanied by force; (2) that the court erroneously failed to instruct the jury that, in order to convict the appellant, the detention must have been forcible; and (3) that appellant was not guilty under the proof.

Appellant was indicted under section 1158 of the Kentucky Statutes, which reads as follows:

"Whoever shall unlawfully take or detain any woman against her will, with intent to marry such woman, or have her married to another, or with intent to have carnal knowledge with her himself, or that another shall have such knowledge, shall be confined in the penitentiary not less than two nor more than seven years."

[1] The indictment follows the letter of the statute, and charges that Stark "did un-

lawfully, willfully, and feloniously detain" the female named in the indictment, against her will, for the purpose of having carnal knowledge of and sexual intercourse with her, she not being his wife. Appellant cites no authority in support of the contention that the indictment should specifically charge a forcible detention. He insists, however, that the statute does not cover cases where the arts of persuasion alone were used, and that, although a man might persuade a woman against her will to remain with him for the purpose of improper relations, he would not be guilty of the offense described in the statute unless he used some physical force in order to effect the detention. It is further stated that, while this court has uniformly held that the force used in the detention of a woman might be slight, it has, nevertheless, in every case, been held that physical force is an essential ingredient of the offense. In taking this position, however, appellant's attention is centered upon the proof necessary to convict, rather than upon the indictment, which merely charges the statutory offense. The test of the sufficiency of an indictment charging a statutory offense was stated as follows, in *Tudor v. Commonwealth*, 184 Ky. 189, 119 S. W. 817:

"Where the offense charged is purely statutory, the indictment will be sufficient if it follows the language of the statute, provided the words of the statute are fully descriptive of the offense; but, if they are not, it is essential that the indictment set out the facts which constitute the offense so the defendant may have notice of that with which he is charged. Our meaning finds an illustration in the case of *Commonwealth v. Moore*, 30 S. W. 873, 17 Ky. Law Rep. 212, in which this court in passing upon an indictment for carrying away or injuring property found under section 1256, Ky. St. 1909, held that, although it followed the language of the statute, the indictment was insufficient, because it failed to allege that the taking of the property was without the consent of the owner."

See, also, *Commonwealth v. Gregory*, 121 Ky. 458, 89 S. W. 477, 28 Ky. Law Rep. 407; *Howerton v. Commonwealth*, 129 Ky. 482, 112 S. W. 606, 33 Ky. Law Rep. 1008; *Bennett v. Commonwealth*, 133 Ky. 452, 118 S. W. 332; *Commonwealth v. White*, 109 S. W. 324, 33 Ky. Law Rep. 70.

The offense is the detention of the woman against her will; it is fully described by the statute. But, in proving the detention, the commonwealth necessarily must show the exercise of force, although it be slight; otherwise there would be no detention. The indictment, therefore, was sufficient when it charged the detention of the woman against her will; it fully described the offense.

[2] The instructions followed the language of the indictment, and there is no complaint of them except in the one respect above mentioned. But the first instruction not only gave the law applicable to the case under the statute, but it further told the jury that any force, however slight, exercised

against the woman named in the indictment, if any there was, against her consent, for the purpose of having carnal knowledge with her, was a detention in contemplation of law. Appellant does not complain of the qualifying clause of the instruction above pointed out, but insists that the principal instruction should have required the jury to find that the detention was forcibly accomplished, before they could find the appellant guilty. But, as above pointed out, detention necessarily implies force, and the qualifying clause of the instruction properly told the jury that if any force, however slight, was used, detention was the result.

By the second instruction the court further advised the jury that if they believed the appellant had not been proven guilty of detaining the woman as predicated in the first instruction, but should believe beyond a reasonable doubt that the defendant assaulted her by laying his hands upon her person, they should find the defendant not guilty as charged in the indictment, but should find him guilty of the lower offense of assault, and fix his punishment accordingly.

By the third instruction, the jury was further directed that in case of doubt, they should find the defendant guilty of the lower offense of assault, and fix his punishment accordingly; and appellant was found guilty of assault only. There is no complaint of this instruction, and under the adjudications of this court, the instruction was proper. *Bowman v. Commonwealth*, 104 S. W. 263, 31 Ky. Law Rep. 828.

[3] Little need be said upon the merits of the case, since the appellant practically admitted every fact charged against him, his only contention being that his advances to the prosecuting witness were made with her consent. That, however, was a question for the jury. And, when both the appellant and the prosecuting witness agreed that the prosecuting witness fled after appellant kissed her and put his hand upon her person, the jury were fully warranted in their conclusion that appellant's advances were without the consent of the prosecuting witness, and constituted an assault within the meaning of the law.

We see no prejudicial error in the record. Judgment affirmed.

GOODMAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 19, 1916.)

1. INTOXICATING LIQUORS §138—OFFENSES—DELIVERY IN PROHIBITION TERRITORY.

Under Ky. St. § 2569b, subsec. 2, as to delivery of intoxicating liquor in prohibition territory, knowledge that the statement required on the package is false is an essential of the crime.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 148; Dec. Dig. §138.]

2. CRIMINAL LAW §21—INTENT—PRESUMED.

Where an act is declared unlawful by statute, criminal intent may be imputed to a person voluntarily doing the act.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 22; Dec. Dig. §21.]

3. INTOXICATING LIQUORS §188—PROSECUTION—EVIDENCE—"KNOWING."

Under Ky. St. § 2569b, subsec. 2, making it an offense to deliver liquor in prohibition territory, "knowing" that the required statement of personal use is false, such knowledge may be imputed to one who has not obtained of the consignee a statement that the liquor is for personal use, or who has not in good faith relied on such statement.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 148; Dec. Dig. §138.

For other definitions, see *Words and Phrases*, First and Second Series, *Knowing*.]

4. CRIMINAL LAW §112(1)—VENUE—INTOXICATING LIQUORS.

Under Ky. St. § 2569b, subsec. 2, making it an offense to deliver liquor in prohibition territory knowing that the required statement of personal use is false, the circuit court of the county in which delivery is made has jurisdiction to try one accused of violation.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 220, 221, 230; Dec. Dig. §112(1).]

Appeal from Circuit Court, Lyon County.

George H. Goodman was convicted of shipping liquor into prohibition territory, and appeals. Affirmed.

Berry & Grassham, of Paducah, for appellant. Denny P. Smith, of Cadiz, and M. M. Logan, Atty. Gen., for the Commonwealth.

SETTLE, J. The appellant, George H. Goodman, senior member of the partnership styled George H. Goodman Company, liquor dealers of the city of Paducah, was indicted in the Lyon circuit court for the offense of "shipping a package containing spirituous liquors to a person in a county where by law the sale of such liquors was at the time prohibited, bearing the name and address of the consignor and consignee, and also the statement that said liquor was for personal use, knowing said statement was untrue and false."

By agreement of the parties a jury was waived and the case tried by the court upon the following agreed statement of facts, viz:

"It is agreed between the commonwealth and the defendant, Geo. H. Goodman, who is the senior member of said firm, that this case be submitted to the court for trial without the intervention of a jury upon the following agreed state of facts, to wit: That on or about August 8, 1915, George H. Goodman Company, of Paducah, Ky., shipped to Sam G. Cash at Eddyville, Ky., four quarts of spirituous liquors, that at said time the county of Lyon in which Eddyville is situated wherein by law the sale of spirituous liquors was prohibited and said Cash at said time lived in said county, and that this shipment was made by George H. Goodman Company to Sam G. Cash in pursuance to an order in words and figures as follows, to wit:

"Paducah, Ky.

"Gentlemen: Inclosed you will find \$3.00 for which please ship to Sam G. Cash, Eddyville, Ky., four quarts of Old Oakford 100 proof. Yours truly."

"And it is further agreed that Sam G. Cash did not send said order nor know anything thereof, and did not accept said whisky when it got to Eddyville, and that he did not want same for his personal use nor at all, and that there was on the outside of the package containing said 4 quarts the name of the consignee and the name of the consignor, and also the words, 'For the personal use of the consignee.'"

The trial resulted in the appellant's conviction and the infliction upon him of a fine of \$100. His dissatisfaction with the judgment of conviction led to this appeal. The indictment was returned under section 2569b, Kentucky Statutes, subsection 2 of which provides:

"It shall be unlawful for any person to consign, ship or transport in any manner whatsoever, or deliver any of the liquors mentioned in section 1 of this act to any person in any county, district, precinct, town or city where by law sale of such liquors is prohibited, or for any person residing in such prohibited territory to receive any such liquors, unless there appears upon the outside of the package containing any such liquors, except such as may be received by distillers, brewers, or wholesale liquor dealers, the following information: Name and address of the consignor, name and address of the consignee, and the statement either that such liquors are for personal and family use of the consignee, or for medicinal, mechanical, chemical, scientific or sacramental purposes. Any consignee accepting or receiving any package containing such liquors upon which appears a false statement, or any person consigning, shipping, transporting or delivering any such package, knowing that said statement appearing upon the outside thereof is false, shall be deemed guilty of violating the provisions of this act."

[1] It is insisted for appellant that on a plea of not guilty, as made in this case, it was incumbent upon the commonwealth to show by evidence that he consigned, shipped, or transported the package of liquor in question to Sam G. Cash at Eddyville with knowledge at the time that the statement appearing upon the outside thereof, "For the personal use of the consignee," was false, and that there was no evidence showing such knowledge on his part. The first of these contentions seems to be sound, for it will be observed from the language of the statute, *supra*, that to constitute the offense for which appellant was indicted, at the time of shipping the package of liquor he must have known that the statement, "For the personal use of the consignee," appearing upon the outside thereof, was false.

It remains to be seen whether the record before us furnishes any evidence that appellant, in putting on the package of whisky shipped to Sam G. Cash at Eddyville the words, "For the personal use of the consignee," knew that they were false. It is manifest that the order upon which he claims to have shipped the whisky did not advise him that it was for the personal use of the consignee for it contains no such statement.

In addition, the order was not signed by Cash, the person to whom it directed the whisky to be shipped. In view of these facts it is patent that appellant, in stating that the package of whisky was for the personal use of the consignee, acted upon a mere assumption that such was the use to which it was to be put. He therefore acted at his peril and took the risk resulting from making himself sponsor for the truth of the statement, thereby obtaining the privilege of shipping the liquor into local option territory, a privilege of which he could not legally avail himself, unless the statement was made. The provision of the statute which permits the shipment of intoxicating liquors into local option territory for the personal use of the purchaser or consumer, or other uses therein specified is intended for the protection of other persons living in the community, rather than that of the dealer in and purchaser of such liquors. If it is not for the personal use of the consumer he has no right to purchase or have it shipped to him in dry territory, nor has the dealer the right to sell or ship it to him. If it is not sold for the personal use of the consumer and is not so used, there is nothing to prevent his selling it to others in violation of the local option law.

[2] It was not necessary that there should have been a criminal intent on the part of appellant to violate the law. As said in *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, Judge Cooley writing for the court:

"I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. * * * Many statutes which are in the nature of police regulations, as is this, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." *Locke v. Commonwealth*, 113 Ky. 864, 69 S. W. 763, 24 Ky. Law Rep. 654; *Ellison v. Commonwealth*, 69 S. W. 765, 24 Ky. Law Rep. 657; *City of Paducah v. Jones*, 126 Ky. 809, 104 S. W. 971, 31 Ky. Law Rep. 1203.

There are a number of statutory offenses in which the law does not inquire into the intention of the person who violates the statute. It is immaterial whether it was good or bad. It is the act constituting the offense that the law looks at and punishes, and not the intention of the perpetrator. In other words, acts that are not done from compulsion or by necessity, if forbidden by statute, although not *malum in se*, are punishable as provided in the statute, notwithstanding they might have been done without criminal intent. *Wayman v. Commonwealth*, 14 Bush, 466; *Jellico Coal Co. v. Commonwealth*, 96 Ky. 373, 29 S. W. 26, 16 Ky. Law Rep. 463. If it were conceded, however, that a criminal intent was necessary to constitute the offense with which appellant is charged, it might well be said that such intent would be presumed if the act constituting the offense were unlawful and voluntarily done. Thus, in

Commonwealth v. Bull, 13 Bush, 666, it is said:

"When the Legislature has declared that a given act shall be deemed unlawful, the person voluntarily doing said act will be charged with a criminal intent."

[3] If a license dealer, residing in a county where intoxicating liquors are permitted to be sold, should ship such liquor into local option territory to a resident thereof, upon an order therefor purporting to be signed by the latter, accompanied by the price to be paid for such liquor and stating that the liquor was for his personal use, such sale, though the order should turn out to be a forgery, would not violate the statute, unless the forgery were known to the licensed dealer at the time of the shipment of the liquor or the circumstances attending the transaction were such as to put a person of ordinary prudence, situated as he was, upon inquiry as to its genuineness that would reasonably have led to discovery of the forgery. In such case the mistake on the part of the dealer would excuse the violation of the statute resulting from the sale; but as in the instant case the order upon which the liquor was shipped did not contain the information that it was for the personal use of the consignee and was not signed by the latter, these facts furnished some evidence conducing to prove knowledge on the part of appellant that the statement made by him on the package containing the liquor, that it was "for the personal use of the consignee," was false. At any rate, if not sufficient to show such actual knowledge, they were amply sufficient to have created in the mind of an ordinarily prudent person, such as appellant is presumed to be, a doubt of the genuineness of the order and put him upon such inquiry as would have disclosed its spuriousness. Such inquiry could have been made by him of Cash, the supposed consignee, by telephone or mail. His failure to make such inquiry, together with the inadequateness of the order referred to, was obviously regarded by the circuit court as furnishing evidence sufficient to constitute the offense charged in the indictment.

Even if the order upon which appellant claimed to have shipped the liquor to Sam G. Cash had purported to have been signed by the latter, in the absence of a statement in the body of the order or his personal assurance otherwise given, that it was for the personal use of Cash, how could he have known it was to be applied to such uses? The agreed statement of facts contains nothing to show that he acquired such information from any other source, hence it does no violence to the evidence or to appellant's rights to say that if he had not been informed that the liquor was for the personal use of Cash, his statement to that effect placed upon the package was unauthorized, and therefore known by him to be false.

The word "knowing," as used in the stat-

ute, should be construed in the light of the evil the statute is intended to prevent, and not given the technical meaning of criminal intent necessary to the committing of a crime per se. The object of the statute is not to define a crime, as such, but to prohibit the sale of intoxicating liquors in local option districts, except for the personal use of the purchaser and other uses therein specified, therefore the seller of such liquor to be shipped into such territory putting on the package the statement that it is for the personal use of the purchaser, must at least obtain of the latter the information that it is for his personal use, and in good faith rely upon such statement.

[4] We do not agree with appellant's counsel that the Lyon circuit court was without jurisdiction to try this case. Appellant was not indicted for illegally selling intoxicating liquors; therefore the rule announced in *Josselson Bros. v. Commonwealth*, 159 Ky. 468, 167 S. W. 374, *Josselson Bros. v. Commonwealth*, 158 Ky. 787, 166 S. W. 234, *Commonwealth v. Gast*, 143 Ky. 674, 137 S. W. 515, *Parker v. Commonwealth*, 147 Ky. 715, 145 S. W. 754, and *Weidemann Brewing Co. v. Commonwealth*, 123 Ky. 556, 96 S. W. 834, 29 Ky. Law Rep. 1026, that sales are to be regarded as made where the order and money are received by the dealer at his place of business and the liquor there delivered to the carrier for transportation, does not apply. Here the indictment was for making the false statement on the package prohibited by the statute. Such statement that the liquor was for the personal use of the consignee, though written on the package at the place of shipment, was on it when it was attempted to be delivered to Cash in Lyon county and within local option territory, and the falsehood and deception involved in its use were as well calculated to deceive the public in Lyon county as in the county of shipment. In view of these facts the statute may well be said to have been violated in Lyon county.

We see no reason for disagreeing with the conclusion reached by the circuit court; hence the judgment is affirmed.

CITY OF HENDERSON v. YEAMAN et al

(Court of Appeals of Kentucky. April 18, 1916.)

1. ADVERSE POSSESSION §31 — STATUTE — PUBLIC STREETS.

Under Ky. St. § 2546, providing that a statute of limitations shall not begin to run in respect to actions by a municipality for the recovery of any street, alley, or other public easement or the use thereof until the city authorities shall be notified in writing by the party claiming possession that such possession will be adverse to the title of such municipality, and that until such notice a person in possession will be deemed the tenant at will of the municipality, where plaintiff's grantor annexed a portion of a strip of land dedicated as a street and fenced it for 15 years without notifying the city au-

thorities of his assertion of right to possession, plaintiff's title cannot be sustained on the theory that it was adversely held.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. ☞ 31.]

2. ADVERSE POSSESSION ☞ 41—TIME—REQUISITE—STATUTE.

In an action to quiet title to a strip of land appropriated by the plaintiff's grantor and claimed by the city to have been dedicated as a street, if not a street at the time of the appropriation the right to claim it by adverse possession is controlled by Ky. St. § 2505, providing that an action for the recovery of real property must be brought within 15 years after the right to institute it first accrued to the plaintiff or to the person from whom he claims.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 184-206; Dec. Dig. ☞ 41.]

3. DEDICATION ☞ 63(2)—ACCEPTANCE—OFFICIAL ACTS OR PROCEEDINGS.

Where a street was set apart and dedicated as a public way when the town was laid out, the fact that the city did not take physical possession or control or improve the street, or that it was not used by the public, without some affirmative act manifesting a purpose to abandon by the city, will not work an abandonment of the street or affect the city's right to reclaim it against an adverse holder.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 104-106; Dec. Dig. ☞ 63(2).]

Appeal from Circuit Court, Henderson County.

Suit by Myra S. Yeaman and others against the City of Henderson. Judgment for the plaintiffs, and defendant appeals. Reversed, with directions to dismiss.

B. S. Morris, of Henderson, for appellant. Yeaman & Yeaman, of Henderson, for appellees.

CARBOLL, J. The city of Henderson was laid out in 1797 by a company that then owned the land on which the city was subsequently established. This company made a plat of the proposed city, dividing it into 182 squares containing 4 acres each. These squares were laid off into lots of convenient size, each lot being numbered consecutively from one up. Two streets were laid off 100 feet wide running parallel with the river, and 10 cross-streets 100 feet wide were also laid off running at right angles from the river. All of the lots shown on the plat, which was recorded in the clerk's office of Henderson county, called for the streets on which they abutted, although it does not appear that any of the streets were then named. It further appears that, immediately following the laying out of the city, an instrument called an ordinance was adopted by the company and placed on record, in which it was set out that the lots and streets shown on the plat should constitute the town of Henderson and the lots be disposed of to any person who might want to buy them, and, as will appear later on, the numbers of the lots given in this plat

are yet recognized in transfers of property in the city.

The street set apart on the map nearest to and running parallel with the Ohio river is now known as Water street, and running parallel with this street the next street is now known as Main street. From Main street to the Ohio river, crossing Water street at right angles, a street was set apart on the plat of the town 100 feet wide, and this street is now known as Dixon street. When these streets were first named does not appear, but it is evident that they were given the names they now bear many years ago. In 1877, S. A. Young purchased a lot fronting on Main street and abutting on Dixon street. The deed conveying the land to Young described it as:

A house and lot "beginning at a stake corner of Dixon and Main streets and running thence in a northerly direction on Main street 70 feet to a stake; thence in a westerly direction and at right angles 208 feet and 8½ inches; thence at right angles in a southerly direction 70 feet to a stake in the line of Dixon street; thence with the line of Dixon street in an easterly direction 208 feet and 8½ inches to the beginning, and being part of lot 143 on the original plat of the city of Henderson."

It will be noticed that the deed conveying this lot to Young recognized Dixon street as one of the lines of the lot, and when Young bought it he did not have or set up any claim to any part of Dixon street. Indeed, under the conveyance to him he could not well have done this, because the deed did not purport to convey to him any part of Dixon street. It further appears that, although the street now known as Dixon street was recognized and set apart on the plat of the city as a public way, it was never improved by the city in any manner or used generally by the public as a street, at least between Main street and Water street; the reason for this being that from Main street to Water street Dixon street is in a sparsely settled part of the city, and a deep ravine interfering with travel runs in the street beginning at a point near Main street and getting deeper and wider towards Water street. With this situation existing, Young, soon after he bought the lot, commenced filling up the ravine in Dixon street adjoining his lot, so that he might have a way to get into his lot from Main street by going down Dixon street. After filling up the ravine in Dixon street, Young annexed to his lot a strip of Dixon street 40 feet wide and 208 feet and 8½ inches deep from Main street; and, after having it in possession for probably 15 years, inclosed by a fence that he built in part, he sold this strip to the appellee Mrs. Yeaman, in 1911.

In 1913, the appellee Mrs. Yeaman brought this suit in equity against the city of Henderson for the purpose of having her title to this strip of ground quieted, stating in her petition that she was the owner and in the actual possession of the land claimed, and

that the city of Henderson was asserting ownership to it. For answer to this suit the city set out the laying off and establishment of the city as heretofore stated, and that Dixon street had been dedicated and set apart as one of the public streets of the city and had been recognized as one of the streets from the time of the laying off of the city, and it was consequently entitled to have it adjudged one of the streets of the city. In a reply, after traversing the answer, Mrs. Yeaman pleaded that she and those under whom she claimed had been in the adverse and continuous possession of the land in controversy for more than 50 years, and that the city had never set up any claim to it until shortly before this suit was brought. A rejoinder completed the issues, and, after the evidence had been taken, the case was submitted, and it was adjudged that Mrs. Yeaman was the owner of and entitled to the quiet enjoyment of the land in dispute. From this judgment, the city appeals.

In addition to the foregoing facts, the evidence further shows that about 1850, or at any rate at least more than 15 years before 1873, a fence was built across Dixon street where it intersected Main street, and for many years prior to 1878 there was also an old fence across Dixon street between Main street and Water street, and these remained, although in a dilapidated condition, until Young appropriated that part of Dixon street heretofore mentioned. Who built these fences across Dixon street, or why they were built, the evidence does not show. Plainly they were not put across the street by any person with the view of taking possession of the street inclosed by these fences or setting up any adverse claim thereto, because there is no evidence in the record that any person at any time or in any manner asserted any adverse claim to any part of Dixon street until Judge Young inclosed that part of it that now constitutes the lot in controversy. So that, in determining the beginning and the length of time there has been an adverse holding of any part of this street, we cannot go back any farther than 1877, when an adverse claim to the part now in controversy was first asserted by Judge Young. He is the first person who appears to have actually taken possession of any part of the street with a view of appropriating it to his own use, and his possession only dates from 1877. It is a further matter about which there is no dispute that Judge Young did not at any time notify in writing the trustees or the council of the city that he was about to or had taken possession of this strip of ground with a view of claiming and holding it adversely, nor did he give the city authorities any notice whatever of any kind of his assertion of right to the possession of this lot.

[1, 2] It is important that the time when this adverse holding and assertion of right commenced, as well as the failure of Young

to give the notice indicated, should be kept in mind in view of section 2546 of the Kentucky Statutes which became a law in 1873. Gen. St. 1873, c. 71, art. 5, § 1. This statute, as it has been in force since 1873, reads as follows:

"The limitations mentioned in the first article of this chapter shall not begin to run in respect to actions by any town or city for the recovery of any street, alley, or other public easement, or any part of either, or the use thereof in such town or city, until the trustees, or the council or the corporation, by whatever name known or called, have been notified in writing by the party in possession, or about to take possession, to the effect that such possession will be adverse to the right or title of such town or city. Until such notice is given, all possession of streets, alleys and public easements, or any part of either, in any town or city, shall be deemed amicable, and the person in possession the tenant at will of such town or city."

Considering this statute in connection with the undisputed facts, it is apparent that the right of Mrs. Yeaman to the possession of the part of this street claimed by her cannot be sustained on the theory that it was adversely held by her and those under whom she claims, if Dixon street is to be treated as one of the streets or public ways of the city, because, in the absence of the notice provided for in section 2546, the statute of limitation never commenced to run against the city after Young took adverse possession of the part of the street in question, and there was no adverse holding prior to his occupancy. The right therefore of Mrs. Yeaman to hold this lot against the claim of the city, if she has such right, must be put, as urged by her counsel, on the ground that Dixon street was not at the time it was appropriated by Young or subsequently one of the streets or public ways of the city, and, if this were so, the statute quoted would have no application to the case. If Dixon street was not at the time Judge Young appropriated part of it, or subsequent thereto, a street or public way of the city, then the right to claim it by adverse possession would be controlled by section 2505 of the Statutes, providing that an action for the recovery of real property can only be brought within 15 years after the right to institute it first accrued to the plaintiff or to the person from whom he claims, and, as Judge Young and Mrs. Yeaman had actual adverse and continuous possession of this lot for more than 15 years previous to the institution of this action, the right of the city to recover the lot would be barred by limitation. The question therefore recurs: Was the place called Dixon street a street or public way of the city at the time that Judge Young inclosed and took adverse possession of the lot now claimed by Mrs. Yeaman?

On behalf of Mrs. Yeaman, the argument is made that, although in the original plat of the town what is now known as Dixon street was set apart by the owners of the land as one of the streets and public ways of the proposed city and dedicated to the use of the

public, it was never accepted in any manner by the city authorities as a street or public way, and so is not now and never was a street or public way of the city. In support of this argument, our attention is called to the cases of *Gedge v. Com.*, 9 Bush, 61; *City of Latonia Agricultural Ass'n*, 139 Ky. 732, 100 S. W. 356; *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129.

In the *Gedge Case*, it appears from the opinion, which was handed down in 1873, that in 1852 W. K. Wall conveyed to the Covington & Lexington Railroad a small parcel of ground adjacent to the town of Cynthiana, to be held by the railroad company for the purpose of a depot, including a street 30 feet wide which was to be kept open for the public use. The railroad company took possession of the ground under the conveyance and used it in connection with the public. The 30 feet of ground designated as a street by the conveyance was never marked off either as a street or road. The only use the public made of it was in crossing it in order to get to the depot. In 1871, the railroad company constructed a switch in such a way as to obstruct the travel upon this 30 feet, and was indicted for creating and continuing a nuisance in and across the public street and highway of the town of Cynthiana. In holding that the indictment would not lie because there had never been any acceptance of this street by the city, the court said:

"The deed from Wall establishes the dedication of the ground for public use, and the only question to be considered is: Can the commonwealth maintain an indictment against the railroad company for a nuisance in obstructing its way created by the grant from Wall, in the absence of any other acceptance by the public than the mere user in crossing it? The right in Wall to make the dedication of the ground to be used as a street or highway is unquestioned, but such a dedication does not compel the town of Cynthiana to improve the street or keep it in repair. * * * A road or street dedicated to the public must be accepted by the county court or town, either upon their records or by the continued use and recognition of the ground as a highway for such a length of time as would imply an acceptance. * * * In the present case, the ground, or the most of it, conveyed by Wall to the railroad company, was left vacant and uninclosed from the year 1854 until the year 1868, and during this whole period the public used the ground of the company as much as they did the 30 feet of ground dedicated for the street. The entire open space was used by the public in their ingress and egress to and from the depot and cattle pens of the company. The ground in controversy had never been even marked out or used as a street by the trustees of the town of Cynthiana, and there was no acceptance by them, either expressly or by implication, of the dedication. The fact of the town limits having been extended so as to embrace the ground where the switch was constructed is not an acceptance of the benefit of the grant from Wall; and, if the acceptance had been shown, still, as there was no street marked out or used by the public on the ground designated, this indictment could not be sustained against the appellants for the obstruction complained of."

In the *City of Latonia Case*, decided in 1906, it appears that in 1869 one Jones made

a plat of his farm situated outside the city limits of the city of Covington, laying off the land into town lots and dividing them by streets and alleys. In 1894, the city of Latonia was organized, and in 1900 its boundaries were extended so as to annex a part of the land that had been laid out into lots and streets by Jones. In 1882, the Latonia Agricultural Association bought about 200 acres of the land Jones had thus laid off for a city site and converted it into a race track. After it had been inclosed and used as a race track for about 15 years, the city of Latonia undertook to open up through the race track grounds the streets laid off in the Jones plat, and thus the litigation arose. In holding that the streets shown on the plat of the Jones subdivision could not be opened through the grounds occupied by the race track because they had never been accepted as streets or public way by the city of Latonia or any public authority, the court said:

"The property in question was outside of the city of Latonia at the time of the attempted dedication by the Jones plat. The attempt to establish a town on the Jones farm had been abandoned. The appellee purchased all the property platted except a few lots, buying out all adverse interests of lot holders within its boundary. It held the property adversely for more than 15 years before the right of the city of Latonia (assuming it to have a right) to claim the streets arose, or could have arisen. The bar of the statute was complete long before the city of Latonia annexed the property of appellee. It has erected upon the land improvements said to be worth from \$200,000 to \$250,000. To permit the city to project the streets in question through its property now would be to entail upon it a complete loss of the property as a race track. No court would permit this to be done without the establishment on the part of the city of a clear legal right so to do."

In the *Mulligan Case*, the question was whether the city could charge property owners with the cost of improving certain ways that had been set apart for the public use in connection with the sale of lots, and it was held that, as the city had never accepted these public ways in such manner as to constitute them streets of the city in accordance with section 3094 of the Statutes, the property owners could not be charged with their improvement, saying:

"The dedication of a street or public place to public use and its use by the general public does not make it a part of the public ways of the city until it has been accepted by the city. Under the common law as well as the statute, acceptance is necessary to convert the dedicated territory into a public way or street of the city. The mere act of dedication, or the use of the dedicated territory by the general public, however long it may have continued, does not put upon the city the duty of acceptance, nor can the city be charged with the care of a public place merely by the dedication of it to a public use. Whether the city will assume the burden that follows acceptance rests with it."

We have set out these cases at some length for the purpose of showing that while they sustain, as do many others, the contention of counsel for Mrs. Yeaman that dedication without acceptance will not for all purposes convert a place into a street or public

way or charge the city with its care, we are yet of the opinion that they should not be followed as controlling authority in the disposition of the case we have. In no one of them was the question here presented directly involved, and in each case the decision was put on the existence of material facts that do not appear in this record.

[3] Returning to our case, the street now called Dixon street was one of the streets set apart as a public way when the town of Henderson was laid off; and so it remained without occupancy or adverse claim on the part of any person until 1877. Until that time no person had asserted any adverse claim to it or appropriated any part of it to his own use. Continuously from the beginning it had retained its character as a street. It is true it had not been improved by the city or any property owner and remained in the same condition it was in when first set apart as a street. But the mere fact that the city failed to improve the street, or its nonuser by the public, did not work an abandonment of it as a street.

When streets are set apart and dedicated to the public use, and a town or city is built on the ground so laid off for this purpose, the city authorities are not required to take physical possession or control of each street, or to improve it in order to save their right to reclaim it against any person who undertakes to hold it adversely. Nor is there any period fixed by statute or judicial ruling in which a street so dedicated must be taken possession of by the city or improved by it in order to prevent an abandonment. The city may delay manifesting its acceptance by control and improvement as long as it pleases. It may wait until the needs of the public or the city require its improvement, and in the meantime, and since the statute of 1873, no person may take possession of a street dedicated to public use, although there may have been no record acceptance of it or overt act of control, without giving the statutory notice of his intention to appropriate it.

If mere nonuser by the public, or failure on the part of the city authorities to take some affirmative action looking towards the acceptance of land dedicated to public use as a street or way, would work an abandonment of it for the purpose for which it was dedicated, to the extent that private individuals might boldly take possession of the ground so dedicated and convert it to their own uses, the city as well as the public might be deprived of valuable property, and the right to use and occupy land that had been set apart for public purposes. Nor do the authorities support the claim here made that the nonuser of this street by the public and the failure of the city to indicate its acceptance of it by some affirmative act between the time it was dedicated to public use and 1873, had brought about an abandon-

ment that left this land in 1873, as well as in 1877, free to be taken possession of by any person who might assert a hostile, adverse claim to it and hold it under such claim for 15 years.

It should be kept in mind that, soon after the town of Henderson was laid off and Dixon street and the other streets set apart for the use of those who might inhabit the city, a town was in fact established on the site laid off, which soon grew into a city of several thousand people; and this street, which was in the beginning within the corporate limits of the town, has always remained within the corporate limits of the city. The land known as Dixon street was a street when Judge Young in 1877, took possession of a part of it. The public and the city had the same claim and right to it in 1877 that the public and the town had when Henderson was first established as a town. It remained as it was when first set apart as a street.

The city at all times had the right to improve it, and the public at all times had the right to the use of it. Acceptance in some form was, of course, necessary before the city could be charged with the duty of maintaining it in good condition for travel and before it could be made liable in damages to any person injured by its unsafe condition; although acceptance of this nature was not necessary to enable the city to retain and hold the possession of the street for the uses to which it was dedicated. Nothing short of some affirmative act on the part of the city manifesting its purpose to abandon the street could work an abandonment, and the record does not disclose any such act. It had not lost in the year of its existence any of the characteristics of a street, nor had the purpose of its dedication been interfered with by any hostile claimant until 1877. If it was a street in 1797, so it was a street in 1877. The fact that the city had not improved it, or the fact that the public had not used it, did not extinguish the purpose for which it was dedicated or authorize its appropriation by one who had not right or title to any part of it. Judge Young entered upon this street as a trespasser and took possession of it without any color or pretense of title, although, except for the statute of 1873, his adverse holding and occupancy would have barred the right of the city. But the statute of 1873 protected the street against adverse holding subsequent to that time, as the notice provided for in the statute was not given to the city, and so the right of the city to reclaim possession is not barred by limitation.

The leading case in this state on this subject is *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232. The facts in that case are very similar to the facts in the case at bar, and the court, in an elaborate opinion, reached the conclusion that when a town is laid off with designated streets and public ways and afterwards a city is established on the

site, the ground designated for public use must be taken to have been irrevocably dedicated to that use. It was further said:

"The dedication, having been made and proved by the map and sales and conveyance of the lots with reference to it, did not require a subsequent user to establish or prove it. * * * To say that a dedication to the use of the future town and of the public, made when the site of the town was in a state of nature, would be lost if not followed by immediate and continued use, or should be limited to the extent to which it was thus used, would deprive the dedication of its practical and of its intended value, and would make it a mockery."

In *City of Covington v. Hall*, 98 S. W. 317, 30 Ky. Law Rep. 356, the court, in speaking of the dedication of streets to public use by the owner of ground who laid it off for the purpose of establishing a town, said:

"When a street has been dedicated in this way, the city may accept it when it gets ready, and in the meantime the owners of the lots calling for the streets are estopped, not only as against the other owners, but as against the city, to say that the ground is not a street."

In *Elliott v. City of Louisville*, 123 Ky. 278, 90 S. W. 990, the court said:

"It is well settled that the mere nonuser of public property—that is, property taken or dedicated to public use—is not an abandonment, no matter how long the nonuser may exist."

These cases, which are distinctly in point, are in line with the weight of authority, as may be seen by an examination of 37 Cyc. 195; *Dillon on Municipal Corporations*, vol. 1, § 667; *Elliott on Streets and Roads*, §§ 187 and 1176—and are controlling here.

Wherefore the judgment is reversed, with directions to dismiss the petition.

CUMBERLAND R. CO. v. HEMPHILL

(Court of Appeals of Kentucky. April 18, 1916.)

1. CARRIERS — 280(1)—TAKING UP PASSENGERS—PLATFORMS.

It is the duty of a carrier to provide for its passengers a reasonably safe platform and approaches to its trains, and if it fails in such duty, and by reason thereof a passenger is injured, it is liable in damages.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085-1088, 1102, 1106, 1109; Dec. Dig. — 280(1).]

2. CARRIERS — 305(2) — NEGLIGENCE—PROXIMATE CAUSE.

To recover for injuries from a carrier's failure to provide a reasonably safe platform and approaches to its trains it must be shown that such failure was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1136-1139, 1245; Dec. Dig. — 305(2).]

3. CARRIERS — 305(2)—TAKING UP PASSENGERS — INJURY — NEGLIGENCE—PROXIMATE CAUSE.

In an action for damages for personal injury, plaintiff, whose evidence showed that the "creeling" of his foot as he was about to board defendant's train was the proximate cause of his fall and consequent injury, and failed to show that the "creeling" of his foot was due to

any negligence on the part of the defendant, was not entitled to recover.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1136-1139, 1245; Dec. Dig. — 305(2).]

Appeal from Circuit Court, Knox County.

Action by John W. Hemphill against the Cumberland Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Black, Black & Owens, of Barbourville, for appellant. Golden & Lay, of Barbourville, for appellee.

OLAY, C. In this action for damages for personal injuries, plaintiff, John W. Hemphill, recovered of the defendant, Cumberland Railroad Company, a verdict and judgment for \$500. The company appeals.

The facts are as follows: The company operates a line of railroad extending from Artemus to Wheeler, in Knox county, a distance of about 10 miles. At Wheeler, the southern terminus of the road, the Brush Creek Coal & Manufacturing Company operates a coal mine. Its store building is located within a few feet of the railroad track. In front of the building is a wooden platform 6 or 8 feet wide and running parallel with the track for about 35 feet. Between the wooden platform and the track is a dirt and cinder fill. No depot building is maintained at Artemus, but the passengers pay cash fare for their transportation. The company's trains stop opposite the platform and fill. Plaintiff was employed in the coal company's store. A few days before the accident he had been notified that the coal company contemplated reducing its store force and that he would probably be one of the men who would be laid off. On the evening of January 24, 1914, plaintiff and his wife, who was partially blind, left the store building and went across the platform and along the cinder fill for the purpose of taking passage on defendant's evening train. The car steps were near the end of the fill and platform. After certain passengers had alighted, those intending to board the train walked up the steps and entered the cars. Among those who boarded the train was plaintiff's wife. After she, with the conductor's help, had boarded the train, plaintiff says that before he started to pull upon the train he stepped around, and in doing so "creeled his foot in some way" and fell down the embankment, a distance of 5 or 6 feet. He claims that his hands and arm were badly hurt, and that his back was wrenched and had been hurting him ever since. Because of the pain in his back he had hardly been able to rest either during the day or the night since he had gotten hurt. At the time of the accident he weighed about 200 pounds and was 64 years of age. In going from the store to the train and at the time of the injury he carried a lantern. The conductor also had a lantern.

There was no railing around the embankment, and no light was maintained by the company. After the injury plaintiff was picked up and boarded the train. He and his wife visited his son-in-law until Monday morning, when he returned to the store, where he worked for the coal company until February 1st, when he was laid off, not because of his physical condition, but because the company had determined to reduce its force. He never consulted any physician in regard to his injuries, although the coal company's physician was related to his wife, and plaintiff contributed 50 cents per month towards the physician's compensation. Some six or seven years before the accident plaintiff had walked off his porch and injured his ankle. It was also shown that he applied to the railroad company for work and wanted an easy job. At the same time he complained of the same physical disability that he claims resulted from his fall. On cross-examination plaintiff admitted that he was acquainted with the physical conditions surrounding the store and railroad track. He also stated that up to the time he turned around and his foot "creeled" he had not been injured in any way. On redirect examination plaintiff stated that the only thing he did for his injuries was to rub some liniment on his back. He also stated that he talked to Dr. Logan two or three times about it, but that Dr. Logan had gone away.

[1-3] It is, of course, the duty of a carrier to provide for its passengers a reasonably safe platform and approaches to its trains, and if it fails in this duty, and by reason thereof a passenger is injured, it is liable in damages. *Louisville, etc., R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352, 19 Ann. Cas. 294; *Louisville, etc., R. Co. v. Turner*, 137 Ky. 730, 126 S. W. 372, 136 Am. St. Rep. 317; *Illinois Central R. Co. v. Cruse*, 123 Ky. 463, 96 S. W. 821, 29 Ky. Law Rep. 914, 8 L. R. A. (N. S.) 299, 13 Ann. Cas. 593, 4 R. C. L. p. 1223, § 648. In order to recover, however, it must be shown that such failure was the proximate cause of the injury. This is not a case where the passenger was ignorant of the conditions, and walked off the platform because it was too narrow, or was unguarded or unlighted. The platform was right in front of the store where plaintiff had been working for some time. He had frequently used the platform and was perfectly familiar with its condition. At the time of the accident he himself carried a lantern. He and his wife, who was partially blind, walked along the platform and had no difficulty in reaching the steps of the car. He and the conductor assisted his wife in boarding the train. He then says that he started to pull upon the train, but before he did so he stepped around and "creeled" his foot in some way and fell. He admits that up to this time he had not been injured. He does not explain how his foot happened to "creel."

He does not show that the "creeling" was due to any defect in the platform. For aught that appears in the record, plaintiff's fall was due entirely to the fact that his foot "creeled," and no one can say that his injuries were not due to the fall, but to the fact that he rolled down the embankment. Neither the presence of electric lights nor of barriers would have prevented the fall. He would simply have fallen against the barriers, instead of rolling down the embankment.

Under the circumstances, it cannot be said that plaintiff's injuries were due to the narrow, or unguarded or unlighted condition of the platform. On the contrary, his own evidence shows that the "creeling" of his foot, which alone caused him to fall, was the proximate cause of his injuries, and, having failed to show that the "creeling" of his foot was due to any negligence on the part of the company, we conclude that he is not entitled to recover. It follows that the trial court should have directed a verdict in favor of defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

CHESAPEAKE & O. RY. CO. v. HUDSON.

(Court of Appeals of Kentucky. April 2, 1916.)

1. RAILROADS \S 278(2)—INJURY TO PERSON WORKING ON CAR—CONTRIBUTORY NEGLIGENCE.

An employé of a brick plant, where railroad cars were being switched, who, at the order of the freight train conductor, released the brake of a coal car while the locomotive was pushing against it, so that he was thrown under the car by its lurching when the brake was released, without knowledge that the car was being pushed by the engine and without knowledge of the danger in which he placed himself in attempting to release the brake as he did, was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 896, 899; Dec. Dig. \S 278(2).]

2. RAILROADS \S 275(1) — PERSON WORKING ON CAR—DISCOVERED PERIL.

Where a freight train conductor saw that the employé of a brick plant, a mere volunteer or trespasser, was in danger from attempting to release the brake of a coal car while a locomotive was pushing against it, it was his duty to stop the engine from pushing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 873; Dec. Dig. \S 275(1).]

3. RAILROADS \S 282(9) — PERSON WORKING ON CAR—DISCOVERED PERIL—QUESTION FOR JURY.

In an action by the employé of a brick plant against a railroad company for injuries received in releasing the brake of a coal car against which the locomotive of the road's freight train was pushing, whether plaintiff's injuries were caused by failure of the conductor of the train to exercise ordinary care to prevent them by stopping the engine after discovering plaintiff's peril held for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 919; Dec. Dig. \S 282(9).]

Appeal from Circuit Court, Lewis County. Action by B. G. Hudson against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Worthington, Cochran & Browning, of Maysville, for appellant. A. R. Johnson, of Ironton, Ohio, Proctor K. Malin, of Ashland, and Johnson & Jones, of Ironton, Ohio, for appellee.

SETTLE, J. This appeal is prosecuted from a judgment of the Lewis circuit court, entered upon a verdict awarding the appellee, Benjamin G. Hudson, \$9,667 damages for the loss of both of his legs, caused, as alleged, by the negligence of the servants of the appellant, Chesapeake & Ohio Railway Company, in charge of and operating an engine, tender, and certain cars of one of its trains. Hudson was thrown from one of the cars, a wheel of which passed over him and so crushed and mangled both of his legs as to necessitate the amputation of one of them above the knee and the other just below the knee. Hudson being an infant, the action was instituted in his name and by John C. Queen as his next friend.

The accident occurred at a place in Lewis county known as "Fire Brick," where the Portsmouth Granite Fire Brick Company owns and operates a fire brick manufactory, or plant. Fire Brick is situated a half mile from the main line of appellant's railway and connected therewith by a spur or switch track. Three switches of this spur, known as the "coal track," "tipple track," and "loading track," enter the plant of the Portsmouth Granite Fire Brick Company. A local freight train which the appellant ran daily from Maysville to Russell in this state, upon reaching Fire Brick station on its main line, would take such cars as it had destined for the fire brick plant on the spur track out to the plant, and in returning to Fire Brick station would remove from the plant cars loaded with brick, consigned by the fire brick company to its customers. The moving and placing of cars on the various switches at the fire brick plant was also done by the engine of the local freight on these daily trips thereto. It appears that the appellee, Hudson, following his graduation from the Portsmouth, Ohio, high school at 18 years of age, entered the employment of the Portsmouth Granite Fire Brick Company in June, 1910, and continued therein down to the date of the accident, November 11, 1910; and that among other things required of him it was his duty, as an employe of the brick company, to superintend and direct the moving and placing by appellant's engine of all cars on the various tracks or switches of that company. Appellant's local freight train was due at Fire Brick about 1 or 2 o'clock p. m. each day, but on the day of the accident it was late and did not get there until 4:30 or 5 o'clock p. m.,

about three hours behind its customary time. Upon its arrival, appellee handed to John Glenn, the conductor, a list showing the cars that were to be moved about the plant and taken therefrom. At that time the engine had in front of it a car of merchandise for the fire brick company and an empty box car, the engine being headed toward the plant. As it proceeded to the point where the car of merchandise was to be left, there were two switches to be thrown, one switch leading to the left side of the dryhouse of the plant, called the "coal track," the other to the right side of the dryhouse, called the "loading track," and the second switch dividing the loading track into what is known as the "tipple track" and the "loading track." The engine stopped just before it got to the dividing point of the loading track. Standing on the tipple track, and so near the switch point that the engine and cars would not clear it on going in on the loading track, was a large steel gondola car loaded with brick, and as, because of its situation, this car would not permit the engine and other cars to clear it in going upon the loading track, it was necessary for them to first push the brick car on up the tipple track out of the way. The tracks were all upgrade going into the plant.

The engine with the two cars in front of it came against the car loaded with brick and tried to push it up the tipple track, but failed to do so, because of the brakes being so tightly set upon it. At that time Hudson was standing on the upper side of the tipple track on the loading wall next to the dryhouse. When the engine and cars pushed against the car loaded with brick, the wheels of the engine began to revolve rapidly. Observing this, appellee jumped down off of the loading wall and crossed at the back of the car loaded with brick to the opposite side of the tipple track, where he encountered Glenn, the conductor, who was standing near the north end of the brick car. Upon this meeting the conductor, appellee told him the brakes were set on the brick car. Thereupon, according to his testimony, the conductor told him to get up and let off the brakes, pursuant to which order he climbed up the ladder of the car and onto the brake platform, all the while in view of the conductor. Upon trying to release the brake by hand, he found that he could not do so. He then kicked the "dog" of the brake without succeeding in releasing it. He next reached into the car, picked up a fire brick, and with it pounded the dog of the brake loose, and when the brake was released the car lurched forward, which caused appellee to be thrown off to the track in front of it, resulting in the injuries already mentioned. The sudden lurch of the car, which moved it forward six or eight feet, was admittedly caused by the pushing against it of the two cars and engine in the rear, at the time of the release of the brake.

It further appears from appellee's testimony, and is uncontradicted by any other witness, that as he climbed on the car and attempted to release the brake he could not see the engine or know whether it was then pushing against the car; also, that the conductor was then standing on the engineer's side of the train, in plain view of both appellee and the engineer, and was engaged in giving signals to the engineer with reference to the movements of the engine. It is the contention of appellee that his injuries were caused by the fact that the engine of the train was, by direction of the conductor, being pushed against the brick car while he was releasing the brake; that the conductor, knowing the danger in which such pushing of the brick car by the engine placed appellee while releasing the brake, was guilty of negligence in failing to signal the engineer to stop the pushing against the car by the engine, which signaling he might have done by a simple movement of the hand and thereby caused the stopping of the pushing in a second's time.

The record shows no contrariety of evidence as to the fact that the shoving of an engine under a full head of steam against a car locked by its brake will inevitably have the effect to suddenly move and jerk it forward when the brake is released. This is fully explained in the testimony of A. J. Hannon, an experienced railroad man, as follows:

"Q. 22. Now, if a car is sitting upon a track, one of those battleship gond cars loaded with paving and the brakes are set on it, and the engine comes in for the purpose of moving that car, I will get you to say whether or not it is usual or customary to attempt to move that car while the brakes are set? A. No, sir. Q. 23. I will get you to say whether or not, then, it was customary for the brakeman to undertake to release the brakes while the engine is pushing against a car? A. No, sir. Q. 24. What is the effect upon a car if the brakes are set upon a car for the engine to push against it? A. Well, it has a tendency to tighten the brake more on account of the brake hangers and beam and brake shoes being connected to the body of the car. When an engine is shoving against a car and the brake is set, just the minute that brake is released the car will lunge forward—plunge forward quickly. Q. 25. What effect will it have on the brake wheel? A. The effect would be you would have revolving of the brake wheel. Q. 26. Very quickly—you mean it would revolve very quickly? A. Yes, sir. Q. 27. I will get you to say whether or not that is a condition ordinarily and generally known among railroad men who operate railroad trains? A. Yes, sir. Q. 28. Now, how is the engine stopped if it is pushing against a car? A. By shutting off the throttle. Q. 29. How is that done? By the engineer? A. Just shoving in a throttle, works by a racket; it releases it and shoves it in. Can be done in a second, and the engineer is always sitting or standing with his hand on the throttle, unless he is doing something, and that is the only thing to be done when they are switching cars."

Other experienced railroad men in appellant's employ, such as Holmes, Griffin, and the conductor, Glenn, testified to the same effect. So it cannot be doubted that one who releases a brake of a car when it is being

pushed by the engine is placed in a situation of extreme danger, and the more inexperienced the person the greater is the peril. At least six other facts are clearly established by the evidence: (1) That the brake on the brick car had been so tightly set the day before by two of appellant's servants with a lever that it could not be released without knocking the dog, as was done by appellee. (2) That appellee had never before attempted to release a car brake. (3) That he was near and in view of appellant's conductor, Glenn, from the time he went upon the car until he was knocked from it by its sudden movement following the release of the brake. (4) That his inexperience at such work as he was attempting to do was also known to Glenn, as was the imminent danger in which he was placed from the pushing of the car by the engine while he was releasing the brake. (5) That Glenn, as conductor, was superintending the moving of the brick car and in control of the engine and engineer, and could see and was seen by the latter, all the time appellee was trying to release the brake of the brick car. (6) That, notwithstanding his knowledge of appellee's peril, he at no time gave the engineer a signal to stop the pushing of the brick car with his engine, as he might have done with a signal of the hand.

There is a contrariety of evidence as to whether the conductor, Glenn, ordered appellee to go upon the car and release the brake. Appellee testified that Glenn gave him such order, and that in obedience thereto he went upon the car and performed the work of releasing the brake. Glenn testified that he ordered the release of the brake but did not give the order to appellee, and that it was intended for his brakeman, without indicating the name of the brakeman. While there were three brakemen belonging to the local freight train then on the ground, one of them, Holmes, was some yards distant in control of the switch. Lambert, another, had gone back to the engine to prepare and light lanterns for use upon the train as night was approaching. The third brakeman, Griffin, was back behind the brick car making the coupling of the engine and other cars to it, or had just completed the coupling. He was then out of Glenn's sight, and, while he heard the latter give the order to release the brake of the brick car, he did not see or know to whom it was addressed, but evidently did not think it had been given to him, as he made no attempt to obey it, and probably could not have immediately done so.

[4] The question submitted to the jury by the instructions of the court was whether or not the conductor in charge of the train discovered appellee's peril in time to have prevented his injuries by the exercise of ordinary care. It is conceded by appellant's counsel that the instructions of the court were faultless if the case should have gone to the jury upon the theory indicated; but insisted by them that there was no evidence

upon which to base the instructions, and that the only instruction authorized was one peremptorily directing a verdict for the appellant, which it asked and the court refused at the conclusion of the evidence. In other words, it is appellant's contention that, in undertaking to release the brake under the circumstances attending the act, appellee was guilty of contributory negligence, but for which his injuries would not have been received. There would be great force in this contention if the evidence had shown that appellee knew when he attempted to release the brake of the brick car that it was being pushed by the engine, and had realized the danger in which he placed himself in attempting to release the brake in the manner adopted by him; but we do not think the evidence shows contributory negligence.

[2, 3] Upon the other hand, though it be conceded that in releasing the brake upon the brick car, as was done by him, appellee was a mere volunteer, as was held by the trial court, and that there was no emergency existing which authorized the conductor to employ or command outside assistance such as was rendered by appellee, as there was evidence conducing to prove that appellee's peril was discovered and known to the conductor in time to have prevented his injuries by the exercise of ordinary care, there can be no question as to the propriety of the action of the trial court in submitting the case to the jury upon this ground. In this view of the case, it is immaterial whether appellee went upon the car with or without an order from the conductor, or that the latter was without authority to employ or command him to perform the duty required of him. It was, however, the duty of the conductor, upon seeing the danger to which appellee was subjected, as the evidence shows he did, to have stopped the engine from pushing; and this, according to the weight of the evidence, he might have done, by the exercise of ordinary care, in time to have prevented his injuries. So, if, as claimed by counsel for appellant, appellee in undertaking the duty performed by him sustained no other relationship to appellant than that of a volunteer, or even a mere trespasser, the conductor nevertheless, upon discovering his peril, owed to him the duty of exercising ordinary care to prevent his injuries; and if his failure to exercise such care caused the injuries sustained by appellee, as much of the evidence conducing to prove, there could have been no error on the part of the trial court in submitting the case to the jury. The doctrine referred to is recognized in the cases of *Clarke v. L. & N. R. Co.*, 111 S. W. 344, 33 Ky. Law Rep. 797; *C. & N. O. & T. P. Ry. Co. v. Finnell's Adm'r*, 108 Ky. 135, 55 S. W. 902, 22 Ky. Law Rep. 86, 57 L. R. A. 266; *Hatfield v. Adams*, 123 Ky. 428, 96 S. W. 583, 29 Ky. Law Rep. 880; *L. & N. R. Co.*

v. Pendleton's Adm'r, 126 Ky. 605, 104 S. W. 382, 31 Ky. Law Rep. 1025; *Sou. Ry. Co. v. Pope's Adm'r*, 133 Ky. 835, 119 S. W. 237, 19 Ann. Cas. 376; *Derrickson's Adm'r v. Swann-Day Lbr. Co.*, 115 S. W. 191—cited and relied on by counsel for appellant.

In *Clarke v. L. & N. R. Co.*, supra, upon which appellant's counsel most strongly relies, it was held that Clarke was not entitled to recover because he was a mere volunteer in assuming the service in performing which he was injured, and there was no negligence shown on the part of the conductor or train crew. It is nevertheless said in the opinion:

"Considering the matter from this standpoint, and treating Clarke as a volunteer, the only duty that the company owed under the facts in this case was to exercise ordinary care to prevent injury to him. With the knowledge of the engineer and by the direction of the conductor, Clarke was engaged in an effort to couple the engine to the cars, and, while in the performance of this act, the engineer was obliged to exercise ordinary care to prevent injuring him. So that the point upon which this case must turn is whether or not the engineer exercised this degree of care. If he did, the company was not liable, and the ruling of the trial court was proper. On the other hand, if he did not, the case should have gone to the jury."

In the instant case, the conductor was present and controlling the operation of the train, all the time in a position from which he could see and understand what appellee was doing and at the same time realize his danger, and, even if appellee rendered the service performed by him without any order or direction from the conductor, the latter saw him go upon the car and release the brake, yet made no attempt to prevent him from doing either of these acts. The conductor at the same time was where he could see the engineer and be seen by him, but notwithstanding the danger to which he saw the appellee, an inexperienced boy of 18 years of age, subject himself, and the knowledge he must have had that appellee could not, from the car, see that the engine was pushing it, he took no step to signal the engineer to stop the pushing of the engine against the car, although he might have done so by waving his hand to the engineer to stop. Upon this state of facts, it was peculiarly the province of the jury to determine whether the injuries sustained by appellee were caused by the failure of the conductor to exercise ordinary care to prevent them after discovering his peril. *Hendrickson v. L. & N. R. Co.*, 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311; *Davis' Adm'r v. Ohio Valley Banking & Trust Co.*, 127 Ky. 800, 106 S. W. 843, 32 Ky. Law Rep. 627, 15 L. R. A. (N. S.) 402; *Newport News, etc., R. Co. v. Carroll*, 81 S. W. 182, 17 Ky. Law Rep. 374; *I. C. R. Co. v. Timmons*, 100 S. W. 337, 30 Ky. Law Rep. 1155; *L. & N. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124.

Judgment affirmed.

GRIFFIN v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. April 18, 1916.)

1. RAILROADS — 355(5) — INJURIES TO PERSONS NEAR TRACK — INVITATION.

One who is taking a sled load of trees to a railway station to be shipped, but because of the obstruction of the crossing leading to the station by a freight train, took down a fence and drove to a point on a highway or on the company's right of way across the tracks from the station, was not there at the invitation of the company so as to impose any duty on the company to look out for his safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1225, 1226; Dec. Dig. — 355(5).]

2. RAILROADS — 359(1) — INJURIES TO PERSON NEAR TRACK — DUTY OF RAILROADS.

A railroad company is not required to keep a watch for persons on a highway adjoining the track or on the edge of its right of way without invitation so as to avoid frightening their teams, but is only required to use due care to avoid frightening the teams after actually discovering the danger, and one whose team was frightened by a railroad engine while he was in such a place must show that the enginemen had actual notice of his peril, and thereafter failed to use ordinary care to prevent the engine making unnecessary noise.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1238; Dec. Dig. — 359(1).]

3. RAILROADS — 398(3) — INJURIES TO PERSONS NEAR TRACK — EVIDENCE — DISCOVERY OF PERIL.

Where plaintiff's team, while standing where the railroad company was not required to keep a watch for a team and about 20 feet from the track on an embankment 6 or 8 feet high, was frightened by an engine backing toward it, testimony by plaintiff that the enginemen were looking in the direction of the team, and that he hollowed to them, does not justify an inference that the enginemen saw the team or heard the shout, since it is more probable that they were looking along the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1359; Dec. Dig. — 398(3).]

4. RAILROADS — 398(3) — INJURY TO PERSONS NEAR TRACK — EVIDENCE — NEGLIGENCE.

Where plaintiff's evidence also showed that as soon as he hollowed to the enginemen his team ran away, there could not have been a finding of negligence in failing to use due care to avoid frightening the horse, even if they had seen their fright at that time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1359; Dec. Dig. — 398(3).]

5. RAILROADS — 398(1) — INJURIES TO PERSONS NEAR TRACK — EVIDENCE — NEGLIGENCE.

In an action for injuries resulting from a runaway team frightened by a railroad engine, while standing where the company was not required to keep a lookout for them, evidence held not to show that the engine was making any unnecessary noise.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356, 1363; Dec. Dig. — 398(1).]

6. RAILROADS — 389(3) — INJURIES TO PERSONS NEAR TRACK — PROXIMATE CAUSE — OBSTRUCTION OF CROSSING.

The blocking of a highway crossing by a railroad train contrary to Ky. St. § 768, is not the proximate cause of the frightening of plaintiff's team by the engine, where in order to unload goods for shipment on the other side of the track, plaintiff took down a fence and drove along the right of way, instead of using another

crossing as he could have done without great inconvenience.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1321; Dec. Dig. — 389(3).]

7. RAILROADS — 253 — OBSTRUCTION OF CROSSING — LIABILITY — PROXIMATE CAUSE.

The blocking of a highway crossing by a railroad train contrary to Ky. St. § 768, renders the company liable only for such damages as are the proximate result of the violation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 732, 733; Dec. Dig. — 253.]

Appeal from Circuit Court, Lewis County.

Action by James B. Griffin against the Chesapeake & Ohio Railway Company. Judgment for defendant on a directed verdict, and plaintiff appeals. Affirmed.

Allen D. Cole, of Maysville, for appellant. Worthington, Cochran & Browning, of Maysville, for appellee.

CLARKE, J. In December, 1910, appellant was taking some packages of evergreens on a sled, drawn by a horse and a mule, to the depot of appellee at Garrison, Ky., for shipment, to Washington, D. C. To reach the depot he had to cross the railroad track, but when he got to the crossing, it was obstructed by a freight train. Upon being informed that the crossing would be obstructed for some time, probably half an hour, he let down some fences and drove through the fields along the side of the railroad track to a point opposite the depot where he stopped and began unloading the sled with the intention of carrying the packages, which were light, across the track to the depot.

The engine of a freight train was almost directly between him and the depot and about 20 feet from the team where it was stopped, and the ground where the team was standing was some 6 or 8 feet higher than the railroad track.

Soon after the team was stopped at this place, the engine was cut loose from the freight train and started up the track to switch some cars. When the engine started up, the team became frightened, and it required both the appellant and Mr. Garrison, who was helping him unload the sled, to hold and quiet the animals. After the engine had gone away, Mr. Garrison began again to unload the sled while appellant held the lines to control the team.

In a short time, and about the time the packages had been removed from the sled, the engine came backing down the track to couple to the train, when appellant's horses again became frightened, and ran away, upset the sled, and injured appellant.

To recover for his injuries he brought this suit, alleging that his injuries were caused by the gross negligence of appellee's servants in permitting the crossing to remain blocked an unreasonable length of time, and by said servant's carelessly and negligently causing and permitting the engine of said train to

emit violent and unusual noises, and to move in such a manner as to frighten his horses and cause them to become unmanageable.

Appellant and Mr. Garrison testified that there were two men in the engine, presumably the engineer and the fireman, one of whom had his face turned in their direction and could have seen that appellant's horses were frightened by the starting of the engine, and that the engine when it started puffed, "popped off" steam and made a noise caused by the stopcocks being open; that engines do not ordinarily have the stopcocks open; that as the engine came back from the switch track and when it was about 90 feet distant from the team, the team began to scare again, appellant threw up his hands and hollowed to the man in charge of the engine to stop until he could get out with his team; that the engine did not stop, but continued to come back, making considerable noise as though the stopcocks were open and blowing off steam.

Appellant testifies that as the engine came back he saw one of the enginemen looking in his direction, which was the direction in which the engine was moving, and that he could have seen that the animals had become frightened at the engine's approach.

At the close of appellant's proof, the jury was directed to return a verdict in favor of appellee, and appellant's petition was dismissed.

[1] Appellant contends that the place where he stopped the team was an appellee's right of way, while appellee claims that it was on a public street, as stated by appellant's witness Garrison, and we think the testimony sustains the latter contention. This is not, however, in our judgment, material, since it is conclusively shown that the place was not one to which shippers were invited or accustomed to be, nor where trainmen were bound to anticipate the presence of teams or in reference to which any duty of lookout was imposed. In order to reach this place appellant had to let down fences and drive through fields. It was not on the same side of the tracks as the depot, and it was up on an embankment where there was no reason why any employé of the company need ever look.

Appellant seeks to apply the doctrine applicable to persons upon the grounds of a railroad company by invitation to transact business, but the facts of his case do not justify it. Even if he was at the time upon the edge of appellee's right of way, he was a trespasser.

He certainly was not invited to that place by the company, and the cases of Ill. Cent. R. Co. v. Beauchamp, 77 S. W. 1096, 25 Ky. Law Rep. 1429, and O., N. O. & T. P. R. Co. v. Rhodes, 102 S. W. 821, 31 Ky. Law Rep. 490, cited by his counsel, are not applicable to the case at bar. While the railroad company invites the public to come to its depot for the

transaction of business, that invitation and its resulting duties only extend to the places used for the transaction of such business and does not extend to other places upon the company's premises, unless by special direction.

[2] Having reached the conclusion that appellant was not upon the premises of appellee by invitation, but was either a trespasser, if upon the premises at all, or more probably upon a public street or premises adjacent to the company's right of way, it results that the duty owed to him by the trainmen consisted in simply doing whatever they reasonably could to avoid further frightening the team after discovering, if they did so, that it was frightened and the appellant in peril. In Cox v. Ill. Cent. R. Co., 142 Ky. 478, 184 S. W. 911, 32 L. R. A. (N. S.) 831, where the facts are not different in principle from those in the instant case, this court said:

"The persons in charge of an engine are not required to keep a lookout on premises or roads adjacent to the track for the purpose of discovering whether or not horses are being frightened by the train or engine, and are only under a duty * * * to prevent frightening a horse after they have discovered his fright."

And the case of L. & N. R. Co. v. Street's Adm'r, 139 Ky. 186, 129 S. W. 570, 189 Am. St. Rep. 471, this court said:

"It is not customary, nor is it reasonable, to require the train operatives to keep a lookout upon the adjacent highway to see if a horse thereon is frightened, or likely to be, and thereupon to stop his train. Nor is the law that they must do so. No case to which we have been cited so holds. The utmost requirement is the trainmen must operate his own vehicle without unusual or unnecessary noise, and, perhaps, if he actually becomes aware of the fright of the horse, to be even more cautious in the making of noises in operating his train. But if he were also required to use care to discover horses and their state of trepidation out on the highway some rods away from his track, it would so distract his attention from his necessary duties as probably to imperil more lives and property, including his own life, and more than offset any advantage to the public by requiring him to keep such lookout. It is for that reason, and not from indifference toward the driver of the horse, that the law has never exacted such a degree of care from the trainmen."

To the same effect are the following cases: L. & N. R. Co. v. Smith, 107 Ky. 178, 53 S. W. 269, 21 Ky. Law Rep. 857; C., N. O. & T. P. R. Co. v. Bagby, 29 S. W. 320, 16 Ky. Law Rep. 533; L. & N. R. Co. v. Bowen, 39 S. W. 31, 18 Ky. Law Rep. 1099; Conway v. L. & N. R. Co., 135 Ky. 229, 119 S. W. 206, 122 S. W. 136; C. & O. R. Co. v. Barbour's Adm'r, 93 S. W. 24, 29 Ky. Law Rep. 339.

It is necessary therefore for appellant to prove in order to make out his case: (1) That his perilous condition was discovered by the trainmen; (2) that thereafter they failed to use ordinary care to prevent the engine from making unnecessary noises.

[3] Upon the first question we do not think the evidence was sufficient to carry the case

to the jury. It consists of the statement that one of the trainmen, at some time after appellant drove up to the place and before the engine went up the track to do the switching, was looking in the direction of the team, but the witness did not say whether or not this was while the team was showing fright; and, even if the trainmen had then seen the team was frightened, the accident did not occur then, and that fact would not have put him on his guard when returning to that place some 5 or 10 minutes afterwards, after having been some 600 or 800 feet up the track switching some cars; so we may dismiss the evidence with reference to what happened before the engine left to do the switching.

When the engine returned to again couple onto the freight train, and was backing toward appellant, the evidence of appellant and Mr. Garrison is that the men in the engine were looking in the direction of appellant, which was the direction in which the engine was moving; but it does not seem to us that that fact would warrant an inference that they saw appellant 20 feet away from the track and upon an embankment some 6 or 8 feet high, but rather the inference that they were watching the track and the train so as to make the coupling with safety, especially as it was about dusk. Under the circumstances here a very different condition exists from a case such as *Willis' Adm'r v. L. & N. R. Co.*, 164 Ky. 131, 175 S. W. 18, cited by appellant, where it was held that evidence that the engineer was looking in the direction of one upon the track in a perilous condition was sufficient to take the case to the jury. The fact that an engineer was looking in the direction of one in a perilous position upon the track in front of him might very reasonably raise the presumption that the engineer saw the person so situated. Such, however, is not the rule with reference to persons and objects not upon the track. Nor does the fact that appellant, located where he was, hollowed to the engineer to stop the engine when it was 90 or 100 feet from him supply an inference that the engineer heard him and thereby received information of his peril. *McKnight v. L. & N. R. Co.*, 168 Ky. 86, 181 S. W. 947.

[4] However, if we admit for the sake of argument that there was some evidence tending to prove that the servants in charge of the engine discovered appellant's peril, there is no evidence that there was anything they could have done thereafter to have prevented the accident to appellant.

Appellant's testimony is that immediately after he threw up his hands and hollowed, and before he even had time to get off of the sled, the team ran away and the accident occurred. The conclusion is unavoidable

that the accident would have occurred anyhow, even if the train had been stopped as quickly as possible, and everything done that could have been done to suppress noises incident to the operation of an engine.

[5] Moreover, it is not shown that the engine was making any unreasonable or unnecessary noises, or any noise other than such as are incident and necessary to its operation, unless it can be said having the stopcocks open, as it is stated they were, caused some unreasonable or unnecessary noise, which does not appear from the evidence. If the engine was "popping off" steam as alleged by the witness, it was because of the fact that there was an excess of steam in the boiler, and stopping the engine would not have prevented that noise continuing.

It results that appellant failed to show any negligence upon the part of appellee's agents in the operation of the engine that caused the accident.

[6] 2. Appellant also contends that the blocking of the crossing for an unreasonable length of time was the proximate cause of the accident, but he is not supported in this contention by the authorities. In the first place, it was not necessary, even if the crossing was unreasonably blocked, for appellant to have stopped his team where he did, as the evidence shows he could have reached the depot by going to another crossing with but little inconvenience.

[7] And while one injured by the violation of a statute, and it is in violation of section 768 of our statutes to block a crossing continuously for more than 5 minutes, may recover from the offender, it is only for such damages as are the direct and proximate result of the violation of the statute. *L. & N. R. Co. v. Cooper*, 164 Ky. 489, 175 S. W. 1034, *L. R. A.* 1915E, 336.

But the blocking of the crossing was not the direct or proximate cause of the accident here. The proximate cause was the movement of the train that ought to have been anticipated by appellant when he stopped his team where he did, and the blocking the crossing was at most simply a prior or remote cause that did no more than furnish the condition which made the accident possible. *Setter's Adm'r v. City of Maysville*, 114 Ky. 60, 69 S. W. 1074, 24 Ky. Law Rep. 828; *Burton v. Cumberland Telephone & Telegraph Co.*, 118 S. W. 287; *L. & N. R. Co. v. Keiffer*, 132 Ky. 419, 113 S. W. 433; *Logan v. C., N. O. & T. P. R. Co.*, 139 Ky. 202, 129 S. W. 575; *Georgetown Telephone Co. v. McCullough's Adm'r*, 118 Ky. 182, 80 S. W. 782, 26 Ky. Law Rep. 72, 111 Am. St. Rep. 294; 29 Cyc. 496.

Wherefore the judgment sustaining a motion for a peremptory instruction is affirmed.

PERKS et al. v. McCRACKEN.

(Court of Appeals of Kentucky. April 21, 1916.)

1. STATES \Leftrightarrow 12(2)—KENTUCKY BOUNDARIES—CESSION ACT.

As Virginia, when she ceded to the United States the Northwest Territory, retained title to the bed of the Ohio river to the low-water mark, on its north side, title to such land, passed to Kentucky when it became a state, and is not affected by the action of the forces of nature which might change the course of the Ohio river.

[Ed. Note.—For other cases, see States, Cent. Dig. § 8; Dec. Dig. \Leftrightarrow 12(2).]

2. STATES \Leftrightarrow 12(2)—BOUNDARIES—ISLANDS—EVIDENCE—SUFFICIENCY.

In an action where plaintiff claimed title to an island and sand bar in the Ohio river by virtue of a patent from the state of Kentucky, evidence held to warrant a finding that the island was on the south side of the north low-water mark, and hence was within the borders of Kentucky.

[Ed. Note.—For other cases, see States, Cent. Dig. § 8; Dec. Dig. \Leftrightarrow 12(2).]

3. NAVIGABLE WATERS \Leftrightarrow 44(3)—ACCRETIONS—EFFECT.

Where a sand bar was formed by accretions to plaintiff's island, plaintiff was entitled to the bar, as against the opposite riparian owner.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 270, 277; Dec. Dig. \Leftrightarrow 44(3).]

4. APPEAL AND ERROR \Leftrightarrow 1068(4)—REVIEW—HARMLESS ERROR.

The erroneous giving of an instruction allowing punitive damages is not prejudicial error, where the record clearly shows no such damages were allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. \Leftrightarrow 1068(4); Trial, Cent. Dig. §§ 475, 525, 553, 558.]

Appeal from Circuit Court, Ballard County.

Action by Q. A. McCracken against L. C. Perks and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. B. Wickliffe, of Wickliffe, for appellants. Gus Thomas, of Frankfort, and W. T. White and J. Corbett, both of Wickliffe, for appellee.

CLAY, C. Alleging that he was the owner of a towhead or island sand bar in the Ohio river near Mound City, Ill., and that the defendants, L. C. Perks and Thomas Higgins, had unlawfully entered thereon and dug and carried away large quantities of sand and gravel, plaintiff, Q. A. McCracken, brought this suit to recover damages in the sum of \$3,000. The defendants denied plaintiff's title, and pleaded title in one Henry Reed, the owner of the Illinois shore, and alleged that they had purchased from him the right to dig and remove the sand and gravel in question. The trial before a jury resulted in a verdict and judgment in plaintiff's favor for \$900. The defendants appeal.

[1, 2] It appears that in the year 1854 the state of Kentucky issued to Gen. Rawlings a

patent to the island in question, and that the legal title thereto is now in plaintiff. The case turns on whether or not the island is Kentucky territory or is a part of the state of Illinois. When Virginia ceded to the United States the Northwest Territory in the year 1784, she retained title to the bed of the Ohio river to the low-water mark on its north or northwest side. When Kentucky became a state on June 1, 1792, she succeeded to the rights of Virginia. Her jurisdiction continues just as it existed at the time of her admission to the Union, and is not affected by the action of the forces of nature upon the course of the river. State of Indiana v. State of Kentucky, 136 U. S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 829; Church v. Chambers, 3 Dana, 279; McFarland v. McKnight, 6 B. Mon. 500; Fleming v. Kenney, 4 J. J. Marsh. 155. The question is, where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so, it is a part of Kentucky. While defendants introduced some evidence to the effect that the island in question had been connected with the mainland on the Illinois side for a great many years, the decided weight of the evidence is to the effect that the sand bar from which the gravel and sand were removed is an accretion to the towhead originally patented, and that many years ago the channel separating the island from the main Illinois shore was very much broader and deeper than it now is, and was navigable at all seasons of the year; and, although the channel has since then been filled up and at times is almost dry, yet, during a large portion of the year, it is navigable, even at the present time, by very large boats. Of course, the evidence does not carry us back to the time of the cession of the Northwest Territory or to the time when Kentucky became a state, but, in view of the fact that a great many years ago the channel between the island and the mainland was very much broader and deeper than it is now, we conclude that the evidence fully sustains the conclusion of the jury that the island in question lies between the Kentucky shore and the low-water mark of the Ohio on its northwest side as it existed when Kentucky became a state.

[3] But the point is made that the sand and gravel were removed from a sand bar not included within the Rawlings survey, but as this sand bar does not lie at right angles to the thread of the stream, but is parallel therewith, plaintiff is not the owner of the sand bar by virtue of the ownership of the island or towhead. In the first place, it may be said that while there is some evidence tending to show that the sand and gravel were not removed from that part of the towhead covered by the patent, the weight of the evidence is to the contrary. In the second place, the doctrine contended for is not applicable

to the facts of this case. This is not a contest between the riparian proprietors of lots originally fronting on the Ohio river of the Kentucky side. In such a case the owners of the lots are entitled to the land added thereto by accretion, to be ascertained by extending the original river frontage of the respective lots as nearly as practicable at right angles with the course of the river. *Miller, etc., v. Hepburn*, 8 Bush, 328. Nor is it a contest between Kentucky shore owners, or between the owner of an island and a Kentucky shore owner, or between the owners of separate islands, over the ownership of an independent island lying in the Ohio river. It is a question of title between the owner of an island to which the sand bar is an actual accretion and the owner of the Illinois shore to which it is not an accretion. Being an actual accretion to, and therefore a part of, the towhead island, the title thereto is in the owner of the island, regardless of the direction in which the accretion runs.

[4] Another error relied on is the giving of an instruction authorizing punitive damages. Whether or not the case is one calling for punitive damages we deem it unnecessary to decide. A careful examination of the record convinces us that the sum fixed by the jury is not sufficient to cover the actual damages sustained. That being true, the giving of the instruction authorizing punitive damages, even though erroneous, cannot be regarded as prejudicial error. *St. Bernard Mining Co. v. Ashby*, 164 Ky. 417, 175 S. W. 626.

Judgment affirmed.

COMBS v. BREWER.

(Court of Appeals of Kentucky. April 20, 1916.)

1. EVIDENCE—§317(2)—HEARSAY—QUALIFICATION OF VOTERS.

Statements by an elector at a school election that she could not read and write are mere hearsay, and furnish no basis for holding her unqualified to vote for trustee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1175, 1192; Dec. Dig. §317(2).]

2. ELECTIONS—§291—VOTERS—QUALIFICATIONS.

One attacking the qualifications of a voter has the burden of proof.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. §291.]

3. ELECTIONS—§295(1)—QUALIFICATION OF VOTER—PUBLIC SCHOOL ELECTIONS—CONTESTS—EVIDENCE.

In a contest over the election of a public school trustee, the court's finding that a voter was not disqualified, as being unable to read and write, held warranted by the evidence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297; Dec. Dig. §295(1).]

4. ELECTIONS—§295(1)—QUALIFICATION OF VOTER—AGE—EVIDENCE—SUFFICIENCY.

In a contest over the election of a school trustee, evidence held to warrant a finding that a voter was of legal age, and that his ballot should be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 297; Dec. Dig. §295(1).]

5. ELECTIONS—§238—CONTESTS—TIE VOTE.

While Ky. St. § 1590a, relating to ordinary elections, provides that in case of tie the election commissioner may determine by lot which of the candidates is elected, such provision did not apply to the election of a school trustee, for section 4436, as amended in 1898 (Acts 1898, c. 44), declaring that if from failure to qualify according to law or from any other cause there shall be a vacancy in the office of trustee, the county superintendent shall within 10 days or as soon as practicable fill the vacancy by appointment, and that in case of a controverted right to the office of trustee the superintendent may recognize a trustee among the contestants until the dispute has been settled, gives the county superintendent the right to appoint a trustee in case of tie vote, as in such case there is a vacancy.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 216, 217; Dec. Dig. §238.]

6. ELECTIONS—§238—TIE VOTES—VACANCIES.

Where there is a tie vote for the office of school trustee, there is a vacancy within Ky. St. § 4436, as amended in 1898 (Acts 1898, c. 44), authorizing the county superintendent to fill vacancies.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 216, 217; Dec. Dig. §238.]

Appeal from Circuit Court, Perry County.

Election contest by Joseph Brewer against K. C. Combs. From a judgment for contestant, contestee appeals. Reversed, and remanded with instructions.

Faulkner & Faulkner, of Hazard, for appellant. W. C. Eversole, of Hazard, for appellee.

CLAY, C. At an election for school trustee held in subdistrict No. 9, educational division No. 5, in Perry county, K. C. Combs received 25 votes and Joseph Brewer 21 votes. Combs was declared elected. Thereupon Brewer brought this suit contesting the election. On final hearing the trial court adjudged that both contestant and contestee received the same number of votes. Thereupon he declared the election a tie, and directed the parties to draw lots for the office. On the draw Brewer won. Combs appeals.

Two grounds are urged for a reversal: (1) That the votes of Malvery Napier and Lou Ellen Crawford were improperly counted for appellee; (2) the court erred in determining the contest by lot.

The vote of Malvery Napier is attacked on the ground that she was unable to read and write. On this question appellant introduced Bob Napier, the husband of Malvery. He testified that he was 29 or 30 years old. He knew his wife for 10 years before they were married. He never knew of her attending school and during that time she never wrote him a letter. He further said: "I never saw her read and write, and she tells me she can't write." To this answer appellee objected. On cross-examination he stated that his wife was not very well; that they had a sick baby which kept her at home. When she was summoned as a witness he asked her what she knew about it. She then

wrote "Malvery Napier, Hazard, Kentucky," on a slip of paper and said: "You take that, that is all I can write." It developed on cross-examination that Napier and his wife were on the opposite sides in the election. For appellee Lacy Combs, the father of Malvery Napier, testified that Malvery could read and write. He further stated that before she married she went to the common schools. He filed with his deposition a sample of his daughter's writing, which he identified as having been written by her.

The vote of Lou Ellen Crawford is attacked on the ground that she was not 21 years of age when the election took place. On this question appellant introduced the school census for the year 1915, which showed that Lou Ellen Crawford, who was then Lou Ellen Phipps, was only 20 years of age. Marion Combs, who took the census, stated that Lou Ellen Crawford's mother gave the date of Lou Ellen Phipps' birth as October 2, 1896. It also appears that Lou Ellen Phipps was married on March 18, 1915. In the marriage certificate her age is given as 20. On the other hand, Lou Ellen Crawford testified that from all the information she could get from her mother and her old kin folks she was 22 years of age at the time of the election. Her mother was also introduced and she testified that Lou Ellen was 22 years of age. She admits telling the census taker that she could put down Lou Ellen Phipps' age at 20. On cross-examination she stated that although she could not tell the year Lou Ellen was born, she was confident she was 21 years of age.

[1-3] Clearly, the statements of a voter that she cannot read and write are mere hearsay and are not admissible as substantive evidence. Omitting these statements of the voter Malvery Napier, we find that on the one hand her husband testifies that he was acquainted with his wife for 10 years before they were married. During that time he never knew of her attending school and she never wrote him a letter. He also says that he never saw her read and write. On the contrary, her father testifies that before she was married she attended the common schools and could read and write. In a contested election case, he who attacks the qualifications of a voter has the burden of proof. Since, in this instance, the husband of the voter testified one way, while her father testified to the contrary, we cannot say that appellant maintained the burden of showing that the voter was disqualified, and that the trial court erred in holding that her vote should be counted.

[4] In the case of the voter Lou Ellen Crawford, the same rule is to be applied. The fact that the mother stated to the census taker that Lou Ellen Crawford was only 20 years of age, and that a friend of hers, who was present when she was married, stated that she was 20 years of age, and this age was put in the marriage certificate, is not

sufficient to overcome the positive statement of her mother that, as a matter of fact, she was 22 years of age. The trial court did not err, therefore, in holding that Lou Ellen Crawford's vote should be counted.

Appellee contends that certain votes for appellant, other than those which the trial court refused to count should have been excluded. Without entering into a discussion of the evidence respecting these votes, it is sufficient to say that a careful consideration of the record convinces us that the court did not err in holding that they should be counted for appellant.

We therefore agree with the trial court that appellant and appellee each received 21 legal votes, and that the election, therefore, resulted in a tie.

[5, 6] It remains to consider whether or not the court erred in determining the contest by lot. It is the contention of appellee that the trial court's action is supported by subsections 5 and 11, § 1596a, of the Kentucky Statutes, giving the election commissioner, in case of a tie, the power to determine by lot which of the candidates is elected. In our opinion, however, the statutes relied on do not apply to school trustee elections. The general election law, embracing the sections aforesaid, went into effect on March 11, 1898. By an act approved March 17, 1898 (Acts 1898, c. 44) section 4436 of the Kentucky Statutes was amended so as to read as follows:

"Vacancy—How Filled—Power of Superintendent.—If, from failure to qualify according to law, or from any other cause, there be a vacancy in the office of trustee, the county superintendent of the county shall, within ten days, or as soon thereafter as practicable, supply the same by his appointment, in writing, and the trustees so appointed shall hold his office until the end of that term, and until his successor is elected or appointed and qualified. In case of controverted right to the office of trustee, the county superintendent is empowered to recognize a trustee among the contestants until the dispute has been settled. If a trustee-elect shall fail to qualify before the county superintendent on or before the first day of June following his election, or file with him a certificate that he has qualified before another officer, it shall be within the discretion of the county superintendent to declare his place vacant, and to fill same by appointment."

It is clear, we think, that the Legislature intended that a vacancy in the office of school trustee should be controlled by the above section, and filled as therein provided. Under the above section it was held that where there was a tie vote there was a vacancy that the county superintendent might fill. *Hopkins v. Swift*, 100 Ky. 14, 37 S. W. 155, 18 Ky. Law Rep. 526. Since that time section 4438, supra, has been further amended, and any vacancy that may exist in the trusteeship of any school subdivision must be filled by appointment by the county board of education. Subsection 4, § 4426a, of the Kentucky Statutes 1915. Since the tie vote resulted in a vacancy, it follows that the trial court, instead of determining the election by lot, should have declared that a vacancy existed,

and have referred the matter to the county board of education for action.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

FIELDS v. COUCH.

(Court of Appeals of Kentucky. April 20, 1916.)

1. QUIETING TITLE ⇨43—ACTIONS—POSSESSION.

Under Ky. St. § 11, declaring that any person having legal title and possession of lands may sue any other persons setting up claims thereto, one suing to quiet title must plead and prove his possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84-87; Dec. Dig. ⇨43.]

2. ESTOPPEL ⇨94(1)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES—PERMITTING SALE OF LAND.

Where defendant, the real owner of the lands in controversy, who knew that such land had not been included in the sale of the property of a decedent, heard that the purchaser at the judicial sale was about to sell the land so acquired, there was no basis of an estoppel in pais preventing defendant from asserting his title to the premises, it appearing that the purchaser at judicial sale sold plaintiff the defendant's lands, for an estoppel can be based on some misrepresentation or concealment amounting to misrepresentation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245-247; Dec. Dig. ⇨94(1).]

3. APPEAL AND ERROR ⇨1009(3)—REVIEW—FINDINGS.

A finding of the chancellor will not be disturbed on appeal where the proof is contradictory and the mind is left in doubt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. ⇨1009(3).]

4. QUIETING TITLE ⇨44(4)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit to quiet title evidence held to warrant a finding that plaintiff had no title to the land in controversy.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91; Dec. Dig. ⇨44(4).]

Appeal from Circuit Court, Perry County.

Action by B. T. Fields against E. C. Couch. From a judgment for defendant, plaintiff appeals. Affirmed.

Wootton & Morgan, Bailey P. Wootton, and Jesse Morgan, all of Hazard, and John L. Dixon, of Hyden, for appellant. Hogg & Johnson, of Hazard, for appellee.

THOMAS, J. On July 1, 1850, there was issued to Esau Fields a patent for 100 acres of land, it at that time being entirely in Perry county, Ky., and described as follows:

"Beginning on a beech at the head of McIntosh's creek; thence north 80° west 150 poles to a stake; north 40 poles to a stake; south 89° east 146 poles to a stake; south 66 poles to the beginning."

Many years after this, the county of Leslie was formed, and the line between it and Perry county passed through this tract of land, leaving about 20 acres of it located in

Perry county and the remaining 80 acres in Leslie county.

[1] This suit was filed on July 10, 1913, in the Perry circuit court by appellant (plaintiff below) against appellee (defendant below) seeking to have the title of the plaintiff to the land covered by the patent quieted, it being alleged in the petition that he was the owner of it and that the defendant was claiming some kind of interest therein, and to hold some character of title to it; but it is not alleged in the petition that the plaintiff was in possession of it. A demurrer was filed to the petition, which was overruled.

The court was manifestly in error in thus holding, for there is no rule of practice better established in this jurisdiction than the one that in cases of this character the plaintiff must not only allege ownership of the land to which he desires the title quieted, but he must also allege that he is in possession of it. Kentucky Statutes, § 11; *Brown v. Ward*, 105 S. W. 964, 32 Ky. Law Rep. 261; *Dupoyster v. Turk*, 110 S. W. 260, 33 Ky. Law Rep. 320; *Bowling v. Breathitt Coal, Iron & Lumber Co.*, 134 Ky. 249, 120 S. W. 817; *Hall v. Pratt*, 142 Ky. 561, 134 S. W. 900; *Le Moyne v. Hays*, 145 Ky. 415, 140 S. W. 552; *Cumberland Co. v. Kelly*, 156 Ky. 397, 160 S. W. 1077.

These allegations of course must be sustained by proof in order to enable the plaintiff to succeed in his suit. The answer consisted of a denial of the allegations of the petition and also an affirmative claim to ownership of the land by the defendant. During the progress of the cause, the defendant abandoned the claim of ownership to any part of that portion of the tract lying in Perry county, but continued to insist upon his ownership to all that portion of it lying in Leslie county.

Upon the submission of the case, judgment was rendered upholding the contention of the defendant as to his ownership of that portion of the land which he claimed lying in Leslie county and dismissing the petition in so far as it sought to have the title of plaintiff quieted to that portion of the tract, and from that judgment the plaintiff prosecutes this appeal.

Both parties claim title to the land through the same person, one Hiran Lewis, and he is alleged to have obtained the title in the following manner: Patentee, Esau Fields, some time after the issuing of the patent to him executed a title bond by which he attempted to sell the land to his son, Hiran Fields, and he subsequently assigned this title bond to Elhanon Fields, and he in turn assigned it to Hiran Lewis. Each of these assignments, according to the testimony, was in writing, and by each of them the assignors attempted to convey and transfer the title to the tract of land in controversy. In 1901, Hiran Fields died intestate, domiciled at the time in Perry

county. The defendant is his son-in-law and was such at the time of his death; and on the 17th day of February, 1902, he and his wife filed suit in the Perry circuit court to settle the estate of the decedent and to allot to his widow dower in his real estate and to sell the remainder for the purpose of payment of debts and division among the heirs. At that time Hiran Lewis was supposed to own something between 400 and 500 acres of land located in Perry county. That suit progressed to a judgment, and the land was sold under a decree of the court by the master commissioner, at which sale one Mat Lewis, a son of Hiran Lewis, became the purchaser, and a deed was executed to him by the commissioner which was approved and filed in the cause and duly recorded in the Perry county court. In 1907, the appellant purchased from Mat Lewis the land which the latter had purchased at the decretal sale and it is his contention that the lands which he so purchased, being the same sold under the judgment of the court, included the land in controversy. This is all the title which he attempts to show in support of his claim to the land.

It is the contention of the defendant that a year or two before the death of Hiran Lewis, he assigned the title bond to the tract of land which he had obtained from Elhanon Fields to defendant, and that he immediately took charge of it, having paid the consideration, and has had possession of it continuously since then; that Hiran Lewis at his death did not own the land, and it was, therefore, not included in the description of the land sold in the suit to settle his estate to which we have before referred. It will be seen that the only issue in this case is one of fact, it being, whether the land in controversy was included in the description of that which was sold in the suit to settle the estate of Hiran Lewis.

Before considering this, it might be necessary to notice a fact appearing in the record, which is, that a small portion of the 100 acres in controversy, being a part of that lying in Perry county is cleared, there being, however, no house of any kind built upon it. Just when this land was cleared, or who cleared it, is not definitely shown, nor is it shown by whom it has been cultivated since being cleared. It does appear, however, that after the purchase made by the plaintiff from Mat Lewis, he placed his son, Henry Fields, in possession of another tract of land owned by Hiran Lewis at his death and that this son since then has cultivated some or all of this cleared land. The tract of land upon which Henry Lewis moved and upon which he resides is a different one from the 100 acres in controversy. We do not find from the record any evidence of such possession of the cleared land with a claim to the well-marked boundaries of the 100 acres covered by the patent so as to ripen a title to all of it by

adverse possession. However, if this was so, it would not aid the plaintiff any more than the defendant, as each of them claims through the same person. There evidently has not been any adverse possession by the plaintiff or any tenant or occupant under him of the land so as to perfect the title in him.

[2] One of the contentions made by the plaintiff is that the defendant was cognizant of the purchase which the former made of Mat Lewis in 1907, and stood by without protest and saw the purchase made and the consideration paid, and that he is thereby estopped to assert any claim to the land adverse to the plaintiff. It is sufficient to say, however, that the evidence totally fails to sustain this claim. It is admitted by the defendant that he heard in a general way through rumor in the neighborhood that Mat Lewis was about to sell or had sold the land which he had purchased at the decretal sale to the plaintiff, but, knowing that the land in controversy was not owned by Hiran Lewis at the time of his death and had not been included in the land which was sold under that judgment, he said nothing about it. There is no evidence to the contrary, and it is perfectly plain that these conditions manifest no elements of equitable estoppel. The facts calling for the application of the doctrine of estoppel must be such as that the person sought to be estopped has caused or permitted it to appear that a certain state of facts exists and that another has acted upon the belief of the existence of such state of facts and parted with his property upon the faith of the truth of such appearance. If the one sought to be estopped in such cases has knowledge of the facts, which are different from the appearance, and fails to speak, he will not afterwards be permitted to do so to the detriment of the one acting upon the appearance. In other words, there must be some element of misrepresentation by the one estopped causing the party seeking the benefit of the estoppel to act otherwise than he would have done had it not been for the misrepresentation. This misrepresentation may be by acts, or words, or even by silence, when good conscience and fair dealing would require one to speak and make the facts known. The doctrine is well stated by this court in *Trimble v. King*, 131 Ky. 1, 114 S. W. 317, 22 L. R. A. (N. S.) 880, wherein the court quotes from *Alexander v. Woodford Springs Lake Fishing Co.*, 90 Ky. 215, 14 S. W. 80, 12 Ky. Law Rep. 107, as follows:

"There may be an equitable estoppel, such as to prevent the real owner from interfering with an easement created by an entry and an expenditure of money by reason of the owner's silence or consent, where the party entering has no other means of redress. If one stands by and sees another build a house on his land, the latter acting in good faith and believing that it belongs to him, will the real owner be permitted to stand by and see the house erected and then assert his title for the first time? Equity will prevent him from speaking when as a conscientious man he should remain silent."

See, also, *Foster v. Shreve*, 6 Bush, 519; *Kenyon Realty Co. v. National Deposit Bank*, 140 Ky. 133, 130 S. W. 985, 81 L. R. A. (N. S.) 169; Vol. 11, *Ave. Ency. of Law*, p. 428. The rule is too well settled to require the citation of further authorities.

In this case there is no absolute proof that the defendant knew of the purchase of the land by plaintiff until after the transaction had been completed, and if he had known it, he did not know the land here involved formed any portion of the subject-matter of that trade. We therefore find no rule for the application of the doctrine of estoppel in pais in this case.

[3, 4] Coming now to the question of fact which we have seen to be the principal question in the case, it is shown by a number of witnesses resident in the community and perfectly familiar with the land which Hiran Lewis owned at his death, as well as that covered by the Esau Fields' patent, that the latter is not included in the former. This is testified to by the defendant as well as Mat Fields, the vendor of plaintiff, and a number of other witnesses. This testimony is not refuted except by the plaintiff and, in a manner, by J. T. Fitzpatrick, a surveyor who prepared and filed a plat with his testimony. An examination of the plat, as well as his testimony, fails to convince us of the correctness of his opinion, which itself is not positive upon the point. The description of the land in the deed from Mat Lewis to the plaintiff, which is the same as that in the commissioner's deed to the former, does not contain any courses or distances, but only calls for creeks and forks of creeks and ridges of mountains. With the description in this condition, Fitzpatrick, when asked the direct question as to whether the land in controversy is included in it, says: "Yes, sir; I *think* it does." He then proceeds to show from the map his reasons for so thinking, but as stated, they are not convincing to us.

It must not be overlooked that the commissioner's deed as well as that of Mat Lewis to plaintiff states that the lands therein respectively conveyed lie in Perry county, when, as we have seen, the land which the trial court adjudged to belong to defendant is, and was at the dates of these deeds, in Leslie county.

The rule is well settled in this state that this court will "not disturb the finding of the chancellor upon an issue of fact where the proof is contradictory and the mind is left in doubt." *Shelton v. Shelton*, 167 Ky. 167, 180 S. W. 83; *Continental Ins. Co. of N. Y. v. Buchanan*, 108 S. W. 353, 32 Ky. Law Rep. 1298; *Clark v. McDowell's Adm'r*, 109 S. W. 887, 33 Ky. Law Rep. 177; *Overton v. Perry*, 129 Ky. 415, 111 S. W. 369, 33 Ky. Law Rep. 931; *Brackett's Adm'r v. Boreling's Adm'r*, 131 Ky. 751, 110 S. W. 276, 33 Ky. Law Rep. 292; *Id.*, 131 Ky. 751, 115 S. W. 766.

As we read the record, a preponderance of

the testimony is to the effect that the land in controversy is not included in plaintiff's deed, and under the rule *supra* we must agree with the chancellor upon his findings of fact. The land involved herein not being included in the judgment in the settlement and division suit *supra*, defendant is not estopped by such judgment to claim it.

This results in an affirmation of the judgment, and it is so ordered.

FREY v. COMMONWEALTH

(Court of Appeals of Kentucky. April 18, 1913.)

1. INTOXICATING LIQUORS \S 249 — SEARCH WARRANT—SUFFICIENCY.

An amended search warrant, charging that defendant, on whose premises a quantity of intoxicating liquors was found after search, had committed the offense of having in his possession intoxicating liquors for the purpose of sale in a local option county, is almost, if not quite, as specific as would be required for an indictment, and is sufficient, since such warrant need not charge the offense with the technical accuracy required in an indictment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385; Dec. Dig. \S 249.]

2. INTOXICATING LIQUORS \S 231 — CHARACTER OF LIQUORS—EVIDENCE.

In a prosecution for keeping intoxicating liquors for unlawful sale, evidence that persons were seen going to defendant's house sober and coming away intoxicated is admissible, when limited to the purpose of showing the intoxicating character of the liquor kept by defendant.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 291; Dec. Dig. \S 231.]

3. CRIMINAL LAW \S 304(20) — JUDICIAL NOTICE — INTOXICATING LIQUORS — GRAPE WINE.

The court will take judicial notice that grape wine is an intoxicating liquor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 716, 2951½; Dec. Dig. \S 304(20).]

4. CRIMINAL LAW \S 315 — EVIDENCE OF LOCAL OPTION ELECTION — PRESUMPTION OF CONTINUANCE.

Evidence that local option was adopted by the voters in a county nearly 30 years before is admissible to show that local option is still in force, where there is no evidence that a subsequent vote was taken, since it would be presumed that the status of the county continued, unless the contrary is shown.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 748; Dec. Dig. \S 315.]

5. CRIMINAL LAW \S 814(7) — INSTRUCTIONS — APPLICABILITY TO CASE—TIME OF OFFENSE.

Where a search warrant charged the keeping of intoxicating liquors for unlawful sale on a certain date, an instruction authorizing conviction if defendant had such liquors for purposes of sale within 12 months before the warrant was issued is not erroneous, since under Civ. Code Prac. § 129, it is not necessary to state the time of the commission of the offense accurately, unless time is a material ingredient of the offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1979; Dec. Dig. \S 814(7).]

6. INTOXICATING LIQUORS \S 236(7)—PROSECUTION—SUFFICIENCY OF EVIDENCE—PURPOSE TO SELL.

Testimony by two witnesses that they bought intoxicating liquor outright from defendant and paid him for it, and by numerous other witnesses that they obtained it from defendant's cellar and would leave the money there, is sufficient to prove that defendant kept the liquor for purpose of sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 309; Dec. Dig. \S 236(7).]

7. CRIMINAL LAW \S 1064(3)—APPEAL—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL.

Where the commonwealth agreed that the affidavit for continuance because of the absence of witnesses might be read as their depositions, but defendant did not read it or offer to read it, and did not make the refusal of continuance a ground for new trial, he waived the error in such refusal, and it cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2677, 2678, 2682; Dec. Dig. \S 1064(3).]

8. CRIMINAL LAW \S 1037(1), 1090(13)—APPEAL—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS—ARGUMENT OF COUNSEL.

Improper argument of prosecuting attorney, which was not made a part of the record by a bill of exceptions and was presented for the first time in the motion for new trial, cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2645, 2619, 3204; Dec. Dig. \S 1037(1), 1090(13).]

Appeal from Circuit Court, Ohio County.

Bruno Frey was convicted of having in his possession intoxicating liquors in a territory where the local option law was in force with intention to sell them, and he appeals. Affirmed.

W. H. Barnes and Heavrin & Kirk, all of Hartford, for appellant. C. E. Smith, of Hartford, James Garnett, of Louisville, M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

THOMAS, J. On June 9, 1915, Clyde Magan, E. F. Cook, and C. F. Boswell, all citizens and residents of Ohio county, in this state, subscribed and swore to an affidavit before John B. Wilson, county judge of the county, charging the appellant, Bruno Frey, with having in his possession intoxicating liquors in a territory where the local option law was in force and effect, with the intention of selling same contrary to the provisions of the local option law, and describing the premises of the appellant as is required by section 2572b of the Kentucky Statutes, whereupon the county judge in accordance with subdivision 1 of the section, issued a warrant, directed to the sheriff of the county, authorizing him to make search of the premises described in the affidavit and to take charge of any intoxicating liquors which he might find therein. The warrant furthermore directed the sheriff, that if such liquors were found on the premises, to arrest the appellant and bring him before the coun-

ty judge to be dealt with according to law. The search resulted in the finding of 9 barrels of grape wine, each barrel containing about 50 gallons, and all located in a cellar under the residence of appellant. This was taken charge of and delivered into the custody of the county judge. The appellant was also arrested and brought before the court, and before his trial the warrant was amended so as to charge him with having in his possession intoxicating liquors for the purpose of selling same in a territory where the local option law was in force. A plea of not guilty was entered, and upon trial the appellant was found guilty, and from the judgment rendered upon that verdict he appealed to the Ohio circuit court. He was tried in that court on October 20, 1915, and was found guilty by the jury; it fixing his punishment at a fine of \$100 and confinement in the county jail for 20 days. His motion for a new trial having been overruled, he prosecutes this appeal.

Numerous grounds are relied upon for a reversal, all of which we will endeavor to consider in the progress of this opinion, without a numerical statement of them.

[1] It is insisted that the demurrer to the warrant as amended should have been sustained. This insistence is made because in the original warrant there was no specific charge made against the appellant, but it only directed the sheriff to arrest him, should intoxicating liquors be found upon the premises, and to return him before the county judge "to be dealt with according to law." Before the trial, and before the filing of the demurrer, the warrant was amended, so as to charge him with the offense of having in his possession for the purposes of sale intoxicating liquors in violation of the local option law; the language of the amendment, omitting the caption, being as follows:

"Comes the commonwealth of Kentucky, plaintiff, and by leave of court amends its warrant herein, and by way of such amendment states that there are reasonable grounds for believing that the defendant, Bruno Frey, has committed the offense of having in his possession June 9, 1915, spirituous, vinous and malt liquors, to wit, wine, for the purpose of sale in Ohio county where the local option laws prohibiting the sale of spirituous, vinous, malt and other intoxicating liquors are in full force and effect. Wherefore it prays as in its original warrant."

From this it will be seen that the charge is in language almost, if not quite, sufficiently specific to be good in an indictment, notwithstanding it has been many times decided by this court that the charge in a warrant of such offenses as can be prosecuted under the law by such process need not be stated with the technical accuracy required in an indictment. *City of Louisville v. Wehmhoff, et al.*, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995; *Commonwealth v. Leak*, 116 Ky. 540, 76 S. W. 368, 25 Ky. Law Rep. 761. In the latter case, upon the point under consideration, this court said:

"The same technical strictness is not required in a proceeding by warrant as by indictment, and ordinarily a warrant in the form prescribed by the Code sufficiently describes the offense; but, if made to appear to the satisfaction of the court that a defendant cannot intelligently make defense, it should be made more specific."

This excerpt from the Leak Case was quoted with approval by this court in the Wehmhoff Case, *supra*. Upon the question of the right of the commonwealth to amend the warrant, this court in that case said:

"In *Commonwealth v. Robert Van Meter*, 18 S., by Judge Cofer, decided in 1878, this court held that a warrant issued in a misdemeanor case not requiring an indictment could be amended, when it was not sufficiently specific, and that the amendment could be made in the circuit court after the appeal there, inasmuch as it would not have changed the prosecution."

In view of these authorities, we are unable to agree with appellant in this contention.

[2] It is insisted that upon the trial the court permitted incompetent evidence to be introduced by the commonwealth over the objection of appellant. The testimony objected to consisted of that of several witnesses to the effect that within 12 months preceding the issuing of the warrant, they had seen numbers of persons going to the house of appellant while in a sober condition, and within a short while thereafter returning therefrom in an intoxicated condition. Some of the witnesses stated that they did not see these parties on some of the occasions at the house of the appellant, while upon other occasions they did see them there, and the argument is made that these persons may have become intoxicated from the use of liquors obtained elsewhere than from the premises of appellant, and that, therefore, such evidence should not have been heard by the jury. The court admonished the jury during the trial that this testimony could only be considered by it for the purpose of determining whether or not the article which plaintiff had on his premises was intoxicating, and while it is possible that some of these persons so observed by the witnesses may have consumed intoxicants obtained from other sources, still we think the evidence was competent for the purposes for which it was permitted to be introduced. The intoxicating qualities of this liquid may be established, as any other fact essential to constitute a crime, by circumstantial evidence, and the jury has a right to be placed by the testimony in possession of all the facts from which a legitimate deduction as to the truth or falsity of the essential fact may be arrived at. In this character of cases and many others it is frequently impossible to prove with mathematical certainty the facts necessary to a conviction, and the jury has a right from the surrounding circumstances to deduce from their common experiences and observations what the truth is touching the issue being investigated. The fact that persons going to a place are seen going toward that place, and with-

in a short while are observed returning therefrom under the influence of some intoxicant, is a strong circumstance that they obtained from that place something which produced their intoxicated condition.

[3] Moreover, there was other evidence that the contents of the barrels in appellant's cellar was grape wine, which is known to be intoxicating, and a fact of which this court will take judicial notice. *Gourley v. Commonwealth*, 140 Ky. 221, 131 S. W. 34, 48 L. R. A. (N. S.) 315; *Mitchell v. Commonwealth*, 106 Ky. 602, 51 S. W. 17, 21 Ky. Law Rep. 222; *Flanders v. Commonwealth*, 140 Ky. 38, 130 S. W. 809; *Pedigo v. Commonwealth*, 70 S. W. 659, 24 Ky. Law Rep. 1029; *Commonwealth v. Hurst*, 62 S. W. 1024, 23 Ky. Law Rep. 365; *Locke v. Commonwealth*, 74 S. W. 654, 25 Ky. Law Rep. 78.

[4] It was shown by the commonwealth, by the records of the Ohio county court, that an election was held throughout the county on November 2, 1886, for the purpose of determining whether or not spirituous, vinous, or malt liquors should be sold in the county, and that there was cast in favor of the sale of such liquors 742 votes and against the sale of it 1,529 votes, the certificate of which election was spread upon the order books of the county court, as required by law; but it was not shown whether the county had continued to remain local option territory since that time, and because it is not so shown appellant makes complaint. The fact that the county became local option territory by a majority of the votes of the county at an election called for that purpose would create the presumption that such status of the county continued, unless it was affirmatively shown to the contrary. There was no effort made by the appellant to show that any subsequent election upon the subject had been held in the county, or that anything had occurred to change the status of the county in this respect. We therefore find no merit in the objections to this testimony introduced by the commonwealth.

[5] Complaint is made that the instruction given by the court permitted the jury to find the defendant guilty if they believed from the evidence beyond a reasonable doubt that appellant had in his possession intoxicating liquors for the purposes of sale within twelve months before the issuing of the warrant. The language of the warrant did not attempt to confine the offense with which appellant was charged to the particular date of the affidavit, but only that he was guilty of the offense denounced by the statute. If he was guilty of such offense at any time within the limitation period for which he could be prosecuted, which is 12 months, it would be perfectly competent for the commonwealth to prove it, and whatever it is competent to prove is likewise competent to be submitted to the jury under the instructions of the court. Time is not of the essence of this offense, only in so far as it is not beyond the

limitation period, and under Criminal Code of Practice, section 129, it is not necessary that the time of the commission of the offense should be accurately stated, even in an indictment, but only that it should be stated to have been committed before the finding of the indictment, unless, of course, time is a material ingredient in the indictment. It is not a material ingredient in the offense with which the appellant was charged, and if it is not necessary to accurately state the time of the commission of an offense in an indictment, it is difficult to see wherein it would be necessary to so state it in a warrant when, as we have before seen, the offense in the latter need not be stated with as much particularity as in the former. *Paul v. Commonwealth*, 159 Ky. 848, 169 S. W. 544; *Commonwealth v. Miles*, 140 Ky. 579, 131 S. W. 385, 140 Am. St. Rep. 401; *Williams v. Commonwealth*, 37 S. W. 839, 18 Ky. Law Rep. 667; *Combs v. Commonwealth*, 119 Ky. 836, 84 S. W. 753, 27 Ky. Law Rep. 273.

[6] It is again insisted that, although the evidence might have shown that the beverage was intoxicating, still the court should have ordered an acquittal of the appellant, because it was not shown he had same in his possession for the purpose of selling it. It is scarcely worth while to burden this opinion with any lengthy consideration of this objection. At least two witnesses testified that they bought quantities of this beverage outright and paid the appellant for it. Numbers of others testify that they obtained quantities of it on different occasions, and would leave the money on the heads of barrels, kegs, and on the doorsteps of the cellar, which method is such an old and cheap trick as to have become as much or more convincing proof of the sale as that of an outright purchase. We find no ground whatever for this contention.

[7] Lastly, it is claimed that the court erred in refusing a continuance asked by appellant and supported by an affidavit. The affidavit states the absence of witnesses who had been subpoenaed and what their testimony would be if present. The commonwealth agreed that it should be read as the depositions of the absent witnesses, but upon the trial the appellant did not see proper to read the affidavit or offer to read it, and he does not make this alleged error a ground for a new trial, which, under the repeated decisions of this court, is a waiver of it, and prevents it from being considered on appeal.

[8] The alleged improper argument of counsel for the commonwealth in the closing argument to the jury cannot be considered by us, because it is nowhere made a part of the record by a bill of exceptions, and is presented for the first time in the motion for a new trial. Under repeated rulings of this court, this objection under such circumstances cannot be considered.

We are thoroughly convinced that the appellant has had a fair and impartial trial, and the judgment is affirmed.

FREY v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 18, 1916.)

1. INDICTMENT AND INFORMATION \S 125(8)—DUPLICITY.

An indictment charging that defendant sold and furnished intoxicating liquors to another within local option territory is not duplicious as charging the offense of selling intoxicating liquor contrary to Ky. St. \S 2557, and of furnishing intoxicating liquor for the purpose of selling in local option territory contrary to section 2557b, subsec. 2, since there is no allegation that the liquors were furnished to be sold.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. \S 335; Dec. Dig. \S 125(8).]

2. CRIMINAL LAW \S 1167(6) — APPEAL — HARMLESS ERROR — INDICTMENT — SURPLUSAGE.

In an indictment charging that defendant unlawfully sold and furnished intoxicating liquors, the words "and furnished" were surplusage which merely required the state to prove an act additional to those necessary to sustain a conviction, and therefore were not prejudicial to defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3101; Dec. Dig. \S 1167(6).]

3. CRIMINAL LAW \S 1172(7) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for unlawfully selling intoxicating liquor, error in an instruction that to convict the jury must find that defendant unlawfully furnished the liquor, in addition to finding that he sold it, is not prejudicial to defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3160; Dec. Dig. \S 1172(7).]

4. COURTS \S 64(5)—CIRCUIT COURT—SPECIAL TERM—NOTICE.

Under Ky. St. \S 964, providing that a special term of the circuit court may be held in any county, either by an order entered at the last preceding regular term in the county or by notice signed by the judge and posted at the courthouse door for 10 days before the special term is held, an objection that the special term at which defendant was tried was called by an order entered at another special term, instead of at a regular term, is immaterial where the notice was duly posted.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. \S 223-227; Dec. Dig. \S 64(5).]

5. CRIMINAL LAW \S 815—LOCAL OPTION — EVIDENCE OF ELECTION—PRESUMPTION OF CONTINUANCE.

In a prosecution for selling intoxicating liquors in a local option county, evidence that the voters of the county adopted local option nearly 30 years before is admissible in the absence of proof of a subsequent election.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 748; Dec. Dig. \S 315.]

6. INTOXICATING LIQUORS \S 231—EVIDENCE — INTOXICATING CHARACTER OF LIQUOR.

In a prosecution for unlawfully selling intoxicating liquor, evidence that persons were seen going to defendant's house sober and coming away intoxicated is admissible to show the intoxicating quality of the article sold.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 291; Dec. Dig. \S 231.]

7. CRIMINAL LAW \Leftrightarrow 304(20)—JUDICIAL NOTICE—INTOXICATING CHARACTER OF LIQUORS.

The court will take judicial notice that grape wine is an intoxicating liquor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 716, 2951½; Dec. Dig. \Leftrightarrow 304(20).]

Appeal from Circuit Court, Ohio County.

Bruno Frey was convicted of selling intoxicating liquors in a local option county, and he appeals. Affirmed.

W. H. Barnes and Heavrin & Kirk, all of Hartford, for appellant. O. E. Smith, of Hartford, James Garnett, of Louisville, M. M. Logan, Atty. Gen., and Oberton Hogan, Asst. Atty. Gen., for the Commonwealth.

THOMAS, J. The appellant, Bruno Frey, was indicted by the grand jury of Ohio county for violating the local option law by selling intoxicating liquors in said county, where the local option law was in force at the time. Upon his trial, after the entering by him of a plea of not guilty, he was convicted, and his punishment fixed at a fine of \$60 and confinement in the county jail for 20 days. Failing to obtain a new trial he prosecutes this appeal.

Several complaints are made to the judgment, each of which, so far as we deem necessary, will be considered in the progress of this opinion.

[1] First. A demurrer was entered to the indictment, which was overruled. The ground insisted upon for the sustaining of the demurrer is that it is bad for duplicity in that it charges the commission of two separate and distinct offenses. The language of the indictment in its charging part is this:

"Said defendant in the county and state aforesaid on the _____ day of _____, 1914, and within twelve months next immediately before the finding of this indictment, did unlawfully sell and furnish to Charlie Condor spirituous, vinous and malt liquors, to wit, wine, and at the time he did sell and furnish such liquors the general local option laws prohibiting the sale of such liquors were in full force and effect in said county, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the commonwealth of Kentucky."

It is insisted that this language accuses the appellant of the two offenses of unlawfully *selling* intoxicating liquors and of unlawfully *furnishing* intoxicating liquors to the prosecuting witness, the one offense being denounced by section 2557, and the other by subsection 2 of section 2557b, of the Kentucky Statutes; and we are referred to the case of Partin v. Commonwealth, 140 Ky. 146, 130 S. W. 968, as authority for this contention. A reading of the opinion in that case, however, will show that this court expressly determined that the language in the indictment then being considered, which was almost identical with that being here considered, did not charge two offenses, but charged only the one offense of selling intoxicating liquors in violation of the local op-

tion law. The opinion cites and quotes from the case of Hyser v. Commonwealth, 116 Ky. 410, 76 S. W. 174, 25 Ky. Law Rep. 608, and the case of Commonwealth v. Dickerson, 76 S. W. 1084, 25 Ky. Law Rep. 1043, and then says:

"Under the authorities, and others which might be cited, it is evident that the indictment did not charge appellant with the offense prescribed in subsection 2 of section 2557b (that of furnishing liquor), for there is no charge that he procured for or furnished the liquor to Adkins for the purpose of sale of it in that or any other town or district, nor was there the slightest proof to that effect. Therefore, the court erred in directing the jury to find him guilty of the procuring for or furnishing to the witness, Adkins, the liquor. The indictment was sufficient to charge appellant with the offense charged in section 2557."

The furnishing of intoxicating liquors, in order to be an offense under section 2557b, subsection 2, must be a furnishing for the purpose of illegal sale in local option territory by the person to whom the liquors are furnished. There are no allegations in the indictment being considered conforming to the requirements of the statute which would make the furnishing an offense. The indictment, therefore, charged but one offense, that being the one denounced by section 2557, and it is therefore not subject to the criticism made to it and the demurrer thereto was properly overruled.

[2] The use of the phrase "and furnish" in the indictment was clearly unnecessary and may be appropriately classed as harmless surplusage as far as the appellant is concerned. It resulted in the commonwealth charging him with an unnecessary and additional act in order to render him guilty, for the offense was complete if he sold the intoxicating liquors under the circumstances charged, without his doing any other act in the way of furnishing or otherwise. This character of surplusage does not harm the defendant in the indictment and will not render it bad on demurrer. Coe v. Commonwealth, 94 Ky. 606, 23 S. W. 371, 15 Ky. Law Rep. 284; Commonwealth v. Jarboe, 89 Ky. 143, 12 S. W. 138, 11 Ky. Law Rep. 344, and other cases which might be cited.

[3] Second. It is also insisted that the court erred in the submission of the case to the jury by its instructions. But two instructions were given, the second one was the usual reasonable doubt instruction, and the first one is as follows:

"If the jury shall believe from the evidence they have heard in this case, to the exclusion of a reasonable doubt, that the defendant did, within 12 months next before the 23d day of June, 1915, in Ohio county, willfully and unlawfully sell and furnish liquor, to wit, wine, to Charles Condor, and at the time he did so the local option laws prohibiting the sale of such liquor were in force at the place where he made said sale, then the jury should find the defendant guilty as charged in the indictment and fix his punishment at a fine of not less than \$60, nor more than \$100, and confinement in the

county jail not less than 20 nor more than 40 days, in their discretion, within said limits."

From this instruction it will be seen that the court required the jury to believe that the appellant had "sold and furnished" the liquor to the prosecuting witness before it was authorized to convict him. The jury were thereby required to believe and find from the evidence more than was necessary to a conviction, *i. e.*, in addition to the sale that the appellant also furnished the liquor to the witness. As we have hereinbefore seen, the offense would have been complete by the act of sale alone. The word "furnish" as used in the instruction was surplusage pure and simple and might be considered as synonymous with "deliver," as though the language in the instruction had been "sold and delivered" to the prosecuting witness, which would clearly not have been prejudicial to the defendant. The case of *Partin v. Commonwealth*, *supra*, does not hold to the contrary. The language used in the instruction, and because of which the judgment of conviction was reversed, is "sold, procured for, or furnished to the witness John Adkins," etc., thus submitting the acts in the disjunctive form, instead of the conjunctive, and making that case almost the antithesis of the instant case. We are clearly of the opinion that there was no error in the point being considered prejudicial to the substantial rights of appellant.

[4] Third. Complaint is made because the prosecution was tried at a special term of the court, called for October 11, 1915, and to continue to and include October 16, 1915. This special term was called by an order entered on the order book of the Ohio circuit court at another special term which convened on the 23d day of August, 1915, and continued to and included September 3, 1915. This last special term had been called by an appropriate order entered at the preceding regular June term, 1915. It is insisted that the court had

no authority to enter an order for the last special term during the first one, as it was not stated in the order calling the first special term that any such second special term would be called at the first one. Without passing upon this point, it is sufficient to say that the special term at which the trial was had was called not only by the order entered at the first special term, but also by the posting of notice at the courthouse door, as directed by the provisions of the statutes upon the subject (section 964, Ky. Statutes). So that we find no merit in this objection.

[5, 6] Fourth. Complaint is made to the evidence which the court permitted the commonwealth to introduce to the jury over the objections of the appellant. This consisted in showing the local option election held in 1886 throughout Ohio county by the records of the Ohio county court, and the testimony of witnesses as to the gatherings of persons at the house of the appellant and leaving there in an intoxicated condition, being the same evidence as was considered in the case of *Frey v. Commonwealth*, 169 Ky. 528, 184 S. W. 896, this day decided by this court.

[7] The testimony of the witnesses was permitted to be introduced by the court solely for the purpose of showing the intoxicating qualities of the article sold, which, according to the proof, was grape wine; and this court will take judicial knowledge of the fact that it is intoxicating. *Gourley v. Commonwealth*, 140 Ky. 221, 131 S. W. 34, 48 L. R. A. (N. S.) 315. These objections were disposed of adversely to the contention of appellant in the case of the same style, *supra*, this day decided, and it will be unnecessary to further consider them here.

Other objections grow out of the questions already determined and their further consideration is unnecessary.

There was ample evidence to justify the finding of the jury as to the sale, and the judgment based upon it is affirmed.

PERRY v. REED. (No. 14737.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. APPEAL AND ERROR §204(1) — NECESSITY OF OBJECTION—EVIDENCE.

Objection to evidence not made during the trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258, 1259, 1274-1277; Dec. Dig. §204(1); Trial, Cent. Dig. § 172.]

2. APPEAL AND ERROR §301—MOTION FOR NEW TRIAL—OBJECTION TO EXCLUSION OF EVIDENCE.

Where a motion for new trial does not suggest that testimony has been improperly excluded, that question cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1748, 1753-1756; Dec. Dig. §301.]

3. GUARDIAN AND WARD §13(4)—APPOINTMENT—CHARACTER OF GUARDIAN.

In a proceeding to have a guardian appointed for two minors under Rev. St. 1909, § 406, providing for guardianship, evidence that their father and his present wife had shown good character since their marriage and were taking good care of the minors held to support a verdict that the father was a fit and competent person to act as guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 45; Dec. Dig. §13(4); Appeal and Error, Cent. Dig. § 566.]

Appeal from Circuit Court, Knox County; Chas. D. Stewart, Judge.

"Not to be officially published."

Application by J. S. Perry for guardianship against Ora F. Reed. For judgment for defendant, plaintiff appeals. Affirmed.

F. H. McCullough, of Edina, for appellant. C. M. Smith, of Edina, Otho F. Matthews, of Macon, and F. E. Robinson, of Edina, for respondent.

REYNOLDS, P. J. One J. S. Perry, maternal grandfather of a boy aged 5 years and a girl, aged 3 years at the time of the making of the application, which was December 2nd, 1913, applied to the Probate Court of Knox County for the appointment of a suitable person as guardian and curator of the estate of the minors, that estate consisting of a farm said to be of the value of \$6,000, situate in Knox County and coming to the children through their mother, since deceased. It is alleged in this application that Ora F. Reed, the father of the two children is "incompetent and unfit to manage said estate and to have the care and custody of said minor children."

The application presented to the Probate Court was heard there by a jury which found Ora F. Reed to be incompetent and unfit for the duties of guardianship of the minors. From this Reed appealed to the Circuit Court, in which he filed an answer averring that he is the father and that he is the natural guardian of the children named; that they are the owners of the 80 acres of land de-

scribed and that he has greatly improved it, having placed extensive improvements on it, and that he is ready, willing and able to furnish bond as guardian of the minors. Further answering, Reed, designated as defendant, avers that neither plaintiff, meaning Perry, nor any other person has filed an application to be appointed guardian or curator of his (defendant's) children with the Probate Court of Knox County, stating facts showing defendant is not entitled to the care and custody of his minor children, and that no application under the provisions of section 406, Revised Statutes 1909, has been filed by any applicant for appointment of guardian and curator and that the Probate Court had no jurisdiction to try the cause, hence the circuit court has none. Defendant prays that the proceedings be dismissed.

Plaintiff filed a reply to this, denying the new matter pleaded. There does not seem to have been any ruling on this plea, as it may be called, and the cause went to trial before the court and jury, at the conclusion of which the jury returned a verdict finding for the defendant and that he, "Ora F. Reed, is a fit and competent person for the duties of guardianship of his children." The court entered up judgment following the verdict, and adjudging costs against plaintiff. From this plaintiff has appealed to our court, having filed his motion for a new trial and in arrest of judgment and saved exceptions to the action of the trial court in overruling these motions.

[1] Here counsel for appellant assigns as one error the action of the court in admitting the testimony of certain witnesses, who testified to the character and reputation of defendant and his wife after the institution of the suit. The "suit" was instituted December 2nd, 1913, by filing the petition of plaintiff before set out, and the cause was tried in December, 1914. We find no such objection made during the trial to the testimony of the witnesses named, so we overrule that assignment.

[2] Another assignment is to the action of the trial court in sustaining objection to testimony of witnesses as to what they had heard the present wife of defendant testify in the trial of the case in the Probate Court. It is sufficient to dispose of this by saying that while the motion for a new trial attacked the action of the trial court in the admission of testimony, no suggestion is there made that testimony had been improperly excluded.

It is further assigned for error that the instructions given at the instance of defendant, and there are 13 of them, are misleading, contradictory, argumentative and illegal. We have read and considered all of them. They are too long to warrant recital here.

This is a rather peculiar proceeding and so far as we are advised has no parallel in our appellate courts. Section 406, Revised

Statutes 1909, provides that if a minor have no parent living, or the parents be adjudged incompetent or unfit for the duties of guardianship, the Probate Court of the proper county, "shall appoint guardians to such minors under the age of 14 years. * * * Unfitness or incompetency of parents, after ten days' notice to the parents, shall be decided in the Probate Court by the judge thereof, or by a jury, if one is demanded."

The preceding sections, 403, 404 and 405, provide (403) that in all cases not otherwise provided by law, the father, if living, shall be the natural guardian and curator of his children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the parent acting as guardian and curator, such parent shall give security and account as other guardians and curators. On his refusal or neglect to qualify the Probate Court shall appoint a suitable person.

Section 404 provides that when a minor is entitled to or possessed of any estate not derived from the parent and it shall be suggested to the Probate Court that such parent is incompetent or is mismanaging or wasting the estate, the court, on notice to the parent, and sufficient cause not being shown to the contrary, shall appoint a curator.

Section 405 provides that—

"every applicant for appointment as guardian or curator of a minor shall file with the Probate Judge or clerk an application stating therein the name and age of such minor, the county of his residence, the estimated value of his real and personal property, the names of his parents, and whether they be living or dead."

We have recently had occasion to consider sections 403, 404 and 405, in *State ex rel. Young v. Cook*, Probate Judge, not yet officially reported, but see 183 S. W. 355.

[3] Counsel for appellant claims that this is a proceeding under the above sections 404 and 405. If that is true, then the point made by respondent in his answer may be good; that is, as these sections 404 and 405 contemplate an application for some one for his own appointment and as there is no such application here, then the case must fail. But it is not necessary to decide this. Both sides have tried it on the theory that the point involved was as to the fitness of the father to act as guardian, using that word here as in section 406, supra, as embracing guardian and curator. By that section this is made a question for the jury. The testimony here was directed to that and took a wide latitude, covering the character not only of the defendant but of his present wife. While there was testimony tending to cloud their conduct prior to their marriage, there was strong, probative evidence tending to prove good character and clean lives since then and that they were taking good care of the minors both as to their personal comfort and moral training. A careful consideration of the in-

structions given satisfies us that they followed the case as made by counsel and the theory upon which it was tried, correctly. There are some minor defects in some of them, but not to mislead the jury or place the case before it on a wrong theory. In short, we find no reversible error in them.

Finally, it is assigned that the verdict is the result of passion and prejudice on the part of the jury. We do not think so. The case as presented was peculiarly one for the jury, a case in which honest men might differ. We see no cause to overturn the verdict.

Finding no errors, as errors are assigned, we affirm the judgment of the circuit court.

NORTONI and ALLEN, JJ., concur.

INGERSOLL v. BOND. (No. 11777.)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

SALES §—439—BREACH OF WARRANTY—BURDEN OF PROOF.

In an action by the seller of a horse for the price, defended for breach of warranty of soundness, the burden was on the buyer to prove the breach of warranty.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1258-1260; Dec. Dig. §—439.]

Appeal from Circuit Court, Bates County; O. A. Calvird, Judge.

"Not to be officially published."

Action by A. J. Ingersoll against George A. Bond. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith & Chastain, of Butler, for appellant. J. S. Brierly, of Harrisonville, and L. A. Bruce, for respondent.

ELLISON, P. J. Plaintiff's action is for the purchase price of a horse alleged to have been warranted to be sound. He recovered judgment in the trial court.

The defense was a warranty of soundness, and breach. Defendant presents the facts, in a bill of exceptions of a few words, as the evidence in favor of each party tended to show them. The parties were in accord that the horse was sold for \$165 and was warranted to be sound; but disagreed as to whether he was in fact sound, that is, they disagreed on the question whether there was a breach of warranty. As just stated, there was evidence tending to sustain each party. The sole question presented is whether the court erred in instructing the jury, at plaintiff's request, that the burden was on defendant to prove the breach of the warranty. We think it did not. The instruction was proper. *Branson v. Turner*, 77 Mo. 489, 495; *Garvey v. Hauck*, 85 Mo. App. 14; *Roth v. Continental Wire Co.*, 94 Mo. App. 236, 270, 68 S. W. 594; *Burns v. Nichols*, 89 Ill. 480; *Hoffman v. Hampton School Dist.*, 96 Iowa, 319, 65 N. W. 322; *Keystone Co. v. Forsyth*,

123 Mich. 626, 82 N. W. 521; Wallace v. Douglas, 58 W. Va. 102, 51 S. E. 869.

We think the authorities referred to in defendant's brief and argument are not applicable.

The judgment is affirmed. All concur.

STATE v. ROSEFELT. (No. 15068.)
(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. CRIMINAL LAW § 883—TRIAL—FINDINGS—SUFFICIENCY—STATUTE.

Under Rev. St. 1909, § 4901, providing that, if on the trial of any person indicted for larceny the evidence shall establish embezzlement, the jury shall return as their verdict that defendant is not guilty of larceny but is guilty of embezzlement, and defendant shall be punished for embezzlement, a finding by the court sitting as a jury that a defendant charged with larceny was guilty of embezzlement without a finding that he was not guilty of larceny is not sufficient to sustain a sentence for embezzlement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2104-2106; Dec. Dig. § 883.]

2. EMBEZZLEMENT § 35—LARCENY § 40(8)—PROSECUTION—VARIANCE—CHECK.

A charge of larceny or embezzlement of lawful money of the United States is not sustained by proof of the larceny or embezzlement of a check.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55-59; Dec. Dig. § 35; Larceny, Cent. Dig. §§ 116-119; Dec. Dig. § 40(8).]

Appeal from St. Louis Court of Criminal Correction; Benj. Clark, Judge.

"Not to be officially published."

S. I. Rosefelt was convicted of embezzlement, and he appeals. Reversed, and defendant discharged.

McShane & Goodwin, of St. Louis, for appellant. Howard Sidener and J. R. Weinbrenner, both of St. Louis, for the State.

REYNOLDS, P. J. Defendant was proceeded against by information filed by the Assistant Prosecuting Attorney of the St. Louis Court of Criminal Correction, in that defendant, at the city of St. Louis, on May 22nd, 1914, "\$12.75 lawful money of the United States, all of the value of \$12.75, all the property of M. Sternberger then and there being found unlawfully, wilfully did then and there steal, take and carry away without the consent of the owner, with the intent then and there to permanently deprive the owner of the use thereof, and to convert the same to his own use," contrary, etc. Pleading "not guilty," defendant was tried before the court, a jury having been waived.

The transcript of the judgment in this case, after recital of the plea, submission, etc., proceeds:

"Thereupon the trial of this cause proceeded, and the court having heard all of the evidence and being fully advised of and concerning the premises, doth find the defendant guilty of em-

bezzlement. It is therefore considered and adjudged by the court, that the said defendant for his said offense pay to the State of Missouri, for the use of the city of St. Louis, a fine of \$50, together with the costs herein accrued, and that execution issue therefor."

The judgment in this case will have to be reversed.

[1] In the first place, section 4901, Revised Statutes 1909, provides, among other things, that:

"If, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof, be entitled to be acquitted, *but the jury shall return as their verdict that such person is not guilty of embezzlement, but is guilty of larceny*, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; * * * and no person so tried for embezzlement or larceny, as aforesaid, shall be liable to be afterward prosecuted for larceny or embezzlement upon the same facts." (Italics ours.)

Our Supreme Court has decided, after what may be called rather diverse opinions on the question, that this part of the section is constitutional in so far as allowing conviction for embezzlement under an indictment charging larceny. This, on the theory that embezzlement is the lesser degree of the same crime. See State v. Thompson, 144 Mo. 314, 46 S. W. 191. Passing upon this same section, which was then section 2367, Revised Statutes 1899, our court, in State v. Cornwall, 88 Mo. App. 190, held that on a conviction under an indictment for larceny, if the evidence proves the defendant guilty of embezzlement, the verdict shall be guilty of embezzlement and not guilty of larceny, and that a general verdict of guilty would not be sufficient.

In the case at bar there is no general verdict of guilty, but a distinct verdict or finding by the trial court, sitting as a jury, of embezzlement. That entitled the defendant, as a matter of right, to a verdict of not guilty of the charge of larceny of which he stood indicted. Here there is no such verdict. For this reason the judgment would have to be arrested.

[2] Over and above that, however, there is a fatal variance between the *allegata* and *probanda*. The defendant is distinctly charged with the larceny of \$12.75, "lawful money of the United States." The proof shows beyond controversy that there was no larceny or embezzlement of any lawful money of the United States; on the contrary, the article or thing received by defendant and said to have been converted by him was a check for that amount, the check payable to S. I. Rosefelt, in payment of a bill for wines sold, it being claimed that the prosecuting witness, one Sternberger, was entitled to this check, although made to the order of defendant. Defendant on his part, claiming that he and Sternberger were partners and that

there was neither embezzlement nor larceny in his receiving and retaining the check. The charge of larceny or embezzlement of \$12.75, "lawful money of the United States," is not sustained by a proof of the larceny or embezzlement of a check for that amount. So our Supreme Court has held in two cases, namely, *State v. Mispagel*, 207 Mo. 557, 106 S. W. 513; *State v. Castleton*, 255 Mo. 201, 164 S. W. 492.

Furthermore, a careful consideration of the testimony in the case satisfies us that there is no substantial evidence warranting the finding that defendant was guilty of embezzlement.

For these reasons, the judgment of the Court of Criminal Correction is reversed and the defendant discharged.

NORTONI and ALLEN, JJ., concur.

DEWEESSE v. CITY OF ST. JOSEPH.
(No. 11946.)

(Kansas City Court of Appeals. Missouri.
April 8, 1916.)

MUNICIPAL CORPORATIONS—§21(20)—INJURY
IN STREET—CONTRIBUTORY NEGLIGENCE—
QUESTION FOR JURY.

In an action for personal injuries, whether plaintiff is guilty of contributory negligence in allowing her buggy to drop into a rut while driving along the street, *held* for the jury under the evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1754; Dec. Dig. § 821(20).]

Appeal from Circuit Court, Buchanan County; Thomas B. Allen, Judge.

"Not to be officially published."

Action by Clara E. Deweesse against the City of St. Joseph. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. L. Faust, City Counselor, Merrill E. Otis, and Herman Hess, all of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff was driving a one-horse buggy along one of defendant's paved streets, and was thrown from the buggy and injured. She brought this action for damages, and recovered judgment in the circuit court.

There was evidence showing a rut in one of the principal streets of the city, 16 to 20 inches deep, 10 inches wide, and running with the street for 20 feet. Plaintiff was undoubtedly hurt, by reason of her buggy dropping into the rut while driving along the street, and defendant was undoubtedly guilty of negligence in permitting the rut. The only question in the case, of any substance, is whether she should be denied a judgment on account of contributory negligence. We have concluded that we would not be justified in holding that she was barred as

a matter of law, and we therefore approve the action of the trial court in allowing the question to be decided by a jury.

Plaintiff did not know of the defect, and testified that she was driving along in a careful manner; that she was looking at the street, that is, she was looking ahead at the street, and did not observe the rut. We do not think the character or kind of defect was such that we should say as a matter of law, that she should have observed it. *Devlin v. City of St. Louis*, 252 Mo. 203, 158 S. W. 346; *Alexander v. St. Joseph*, 170 Mo. App. 376, 156 S. W. 729. The obstruction in this case is wholly unlike the pile of iron rails in *Woodson v. Met. Ry. Co.*, 224 Mo. 685, 123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039.

We do not see any abuse of discretion in the trial court refusing a new trial on account of newly discovered evidence. The judgment is affirmed. All concur.

MCKENZIE CARPET CO. v. LEFFLER.
(No. 11998.)

(Kansas City Court of Appeals. Missouri.
April 8, 1916.)

1. HUSBAND AND WIFE—§131(7)—TITLE TO
PROPERTY—PRESUMPTION FROM POSSESSION.

Where a husband, living with his wife, bought furniture and made payments reducing the balance due, and in consideration of such balance by a written bill of sale sold the furniture to the seller, no delivery being made, the wife, then living apart from the husband, being in possession of the property, the presumption raised by her possession was that title was in the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 483; Dec. Dig. § 131(7).]

2. HUSBAND AND WIFE—§131(7)—POSSESSION OF PERSONALTY BY WIFE—PRESUMPTION.

In a contest over the title to personalty between a wife and her husband who have separated, there is no presumption that the possession of the goods is in the husband, and the wife's possession will be presumed to be in her own right.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 483; Dec. Dig. § 131(7).]

3. HUSBAND AND WIFE—§131(7)—POSSESSION OF PROPERTY—PRESUMPTION OF TITLE—RIGHT TO REBUT.

The seller of furniture to a husband, suing his wife in replevin therefore after separation from her husband, had the right to rebut the presumption of title in the wife, arising from her possession of the goods, as by showing that when it sent for the property the wife stated that her husband should pay for it and give it to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 483; Dec. Dig. § 131(7).]

4. APPEAL AND ERROR—§665—ACCEPTANCE OF ABSTRACT—SENDING FOR BILL OF EXCEPTIONS.

In the absence of a counter abstract, the Court of Appeals must accept that of appellant, though if a counter abstract had been presented by respondent and not agreed to by appel-

lant, under the statute the Court of Appeals is required to send for the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2860; Dec. Dig. ¶665.]

5. TRIAL ¶66—REOPENING OF CASE—CONSENT OF COURT.

A case can be reopened and further evidence received only by consent of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 156; Dec. Dig. ¶66.]

6. APPEAL AND ERROR ¶854(4)—REVIEW—ADMISSION OF EVIDENCE—OBJECTION BELOW.

The Court of Appeals cannot uphold the exclusion of evidence because obnoxious to an objection not made below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3418-3419; Dec. Dig. ¶854(4).]

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

Action by the McKenzie Carpet Company against Edna Leffler. From a judgment of nonsuit, plaintiff appeals. Judgment reversed, and cause remanded.

C. C. Kelly, of Sedalia, for appellant. Paul Barnett and Hall, Robertson & O'Bannon, all of Sedalia, for respondent.

ELLISON, P. J. Plaintiff's action, begun in the circuit court, is in replevin to recover possession of a lot of household furniture. Affidavit and bond were filed, and the property taken from defendant and delivered to plaintiff. The court gave an instruction for defendant in the nature of a demurrer to the evidence in plaintiff's behalf, and the latter took a nonsuit.

[1] It appears from the evidence that defendant is the wife of James Leffler, though they have separated; that while they were living together, James bought of plaintiff the furniture in controversy for the price of \$551, on which he made payments, reducing the balance due to \$312. It further appears that, in consideration of this balance, James, by written bill of sale, sold the furniture to plaintiff; but no delivery was made, and defendant, then living apart from him, was in possession of the property. On this state of the evidence, considered apart from an offer of proof made by defendant, the title to the property should be held to be in the defendant. The possession in defendant raises presumption of title. *O'Malley v. Construction Co.*, 255 Mo. 386, 164 S. W. 585.

[2] But it is said that in the instance of a married woman on a contest between her and her husband, the presumption will be that the possession is in the husband. *Burns v. Bangert*, 16 Mo. App. 22, 35; *McClain v. Abshire*, 63 Mo. App. 333, 339. If we concede that to be true when the husband and wife are living together, when they have separated, though not divorced, the presumption in favor of the husband does not obtain, and the wife's possession will be presumed to be in her own right.

[3] But it was plaintiff's right to rebut the presumption of title in defendant arising alone on possession, and to do so it offered to prove that when it obtained the bill of sale and sent for the property, defendant stated that her husband "ought to pay for this property and then give it to her." This should not have been excluded. It had a tendency to show that defendant, though in possession of the property, did not own it.

[4] Defendant claims in her statement and brief that this evidence was offered after the case had been closed. But the abstract does not so show it, and, in the absence of a counter abstract, we must accept that of the appellant. If a counter abstract had been presented by respondent and not agreed to by appellant we then, under the statute, would be required to send for the bill of exceptions.

[5, 6] But even if the evidence was offered on a reopening of the case, it must have been reopened by consent of the court. The evidence was not excluded on account of time when offered, but that it was considered not to affect the case.

Other suggestions were made which may not arise on retrial. The judgment is reversed, and cause remanded. All concur.

HOWARD v. CHICAGO, R. I. & P. RY. CO. (No. 11931.)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

1. COMMERCE ¶33—SHIPMENTS—TERMINI WITHIN STATE—"INTERSTATE COMMERCE"—PASSING THROUGH OTHER STATE.

Where the point of shipment of live stock and the point of destination were both in Missouri, but the course of transportation was through both Missouri and Kansas, the cars of the railroad containing the stock passing over the tracks of other railroads in going into Kansas to the road's yards in that state, the shipment was interstate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. ¶33.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COURTS ¶97(5)—RULES OF DECISION—FOLLOWING FEDERAL COURT—INTERSTATE COMMERCE.

In suit for damage to an interstate shipment of live stock, it is the duty of the Court of Appeals to apply the law relative to a stipulation as to the time of suit as interpreted by the Supreme Court of United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 332; Dec. Dig. ¶97(5).]

3. CARRIERS ¶218(1)—CARRIAGE OF LIVE STOCK—INJURY—LIMITATION OF TIME FOR SUIT—STIPULATION—VALIDITY.

A stipulation between carrier and shipper of live stock in interstate commerce limiting the time for bringing suit for injury thereto is valid under the federal rule.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-935, 939; Dec. Dig. ¶218(1).]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by Ralph Howard against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

Paul E. Walker, of Topeka, Kan., E. C. Hall, of Kansas City, and Luther Burns, of Topeka, Kan., for appellant. Frank B. Klepper, of Cameron, and John A. Cross, of Lathrop, for respondent.

ELLISON, P. J. This is an action for damages accruing to plaintiff by reason of injuries to horses shipped over defendant's road from Princeton, Mo., to Kansas City, in the same state. The judgment in the trial court was for the plaintiff.

The shipment was by a written contract providing that no action should be maintained unless brought within six months of the arrival of the horses at destination. This action was not begun until a later period. That stipulation is valid under the federal law, and a determination of the question is made to depend on whether the shipment was interstate or intrastate; if the former, the judgment must be reversed.

There was evidence tending to prove that the defendant's course of transportation from points in Missouri to Kansas City, Mo., was over its own line to Cameron, Mo., a place about 50 miles from Kansas City, Mo.; thence over a joint track with the Chicago, Burlington & Quincy Railway to the end of the Terminal Railway tracks in the north part of Kansas City, Mo.; thence west to Hickory street, in Kansas City, Mo.; thence further west over the Union Pacific Railway tracks to the defendant's yards (known as the Armourdale Kansas yards) at Twenty-Third street, in Kansas City, Kan.; thence back in an easterly direction to Nineteenth and Genesee streets, in Kansas City, Mo.; and thence to the Kansas City Stockyards Company's railroad to such yards.

[1] This evidence shows that, while the point of shipment and the point of destination were both in Missouri, the course of the transportation was through two states. It was therefore an interstate shipment under the ruling of the Supreme Court of the United States: *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

[2, 3] We do not see that any point of distinction can be made between that case and this arising out of the fact that in this case defendant's cars containing the horses passed over the tracks of other railroads in going into Kansas to reach defendant's yards in that state. It is our duty to apply the law as interpreted by that court: *Sims v. Railroad*, 177 Mo. App. 18, 163 S. W. 275; *Hamilton v. Railroad*, 177 Mo. App. 145, 164 S. W. 248; *Johnson Grain Co. v. Railroad*, 177 Mo. App. 194, 164 S. W. 182; *Bowman v. Rail-*

road, 185 Mo. App. 25, 171 S. W. 642. Under these rulings the provision of limitation for bringing suit was valid and binding, if the shipment was interstate; and, as we have seen there was evidence tending to prove it was of that character, defendant's instruction submitting that question should have been given.

The judgment is reversed, and cause remanded. All concur.

AMERICAN RADIATOR CO. v. CONNOR PLUMBING & HEATING CO. et al. (No. 11855.)

(Kansas City Court of Appeals. Missouri.
April 3, 1918.)

1. MECHANICS' LIENS §260(4) — FORECLOSURE—LIMITATIONS.

Under Rev. St. 1909, § 8221, declaring that in mechanic's lien suits "the parties to the contract shall" and all others interested "may be made parties," and that the suit must be filed within 90 days from the filing of the lien, a principal contractor may, after the expiration of the 90 days, be made a party defendant to an action by a materialman to foreclose a lien based on a contract with a subcontractor; the principal contractor not having been a party thereto.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 466, 466; Dec. Dig. § 260(4).]

2. MECHANICS' LIENS §263(9)—ESTABLISHMENT—PROCEEDINGS.

Rev. St. 1909, § 8221, declares that parties to the contract and others interested may be made parties, while sections 8226 and 8233, respectively, provide that if judgment be for the plaintiff it shall be against the debtor as in ordinary cases, but if he has not sufficient property the residue may be levied against the owner's property, and that in all cases where a lien shall be filed it shall be the duty of the contractor to defend any action at his own expense, and the owner may deduct the amount of the judgment lien against his property from what he may owe the contractor or have recourse against him. *Held*, that the principal contractor is a necessary party to an action by a materialman to foreclose a lien based on a contract with a subcontractor, though he might be brought in after the expiration of the 90-day period.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 479; Dec. Dig. § 263(9).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by the American Radiator Company against the Connor Plumbing & Heating Company and others. From the judgment, plaintiff appeals. Reversed, and cause remanded and certified to the Supreme Court.

John F. Oell, of Kansas City, for appellant. Haff, Meservey, German & Michaels, of Kansas City, for respondents.

ELLISON, P. J. The action to enforce the lien was begun within the 90-day period of limitation for bringing suits after the lien paper was filed. The whole difficulty has

arisen by plaintiff omitting to make Vrooman, the original contractor, a party defendant until after the limitation period had expired. That brought up the questions whether Vrooman was a necessary party to an action for the enforcement of a lien against the owner's property, and, if so, was it necessary to the continued life of the lien that he should have been made a party before the 90-day limit for bringing suit expired, or did it suffice if he was made a party after that time? After the suit was brought against the owner, the mortgagee, and the subcontractor, as co-defendants, and after the limitation period for bringing a suit had expired, defendants moved to dismiss because Vrooman, the original contractor, had not been made a party, and no lien could be maintained without him. Plaintiff then filed an amended petition making him a party defendant. Then defendants, including Vrooman, filed demurrers to the petition based on the ground that Vrooman had not been made a party until after the limitation period had run, which, it was contended, destroyed the lien. The motion and the demurrer were overruled. But at the beginning of the trial the court, having concluded Vrooman was a necessary party to the establishment of a lien, refused admission to any evidence on the lien, admitted proof of the account against the subcontractor, rendered judgment against him, and found against the lien.

[1] The statute (section 8221, R. S. 1909) provides that "the parties to the contract shall" and all others interested "may be made parties." That means the immediate parties to the contract must be made parties to the action. In the instance of this action, it means the subcontractor must be made a party; and in this respect plaintiff complied with the law, for the subcontractor was joined as a defendant with the owner in the first instance. That satisfied the limitation statute requiring the action to be brought on the lien within 90 days after filing.

The original contractor, where he is not, himself, the contractor, with the lienor, is not a necessary party defendant so far as concerns the lien; but he is a necessary party (unless waived) so far as concerns the judgment for the amount of the account upon which the lien is claimed. But since a lien cannot be established without first having a judgment upon which to base it (*Wibbing v. Powers*, 25 Mo. 599; *Murdock v. Hillyer*, 45 Mo. App. 287), it may be said that the distinction I state is a distinction without a practical difference, and without practical use. But there is a practical difference, for a necessary party to the lien must be made a party before the limitation to such lien expires, as after that period he cannot be made a party; the lien being already dead. *Lumber Co. v. Wright*, 114 Mo. 326, 21 S. W. 811; *Bombeck v. Devorse*, 19 Mo. App. 38; *Hiller v. Schulte*, 184 Mo. App. 42, 167 S. W. 461.

But a necessary party to the judgment may be made a party any time before trial.

A lien exists against property and not individuals; and ordinarily, in instances of ordinary liens, the only persons interested antagonistically to the lien are the owner and others interested in the property, who ordinarily are the only necessary parties defendant. But in the instance of mechanics' liens, where the owner may find his property affected by claims with which he has had no connection, the statute is mandatory that "the parties to the contract shall be made parties" to the action. And such action "shall be commenced within 90 days after filing the lien"; otherwise, says the statute, it shall not "continue to exist." In this case, the party (subcontractor) to the contract with plaintiff was made a party defendant with the owner by bringing the action within the limitation period. Thereby, so far, the lien was made secure; for it is not mandatory that all persons who may be necessary parties to a proper judgment enforcing the lien should have been made parties within the period of limitations for bringing the suit. They, as we have just said, may be brought in afterwards at any time before trial, as in ordinary cases.

[2] Having, I think, shown that the original contractor, where he is not the contractor with the lienor, is not a necessary party to the validity of the lien, I proceed to show that, unless waived, he is a necessary party to the action before judgment is rendered enforcing the lien. By force of section 8233 of the statute (as well as by the necessity of the situation between the owner, contractor, subcontractor, materialman, and laborer), it is made the duty of the contractor in lien actions, other than his own, to defend them at his own expense; and the owner may deduct the amount of the judgment lien against his property from what he may owe such contractor; or, if he has paid him, that he may have recourse against him.

In addition to this, the statute (section 8226) provides that, if judgment be rendered for the lienor plaintiff, it shall be against the debtor, with the addition that, if he has not sufficient property to satisfy it, the residue is to be levied against the owner's property. In such circumstances, the Supreme Court of Iowa said of the owner that:

"He ought to be furnished with an adjudicated claim, and not with a mere open account." *Vreeland v. Ellsworth*, 71 Iowa, 347, 349, 32 N. W. 374, 375.

From these considerations it is clear that, in fairness to all concerned, the contractor should be bound by the judgment rendered, and, since he will not be bound if not a party, it becomes necessary, unless waived, to make him a party defendant, not for the purpose of carrying the lien beyond the 90-day limit for commencing a suit, but for the purpose of a proper judgment and an adjustment

of the rights of the parties who have diverse interests.

In *Clark v. Brown*, 22 Mo. 140, 142, the Supreme Court said that:

The contractor and owner "may be and probably are proper parties to the *scire facias*; the contractor, because he is interested in the question of indebtedness, being bound to indemnify the owner against this charge upon his property, and the owner, because his property is thereby subjected to the payment of the debt, his interest extending to both debt and lien, as the latter involves the former."

In *Horstkotte v. Menier*, 50 Mo. 158, the original contractor was not made a party at all, either before or after the limitation period expired. The court ruled that he should have been made a party defendant. The court does not say that he was a necessary party to the life of the lien, but that he was necessary that he might protect the owner and be bound by the judgment when the owner turned to him. The court further said:

"What we now hold is that the original contractor ought to be brought before the court as a codefendant, for the purpose of protecting his own rights and those of the owner. But if he is not so brought before the court at the proper time, the judgment will not for this omission be irregular or void. The objection should have been taken by the owner by demurrer or answer. If he fails to demur when the defect appears on the petition, or fails to set up the nonjoinder by answer when it does not appear on the face of the petition, he will be presumed to have waived the objection."

It is manifest that the court, in using the expression that if the original contractor is not brought before the court "at the proper time" the objection should be taken by demurrer or answer, was not referring to the period of limitation, and did not mean to say that the only proper time was before the 90 days had expired, for the defendant may not have had an opportunity either to demur or to answer before that limit had run; as, for instance, if the suit was brought on the 89th day. So, also, that view would frequently be harsh and unjust to the plaintiff. As, although he brought his action soon after filing the lien paper, he may not have known the person with whom he dealt and whom he sued was a subcontractor. He may have understood him to be the original contractor, and the defendant could conceal information on that subject by withholding his demurrer or answer striking at defect of parties, until after the 90-day limit had expired, and thus cut him out of his lien.

If the original contractor is brought in in time to defend against the case and thereby protect the owner and himself, he is in time to accomplish the purpose of the statute. Such time is not necessarily before the lien period expires, but is before opportunity for defense passes by.

In passing upon like diversity of interests in mechanic's lien actions, the Supreme Courts of Minnesota, California, and Michigan concluded that the original contractor was a necessary party within the intent of

similar statutes to ours, in the respect here considered, even though the lienor's contract was not with him. *Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 200, 20 Pac. 419; *Pavement Co. v. Norwegian Seminary*, 48 Minn. 449, 453, 45 N. W. 868; *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62.

Having shown that the original contractor is not a necessary party in order to continue the life of the lien beyond the 90-day limitation period, and that he is a necessary party defendant for the trial determining whether there is a lien and for what amount, and he having been made a party in this case in due time, before trial, of course no question of waiver arises.

The result of the views herein is that the owner's grounds of objection to the lien are not well taken. I think the personal judgment against the subcontractor should be affirmed, and the judgment in favor of the other defendants should be reversed and the cause remanded.

But it seems that the St. Louis Court of Appeals decided, in *Rumsey v. Pfeiffer*, 103 Mo. App. 486, 489, 83 S. W. 1027, a case like this, where the plaintiff furnished material to a subcontractor, that it was necessary to the continued life of the lien beyond the limitation period for bringing the suit that the original contractor be made a party before that limitation expired, and that an amendment making him a party, as in the case before us, could not be allowed after the limitation period for bringing the suit had expired. The court cites, in support of that view, the cases of *Fury v. Boeckler*, 6 Mo. App. 24, and *Bombeck v. Devorss*, 19 Mo. App. 38. I think that those cases are not in point. In each of them the original contractor was himself a contractor with the subcontractor, thus falling within the very letter of the mandatory statute (section 8221) that "the parties to the contract shall" be made parties to the action, which action, with such parties, must be brought within 90 days from filing the lien paper.

Deeming the decision in that case in conflict with the decision we have made herein, the case will be certified to the Supreme Court for final determination.

TRIMBLE, J., concurs. JOHNSON, J., concurs in result, except as to certifying to Supreme Court.

STATE v. WIDNER. (No. 11704.)

(Kansas City Court of Appeals. Missouri. April 3, 1916.)

1. HUSBAND AND WIFE \S 305—ABANDONMENT—GOOD CAUSE.

It is good cause for a husband abandoning his wife, preventing it being an offense under Rev. St. 1909, \S 4495, as amended by Laws 1911, p. 193, that she confessed to him to having had before marriage illicit relations with another, casting a grave doubt on the paternity

of her child; this constituting an indignity which would entitle him to a divorce.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1103; Dec. Dig. ¶ 305.]

2. CRIMINAL LAW ¶ 770(2)—TRIAL—INSTRUCTIONS—ISSUES.

Defendant's evidence bearing on an issue being substantial, he is entitled to have given his instruction properly defining the issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. ¶ 770(2).]

Appeal from Circuit Court, Mercer County; Geo. W. Wanamaker, Judge.

"Not to be officially published."

Harry Widner was convicted, and appeals. Reversed and remanded.

Eldon C. Orton and Ben F. Kesterson, both of Princeton, for appellant. Lucien E. May, Pros. Atty., of Princeton, for the State.

JOHNSON, J. On information of the prosecuting attorney of Mercer county defendant was tried, convicted, and fined \$600 for wife abandonment. The prosecution was under section 4495, R. S. 1909, amended in 1911 (see Laws 1911, p. 193), and the information charged that on May 18, 1914, the defendant without good cause abandoned his wife, Edna, and failed, neglected, and refused to maintain her. Evidence in support of the charge was introduced by plaintiff and was met by evidence of defendant tending to show that he had good cause for leaving and refusing to support his wife. We are asked to reverse the judgment for error in the refusal of certain instructions offered by defendant.

At the time of their marriage, May 6, 1914, defendant was 21 years of age, and his wife 24. They lived in the country, and defendant worked for his parents on their farm, and he and his wife lived there during the brief period of their cohabitation. The couple had sustained illicit relations before their marriage, and the woman was pregnant at that time. She testified that their union had the approval of their respective families and began happily, but one day when she carried water to him in the field, he told her that he could not live with her and was going to take her back to her mother. The reason he gave was that they could not live where they were "as they ought to." She protested in vain. He took her back to her mother and returned to his parents, and thereafter failed and refused to maintain her. The child was born the following October. Her testimony shows that the abandonment was wholly without cause. Witnesses testified to her good character, and it appears that her illicit conduct with defendant was her only departure from the path of virtue.

Defendant's testimony does not vary materially from that of his wife, except as to the cause of the separation. He states that one evening his wife admitted to him that she had had illicit commerce with another man

before her marriage, but thought that defendant was the father of her child. For this cause defendant put her away and refused to support her. She denies making any such statement and denies the wrongful conduct it imputes.

In the instructions given for the state the court properly told the jury that to find defendant guilty they must believe from the evidence beyond a reasonable doubt that defendant, without good cause, abandoned and refused to support his wife, but the court refused to give instructions to the effect that defendant should be acquitted if the jury believed from the evidence that after their marriage the wife had confessed to illicit intercourse with another man and cast a doubt upon the paternity of the unborn child, and that this confession had rendered the marriage intolerable to defendant and caused him to leave his wife.

[1,2] To constitute the offense of wife abandonment and nonsupport the abandonment must be without good cause and with a criminal intent. Any cause that would entitle the husband to a divorce from his wife would be a good cause for abandoning her. *State v. Macklin*, 86 Mo. App. 636; *State v. Tietz*, 186 Mo. App. 672, 172 S. W. 474. A husband is justified in leaving his wife and withholding his support from her if at the time of the marriage she is pregnant by another man without the knowledge of her husband. Section 2370, R. S. 1909. Defendant does not rely on this ground, but insists that, whether or not she was thus pregnant at the time of the marriage, her subsequent confession, which, as stated, cast a grave doubt upon the paternity of her child, constituted an indignity which would have entitled him to a divorce, and therefore was good cause for putting her away. Defendant is right in this contention, and, since his evidence bearing on the issue of good cause is substantial, he was entitled to have that issue submitted to the jury and defined in the instructions. The issue was properly defined in defendant's second instruction, and the court erred in not giving it.

The judgment is reversed, and the cause remanded. All concur.

SMITH v. ROSE. (No. 11904.)

(Kansas City Court of Appeals. Missouri.
Feb. 21, 1916. Rehearing Denied
April 3, 1916.)

1. CONTRACTS ¶ 108(2)—LEGALITY OF OBJECT—FRAUD.

Where a palmist, astrologer, and clairvoyant agreed to practice her profession, and in so doing to advise clients to buy certain mining stock offered by the defendant, although she testified that she did not know that there was no mine on which the stock purported to be issued, it is so palpable a fraud and so contrary to public policy that the courts must, as a matter of law, declare it illegal, and deny recovery of

commissions which the defendant agreed to pay her.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. § 108(2).]

2. NEW TRIAL § 27—GROUNDS—DISQUALIFICATION OF JUDGE.

It is no ground for new trial that after the trial it was discovered that the judge was a stockholder whose name appeared in the prospectus of a wild-cat mining company, commissions on sales of whose stock plaintiff sought to recover, where by her own evidence she disclosed that she had no cause of action, and a new trial must in any event result as did the first.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 40, 41; Dec. Dig. § 27.]

3. APPEAL AND ERROR § 1029 — HARMLESS ERROR.

Where the appellant's own evidence disclosed that he has no cause of action, errors assigned are of no consequence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4085, 4086; Dec. Dig. § 1029.]

Appeal from Circuit Court, Jackson County; D. E. Bird, Judge.

Action by Maude V. Smith against W. W. Rose. From a judgment on peremptory instruction for defendant, plaintiff appeals. Affirmed.

R. E. Aleshire, of Kansas City, for appellant. L. W. Byram, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff brought an action on a contract alleged to have been made with defendant whereby she was to be brought from Chicago, established in an office, and paid a commission and monthly salary for the sale of all mining stock which should be made through her assistance. At the close of the evidence on her part the trial court gave a peremptory instruction to find for defendant.

It appears from the testimony given by plaintiff in her own behalf that she was residing in Chicago, Ill., engaged in the business of "palmistry," "astrology," and "clairvoyance," and that when she obtained "too much notoriety" she moved from place to place; that defendant, at Kansas City, Mo., with several others, was engaged in selling gold mining stock in a mine represented to be in California; that one of defendant's associates made a contract with her (which was specially adopted and confirmed by defendant) whereby she was to come to Kansas City, procure rooms, advertise and prosecute her business by reading the palms of her patrons, divining the influence of the planets on their fortunes, and advising them that the result of her reading and her observation of the planets was that they should buy defendant's mining stock. She testified that she "was to advise them of the mining stock defendant had to sell and the mining company," and that she "was to read palms and write horoscopes and advise every one to buy mining stock." She stated that the

stock was worthless, but that she did not know it at the time. Why the planets and her own palm permitted her to be deceived is not disclosed. She further testified that she would secure the names and addresses of her patrons, notify defendant, or his associates, and they would seek the parties and sell them stock; that by this means they were enabled to sell large amounts, but had refused to pay her as agreed.

[1] That plaintiff's contract was to engage in a palpable fraud on gullible people there is not a particle of doubt, and the trial court was bound to so declare; for the courts will not aid one to enforce an illegal obligation. In the protection of sound morals and the general public the law forbids the enforcement of such contracts. *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Attaway v. Bank*, 93 Mo. 485, 5 S. W. 16. And our courts, and the courts of other states, have repeatedly decided that when the illegality of the contract appears on its face, or in the testimony of the plaintiff, it is the duty of the court to do so declare, as a matter of law. *Cohen v. Berlin Envelope Co.*, 166 N. Y. 292, 59 N. E. 906; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 406, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655; *Tatum v. Kelly*, 25 Ark. 209, 94 Am. Dec. 717. We have examined authorities cited by plaintiff and find them without application to her case.

[2] On the hearing of plaintiff's motion for new trial it was shown that the trial court appeared as a stockholder in the prospectus of the mining company, and for that reason it is insisted that, as plaintiff only learned this after the judgment, a new trial should have been granted, and the cause sent to some other court. But the difficulty with this position is that plaintiff has shown she has no case—no cause of action. Regardless of what ruling the trial court might have made on the motion, we must view the matter from the standpoint of her rights as an appellant.

[3] When on the hearing and consideration of an appeal it is disclosed that on his own showing the appellant has no cause of action, errors assigned looking to a new trial become of no consequence.

These remarks apply to points of error assigned on the ruling on the admission of evidence. Plaintiff stated her contract fully and completely, and, being wholly forbidden by the law, the evidence offered had no tendency to legalize the contract.

The judgment is affirmed. All concur.

SEARS v. KREKEL (No. 11648)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

1. APPEAL AND ERROR § 1010(1)—REVIEW—FINDINGS OF COURT—CONCLUSIVENESS.

Where a case is tried by the court without a jury, and no instructions are asked or given,

the judgment rendered will not be disturbed, if supported by substantial evidence and consistent with any tenable theory of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. § 1010(1).]

2. CONTRACTS §52 — VALIDITY — CONSIDERATION.

Where plaintiff purchased land from the defendant's grantee, relying on the defendant's oral promise to pay special taxes constituting a lien on the property, there was a sufficient consideration, although the defendant received nothing for his promise; it being sufficient that an injury would result to the plaintiff from defendant's failure to perform the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 223, 224; Dec. Dig. § 52.]

3. JUSTICES OF THE PEACE §91(2) — ACTION — COMPLAINT — SUFFICIENCY.

In an action on an agreement to pay taxes, a statement filed in a justice court in the form of an itemized bill for the taxes paid, with interest, and stating that the defendant agreed to pay the taxes, and because of his failure to do so such taxes were paid by the owner of the lands, is sufficiently explicit to bar another action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 810; Dec. Dig. § 91(2).]

4. CONTRACTS §324 — VALIDITY — ORAL AGREEMENT TO PAY TAXES.

Where the plaintiff purchased land from the defendant's grantee in reliance upon the defendant's promise to pay certain special taxes constituting a lien on the property, this agreement was sufficient to support an action to recover for the defendant's failure to perform; plaintiff not being confined to his remedy on the warranty in his deed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.]

Error to Circuit Court, Jackson County; W. O. Thomas, Judge.

"Not to be officially published."

Action by John T. Sears against A. Krekel. From a judgment for the plaintiff on appeal to the circuit court, the defendant brings error. Affirmed.

John Georgen, of Kansas City, for plaintiff in error. Haff, Meservey, German & Michaels and W. W. Filkin, all of Kansas City, for defendant in error.

ELLISON, P. J. Plaintiff brought an action before a justice of the peace by filing with the justice the following statement:

"Kansas City, Mo., Feb. 20, 1912.

"A. Krekel, Dr., 703 Victor Bldg., to John T. Sears.

11/2/10 Paving taxes agst lots 5 to 14
 blk 16 Edgerton Pl K C K 1910.....\$ 51.15
 12/16/11 Same for year 1911..... 48.85

\$100.00

"With 6 per cent. interest from date of payment. The above taxes A. Krekel agreed to pay, and because of his failure to do so said taxes were paid by the owner of said lots."

On appeal to the circuit court, plaintiff recovered judgment. It appears that the lots mentioned in the statement were in Kansas City, Kan., and that they were conveyed by defendant to one Fowler, and that there were special taxes against the property,

which were a lien thereon. Defendant gave Fowler a written statement that he would pay the taxes. There was evidence of a suit between defendant and Fowler that involved some of the annual installments of these taxes; but we think that such fact may be treated as not affecting this case. Plaintiff bought the property of Fowler, receiving a deed therefor; but before the deal was closed the taxes in controversy were brought to plaintiff's attention and he was shown defendant's written statement that he (defendant) would pay them. He then called defendant over the telephone, and informed him that he was about to purchase the property, and asked him about the taxes, when defendant answered "that that was all right, that he would pay those unpaid paving taxes, and I could go ahead and make my deal with that understanding, that he would pay them." This conversation was confirmed afterwards when they met. The evidence showed that plaintiff relied on this promise.

[1] The case was tried by the court without a jury, and no instructions were asked or given. In this situation plaintiff is right in his position that the judgment rendered will not be disturbed, if it is supported by substantial evidence and is consistent with any tenable theory of the law. *Miller v. Breneke*, 83 Mo. 163; *Winfrey v. Matthews*, 174 Mo. App. 713, 161 S. W. 583.

[2] It is clear that if defendant, on learning that plaintiff was about to purchase the land, told him to go ahead and he (defendant) would pay the taxes, and that plaintiff, relying upon this, made the purchase, there was a sufficient consideration. It is of no consequence that defendant received nothing from plaintiff. It is sufficient that an injury would result to the latter.

[3] The statement filed with the justice, we think, is sufficiently explicit to bar another action. *Simrall v. American Sales Co.*, 172 Mo. App. 384, 158 S. W. 437.

[4] It was not necessary that plaintiff file the written agreement between defendant and Fowler that defendant would pay the taxes. The promise we have stated, and which was shown in evidence, is sufficient basis for the action.

Defendant insists that the settlement of the action between defendant and Fowler affects this case. We do not see any reason why it should. This case is based on defendant's promise to plaintiff and the latter's reliance thereon.

Again, defendant contends that any remedy plaintiff has would be on the warranty in the deed from Fowler to him. We think not. There is no legal reason why he should not be held on his promise to plaintiff.

After full consideration of the briefs and argument of defendant, we are satisfied that we have no right to disturb the judgment; and it is accordingly affirmed. All concur.

HAYES v. BERRY. (No. 11716.)

(Kansas City Court of Appeals. Missouri.
April 6, 1916.)

1. MASTER AND SERVANT ⇨101, 102(8)—INJURIES TO SERVANT—DUTIES OF MASTER.

A master owes his servant the duty of exercising reasonable care to furnish him a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 178; Dec. Dig. ⇨101, 102(8).]

2. MASTER AND SERVANT ⇨226(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—RISKS ASSUMED.

While a servant who works underneath a traveling crane, newly installed and not yet completed, assumes the risks ordinarily incident to the completion thereof, he does not assume risks created by the negligence of his master in the prosecution of such work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⇨226(1).]

3. MASTER AND SERVANT ⇨117—INJURIES TO SERVANT—DANGEROUS APPLIANCES—LIABILITY OF MASTER.

A master, who is having installed a traveling crane at a point under which his employes work, is liable for any negligence in prosecution of the work through which his servants are injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 203; Dec. Dig. ⇨117.]

4. MASTER AND SERVANT ⇨265(8)—INJURIES TO SERVANT—ACTIONS—PLEADING—BURDEN OF PROOF.

Where a servant alleged specifically that failure to brace certain posts was the cause of his injury when a traveling crane fell upon him, the question of *res ipsa loquitur* is not involved, and he has the burden of proving the specific acts of negligence alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955; Dec. Dig. ⇨265(8).]

5. MASTER AND SERVANT ⇨264(10)—INJURIES TO SERVANT—ACTIONS—PLEADING—PROOF—SUFFICIENCY.

The burden of proving specific acts of negligence alleged is not satisfied when the servant proves state of facts compatible with the existence of another cause than that pleaded, but the facts proved must admit of only the conclusion that the facts alleged are true.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 870; Dec. Dig. ⇨264(10).]

6. MASTER AND SERVANT ⇨278(1)—INJURIES TO SERVANT—LIABILITY—EVIDENCE.

Evidence held insufficient to support the allegations of the servant's petition of specific acts of negligence, so that he could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 957; Dec. Dig. ⇨278(1).]

7. TRIAL ⇨127—CONDUCT OF TRIAL—REFERENCE TO INDEMNITY INSURANCE.

In a servant's action for injuries, attorneys should refrain from mentioning employers' liability insurance, where it affirmatively appears that the defendant master did not have such insurance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. ⇨127.]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

"Not to be officially published."

Action by James T. Hayes against Charles R. Berry, doing business as the Berry Iron & Steel Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John E. Dolman, W. E. Stringfellow, and O. E. Shultz, all of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondent.

JOHNSON, J. Plaintiff, a carpenter employed in an iron foundry defendant was operating in St. Joseph, was injured by the falling of the carriage of a traveling crane, and sued to recover damages on the ground that his injury was caused by negligence of defendant. The crane had just been erected in one of the buildings and was in process of final completion and adjustment when the injury occurred. It consisted of a track running north and south laid on two parallel lines of posts which were about 15 feet high and 15 feet apart, and a carriage suspended from two steel axles connecting the flanged wheels which were to move along the track. The axles were about 5 feet apart and ran parallel to each other. There were wheels designed to run crosswise on this framework to permit the block and tackle which carried the loads to be moved laterally as well as longitudinally. The main wheels which, as stated, were to run on the track, were fastened to their axles by set screws and the rails of the track, which were 8-inch I-beams, were fastened to the tops of the posts by lag screws. To prevent the track spreading and allowing the carriage to fall, it was necessary to brace the posts, and this was done by running braces from them to the solid timbers of the building; but plaintiff alleges, and his evidence tends to show, that these lateral braces were not installed until after his injury. He also alleges that the wheels had not been securely fastened to their axles by set screws at that time, but his specific charge of negligence is that defendant moved the carriage along the track without having braced its supports, and that the track spread and caused the carriage to fall. There is no averment of negligence in ordering plaintiff to work in a place which would be dangerous if the carriage were moved, nor of negligence in failing to warn plaintiff of the intended movement. Plaintiff had been working that day putting in lag screws to attach the rails to the posts, and after completing that task was ordered by the foreman to repair a flask for an iron column the molders intended to make that afternoon. The flask, a long, narrow, wooden box, was on the floor under the traveling crane near its east side.

The evidence of plaintiff does not tend to show that the order of the foreman precluded him from moving the flask from under the crane before proceeding with his work, and he states that he knew the track would

spread if they tried to move the carriage along it, and that he was familiar with the conditions of the structure and of the state of the work of construction and adjustment. The carriage had been set on one end of the track, a chain and pulley had been attached to it, and the foreman and a workman were at work on the adjustments. Plaintiff testified:

"Q. Did you know where the crane was when you went to work there? A. Yes, sir. Q. Where was it? A. Right up over me. Q. When you went to work there? A. When I went to work putting this plate on. Q. How long did it stay there? A. Just a few minutes; I hadn't hardly had time to do anything. Q. Was anybody doing anything with the crane? A. There was a couple of men had hold of it and holding on the rope. Q. While you were working there? A. When I started to work. Q. What did they appear to be doing? A. Why, I didn't pay much attention to them."

It appears that the foreman proceeded to move the carriage to ascertain if it would pass under certain timbers of the roof. He, or the workman, or both, pulled on the chain or rope, and, as the carriage started to move, it suddenly fell from the track and injured plaintiff, who was underneath. Plaintiff states that no warning was given him of the contemplated movement, but that he heard the foreman shout: "Look out, boys! The damned thing is falling, ain't got no set screws in it." But this warning came too late for plaintiff to escape. Plaintiff is very positive that the absence of lateral braces caused the track to spread and the carriage to fall. We quote from his cross-examination:

"Q. You don't know whether the track spread or not? A. Sure did. Q. You know that? A. Positively know it. Q. How do you know it? A. My knowledge would prove to me the track spread. Q. How did you arrive at that conclusion—you didn't see it spread? A. I know that is the only way. Q. How do you know it spread? A. Just my knowledge teaches me that is the only way it could spread. * * * Q. You didn't see it spread? A. I didn't see it spread. Q. And you really don't know? A. No. Q. It is your opinion? A. Yes, it is my opinion; that is all."

A witness introduced by plaintiff testified to making an examination of the carriage after the injury, and on direct examination stated that he did not notice any set screws in the wheels, but on cross-examination said the wheels were still on the axles, and that he did not notice whether or not they were fastened by set screws. The evidence of defendant tends to show that the posts were braced, and therefore that the track did not spread, but does not attempt to explain the cause of the falling of the carriage. The jury returned a verdict for plaintiff for \$6,000, and defendant appealed.

The principal argument of defendant goes to the sufficiency of the evidence to take the case to the jury. The answer, in addition to a general denial, pleaded assumed risk, contributory negligence, and negligence of fellow servants, and defendant insists that

the evidence fails to sustain the pleaded charge that a failure to brace the posts was the proximate cause of the injury, and does show that plaintiff was guilty in law of contributory negligence in selecting an unsafe, instead of a safe, place, in which to work while repairing the flask.

[1, 2] Defendant owed plaintiff, his servant, the duty of exercising reasonable care to furnish him a reasonably safe place in which to work. This duty, of course, obtained during, and with respect to, the construction of the crane, and, while plaintiff assumed all risks of injury naturally resulting from the prosecution of that work, he did not assume risks created by the negligence of defendant.

[3] If the foreman of defendant, with knowledge that plaintiff was at work under the crane, at a place where the fall of the carriage would injure him, negligently proceeded to move it, and thereby injured plaintiff, defendant would be liable to respond in damages, unless it should appear that plaintiff was guilty of contributory negligence in working in such place. The work of adjusting the carriage to the track for practical and safe use involved a number of tasks in the performance of which the foreman owed the duty of reasonable care to workmen such as plaintiff who were required or permitted to work on the floor under the structure. As, for example, it was his duty to see that the track supports were properly braced so they would not yield to the weight of the carriage, and thereby cause the track to spread and the carriage to fall; to see that the wheels were securely fastened by set screws to their axles so they would not work back and leave the rail; to see that the tread of the wheels properly coincided with that of the track; and to see that all the parts of the mechanism were in a reasonably safe condition for the initial trial of moving the carriage along the track. The failure to observe reasonable care in the performance of any such tasks would be a negligent breach of duty towards a workman properly at work under the structure.

[4] Plaintiff, in the petition, specified that the failure to brace the posts was the cause of his injury. The case before us, therefore, cannot involve any question of *res ipsa loquitur*, and plaintiff must be held to proof of the cause he specified and notified defendant to meet. As is said in *McGrath v. Transit Co.*, 197 Mo. loc. cit. 105, 94 S. W. 874:

"If it were a case to which, under proper pleadings, the doctrine would apply, yet in this case specific acts of negligence are charged, and not general negligence. In such cases where the plaintiff chooses in the petition to allege specific acts of negligence, the rule of law places the burden of proving such specific negligence upon the plaintiff, and a recovery, if had at all, must be upon the specific negligence pleaded. *Hamilton v. Railroad*, 114 Mo. App. loc. cit. 509 [89 S. W. 893]; *Ely v. Railroad*, 77 Mo. 34; *Leslie v. Railroad*, 88 Mo. 50; *Yarnell v. Railroad*, 113 Mo. 570 [21 S. W. 1, 18 L. R. A. 599];

Bunyan v. Railroad, 127 Mo. loc. cit. 19 [29 S. W. 842]; *Hite v. Railroad*, 130 Mo. loc. cit. 136 [31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555]; *McManamee v. Railroad*, 135 Mo. loc. cit. 447 [37 S. W. 119]; *Bartley v. Railroad*, 148 Mo. loc. cit. 139 [49 S. W. 840]; *Gayle v. Mo. Car & Foundry Co.*, 177 Mo. loc. cit. 450 [76 S. W. 987]; *Breeden v. Mining Co.*, 103 Mo. App. 179 [76 S. W. 731]."

[5] This burden cannot be satisfied by proof of a state of facts as compatible with the existence of another cause as with that pleaded. Where the evidence most favorable to the plaintiff goes no further than to show that the injury might have been the result of the pleaded cause, but might also have resulted from some other cause, he must be held to have failed in his proof.

[6] Applying these rules to the facts before us, we are compelled to find that the evidence of plaintiff leaves the triers of fact in the position of having to choose one from several equally probable causes, for only one of which defendant would be liable under the specifications in the petition. True, plaintiff attempted in his testimony to show that the absence of lateral braces caused the carriage to fall, but he was forced to admit that this deduction was drawn from the facts that there were no braces and that the carriage fell. The issue did not call for expert opinion evidence, and such testimony possessed no probative value and must be disregarded. With it eliminated, plaintiff must fall back to the position that since the evidence shows there were no braces, and there is no proof of any other reasonable cause, the connection between the pleaded cause and the injury is sufficiently shown. It should be kept in mind that the burden was not on defendant to show what caused the injury, but on plaintiff to prove the existence of the alleged cause. The foreman testified that the wheels were securely fastened to the axles by set screws, and that testimony should be regarded as aiding plaintiff's case; but there were other possible and probable causes which the evidence leaves wholly untouched. There is no proof that the track, or its supports, was out of line after the injury, and the inference that the track did spread has no other supporting facts than the absence of braces and the fall of the carriage. Considering that the carriage had not been, but was about to be, adjusted to the track, and that one of a half dozen or more deficiencies and inaccuracies in the tentative adjustments might have caused it to fail, it is difficult to perceive how the inference that it fell because of the lack of braces could be reached without resort to conjecture and speculation. To illustrate: If the wheels had been on an exact plane and with their flanges close to the rails, the inference would be strong that their bearing surfaces would have been so broad that the weight of the empty carriage bearing downward and not outward could not have

pushed the rails laterally and spread them; but, if the adjustments were less exact and only a narrow edge of the wheels rested on the rails, the result could have been that the wheels left the track, either with or without spreading it. We give this illustration, not as a conclusion we have drawn from the evidence, but to emphasize the point that the evidence most favorable to plaintiff leaves the cause of the fall of the carriage in the field of conjecture and speculation, and certainly falls short of pointing to the pleaded cause as the only reasonable inference the hypostatized facts will permit. We think the facts and circumstances in proof would not warrant us in holding plaintiff guilty in law of contributory negligence. He was directed by the foreman to work on the flask which was under the track. Whether or not he should have moved the flask to another place before proceeding to work is a question the triers of fact should determine. We do not feel justified in declaring that he voluntarily chose a more dangerous place of work in preference to one less dangerous. The question of his negligence is an issue of fact for the jury to determine.

The demurrer should have been sustained on the ground that the evidence fails to establish the specific charge of negligence in the petition.

[7] We infer that, if the cause is retried, the pleaded issues will be different, and, consequently, no useful purpose would be served in reviewing the rulings on the instructions called in question by defendant. The answer of defendant contains an admission that he was the employer of plaintiff, and the evidence bearing on that subject heard by the court shows that such was the relationship. The parties at another trial should refrain from mentioning the subject of employers' insurance in the hearing of the jury, since it appears to be conceded that defendant was carrying no such insurance at the time of the injury.

The judgment is reversed, and the cause remanded. All concur.

RYLEY-WILSON GROCER CO. v. ST.
LOUIS & S. F. R. CO. (No. 11891.)

(Kansas City Court of Appeals. Missouri.
Feb. 21, 1916. Rehearing Denied
April 3, 1916.)

1. APPEAL AND ERROR — 231(5) — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW — OBJECTIONS — NECESSITY.

In an action for damages for failure to deliver a car of sugar which plaintiff had resold, a general objection to testimony by the general manager of plaintiff's business as to the sales, apparently on the ground that the sales were not made personally by the manager, will not support an assignment on appeal that the evidence was hearsay, that objection not being presented in any manner, as the motion for new

trial merely declared that such evidence was incompetent, irrelevant, and immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶231(5); Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. § 199.]

2. CARRIERS ¶135 — CARRIAGE OF GOODS — NONDELIVERY—DAMAGES.

In an action against a carrier for failure to deliver a shipment of sugar, evidence held to show that the carrier knew that the sugar had either been resold or was for immediate sale and that prompt delivery was most important, and so consequential damages, as loss of profits on resale, may be recovered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 557-559, 599-602, 603½-604½; Dec. Dig. ¶135.]

3. APPEAL AND ERROR ¶671(7)—ABSTRACTS.

Though on appeal defendant carrier relied on an alleged provision in the bill of lading, no effect can be given the provision where it did not appear in the abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2872; Dec. Dig. ¶671(7).]

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by the Ryley-Wilson Grocer Company against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Cowherd, Ingraham & Durham, of Kansas City, and W. F. Evans, of St. Louis, for appellant. Lathrop, Morrow, Fox & Moore, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff is a wholesale grocer company at Kansas City, Mo., with a branch at Ft. Scott, Kan. On August 19, 1912, plaintiff purchased through the "Russell Brokerage Company" a carload of granulated beet sugar from a sugar refinery in Colorado at \$5.18 per 100 pounds, including freight to Ft. Scott. The sugar was shipped under bill of lading by the refining company to the Russell Brokerage Company at Ft. Scott. The car duly arrived at Ft. Scott on August 26th and defendant's agent notified the Russell Brokerage Company that the car had arrived and had been delivered to plaintiff's warehouse. After plaintiff purchased the sugar and before its arrival it sold a part of it to retail grocers to be delivered on arrival, and after being notified of its arrival and delivery it sold the remainder all at a profit of 34 cents per 100 pounds.

But defendant had not delivered the sugar to plaintiff. It was ascertained that it had made the delivery to one of plaintiff's competitors, and plaintiff was deprived of the benefit and profit of the sales made as stated. Plaintiff thereupon brought this action for damages in the loss of the profit, amounting to \$112.20 and recovered judgment in the trial court.

Defendant insisted that the sugar was shipped under a bill of lading containing a provision that the amount of any loss for which it should be liable should be computed

on the basis of the value of the property at the place and time of shipment. With this as a basis, defendant says that as plaintiff never paid for the sugar he had not sustained any pecuniary loss. It then claims that it never had any notice of plaintiff's contracts of sales of sugar and that the damages claimed are too remote and speculative. The evidence of sales came through the testimony of one of the members of the plaintiff's firm. He had not made the sales personally, but through a salesman for the company who sent in sales tickets. It further appeared that plaintiff, thinking there was some delay in the car getting to Ft. Scott notified defendant's proper agent and "we had him tracing the car for some days. I was in a hurry for it. The men were all demanding the sugar. Fruit was to be put up, and he was tracing it by wire," and finally this agent was notified by the agent at Ft. Scott that the car was there. It was further shown that defendant was notified by letter four days before the arrival of the car at Ft. Scott to deliver to plaintiff; these words being used in the notice, "It is very important that you notify us day of arrival."

[1] It is insisted by defendant that as plaintiff's witness (who, as stated, was one of the proprietors and the general manager of plaintiff company, and who conducted the business which is the subject of this controversy) did not make the sales personally, his testimony of the sales was hearsay. Defendant is bound by the objection as made at the trial court. The question arose when the witness was testifying to the sales made before the arrival and again to the sales made after the arrival. The objections to the evidence of the former, as stated to the court, did not include hearsay, the objection now claimed. The matter again arose when the witness was testifying as to the sales after the arrival, when defendant's counsel interrupted with the inquiry, "Did you make the sales personally?" and the witness answered, "Through my salesmen." Then plaintiff's counsel asked, "You have no personal knowledge of it?" The answer being, "I receive the sales tickets which he sends in daily for the sales. * * * We never have any other personal knowledge of any sales our agent makes." Defendant's counsel then stated, "I object to this witness testifying to these sales"; the court saying, "Objection overruled, if the tickets are produced." Here again no reason is given for the objection except we may suppose it was because the witness had not made the sale personally. No suggestion was afterwards made to strike out the evidence and the matter seems to have been dropped. These were about 7 per cent. of the total sales. The case was tried by the court without a jury, and as it found the full amount of plaintiff's claim it must have considered the evidence. The motion for new trial makes no reference to it fur-

ther than a general statement that the court erred in admitting "incompetent, irrelevant, and immaterial testimony offered by plaintiff." In all these circumstances we do not think defendant in a position to complain of the evidence. It cannot be expected the court would remember remarks made in the course of the trial, and defendant should have moved to strike out the evidence, or in some way brought the matter to the court's attention.

[2] Defendant's next point is that the damages are consequential, and hence defendant should have had notice of the special matter that plaintiff had made the sales. To sustain this we are cited to *Hadley v. Baxendale*, 9 Exch. 341, *Rogan v. Railroad*, 51 Mo. App. 685, and *Dunne v. Railroad*, 166 Mo. App. 372, 148 S. W. 997. In our opinion the evidence shows defendant did have notice before it made the default, and it accepted and acted on such notice. We think it to be reasonably inferred from the testimony quoted above from plaintiff's manager, that defendant's agent knew the sugar either had been sold or was for immediate sale. So, too, the notice to the agent that it was very important that plaintiff be notified the day of the arrival of the sugar, must be taken to have been understood that the sugar was already, or was to be immediately, disposed of.

[3] As has been already stated, it is claimed the damages were assessed contrary to the rule for ascertaining damages as provided in the bill of lading. There is quoted in appellant's brief what is stated to be a provision in the bill of lading, but no such provision is found in the copy set forth in the abstract. The point, therefore, has no foundation upon which to rest.

No ground exists for disturbing the judgment, and it is accordingly affirmed. All concur.

FLAIZ v. CHICAGO, B. & Q. R. CO. (No. 14296.)

St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

I. PLEADING \S 216(2)—DEMURRER.

On demurrer to a pleading, as an amended answer, its allegations alone can be considered.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 537, 538; Dec. Dig. \S 216(2).]

II. MASTER AND SERVANT \S 100(1)—INJURIES TO SERVANT—INDEMNITY—CONTRACT.

Where a railroad maintained a relief department, whereby an employé, being a member, should receive benefits in case of sickness, there being also a death benefit payable, the employé's contract of membership in such relief department providing that suit against the railroad should waive benefits under the contract, such contract was void in so far as it sought to provide an advance for the release of the road from the legal consequences of its future wrongs.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 166; Dec. Dig. \S 100(1).]

Appeal from St. Louis Circuit Court; Leo S. Rasseleur, Judge.

Action by Isabel Flaiz against the Chicago, Burlington & Quincy Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded.

Selden P. Spencer and F. C. Donnell, both of St. Louis, for appellant. Douglas W. Robert, of St. Louis, for respondent.

Statement.

REYNOLDS, P. J. The petition in this action avers that the defendant company maintains a department of service for the establishment and management of a fund known as the Relief Fund, for the payment of a definite amount to the relatives or beneficiaries of its employés, who are killed and who have, in accordance with the provisions of the department, contributed to the Relief Fund and become a member thereof; that this department has been maintained by the defendant since and prior to March 15th, 1889, and continuously down to the date of the institution of this action (November 18th, 1910), and that the defendant company guaranteed the fulfillment of the obligations of the Relief Department evidenced by a memorandum of agreement entered into between the defendant company and other affiliated companies, by which they jointly maintained the Relief Department and by which each became responsible for and guaranteed the payment of such amounts as might become due from that department to the beneficiary of the employés of the respective roads in case of the death of the employés, who had become members of and contributed to the Relief Fund in accordance with its provisions and regulations. It is further averred that one Marvin M. Matthews, on November 3rd, 1899, was an employé of the Hannibal & St. Joseph Railroad Company, that company affiliated with the defendant company, and that Matthews, in accordance with the regulations of the Relief Department and because of his employment with the Hannibal & St. Joseph Railroad Company, on November 3rd, 1899, became a member of this Relief Department, called "Burlington Voluntary Relief Department"; that afterwards but prior to February 26th, 1906, Matthews ceased to be an employé of the Hannibal & St. Joseph Railroad Company and was transferred to and entered upon the service of, and thus became an employé of, the defendant company and so continued a member of the Relief Department and from the date of the change in employment until his death, was as well an employé of the defendant company; that under and pursuant to the agreement between the parties the defendant company agreed to pay to the beneficiary of Matthews the sum of \$1000 in case of his death, the payment to be made under and pursuant to the regulations of the Relief Department to the fund of which Matthews

regularly contributed; that he was in good standing in this department up to and including February 26th, 1906, on which date he was killed, having faithfully performed all the conditions and made all the payments up to the date of his death, that resulting from his having been run into by an engine operated by defendant company, the engine then under the temporary control of one Stone, a hostler's helper in the employ of defendant company; that plaintiff, who had been the wife and was the widow of Matthews (but who it appeared had since intermarried with one Flaiz), brought her suit in the circuit court of Audrain county, this state, against the defendant company and Stone and obtained a judgment against both in the sum of \$9000, which judgment was reversed by the Supreme Court of this state as to the defendant company but affirmed as to Stone, the latter, it being averred, then and now insolvent and the judgment against him worthless. The petition further sets out that by a regulation (No. 63) of the Relief Department in force during the time of the membership of Matthews and still in force, it is, among other things, provided:

"If any suit shall be brought against the company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the company created by the membership of such member in the Relief Fund shall thereupon be forfeited without any declaration or other act by the Relief Department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed."

Setting out this regulation, it is averred that it is illegal, void and of no effect, and that under the membership of Matthews in the Relief Department his beneficiary was entitled to the sum of \$1,000 in case of his death. Averring that plaintiff was and is the beneficiary under the membership and as such entitled to the sum of \$1,000, which the defendant company agreed to pay, and that demand for the payment of the amount due plaintiff was made and refused, the demand, it being averred, having been made soon after the death of Matthews in 1906, and again specifically on March 9th, 1910; that the payment was refused by both the Relief Department and the defendant company, and that no payment had been made to plaintiff by either the Relief Department or by the defendant company, judgment is demanded against the defendant railroad company for \$1,000, together with interest at the rate of 6 per cent. per annum from and after March 6th, 1910, and for her costs.

Defendant filed an amended answer to this, which was demurred to and the demurrer overruled. Thereupon the defendant filed its second amended answer to the petition. In this answer, admitting that it was a corporation engaged in operating a railroad through Audrain county, Missouri, and that

plaintiff was the wife of Marvin Matthews, and that he died from injuries received by him, the answer denies all the allegations in the petition except as thereafter admitted. It is then pleaded, in substance and confining ourselves to the most material allegations, that plaintiff ought not to recover because at the time of the death of her husband, the defendant had been engaged in the operation of several thousand miles of railroad for which purpose it was compelled to and did employ several thousand men; that the work of operating a railroad is hazardous to life and limbs of employes, and that because of the high rate of premiums charged railroad employes by insurance companies, it is practically beyond the means of the employes to obtain insurance in such companies; that for the purpose of furnishing aid and relief to its employes and their families, in the event of sickness, injury or death, defendant had established the Relief Department referred to in the petition, of which Matthews was a member while an employe of the Hannibal & St. Joseph Railroad Company, as well as afterwards while an employe of defendant, being a member of the second class; that he accepted all the conditions of membership in the Relief Department and by virtue of such membership became and was entitled to receive the sum of two dollars a day for such time as he might be disabled on account of sickness, and in case of his death, his widow would become entitled to receive the sum of \$1,000, if, after his death, she elected to accept the same and thereby release the defendant from any liability on account of the death of her husband, or that plaintiff, as such widow, was entitled to elect to refuse the above-mentioned death benefit and to take in lieu thereof a cause of action at law against the defendant for damages arising from the death of her husband, but that under the regulations of the Relief Department she could not take both, it being provided that if she refused to accept the death benefit and brought suit against the defendant on her cause of action for the death of her husband by virtue of the suit, she waived any right she might otherwise have to thereafter accept, receive or recover on the death benefit from the Relief Department. Averring that defendant operated this Relief Department in accordance with the terms of the contract, and that the fund was created by the voluntary contributions of members and by interest to be paid into it by defendant on balances in the fund in its hands, it is averred that defendant guaranteed the sufficiency of the fund to pay all disability and death benefits which might accrue in favor of the members and their families and became liable to pay these benefits out of its own treasury to make up deficiencies in the Relief Fund, if any should occur; it is further averred that defendant became responsible for all monies belonging to this Relief Department, as also to pay

interest thereon into the fund, and to maintain and operate that department at its own expense, all of which duties it performed, as it is averred. Averring that the husband of plaintiff came to his death while in the employ of defendant, on February 26th, 1906, as stated, it is averred that by virtue of the contract between the husband of plaintiff and its Relief Department plaintiff became entitled to elect which of two things she would do, that is to say, to refuse to receive the death benefit of \$1,000 from the Relief Fund and to prosecute an action at law against defendant for damages on account of the alleged wrongful death of her husband, or she became entitled to elect to receive and accept the death benefit and thereby release the defendant from any cause of action she might have against it for damages on account of the death of her husband; that long after plaintiff became entitled to elect, to-wit, about May 17th, 1906, and within six months after the death of her husband, plaintiff made her election and refused to accept the death benefit of \$1,000 and elected to prosecute her cause of action against defendant for damages on account of the death of her husband; that the election was made after defendant had tendered the plaintiff the death benefit and her refusal to accept the same. The plaintiff further evidenced her election, it is averred, by filing the action referred to by her on May 17th, 1906; that the action resulted in a verdict in favor of plaintiff in the sum of \$9,000; that when this judgment was rendered against defendant, it appealed to the Supreme Court of this state, which body reversed and set aside the judgment on March 1st, 1910, the opinion in which cause being reported under the title of *Isabella Matthews v. Chicago, Burlington & Quincy R. R. Company and Stone*, 227 Mo. 241, 128 S. W. 1005; that in the defense of that action defendant had paid out of its own treasury the sum of \$1,000 by way of attorney's fees, printing and other expenses. It is further averred that during the time plaintiff's husband was a member of the Relief Department, defendant, in pursuance of its contract with him, had paid out in operating it \$75,000 per annum out of its own treasury and not out of the Relief Fund, and in addition thereto furnished at its own expense all the office room for the general offices of the Relief Department and its numerous branches, the expense amounting to many thousands of dollars per annum, and that prior to plaintiff's membership it had paid benefits to the amount of over \$42,000 because of the insufficiency of the Relief Fund proper. It is also averred that this money so paid by defendant out of its own treasury and its guarantee of the contract with plaintiff, constituted valuable considerations flowing directly from defendant to plaintiff's husband and to plaintiff herein in support of the contract between defendant and plaintiff's husband in relation to his said

membership in its Relief Department, which contract was constituted and evidenced by plaintiff's accepted application for membership and the regulations of the Relief Department. Wherefore, the answer concludes, that by virtue of plaintiff's refusal to accept said death benefit when so tendered to her, and by reason of her act in filing and prosecuting a suit at law against defendant on a cause of action for the alleged wrongful death of her husband, plaintiff had elected to waive and thereby forever did waive and forfeit any right to recover from the Relief Fund and Relief Department of this defendant the sum of \$1,000, or any other sum as a death benefit on account of the death of her husband, and defendant pleads such waiver and forfeiture in bar of any recovery herein.

To this second amended answer plaintiff demurred on the ground that the matters and things set out therein did not constitute a valid defense to her cause of action. The demurrer was overruled and plaintiff refusing to plead further, judgment went in favor of defendant, from which plaintiff has duly perfected her appeal.

Opinion.

[1] We have set out the answer with perhaps unnecessary fullness, and we do so to give the defendant the full benefit of exhibiting its claimed equities. The appellant has included in her abstract the first amended answer of the defendant, in which defendant admitted that it was a corporation operating its railroad through Audrain County, Missouri, and that it then owned and was operating its railroad through portions of the state of Illinois and other states of the United States, that of course meaning that it was engaged in interstate commerce and so amenable to the Acts of Congress. This is not in the second amended answer, which is the only one we can consider on this demurrer. As we are remanding the case, we think it not improper to call attention to this so that it can be made clear by amended pleadings or stipulation, if it is desired to appeal to the federal employer's liability law. As to whether this case comes under that law we now express no opinion.

The principal question involved in this case is practically identical with that which was before the Kansas City Court of Appeals in *Hartman v. Chicago, B. & Q. R. R. Co.*, not yet officially reported, but see 182 S. W. 148. In that case it was argued that this defendant and its employer were at the time of the accident engaged and employed in interstate commerce. As we have said, that question is not now before us.

[2] That court further there held that under the general law, irrespective of Congressional legislation, and following the thought thrown out by Judge Caldwell, in *Chicago, B. & Q. R. R. Co. v. Miller*, 76 Fed. 439, loc. cit. 443, 22 C. C. A. 264, 267, that like contracts "must ultimately be so declared by all

courts," that the contract under consideration, "to the extent that the relief contract seeks to provide in advance for the release of the defendant from the legal consequences of its future wrongs, it will be held unconscionable, and therefore non-enforceable, regardless of whether or not it has the support of a consideration moving from the defendant to the plaintiff."

So also the Supreme Court of Nebraska held in its opinion on a motion for rehearing in *Chicago, B. & Q. R. R. Co. v. Healy*, 78 Neb. 786, 111 N. W. 598, reversing the original opinion to the contrary, which is in the same volume, commencing at page 783, 107 N. W. 1005. See also note to the opinion on rehearing in the *Healy Case* in 10 L. R. A. (N. S.) 198, 124 Am. St. Rep. 830.

Without further discussion of the case or of the points so ably briefed and argued by the respective counsel, we refer to the decision of the Kansas City Court of Appeals, in *Hartman v. Chicago, B. & Q. R. R. Co.*, supra, for our view of the law here applicable.

It follows that the action of the learned circuit court in overruling appellant's demurrer to the second amended answer and in dismissing plaintiff's action is reversed and the cause remanded for such further proceedings as may be taken in line with what we have here determined.

NORTONI and ALLEN, JJ., concur.

DAVIS v. McCOLL. (No. 11873.)

(Kansas City Court of Appeals. Missouri. Feb. 21, 1916. Rehearing Denied, April 3, 1916.)

1. STATUTES \S 289—EVIDENCE—STATUTES OF FOREIGN STATES.

On the issue whether a foreign state has adopted the Uniform Negotiable Instruments Law, it is not error to admit the entire Negotiable Instruments Law of such state, in spite of the rule that only the applicable statutes of a foreign state should be admitted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. \S 289.]

2. BILLS AND NOTES \S 267—INDORSERS—LIABILITY.

The contract of an indorser of a negotiable instrument is separate and distinct from the contract expressed by the note itself.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 620, 629; Dec. Dig. \S 267.]

3. STATUTES \S 281—PLEADING—STATUTES OF FOREIGN STATES.

Where the action or defense immediately rests upon a foreign statute, such statute must be pleaded as well as proved.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 381; Dec. Dig. \S 281.]

4. JUSTICES OF THE PEACE \S 91(3)—ACTIONS—PLEADING—NECESSITY.

Under Rev. St. 1909, § 7413, providing that when a suit is founded on an instrument in writing executed by defendant and the debt may be ascertained by such instrument, it shall be

filed with the justice, and no other statement or pleading shall be required; all that is necessary in filing suit on the indorsement of a note is to file the note, and statutes of a foreign state establishing the right to recovery need not be pleaded.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 310, 316; Dec. Dig. \S 91(3).]

5. JUSTICES OF THE PEACE \S 91(3)—ACTIONS—PLEADING.

In suit in Justice Court upon negotiable notes, where the defendant is advised by their lodgment with the justice and the issuance of summons, to meet the issue of his liability as an indorser, and the judgment would be a bar to maintenance of a future action, the purposes of statutory rules of pleading are met, and failure to file specific pleadings is not fatal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 310, 316; Dec. Dig. \S 91(3).]

Appeal from Circuit Court, Jackson County; Daniel E. Bird, Judge.

"Not to be officially published."

Action by Frank H. Davis against A. J. McColl. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 166 S. W. 1113.

Hughes & Whitsett, of Kansas City, for appellant. Lathrop, Morrow, Fox & Moore, of Kansas City, for respondent.

JOHNSON, J. Five suits brought by plaintiff in a justice court on five separate promissory notes on which defendant's name appears as payee and indorser were consolidated and tried as one in the circuit court, and defendant appealed from the judgment rendered against him. We reversed the judgment and remanded the case for the reason that plaintiff had failed to prove the substantive fact that the laws of Iowa, where the notes were signed and made payable, imparted to them the character of negotiable instruments, and that in the absence of such proof, we could not assume that the laws of that state were the same as our own; i. e., that Iowa had adopted the uniform laws relating to negotiable instruments embodied in our Negotiable Instruments Act. The notes provided for the payment of attorney's fees and expenses of collection, and in the absence of a statutory provision in Iowa similar to that in our Negotiable Instruments Laws would be nonnegotiable, and the indorsement of the payee on the backs of the notes would not ipso facto make him liable as an indorser.

[1] At the second trial in the circuit court the signature of defendant on the backs of the notes was admitted, as was also the fact that 10 per cent. of the amount of the notes would be a reasonable attorney's fee, and over the objections of defendant the notes and indorsements were received in evidence, and plaintiff was allowed to introduce the chapter in the statutes of Iowa relating to negotiable instruments which shows that the Uniform Negotiable Instruments Law was in

force in that state when the notes were delivered, and therefore that they were negotiable. Inasmuch as the court received the whole chapter in evidence—obviously on the theory that it established the fact that Iowa had adopted the Negotiable Instruments Law—we do not regard as meritorious the effort of defendant to apply the well-settled rule that only the applicable statutes of the foreign state should be offered or admitted in evidence.

[2, 3] The principal point urged by defendant for a reversal of the judgment rendered against him at the second trial is that the pertinent statutory law of Iowa which conferred the character of negotiability on the notes was a substantive fact which should have been pleaded as well as proved, and since it was not pleaded, the objection to the introduction of any evidence should have been sustained. That argument might be sound if the cause had originated in the circuit court. The contract of an indorser of a negotiable instrument is separate and distinct from the contract expressed by the note itself, and the rule is well settled that where the action or defense immediately rests upon a foreign statute, such statute must be pleaded as well as proved. *Bancher v. Gregory*, 9 Mo. App. loc. cit. 104; *Clark v. Barnes*, 58 Mo. App. 667; *Swing v. Karges*, 150 Mo. App. 574, 131 S. W. 153; *Hazlett v. Woodruff*, 150 Mo. loc. cit. 539, 51 S. W. 1048; *Lee v. Railway*, 195 Mo. loc. cit. 400, 92 S. W. 614; *Gibson v. Railroad*, 225 Mo. loc. cit. 485, 125 S. W. 453.

[4] But the cases in hand originated in a justice court where no formal pleadings are required (section 7412, R. S. 1909), and fall squarely under section 7413, R. S. 1909, which provides:

"When the suit is founded upon any instrument of writing purporting to have been executed by the defendant and the debt * * * may be ascertained by such instrument, the same shall be filed with the justice, and no other statement or pleading shall be required. If the suit is founded on an account, a bill of items shall be filed; in all other cases, a statement of the fact constituting the cause of action, etc., shall be filed with the justice."

A statement is not required in actions founded on written instruments or accounts and whether the fact in question be constitutive or merely evidentiary, plaintiff was not required to do more than to file the notes with the justice. An action against the indorser of a negotiable promissory note "is founded upon an instrument of writing, purporting to have been executed by the defendant," and needs no statement when begun in a justice court to supply either substantive or evidentiary facts.

[6] Since the notes were negotiable under the laws of this state, defendant was advised by their lodgment with the justice and the issuance of the summons to meet the issue of his liability as an indorser of negotiable paper; and since the judgment under

review will be a bar to the maintenance of any future action against defendant on his indorsements, the purposes of the statutory rules of pleading applicable to suits in justice courts have been fully met. *Bank v. Hammerslough*, 72 Mo. 274; *Collins v. Burrus*, 66 Mo. App. 70; *Bank v. Noel*, 94 Mo. App. 498, 68 S. W. 235; *Warder v. Johnson*, 114 Mo. App. 571, 90 S. W. 892; *Brittain v. Murphy*, 118 Mo. App. 235, 94 S. W. 303; *National, etc., Co. v. Mermod*, 158 Mo. App. 673, 139 S. W. 251; *Maurer v. Phillips*, 182 Mo. App. 440, 168 S. W. 669; *Johnson v. Parker*, 86 Mo. App. 660.

The judgment is affirmed. All concur.

OUTTS v. DAVISON. (No. 11914.)

(Kansas City Court of Appeals. Missouri.
Feb. 21, 1916. Rehearing Denied
April 3, 1916.)

1. MASTER AND SERVANT §330(3)—INJURY TO THIRD PERSON—RELATION OF PARTIES—EVIDENCE.

In an action by one run down by defendant's motor car, evidence held to warrant a finding of the negligence of defendant's agent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1272; Dec. Dig. § 330(3).]

2. WITNESSES §56(2)—COMPETENCY—HUSBAND AND WIFE.

Under Rev. St. 1909, § 6359, a wife is competent in the first instance to testify in an action against her husband that she was his agent in the transaction involved.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 154; Dec. Dig. § 56(2).]

3. MASTER AND SERVANT §801(1)—WIFE'S AGENCY FOR HUSBAND—CONTROL OF AUTOMOBILE.

Where defendant telephoned his son to meet him at the station with the family automobile, defendant's wife, who rode on the back seat, was not his agent, though in defendant's absence she had charge of the car, it appearing that the son regularly drove it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1210, 1216; Dec. Dig. § 301(1).]

4. TRIAL §258(2)—REQUESTS—NUMBER—REFUSAL.

Where two or three instructions would have adequately presented defendant's defense, but defendant requested a dozen, the trial court might properly refuse them on the ground of their length.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 647; Dec. Dig. § 258(2).]

Appeal from Circuit Court, Jackson County; Kimbrough Stone, Judge.

"Not to be officially published."

Action by William W. Cutts against John E. Davison. From a judgment for plaintiff, defendant appeals. Affirmed.

Calvin & Rea, of Kansas City, for appellant. C. R. Leslie, J. R. Kaspar, and J. W. Patterson, all of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for damages alleged to have been received by him by being run over by defendant's auto-

mobile. He recovered judgment in the trial court.

It appears that on the 19th of May, 1914, defendant was due to arrive in Kansas City from Omaha, Neb., at 10 p. m., and telephoned to his home that he be met at the Union Station with his automobile. Accordingly his son, together with his mother and her sister, got in the machine and started for the station, the son driving. The accident happened at the intersection of Eighth and Broadway streets. Plaintiff rode on a street car north on Broadway to Eighth, and there endeavored to transfer east onto an Eighth street car, which stopped on the east side of Broadway. He got off the Broadway car and proceeded, diagonally, northeast towards the stopping place of the Eighth street car. Defendant's son was driving the machine north on Broadway, and therefore was approaching plaintiff from the rear, and ran upon him without warning and knocked him to the street. A large electric light hung nearly directly over the scene, and plaintiff could easily have been seen by any one on the lookout.

[1] Defendant's son's version of the matter was that he was driving close to the Broadway car, and that plaintiff unexpectedly and quickly got off that car while it was in motion. The witness said:

"As he got off the car the machine was right at the car, and as he got off the machine hit him."

But there were two witnesses besides plaintiff himself who do not agree to this, and the evidence is ample that plaintiff had not quickly swung off a moving car in front of the machine, but that he had gotten off and the car had passed on before he was struck. There was abundant evidence supporting plaintiff's theory of the case, that the young man saw plaintiff's peril in time to have stopped the machine before striking him, and we need only inquire whether the trial was free from substantial error.

[2, 3] Defendant's wife was offered as a witness in his behalf on the ground that in the matter of going to the station for defendant she was acting as agent for him, and was therefore competent under section 6359, R. S. 1909. It is true that the wife is competent, in the first instance, to testify as to her agency. *Reed v. Peck*, 163 Mo. 333, 63 S. W. 734; *Brick Works v. Thompson*, 59 Mo. App. 98; *Ingerham v. Weatherman*, 79 Mo. App. 480. But it devolves upon the husband who is seeking the benefit of his wife's testimony to show that she conducted the business (*Hardy v. Matthews*, 42 Mo. 406), and that she conducted it as his agent. In this case it is manifest that the wife was not conducting the business of driving the automobile. She was simply in the machine, on a back seat with her sister, while the son was driving. He testified that his father telephoned for him to meet him at the station,

and that he, not only then, but usually, drove the car for his father. Certain it is that he, and not the wife, was conducting the business of driving the car. The trial court properly ruled that the wife's agency was not shown. We do not regard the circumstance shown that when the father was away from home the machine was at the disposal and under charge of the wife, as controlling the patent fact that the son was defendant's agent.

[4] The three instructions given for plaintiff are not open to substantial criticism. Defendant offered twelve in addition to his demurrer. The court gave the twelfth and refused the others. The mere number alone justified their refusal. Two or three would have been abundantly sufficient to fully present the case. The Supreme and appellate courts have so often condemned the confusing practice of asking a large number of instructions that it is strange the evil does not cease.

But the instructions were properly refused aside from the excessive number of them. One or two were mere abstract propositions. Others submit ordinary care instead of the extraordinary care required by the statute, while others ignore the humanitarian rule upon which plaintiff's case rests.

The verdict is small (\$350), and is undoubtedly for the right party, and it is accordingly affirmed. All concur.

STATE v. ADAMS. (No. 11969.)

(Kansas City Court of Appeals. Missouri.
April 8, 1916.)

INTOXICATING LIQUORS \S 236(1) — PROSECUTION—EVIDENCE—DELIVERY TO ANOTHER.

Evidence that a drayman, who was a common carrier, procured from a railroad in a local option county several packages shipped from without the state, which he knew to contain intoxicating liquor, and to be consigned to fictitious persons, and that he hauled them away from the depot, is not sufficient to show that he was guilty of violating Rev. St. 1909, \S 7227, providing that no person shall keep, store, or deliver for or to another person in any local option county any intoxicating liquors, since it does not justify an inference that the liquor was delivered to any one, and does not show that it was not within the exception of section 7228, providing that the preceding section should not be construed to prevent any person from ordering liquor for his own or family use where it is sent directly to the user of it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 300-302, 307, 308, 319-322; Dec. Dig. \S 236(1).]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

"Not to be officially published."

J. W. Adams was convicted of unlawfully storing and delivering intoxicating liquors for others in a local option county, and he appeals. Reversed.

John W. Bingham and John W. Clapp, both of Milan, for appellant. James P. Painter, of Milan, for the State.

JOHNSON, J. On information of the prosecuting attorney of Sullivan county defendant was convicted and fined \$300 on each of the seven counts in the information. The offense charged in each count was a violation of section 7227, R. S. 1909. Defendant, a colored man, has been the town drayman in Milan for 20 years, and has hauled most of the freight and express matter to and from the depot. He fell into this prosecution by hauling from the depot on April 9, 1915, one cask and six barrels of beer which had been delivered in Quincy, Ill., to the railroad company for transportation to Milan and delivery to the designated consignees; there being a separate consignee for each barrel and cask.

Defendant appeared at the depot, presented the seven bills of lading to the agent, and signed a separate written receipt for each shipment which recited that each barrel and cask contained beer. The state introduced evidence to show that all of the six barrels and the cask were hauled from the depot, that defendant was observed hauling two of them along the streets, and that the various named consignees were fictitious persons. For present purposes we accept as sufficient the proof offered by the state that the barrels and cask contained intoxicating beer, and that defendant had knowledge of that fact when he hauled them from the depot, as well as knowledge of the fact that the persons named in the bills of lading as consignees were not the real consignees.

But the inference the learned trial judge attempted to draw from these facts that defendant delivered to or kept this beer for another person in violation of section 7227 rests upon conjecture or speculation, since the facts mentioned are as consistent with an innocent as with a guilty intent. The state does not attempt to show to whom the barrels and cask were delivered, or for whom they were kept in violation of the statute. This was an interstate shipment, and this drayman, who was a common carrier (Campbell v. Storage Co., 187 Mo. App. 565, 174 S. W. 140), had as clear right as the railroad company to engage in its transportation, and, unless he knew that the beer was being brought into the county for the purpose of being disposed of in violation of the local option law, he could not be said to have delivered or kept it within the prohibition of the statute. If each barrel or cask was bought direct from the consignor by a citizen of the county for his own and his family's consumption, no offense was committed, either by vendor, vendee, or transportation agency, and an offense could not be legitimately deduced from the mere act of such vendee having the consign-

ment made to a fictitious name. Such hypothesis is just as reasonable as any other the evidence tends to support. The burden of the state was to prove facts and circumstances the existence of which would be incompatible with an innocent intent, and this the state has failed to do, since it is no offense under the statute for a resident in local option territory to import intoxicants for his own consumption, and, for aught disclosed, defendant was nothing more than a carrier employed in such traffic. Section 7228, R. S. 1909; State v. Brown, 188 Mo. App. 248, 175 S. W. 131; State v. Cox, 180 S. W. 16; State v. Burns, 237 Mo. 216, 140 S. W. 871.

The judgment is reversed. All concur.

KENNISH v. SAFFORD et al. (No. 11881.)
(Kansas City Court of Appeals. Missouri.
March 6, 1916. Rehearing Denied
April 3, 1916.)

1. APPEAL AND ERROR \S 927(5)—**RULING ON DEMURRER—INFERENCES.**

In ruling on defendant's demurrer to the evidence, the appellate court must draw every legitimate inference in favor of plaintiff which evidentiary facts and circumstances will permit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3748; Dec. Dig. \S 927(5).]

2. FRAUD \S 58(1) — **SUFFICIENCY OF EVIDENCE.**

The difficulty of proving fraud does not dispense with the necessity of proof, and, while merely suspicious facts and circumstances will not be accepted as legal proof, yet where all the evidentiary facts and circumstances, when properly pieced together, enable the court to perceive the fraud, the showing is sufficient for practical and remedial purposes.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 55; Dec. Dig. \S 58(1).]

3. CONSPIRACY \S 19—**SUFFICIENCY OF EVIDENCE.**

Evidence, in an action against defendants on the ground that they had conspired to defraud plaintiff by representing that the security offered for his loan was good, held to sustain a verdict for plaintiff for the amount of the loan.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. \S 25, 26; Dec. Dig. \S 19.]

4. FRAUD \S 22(1)—**RELIANCE ON REPRESENTATIONS—ESTOPPEL.**

Where plaintiff, in making a loan upon a note, with deeds of trust as collateral security, relied upon defendant's representations in taking the security, without investigating it himself, as known to defendant, the defendant could not say that plaintiff's own neglect to examine the abstracts and make independent investigations as to the value of the security was the proximate cause of his loss.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 19, 20, 22, 23; Dec. Dig. \S 22(1).]

5. FRAUD \S 65(1)—**INSTRUCTION.**

In an action on the ground that the fraudulent representations of a codefendant as to the value of the security given as collateral for a loan made by plaintiff were made with the full knowledge of defendant in carrying out the conspiracy to defraud the plaintiff, a charge that plaintiff would be entitled to recover against defendant even if he did not enter the conspiracy at first and did not know of the fraud until

after plaintiff had parted with his money, but before defendant received a part of it, was not objectionable, as broadening the issues made by the pleadings.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72-74; Dec. Dig. ¶65(1).]

6. CONSPIRACY ¶13—LIABILITY.

If a conspiracy exists, a party who joins at any stage becomes a party to, and answerable for, all acts done by each and all of the conspirators before or afterwards in furtherance of the common design.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. ¶13.]

Appeal from Circuit Court, Jackson County; D. E. Bird, Judge.

Action by John Kennish against Charles G. Safford and Isaac W. Ray. Judgment for plaintiff, and defendant Ray appeals. Affirmed.

McCune, Harding, Brown & Murphy, of Kansas City, for appellant. T. A. Witten and Hadley, Cooper & Neel, all of Kansas City, for respondent.

JOHNSON, J. June 18, 1910, plaintiff (who then was practicing law in Kansas City) loaned \$3,650 to A. M. Howell, a building contractor, and took Howell's promissory note for that sum, due in 90 days, with interest from date at 8 per cent. per annum. As collateral security Howell at the same time delivered, or caused to be delivered, to plaintiff three other promissory notes, which purported to be secured by deeds of trust on real estate; one for \$4,000, one for \$1,800, and the third for \$1,500—in all \$7,300, twice the amount loaned to Howell. One of these collateral notes turned out to be a forgery, and the other two were worthless. Howell, who had been operating as a building contractor on an extensive scale, was guilty of this and other criminal deeds, and his affairs came to a crisis shortly before the maturity of his note to plaintiff. A receiver of his property was appointed, but nothing was realized for creditors. The defendant Safford, a loan broker, procured the loan from plaintiff for Howell, and a part of the proceeds was paid over to defendant Ray, who was Safford's father-in-law and a creditor of Howell. Plaintiff charges a conspiracy between Safford and Ray to defraud him. The petition alleges:

"To induce plaintiff to make said loan, said defendant Safford, for the purpose of carrying out said conspiracy to defraud plaintiff, represented that all of said notes [meaning the three collateral notes] were the property of said Arthur M. Howell; that the same were all secured by deeds of trust on real estate in Kansas City, Mo., which deeds of trust constituted and were first liens on the properties respectively described therein; that he knew said notes and deeds of trust to be good, valid, bona fide, and in full force and effect, and that he knew the titles to all of said real estate were good; that said real estate was ample in value to secure said notes; and that said Howell desired to make said proposed loan in order to complete an apartment building owned by him then in

course of construction; that said representations were all fraudulent and false, and were at the time known by both of said defendants to be fraudulent and false, and were made by said Safford with the full knowledge of said Ray in carrying out said conspiracy and fraudulent scheme and design of said Safford and said Ray to defraud plaintiff; that in truth and in fact said \$1,800 note and the deed of trust purporting to secure same were forgeries, and were not executed by said Benjamin S. Fauber and Melvina F. Fauber, and the deeds of trust purporting to secure said \$4,000 note and said \$1,500 note were subject to prior deeds of trust on the real estate in said deeds described, and said real estate had been sold under said prior deeds of trust, and said securities were wholly worthless, all of which both said Safford and said Ray fully knew at the time; that said loan was, in fact, applied for by said defendants for the said Howell for the fraudulent purpose of obtaining the proposed loan from plaintiff for said defendants' own use; that relying upon the friendly intentions of said Safford and upon his well-known financial ability, and believing the representations so made by him, and that defendants were not personally interested in said loan, plaintiff agreed to make said loan of \$3,650 to said A. M. Howell, and did pay and deliver said sum to said Safford as agent for said A. M. Howell, and accept from said Safford the aforesaid notes, alleged to be secured as aforesaid, as collateral security therefor; that said A. M. Howell was, at the time, wholly insolvent and financially worthless, all of which both said Safford and said Ray at the time knew, but which plaintiff did not know, and that said Howell soon thereafter became a fugitive from justice, and is now insolvent and a fugitive."

[1-3] The answer is a general denial. The verdict of the jury was for plaintiff for \$3,650, the full amount of his demand, and defendant Ray appealed. His principal contention is that the judgment against him lacks the support of any substantial evidence, and that his demurrer to the evidence should have been sustained. The business of defendant Safford was conducted under the name of Farmers' Mortgage & Loan Company. His father-in-law, Ray, a wealthy man, lived near Kansas City, and made the office of that company his headquarters, but had no interest in the business. Some time before the events in controversy he had allowed Safford to lend some money for him, and Safford loaned about \$2,900 to Howell, who was one of his regular customers. This loan was secured by two, and perhaps all three, of the collateral notes afterward turned over to plaintiff. Defendants deny having had possession of the forged note, but the evidence as a whole supports an inference that Ray received and held that note as a part of the security for his loan to Howell.

The major part of that loan was not due at the time plaintiff made his loan to Howell, but there is evidence tending to show that Safford, on behalf of Ray, was vigorously pressing Howell for instant payment, and was moved to take that course by knowledge of the fact that the collateral notes were worthless, and that Howell had been borrowing money on spurious collateral. A bank recent-

ly had forced Howell to make good some paper of that character, and a woman stenographer employed in Safford's office testified to hearing Safford demand of Howell that he repay the Ray loan within an hour. Defendant's evidence contradicts her testimony and attacks her credibility, but we regard the issues it raises as issues of fact for the jury to determine. Safford and Ray both admit they were trying to collect the loan, but say the effort was prompted by the desire of Ray to use the money in the purchase of lands in Colorado as gifts to his grandchildren. Defendants deny any knowledge of the insolvency or criminal practices of Howell, and their evidence tends to show that they manifested confidence in him by lending him money after plaintiff made his loan.

Plaintiff had become acquainted with Safford at Jefferson City while plaintiff was Assistant Attorney General. Safford was introduced by Fred Burkhart, who had lived in Mound City, where plaintiff practiced law, many years. Burkhart was associated in business with Safford at Kansas City, and when plaintiff retired from public office and opened a law office in Kansas City, Burkhart and Safford were among the first to visit him, and Safford employed him in an important suit in Callaway county, and informed plaintiff that he expected to employ him in all of his legal business, which was large. An intimate personal relationship was established between plaintiff and Safford, the details of which need not be recounted. About the time Safford began pressing Howell for payment of the Ray loan, plaintiff sold a farm he owned in Arkansas and consulted Safford about the investment of the proceeds in a home in Kansas City. Afterward Burkhart called at plaintiff's office, and in the ensuing conversation inquired if plaintiff knew Howell, and, receiving a negative answer, remarked:

"He is a good man to get acquainted with. He has a great deal of business here, and he can throw you a lot of business, and I would like you to get acquainted with him."

Several days later Safford visited plaintiff, and asked if he would like to make a loan. Plaintiff replied, "No"; that he desired to buy a home with his money. Safford said he had a good customer, who needed some money for building purposes, and he would consider it an accommodation to him if plaintiff would make the loan, since he did not like to risk losing so good a patron. He told plaintiff that Howell was the customer, and that a loan for 90 days would suffice. He spoke of the security as consisting of the three collateral notes we have mentioned and the indorsement of Ray which, of itself, the evidence shows, would have been ample security. The amount of the three notes was double the amount Howell wished to borrow, and Safford represented that each note was secured by real estate, the value of which was double the amount of the note. Plaintiff

finally consented to make the loan, though not at the first interview. He told Safford that he knew nothing about values of city property and that he would not take the time or pains to inform himself about the value of the security or the titles to the land. There were three large abstracts of title, and plaintiff said he would not go through them for the interest on the loan, which would not exceed \$70. In short plaintiff (so he states) made plain the fact that he was relying entirely upon Safford as his friend and client to give him the represented security and to attend to closing the loan. This is denied by defendants, and their evidence is to the effect that Safford dealt at arm's length with plaintiff who, himself, investigated both the values of the security and the titles to the real estate.

Before the transaction was closed Safford informed plaintiff that he had investigated the collateral, and knew it was "gilt edge," and suggested that it was not necessary to have Ray indorse the note of Howell. Relying on these representations, plaintiff accepted Howell's note for \$3,650, with the collateral notes as security, and at the request of Safford drew two checks, payable to the order of Howell, one for \$2,900, and the other for \$750, and delivered them to Safford. The check for \$750 was turned over to Howell, who received the money on it, and the \$2,900 check was indorsed by Howell and deposited in bank to the credit of Safford. Howell and Safford then went to the office of the latter, where they had a settlement with Ray. Safford was given \$1,000, it is claimed by defendants, as a loan from Ray to defray the expenses of a trip to Colorado for the health of Mrs. Safford, who was ill with pulmonary tuberculosis and afterward died from that disease. There is no doubt about Safford receiving that sum out of the proceeds of plaintiff's loan, but there is a reasonable question as to whether it was a loan from Ray or Safford's share of the spoils of fraud successfully practiced on plaintiff. Furthermore it is claimed by defendants that Ray, still having full confidence in Howell, loaned him \$800 out of the proceeds on finding that he had no immediate need of the money for his intended purchase of land for his grandchildren, but the jury were entitled to infer from all the facts and circumstances in evidence that the loan of \$800 to Howell, as well as the intention of Ray to purchase land, were mythical. We are not intimating that the proof of defendants on all these issues was not substantial, but in ruling on the demurrer to the evidence we must draw every legitimate inference in favor of plaintiff which evidentiary facts and circumstances will permit. After the transaction was closed Safford, aided by Burkhart, repeatedly urged, and finally prevailed on, plaintiff to accept one-third of a commission of \$75 they claimed Safford had collected from Howell, and when the exposure of Howell came

Burkhart threatened plaintiff with the consequences of having exacted usury in the acceptance of this part of the commission.

It is not seriously contended that plaintiff's evidence does not sustain the charge that Safford was a party to, and one of the active instruments in, the perpetration of a conspiracy to defraud plaintiff, but it is strenuously insisted that Ray appears rather as a victim than a partner in the conspiracy to which Safford and Howell were the parties. Plaintiff states that he had no knowledge that Ray was a creditor of Howell; that he was lending \$3,650 on the same collateral Ray had taken as security for his loan of \$2,900, or that Ray was to be paid out of the proceeds of his loan. If Ray was a party to the conspiracy, he remained carefully concealed in the background, and the conclusion that he was not a dupe of Howell and Safford, but was their guilty partner, must be drawn, if at all, from a mass of circumstances, none of which, standing alone, would support such conclusion, or suffice to do more than raise a mere suspicion. It is seldom that fraud may be proved by direct evidence. Secrecy is of its very essence, and if circumstantial evidence would not suffice to expose it, there would be few instances indeed in which justice could not be defeated. While the difficulty of proving fraud does not dispense with the necessity of proof, and while merely suspicious facts and circumstances will not be accepted as legal proof which must consist of more than insinuation and innuendo, the courts, as is well observed in *Bank v. Hutton*, 224 Mo. loc. cit. 71 et seq., 123 S. W. 57, are solicitous in such cases, realizing that fraud—

"is commonly deeply hid away; * * * can only be got at by inference. * * * Therefore they permit a minute search and a wide one in pursuit of fraud; for it may now and then be seen through a small crevice, and seemingly indifferent things, without sinister significance, when taken separately, may, when properly dovetailed together, establish fraud. Courts are fond of saying so much as that. *Black v. Epstein*, 221 Mo. 288 [120 S. W. 754]; *State ex inf. v. Standard Oil Co.*, 194 Mo. loc. cit. 154 et seq. [91 S. W. 1062]; *St. Francis Mill Co. v. Sugg*, 206 Mo. loc. cit. 155 [104 S. W. 45]."

Where all the evidentiary facts and circumstances, when properly pieced together enable the judicial eye to see through the outer covering to a dark and false interior, the showing will be deemed sufficient for all practical remedial purposes, though the cover be never so fair. See, also, *Mosby v. Commission Co.*, 91 Mo. App. loc. cit. 507; *Allen v. Forsythe*, 160 Mo. App. loc. cit. 289, 142 S. W. 820; *Summers v. Keller*, 152 Mo. App. loc. cit. 639, 133 S. W. 1180.

Of course if Ray, in good faith, was trying to collect a debt due him, and accepted payment or partial payment without knowledge that Howell had fraudulently procured the money, he could not be deemed culpable in any degree, though the money had been secured by means of a fraudulent conspiracy

between Howell and Safford. But the evidence of plaintiff does not leave Ray in such secure position. There is ample proof that, with knowledge that he had been victimized and held paper that had no value, Ray set his son-in-law, Safford, to work to save what he could from the wreck by fair means or foul, and that when he surrendered his worthless collateral and received payment in return, he knew that plaintiff had been deceived into parting with his money by trickery and fraud. There is much in his own testimony that the jury were entitled to reject as untrue. For example, his assertion that he had no thought that anything was wrong with his paper, and was trying to collect what Howell owed him before it was due, for the purpose of buying gifts for his grandchildren, is not very plausible in the light of all the attending circumstances, and would justify an inference that the story about the intended gifts was used to cover up the fact that he was trying to scramble to a place of safety before the explosion in his debtor's affairs occurred.

[4] We hold that the evidence in its aspect most favorable to plaintiff accuses Ray of participation in the conspiracy. Since the testimony of plaintiff is to the effect that Safford entered into a sort of confidential relationship with him with respect to the loan in which he undertook to see that plaintiff received the represented security, and that he knew plaintiff intended to rely upon his representations and not make any investigations for himself, defendants are in no position to say that plaintiff's own neglect to examine the abstracts and make independent investigations into the nature and value of the security was the proximate cause of his loss. As he said to Safford, the amount of the interest on the loan would not justify him in expending the professional effort an examination of the abstracts would entail. He had a right to say:

"I will not make the loan if I have to go to any trouble to investigate the security, and if I make it I shall rely entirely upon your representations both as to title and value."

If such were the understanding, neither Safford nor his codefendant, Ray, will be heard to say that plaintiff should not have reposed such confidence in Safford. *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979. The demurrer to the evidence was properly overruled.

[5, 6] The second instruction, given at the request of plaintiff, is challenged on the ground of broadening the issues tendered in the petition. The theory of this instruction is that plaintiff would be entitled to recover as against Ray, even under the hypothesis that Ray did not join the conspiracy at first, and did not know of the fraud until after plaintiff had parted with his money, but before Ray received a portion of the proceeds of the fraud. The principle of law thus applied cannot be gainsaid. If a conspiracy

exists, a party who joins at any stage of the operation becomes a party to, and answerable for, all acts done by each and all of the conspirators before or afterwards in furtherance of the common design. *State ex rel. v. Ice Co.*, 246 Mo. loc. cit. 218, 151 S. W. 101; *Greenleaf on Evidence* (17th Ed.) § 184a; 8 Cyc. 658. The charge in the petition against Ray is that the fraudulent representations of Safford were made "with the full knowledge of said Ray in carrying out said conspiracy." This language would appear broad enough to include the act of joining at the last stage of the action; but, if not susceptible of such construction, we hold a charge that one entered, and remained in, a conspiracy is broad enough to include, not only the act of coming in at the beginning, but also that of entering at any subsequent stage. The logic of the rule we have just discussed supports this view, since the reason for holding a late comer responsible for all the preceding acts of his co-conspirators would apply with equal force to sustain the rule that an allegation that A. and B. conspired to defraud is supported by proof that B. joined in a fraudulent scheme of A. which had progressed successfully, and afterward shared in its spoils. What we have said answers the objection to the second instruction, and the further suggestion that Ray should not be held responsible beyond the money he actually received from the proceeds of plaintiff's loan.

There is no substantial error in the record, and the judgment is affirmed. All concur.

HAWKINS v. CITY OF INDEPENDENCE. (No. 11906.)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

1. MUNICIPAL CORPORATIONS ⇨821(20)—DEFECTIVE SIDEWALK — PERSONAL INJURIES — QUESTION FOR JURY.

In an action against a city for personal injuries caused by a fall on a defective sidewalk, whether plaintiff was in the exercise of ordinary care *held* for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1754; Dec. Dig. ⇨821(20).]

2. TRIAL ⇨260(1) — INSTRUCTIONS — REFETITION.

A request covered by given instructions was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. ⇨260(1).]

3. DAMAGES ⇨208(2)—PERSONAL INJURIES—QUESTION FOR JURY.

In an action against a city for injuries through a fall on a defective sidewalk, injury to plaintiff's head as an element of damage *held* for the jury under the evidence.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 533, 534; Dec. Dig. ⇨208(2).]

4. APPEAL AND ERROR ⇨1060(1)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

In an action against a city for personal injuries received through a fall on a defective side-

walk, where evidence that others had stumbled over the place was admitted without objection and gone into by both sides, reference to the fact by plaintiff's counsel in discussing the question whether plaintiff was in the exercise of ordinary care was not reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4135; Dec. Dig. ⇨1060(1).]

5. DAMAGES ⇨132(5)—PERSONAL INJURIES—EXCESSIVE VERDICT.

In an action against a city for personal injuries caused by a fall on a defective sidewalk by a woman 38 years old, strong and healthy up to the fall, and the mother of five children, who suffered a miscarriage in consequence thereof, and was in a critical condition for a number of days, and in ill health after the accident, unable to do her accustomed household duties, and ill for a space of two years, verdict for \$2,500 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 376; Dec. Dig. ⇨132(5).]

Appeal from Circuit Court, Jackson County; Kimbrough Stone, Judge.

"Not to be officially published."

Suit by Hattie Hawkins against the City of Independence. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

John F. Thice, of Independence, for appellant. William B. Bostian, of Independence, for respondent.

TRIMBLE, J. A suit for damages caused by a fall on a defective sidewalk. Plaintiff, a woman 38 years old, was walking west on the cement sidewalk along the south side of West Lexington street, between Pleasant street and Pendleton avenue, in the city of Independence. As usual in such sidewalks, the walk was divided into five-foot portions by lines across the walk. The east end of one of these blocks had in some manner become elevated above the adjoining block, and the edge of the latter had in one place crumbled away for about five inches. Thus a hole or depression was left in the east block at its west edge, which, in conjunction with the elevation of the west block at that point, made an offset of about six inches in the walk. Plaintiff's foot went into this hole, and her toe struck against the elevated block and threw her down. She was pregnant at the time, and the petition alleges that the fall injured her head and skull, wrenched her spine, bruised her body on the right side and back, caused her to miscarry, rendered her unable to work or to walk any appreciable distance, and inflicted upon her great pain, from which she yet suffers, and also severe, permanent, and painful injuries. She recovered judgment in the sum of \$2,500 and the city has appealed.

It is urged that defendant's demurrer to the evidence should have been sustained. This is on the ground that the evidence so clearly and conclusively shows that plaintiff was not in the exercise of ordinary care that

the trial court should have declared as a matter of law that she could not recover.

[1] We are unable to agree with this contention, but are of the opinion that the trial court correctly left that question to the jury. Taking the whole of plaintiff's testimony, it presents a fair and candid picture of the way in which persons of ordinary care usually and ordinarily walk the streets. She walked along looking ahead of her with the sidewalk in the line and scope of her vision looking at it now and then and observing that it was a cement sidewalk in good condition, as it undoubtedly was except for this one place. Plaintiff very frankly said she did not go along with her head down watching the sidewalk all the time. But she does say repeatedly that she was looking in front of her and along the sidewalk, and that she looked at the sidewalk, though not with particularity, as one would do if hunting for a defect. Plaintiff did not know of the defect. She had not walked over the sidewalk for a year prior to the time of her fall; her prior trips up the street being made on the street car. The defect as described in the evidence does not appear to be one of so glaring a nature that we can say, as a matter of law, it could not escape the observation of one in the exercise of ordinary care. Nor can we say that she was lacking in ordinary care, as a matter of law, because at the moment she fell she glanced at a street car coming toward her full of people and on which an unusual noise was being made, which momentarily attracted her attention. The street car was so situated as to be in the line of her vision as she was proceeding along looking in front of her. As one of the witnesses say: "She could not help but see the street car." So that her glance at the street car was not an entire abandonment of all care to observe where she was going. In other cases where the pedestrian's attention was momentarily attracted such distraction did not prevent the question of negligence being submitted to the jury. *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532; *Alexander v. St. Joseph*, 170 Mo. App. 376, 156 S. W. 729. We think the question whether or not plaintiff was exercising ordinary care was one for the jury. *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985; *Kelley v. Kansas City*, 153 Mo. App. 484, 133 S. W. 670; *O'Donnell v. Hannibal*, 144 Mo. App. 155, 128 S. W. 819; *Barr v. Kansas City*, 106 Mo. 550, 16 S. W. 483.

The point that evidence of plaintiff's suffering pain in her head, neck, and abdomen, and that she lost weight, was not admissible, because not within the allegations of the petition, is clearly without merit.

A number of objections are raised against plaintiff's instruction A, which covered the case and submitted it to the jury. We have carefully examined these objections, and find that they are not tenable. The instruction submits fairly every feature of the case, and

in terms which have met with the approval of the courts in other cases. *Kelley v. Kansas City*, 153 Mo. App. 484, 133 S. W. 670; *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532; *West v. Railroad*, 187 Mo. 351, 86 S. W. 140.

[2, 3] Instructions 9 and 13 asked by defendant and refused by the court were properly refused. No. 9 was covered by instructions 4 and 15, which were given. No. 13 sought to withdraw from the jury any injury to plaintiff's head as an element of damage. But the evidence was that plaintiff struck her head on the sidewalk, was rendered somewhat dazed, and since that time has suffered pain in her head. So that the court could not withdraw such feature from the jury.

[4] Complaint is made of improper remarks made by counsel for plaintiff in argument. Some of the objections related to matters which were of no moment whatever. Others having some weight were promptly sustained by the court. Plaintiff's counsel, in discussing the question whether plaintiff was in the exercise of ordinary care when she stumbled over the defect, did refer to the fact that others had stumbled over the same place. But the evidence as to others having stumbled over the place was admitted without objection and was gone into by both sides. In view of this evidence being in without objection, we do not think the case should be reversed because counsel referred to it in argument. There was nothing in the remarks to prejudice the jury or to give them a false standard by which to judge the issues they were to decide. The jury were told that it was for them to decide whether plaintiff, at the time in question was exercising care.

[5] Lastly, it is urged that the verdict is excessive. The plaintiff was a strong healthy woman up to the date of her fall. She was the mother of five children, and, so far as the record shows, had never suffered a miscarriage before her fall. She undoubtedly fell and was hurt. That is shown by disinterested witnesses. She was in bed "off and on" for several days, when the doctor was sent for, who found her threatened with a miscarriage. He prescribed for her and directed that she be kept quiet in bed. Three days later the miscarriage occurred, and the doctor testified that when the child passed from her it showed it had been dead for a time. The doctor testified that in his opinion plaintiff's fall might and could have caused the miscarriage. He further testified she was in a critical condition at the time of the miscarriage, though she seemed to quickly get better. Plaintiff, according to her neighbors, has been in ill health, unable to do her accustomed household duties and work ever since, a space of at least two years. Under these circumstances we cannot say the jury awarded an excessive verdict when they allowed \$2,500.

The judgment is affirmed. All concur.

MURPHY v. FOSTER. (No. 11225.)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

1. BROKERS —88(10)—ACTION FOR COMMISSIONS—INSTRUCTIONS.

The issue in a broker's action for commissions on a sale, in which O. and B. figured as purchasers, being whether the sale was made by reason of his effort, and he claiming to have dealt only with C., instructing that he could not recover unless he caused C. and B. to go and examine the land with view of purchasing it was error, as in effect a peremptory instruction for defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 126, 127; Dec. Dig. —88(10).]

2. APPEAL AND ERROR —1031(6)—PRESUMPTION—CURING ERROR.

Where the court, after reading an instruction to the jury, corrected it, but refused to read it to them, the error cannot be presumed to have been cured by the jury reading the corrected instruction after retiring.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4043, 4044; Dec. Dig. —1031(6).]

Appeal from Circuit Court, Adair County; C. D. Stewart, Judge.

"Not to be officially published."

Action by S. A. D. Murphy against John D. Foster. From an adverse judgment, plaintiff appeals. Reversed and remanded.

Campbell & Ellison and Cooley & Murrell, all of Kirksville, for appellant. Higbee & Mills, of Kirksville, for respondent.

ELLISON, P. J. Plaintiff's action is to recover a commission as a real estate agent for the sale of defendant's farm. He recovered judgment before a justice of the peace and lost on appeal to the circuit court. Each party testified that the farm was put in plaintiff's hands for sale, and that the contract was that plaintiff should receive one dollar per acre as his commission. So each party testified the farm was sold; but whether by reason of plaintiff's effort was a matter of dispute, and there was evidence and circumstances tending to support each of them. Two men, Cheffey and Burris, figured as purchasers, though plaintiff only claimed to have dealt with the former.

[1, 2] Instruction No. 2, for defendant, directed the jury that, unless "plaintiff caused Cheffey and Burris to go and examine defendant's farm with a view of purchasing the same, the plaintiff cannot recover." Plaintiff's case was not based on his inducing or procuring Burris to examine the farm. There was no pretense that he had anything to do with Burris, and the effect of the instruction was as if a peremptory instruction had been given for defendant. The record shows that the instruction was given by the court and read to the jury, and later during the argument of counsel was changed by the court by striking out the words "and Burris." Whereupon plaintiff, by his counsel, requested that the instruction be read to the jury as changed.

This request was refused, and plaintiff excepted to the ruling.

The ruling was error. The jury having heard the instruction before the change, and not being informed by the court of the change, would, of course, act upon it as they heard it. It is true that, after going into consultation, they might have read it as changed; but that is going a long way to find cure for prejudicial error.

The judgment is reversed, and cause remanded. All concur.

STATE ex rel. KING v. BOARD OF TRUSTEES OF FIREMEN'S PENSION FUND OF KANSAS CITY. (No. 11844.)

(Kansas City Court of Appeals. Missouri.
Feb. 21, 1916. Rehearing Denied
April 3, 1916.)

1. MUNICIPAL CORPORATIONS —200—FIREMEN'S PENSION ACT—CONSTRUCTION—"SERVICE"—"WHILE IN SUCH SERVICE"—"SUCH"—"WHILE A MEMBER OF FIRE DEPARTMENT."

Const. art. 4, § 47, empowers the Legislature to authorize the creation and maintenance of a fund for crippled and disabled firemen, and for the relief of the widows and minor children of deceased firemen, to be taken from the municipal revenues. Rev. St. 1900, § 9892, part of the act relating to the firemen's pension fund and its administration, provides that if any member of the fire department shall while in the performance of his duty be killed or die as the results of an injury received in the line of his duty, or of any disease contracted by reason of his occupation as fireman, or die from any cause whatever while in such service, and shall leave a widow or children under 18 surviving, the board of trustees shall direct the payment of the amounts fixed by its rules to such widow and children. Section 9891 provides that a fireman permanently disabled while in the performance of his duty or by reason of service in the department may be retired from service on a pension. Section 9894 provides for retirement and a pension out of the retirement fund. Section 9895 provides a pension for the widow of a fireman dying after retirement on a pension under section 9861, by reason of injuries sustained or disease contracted while serving as a member of the department, and section 9888 authorizes the retention from a fireman's pay of certain sums for the relief fund. *Held*, that, construed with reference to the intent of the whole act, to the context, and under the rule ejusdem generis, the word "service" meant the act of serving, the labor performed or the duties required of a fireman, and did not designate a department of the city's activities; that the word "such" was a term of comparison meaning of that kind, of the same or like kinds; and that the phrase "while a member of the fire department" was not synonymous with "while in such service"—so that the names of a widow and minor children of a fireman killed in a fight in a saloon while off duty were properly excluded from the pension list.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 547; Dec. Dig. —200.

For other definitions, see Words and Phrases, First and Second Series, Such; While.]

2. STATUTES —206—CONSTRUCTION—EFFECT TO ALL PARTS.

In the construction of statutes, effect is to be given, if possible, to every word, clause, and

sentence, and it is the duty of the court to reconcile the different provisions so as to make them consistent and harmonious, and to give sensible and intelligent effect to each.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. ¶206.]

8. STATES ¶119—PUBLIC MONEY—EXPENDITURE.

It is a fundamental principle of the law of Missouri that public money shall not be paid to a private individual for something wholly dissipated from the interests of the public.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. ¶119.]

4. MUNICIPAL CORPORATIONS ¶200 — PENSION FUNDS—RIGHTS OF EMPLOYEES.

Governmental employees can have no property right in a pension fund, nor can those claiming under them have any such right, except their claim be based upon and come within the laws governing the funds, and the city's retention of a part of a fireman's salary and the placing of it in the relief fund, as authorized by Rev. St. 1909, § 9888, part of the firemen's pension act, does not make it any the less a public fund, nor do the moneys going into said fund cease to be public moneys.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 547; Dec. Dig. ¶200.]

5. CONSTITUTIONAL LAW ¶102(2) — VESTED RIGHT—INTEREST IN PENSION FUND.

Notwithstanding such payment of a part of the salary of a fireman into a relief fund, the fund remains a public fund, and the payer of such sums has no vested right therein which cannot be taken away by subsequent legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 356; Dec. Dig. ¶102(2).]

Appeal from Circuit Court, Jackson County; Danl. E. Bird, Judge.

Certiorari by the State of Missouri on the relation of Jennie King, and Jennie King, guardian for Jesse King and others, against the Board of Trustees of the Firemen's Pension Fund of Kansas City, composed of A. F. Evans and others, to review the record of the Board in refusing to place the names of the relatrix and her children upon the pension list of such fund. Records quashed and the Board appeals; cause transferred on motion to the Supreme Court, and by it retransferred. Reversed, and case remanded, with direction to quash the writ of certiorari and to dismiss the petition.

A. F. Evans, H. C. Moore, and A. F. Smith, all of Kansas City, for appellant. H. S. Julian and I. J. Ringolsky, both of Kansas City, for respondent.

TRIMBLE, J. Certiorari issued from the circuit court of Jackson county, Mo., to review the record of the board of trustees of the firemen's pension fund of Kansas City, wherein it refused to place upon the pension list of said fund the names of the widow and minor children of Jesse King, deceased, who was or had been a member of the city fire department. The return shows that the board refused to place the names on the pension list "for the reason that Jesse King's death resulted from injuries received in a fight in a

saloon while off duty." It seems that King had asked and had been granted a special leave of absence as a fireman for 12 hours, and, during the time of such absence, he became engaged in a quarrel with another negro over a purely personal controversy in no way connected with the business of the fire department and was shot, receiving injuries from which he died several days thereafter. The firemen's pension fund and the board controlling and administering the same were authorized by the Act of March 25, 1903 (Laws of Missouri 1903, p. 86 et seq.), now appearing in the Revised Statutes, 1909, as sections 9879 to 9903, both inclusive. The circuit court quashed the record of the board, and it prayed an appeal to the Supreme Court, on the theory that the trial court, in overruling the board's point that its action was not subject to review because of a provision to that effect in section 9886, R. S. Mo. 1909, had held said provision to be unconstitutional. The appeal, however, was allowed to this court, and on motion we transferred the case to the Supreme Court, but that tribunal ordered it retransferred.

Many preliminary questions are raised concerning matters of procedure and the right to a change of venue which the board applied for and failed to get; also, the power of the circuit court to review the action of the board because of the aforesaid provision in said section 9886. However, our views upon the main and ultimate question involved in the case make it unnecessary to decide these preliminary points or objections raised by the board, for, if it be found that the board acted correctly, then such result disposes of the case and renders the other objections to the judgment immaterial and academic so far as this case is concerned.

[1-3] The correctness of the board's action depends upon what is the true construction and meaning to be placed upon section 9892, R. S. Mo. 1909, which reads as follows:

"If any member of such fire department shall, while in the performance of his duty, be killed or die as the result of an injury received in the line of his duty, or of any disease contracted by reason of his occupation as fireman, or shall die from any cause whatever while in such service, and shall leave a widow, or child or children under the age of sixteen years surviving, said board of trustees shall direct the payment * * * monthly to such widow, while unmarried * * * and * * * for each child until it reaches the age of sixteen years such sum of money as may be determined by said rules and regulations."

The board contends that this section does not authorize the granting of a pension to a fireman's widow and minor children unless his work, duties, or occupation as a fireman sustain some relation to his death; that the fact that he was in the line of his duties as a fireman must have something to do with his death.

The construction claimed by relatrix is based upon the clause in said section which we

have italicized. Her contention is that this clause means that, if a fireman dies from any cause whatever while he is a member of the fire department, then his widow and minor children under 16 are entitled to be placed on the pension list. In other words, his death does not have to be related in any manner whatever to the performance of his duties as a fireman. If he is a fireman and his death occurs, then no matter how, nor where, nor when, that death came about, his widow and children get a pension.

It seems to us that the meaning *relatrix* extracts from the words "or shall die from any cause whatever while in such service" is obtained by giving to the word "service" a limited and arbitrary meaning. Arbitrary because it is given without reference to the meaning shown by the context. A word having several meanings, or shades of meaning, must be given that meaning which the context shows it was intended to have. Now the word "service" may mean:

"(1) The act of serving; labor performed in the interest and under the direction of others; the work of a slave, hired man, or employé. * * * (2) Any work done for the benefit of another; the act of helping another; * * * hence, also, a benefit or advantage conferred. * * * (3) The state of being a servant; the position of a servant; employment in the interest of a person or of a cause. * * * (4) The official duty or work required of one; hence, also, any system or organization instituted for the accomplishment of such duty; as, military or naval service; the consular or the diplomatic service"—and many other meanings. New Standard Dictionary.

Relatrix takes the last meaning given above, which we have put in italics, and, applying it to the word "service," makes it mean the system or organization instituted by the city for the extinguishment of fires, or, in other words, the city fire department. With this meaning given to the word "service," the clause in the statute should be understood and interpreted as if it read "or shall die from any cause whatever while in the city fire department, or while a member of such city fire department." But suppose some of the other meanings are given to the word "service." Take for instance the first one above, "the act of serving; or the work of a * * * hired man or employé," or the first subdivision of the fourth definition given above "the official duty or work required of one." The statutory clause would then read "or shall die from any cause whatever while in the act of serving as a fireman or doing the work of a fireman or while in the official duty or work required of a fireman." We do not mean to hold that the word "service," as used in this section, is to be limited to these two meanings last given. We cite these two in contradistinction to the meaning given it by *relatrix* merely to show that it has different meanings according to the sense in which it is used. And the sense in which it is used must be determined from the context.

What then is that meaning as shown by the context? In the first place, a careful reading of the entire act does not reveal any instance where the word "service" is used in the sense of the system or organization instituted by the city for the extinguishment of fires. It is never used to express the fact that the fireman is a member of the fire department; that is, in the sense one uses the term when speaking of a man enlisted in the army and says "He is in the military service." The statute nowhere uses the word in that sense, but always in the sense of the labors, duties, and things to be performed by a fireman. The statute, in expressing the idea that the fireman belongs to a branch of the city's governmental activities, never says "in the fire service of the city," but always the words "member of the city fire department" are used. In the next place, the other clauses in section 9892 show that the clause "or shall die from any cause whatever while in such service" does not have the scope and meaning *relatrix* would ascribe to it. These other clauses give a pension: (1) If a member of the fire department be killed "while in the performance of his duty"; or (2) die as the result of an injury received "in the line of his duty;" or (3) die as the result of any disease contracted "by reason of his occupation as fireman." In all three of these the death must sustain a relation of some sort to the duties and work of a fireman, either a causal relation or a relation of time of occurrence with performance. Why should these limitations be carefully inserted in each of these three clauses, if the Legislature intended by the next clause to give a pension in case of the death of a fireman without regard to whether the death had any connection whatever with the performance of the duties of a fireman? The last clause, if it means what *relatrix* says it does, would give a pension to the widow and minor children of a deceased fireman no matter whether he was killed "while in the performance of his duty" or not. It would also give a pension if the fireman was injured and died from such injury while still a fireman, no matter whether such injury was received "in the line of his duty" or was received while he was bent upon a purely personal matter and attempting to perpetrate a crime. If he died from a disease, it would not make any difference whether that disease was "contracted by reason of his occupation as fireman" or not, so long as he was still a member of the fire department, and this section deals only with members. Hence it would seem that to give the italicized clause in controversy the meaning ascribed to it by *relatrix* is to eliminate entirely the three preceding clauses of the section, or to render them meaningless or reduce them to useless surplusage. This would violate a cardinal rule in the construction of statutes:

"It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to

every word, clause, and sentence. It is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each." 36 Cyc. 1128, 1129; *Strottman v. St. Louis, etc., R. Co.*, 211 Mo. 227, loc. cit. 251, 109 S. W. 709.

So that the phrase "while in such service" is not synonymous with "while a member of the fire department." But the word "service" means the "same service" referred to in the three preceding clauses; that is to say, a service rendered "in the line of his duty" or "by reason of his occupation as a fireman." The word "service" as here used means the act of serving, the labor performed or the duties required of a fireman, and is not used to refer to or designate a department of the city's activities. The word "such," which precedes and modifies the word "service," shows this to be true, because the word "such" is essentially a term of comparison. It means "of that kind; of the same or like kind; identical with or similar to something specified." *New Standard Dictionary*. So that when the statute contains several clauses, each containing a provision that the fireman must be, at the time, in the line of his duties and attending, to them, and then follows it with another clause containing the provision "while in such service," the word "such" means that the service must be of the same kind as that which has been enumerated.

It also appears that the construction sought to be placed by relatrix upon the italicized clause of said section is contrary to the whole intent and spirit of the firemen's pension act. The provisions therein for a pension are not the same as, nor do they partake of the nature of, an unlimited contract of life insurance. The "pension" created by the statute has in it the idea of an allowance because of death or disability arising from, or connected in some way with, the performance of the duties in the line of a hazardous occupation in the interest of the public. The statute did not create a system of life insurance insuring a fireman against every hazard of life to which men as individuals are exposed, but only to those hazards which arise from the performance of, or while he is performing, or is in the line of, his public duties. Section 9891 provides that, if a fireman becomes permanently disabled, he may be retired "from service," that is, from the requirement to perform the duties of a fireman, and shall receive a pension. But his disablement must be from something occurring "while in the performance of his duty" or "by reason of service in the department," and such disability must have been "contracted in the service of such fire department." (The word "service" as here used is clearly not equivalent to membership in the department.) And so on throughout the act, the disability, injury, incapacity, or whatever it is, must arise from, or be connected in some way with, the performance of the duties of a fire-

man. Clearly, if Jesse King had been merely disabled when he was shot in his quarrel, he could not have claimed a pension. But, according to his widow's contention, since he was killed, she can. The evident spirit and purpose of the act does not bear this out. It provides two funds, the "relief fund" and the "retirement fund." Public moneys can be used to replenish the former, but not the latter, which must come from contributions and other private sources. Firemen that are disabled in the performance of their duties, or who, in the line of their duty, have contracted something which results in disability, may be pensioned out of the "relief fund," and so may their widows and children under 16, if death, instead of disability, comes in the line of duty. Section 9894 provides for the retirement and pensioning of a fireman after he is 50 years old and has served 22 years in the fire department. This section says nothing about "disability" as a prerequisite to obtaining the pension, unless indeed disability is implied by age and length of service. It also provides that if such fireman, retired through length of service, dies, his widow, if married to him before retirement, and his children under 16, may be pensioned. But the pensions provided in this section are payable out of the "retirement" fund and not out of the "relief" fund, which is maintained out of public moneys. This section is the only section which does not contain a provision requiring the disability or death of the fireman to be in consequence of or while in performance of duty as a prerequisite to the pension before it can be granted; and the pension it provides is payable only out of the private fund. But the pension provided for in section 9892, and which relatrix herein is seeking, is payable out of the fund derived from public moneys. Section 9895 provides a pension for the widow of a fireman who dies after being retired and pensioned, under section 9861 "by reason of injuries sustained or disease contracted while serving as a member of the fire department"; but this pension is likewise payable out of private funds. So that throughout the entire act, so far as it authorized the use of public money, great care is exercised to authorize its use only in those instances where the occasion calling therefor arose from the work done for the public or while such work was being done. Section 47, art. 4, of the Constitution, empowers the Legislature to authorize the creation, maintenance, and management of a fund for crippled and disabled firemen and for the relief of widows and minor children of deceased firemen, "said fund to be taken from the municipal revenue of such cities." Doubtless, the distinction maintained throughout the act between the payments to be made out of the "relief" fund and those to be made out of the "retirement" fund may have been preserved lest the constitutional provision did not give power to take public money

to pay either a fireman who has been retired for length of service but who has not been disabled, or the widow and orphans of a fireman who dies after he has been retired, and therefore after he is no longer in the service of the city. But the same reason, namely, fear of a lack of constitutional power, is equally efficacious in causing the Legislature to limit the pensions paid out of funds created by public money to those cases where the disability or death was caused by the performance of, or occurred in the line of, public duties, or while they were being performed, and not to extend such pensions to cases where the death was wholly disconnected from public duties either in point of time or with respect to matters of causal relation. It is a fundamental principle of the law of this state that public money shall not be paid to a private individual for something wholly disassociated from the interests of the public itself. But if relatrix's construction of the clause in controversy is correct, then the life of a man as an individual is insured at public expense merely because of the fact that he happened to be a member of the city fire department. Such is not the general policy of our law, and therefore we do not think the statute in question confers a right to a pension upon the widow and minor children of a fireman when his death arises from a cause entirely disconnected from his services as a fireman and at a time when he is out of the line of his duties and engaged in a purely personal affair of his own. *Scott v. Mayor and Aldermen of New Jersey*, 68 N. J. Law, 687, 54 Atl. 441.

[4, 5] It is true section 9838 authorizes the retention from a fireman's pay of certain sums monthly which go into the relief fund in addition to the other public moneys constituting that fund; but, if this has any tendency to give the fireman a quasi-property interest in such fund, it does not do so beyond the terms of the law providing for the pension. The fact that the fireman must contribute to the fund does not broaden his rights or the rights of his widow and children to the pension. It does not authorize the awarding of a pension where the death occurs under circumstances which are not within the terms of the law granting the pension. Governmental employes can have no property rights in a pension fund, nor can those claiming under them have any such rights except their claims be based upon and come within the laws governing the fund. *People ex rel. v. Coler*, 173 N. Y. 103, 65 N. Y. 2. 956. The retention by the city of a part of the fireman's salary and the placing of the same in the "relief fund" does not make the same any the less a public fund, nor do the moneys going into said fund cease to be public moneys. *State ex rel. v. Board of Trustees Policemen's Pension Fund*, 121 Wis. 4, 98 N. W. 954. Notwithstanding the payment of a part of the salaries of the firemen into a fund, the same remains a public fund,

and the payor of such sums has no vested right therein which cannot be taken away by subsequent legislation. *Pennie v. Reis*, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426.

It is urged that the three clauses of section 9892 specifying the death of a fireman killed in performance of duty, dying from injuries received therein, or from disease contracted by his occupation, covers every possible cause of death arising as a consequence of the performance of his duties, and, for this reason, the next clause is mere surplusage and has no function to perform if it is to be given the interpretation we place upon it. It might be retorted that relatrix's construction makes the other three clauses mere surplus words. But we do not think our construction eliminates the fourth clause from said section, or makes it of no effect. It may have been inserted out of precaution lest some circumstances might arise wherein the death would occur while the fireman was in the line of his duty, and yet not come within the purview of the three preceding clauses. A fireman might die while in the performance of his duties, and yet his widow have difficulty in proving that his death arose from or was caused thereby. In such case, the clause now in controversy would relieve her of the necessity of proving that such was the fact. And the clause may have been inserted for this very purpose. In other words, the clause may be a legislative declaration that, if the death occurred while he was in the act of performing the work of a fireman or in the line of his duties, then the pension would be granted without regard to the cause of death. We do not say that such is its purpose, it being unnecessary to do so in this case, since clearly relatrix's husband's death did not occur while he was in the performance of his duties. We mention it merely as an illustration of the fact that the three preceding clauses do not necessarily cover all varieties of their class, and therefore do not come within an exception rendering the doctrine of *ejusdem generis* inapplicable. 31 Cyc. 1122.

The construction placed by us upon said section 9892 renders it unnecessary for us to go into the question whether King was or was not a member of the fire department at the time he died. The return of the board includes certain matters which allege that King, after entering into the quarrel in the saloon, went away and procured a pistol, and, upon returning to and entering the saloon, was shot and injured, and that, upon learning of such conduct upon his part, the board suspended him, and that afterwards, during such suspension and before he had been reinstated or had ever returned to his work as a fireman, he died from the wound he received. The board argues from this that he was therefore not a member of the department at the time he died, and that relatrix is not entitled to a pension because he was suspended

prior to his death and was in suspension when that occurred. Our construction of the section and the spirit and meaning of the act, however, make it unnecessary to say whether his suspension has any bearing upon relatrix's right or lack of right to a pension. We do not put our denial of her right upon that ground.

It results from the foregoing that the judgment of the trial court quashing the record of the board should be reversed, and the case remanded, with directions to quash the writ of certiorari and dismiss relatrix's petition. It is so ordered. All concur.

REYNOLDS v. CITY ICE & STORAGE CO. (No. 11893.)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

1. MASTER AND SERVANT ⇨234(1)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an iceman, who knew that a strip of iron on the endgate of the wagon which was hung in a horizontal position so that it was a continuation of the bed was loose on one side, and who had previously caught his foot in attempting to jump from the endgate to the ground, jumped from the endgate to the ground, he was negligent as a matter of law barring recovery for injuries resulting from the catching of his foot on the loose strip.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 706; Dec. Dig. ⇨234(1).]

2. MASTER AND SERVANT ⇨101, 102(6)—INJURIES TO SERVANT—DUTY OF MASTER.

A master is bound to furnish appliances which are reasonably safe, but is not required to furnish appliances absolutely safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 181-184; Dec. Dig. ⇨101, 102(6).]

3. MASTER AND SERVANT ⇨247(2)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where an iceman, knowing that the endgate of his wagon which was hung so as to form a continuation of the bed was defective in that on one side the iron strip which formed the end was loose, attempted to jump from the endgate to the ground and caught his foot on the loose strip, his own negligence, and not that of the master, was the proximate cause of the injury; it appearing that on one side of the endgate the iron was tight.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 796; Dec. Dig. ⇨247(2).]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Action by Albert A. Reynolds against the City Ice & Storage Company, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Guy M. Cowgill, of Kansas City, for appellant. Boyle & Howell, Glen L. Bruner, and Jos. S. Brooks, all of Kansas City, for respondent.

TRIMBLE, J. Plaintiff was in the employ of defendant and engaged in delivering ice

to customers in Kansas City. Delivery was made from a wagon. The endgate was so attached that it could be held upright like the sides of the bed, thus preventing ice from sliding out of the wagon when going up hill; or it could be lowered to the plane of the bed and there held by chains, and, in this position, it formed an extension of the bed beyond the end of the wagon; or it could be lowered until it hung down perpendicularly from its hinges on the end of the bed. Along what would be the top of the endgate when it was in an upright position was a strip of iron bolted to the wood and extending the full length of the gate. At one end thereof, and extending perhaps halfway the length of the endgate, the wood next the iron had become worn and the screws loose, so that, when the endgate was let down to the same plane as the bottom of the wagon bed, the strip of iron extended from a half to three-quarters of an inch above the board. With one's face to the front end of the wagon, this projection began at the left end of the gate and extended, as stated, perhaps halfway along the length of the gate. The rest of the way the strip was down tight against the board. The wagon had been turned to the north. Plaintiff was in the wagon bed and walked to the south end, where the endgate was in a horizontal position in the same plane as the bottom of the bed. Plaintiff, facing south, stooped down and, placing his right hand at the west end of the endgate, attempted to leap to the ground. As he made the spring, his right foot slipped on the board and caught upon the protruding strip of iron, causing his body to swing around to the right as on a pivot and fall to the ground with his left leg doubled under him, breaking it in two places. He brought this suit for damages and obtained a verdict in the sum of \$2,750. A motion for new trial was sustained "for the reason that the court erred in refusing to give an instruction in the nature of a demurrer to the evidence asked by the defendant at the close of the evidence on behalf of the plaintiff and at the close of all the evidence." Plaintiff appealed.

The foundation of plaintiff's case is the alleged failure of defendant to exercise ordinary care to furnish plaintiff a reasonably safe appliance with which to work. And the petition also alleged that, prior to plaintiff's fall, he called defendant's attention to the condition of the endgate, and that defendant promised to repair same, but failed to do so. The answer, in addition to a general denial, pleaded contributory negligence and assumption of risk.

Plaintiff's evidence shows that he was 50 years of age; that he had been a driver of teams and wagons all his life, and had worked around ice wagons for 25 or 30 years. The wagon bed was 5 feet wide, and below

the endgate was a step about 30 inches in length; but, when the endgate was adjusted to the same plane as the bottom of the wagon bed, it extended beyond the step. Plaintiff testified that he placed his right hand on the west end of the endgate and intended to jump out with both feet at the same time, as he always did; but that time his right foot slipped on the slush in the bed, and his right heel caught on the projecting edge of the iron. Plaintiff also testified that he had slipped and caught his heel on this iron band before that. How often he was not able to say, but he had done so. However, always theretofore he had been able to catch and recover himself. Plaintiff's son, who was the driver of the wagon, and who testified in plaintiff's behalf, testified to slipping and catching his heel on the iron strip prior to the date of the injury. Plaintiff further testified that a man could get out of the wagon a dozen different ways if he wanted to, and they would all be safe; that he could have gotten out of the wagon a little east or west of where he did get out, and could have gotten out on either side of the place where the strap iron was loose. He was then asked:

"Q. Well, why didn't you do it? A. Well, when you are in a hurry you don't always wait to pick out a place; you just jump right out. I've been doing it all my life, and I never got hurt before, to amount to anything."

He then went on to say that he could not say he was in any more of a hurry than he usually was; that he was in no particular hurry; that he did not notice the ice on the endgate, did not pay any attention to it; that if he had thought of being specially careful he could have avoided the injury, but he got out that time just like he always did; and that he was always careful.

[1] We have, then, a wagon with an endgate which could be either let down or lowered to the level of the wagon bed. The endgate was not for the purpose of enabling the employes to get in or out of the wagon. A step was provided for that purpose. The loose strip extended only a part of the way across. The rest of the way it was tight. Plaintiff was perfectly familiar with the condition of the strip. He could have gotten out of the wagon at places other than over the loose strip. Had he gone to the other end of the endgate, his heel would have been in no danger of catching on the iron. There were various other safe ways of getting out of the wagon. And yet, knowing all these things, he chose to get out at a place and in a way that, if he did slip, his heel would catch and he would be in danger of being thrown. And in addition to all this, he had slipped before, and his heel had caught before, although he says he had always been careful. So that, notwithstanding his efforts at care, he had both slipped and caught his heel when getting out at that place and in the way he did. We think that, in choosing this place and

way of getting out, he was, under the circumstances, guilty of contributory negligence as matter of law.

[2] The master is under obligation to furnish an appliance that is reasonably safe, but is not required to furnish one that is absolutely safe. Plaintiff knew better how to alight from the wagon than did the master; and the endgate not being furnished for the purpose of enabling the plaintiff to alight from the wagon, and plaintiff not being required to use it for that purpose, nor required to get out over the place where the strip was loose, and being fully cognizant of the dangers of getting out at that place and in the manner he did, his injury arose, not from a failure of the master to observe ordinary care in furnishing the wagon and its appliances, but from the use thereof which plaintiff chose to make of it, and his improper and negligent method of getting out of the wagon knowing full well the hazards attending that place and way. As said in the case of *Beebe v. St. Louis Transit Co.*, 206 Mo. 419, loc. cit. 435, 436, 103 S. W. 1019, 1023 (12 L. R. A. [N. S.] 760):

"The general rule of law is that the master must use ordinary and reasonable care to supply and maintain safe machinery, tools, and appliances with which to do the master's work; but the master is not required to furnish his servant machinery, tools, and appliances which are absolutely safe; nor can an employer be held guilty of negligence in the failure of the discharge of his duty towards his servant where he furnishes machinery and appliances which are reasonably safe when used in the manner intended to be used, but which may become dangerous if used for a purpose for which they were not intended or adapted. *Grattis v. Railroad*, 153 Mo. 380 [55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721]."

[3] In the case at bar, it was not the negligence of the master in failing to furnish a reasonably safe wagon, when used in the way it was intended to be used, that caused the injury. It was the negligence of the servant in using it that caused the injury. The failure to repair the strip was not the proximate cause of the injury. The wagon or endgate was a suitable appliance for the purpose for which it was intended, but the injury occurred because the plaintiff negligently chose to get out of the wagon at the place and in the way he did. In such case, the servant cannot recover. *Holmes v. Brandenbaugh*, 172 Mo. 53, 72 S. W. 550. The manner, place, and method of getting out of the wagon was wholly within the control of the servant. He was fully aware of the condition of the gate at the west end thereof. He was free to use the step provided for the purpose, or was free to get out at places where there was neither danger of slipping nor of catching, and yet chose to get out at the dangerous place and in the unsafe way, when he knew he was liable to slip and catch. It would seem that to hold defendant liable in this case would render every farmer liable every time a hired hand fell in getting out of his farm wagon, regardless of the method adopted by the lat-

ter to get out or the known dangers he voluntarily encountered in so doing.

Plaintiff says the case is like that of *Bliesner v. Riesmeyer Distilling Co.*, 174 Mo. App. 139, 157 S. W. 980. We do not think so. There the plaintiff, a young man not quite of age, was ordered to insert his finger into the cylinder of a corking machine and was injured as a result thereof. The injury arose as the direct result of doing what he was told to do. The plaintiff in that case was required to use the machine in a particular way. There is nothing of that kind in the case at bar.

The judgment is affirmed. All concur.

GUERINGER v. FIDELITY & DEPOSIT CO. OF MARYLAND. (No. 11850.)

(Kansas City Court of Appeals. Missouri. April 3, 1916.)

1. INSURANCE ~~665~~(7) — BURGLARY INSURANCE—NOTICE AND PROOFS OF LOSS—SUFFICIENCY OF EVIDENCE.

In an action on a policy of burglary insurance, evidence held to show that notice and proofs of loss were given the insurer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1723, 1724, 1726, 1727; Dec. Dig. ~~665~~(7).]

2. INSURANCE ~~335~~(3) — BURGLARY INSURANCE—KEEPING OF BOOKS BY INSURED.

A book wherein the owner of a pool hall entered the amounts of money taken in, amounts paid out, and the amounts placed in the safe each day, was a compliance with his policy of burglary insurance requiring him to keep books showing the money on hand to enable the insurer to determine a loss.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 853; Dec. Dig. ~~335~~(3).]

3. APPEAL AND ERROR ~~1050~~(1)—HARMLESS ERROR—EVIDENCE.

In an action on a policy of burglary insurance on money in insured's safe, error in the trial court's ruling that insured had a right to prove the contents of the safe, including uninsured property, and to mention such property in so doing, was harmless unless the jury were led into incorporating the value of such property in their verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ~~1050~~(1).]

4. INSURANCE ~~669~~(12) — BURGLARY INSURANCE—ACTION—INSTRUCTION.

In an action on a policy of burglary insurance on money in insured's safe, an instruction that if the jury found from the evidence that money belonging to plaintiff was stolen from the safe and taken and carried away, and if they further found that same was lost to the plaintiff, referring thereafter to "such loss," was not erroneous as misleading the jury or authorizing them to include in their verdict the loss of uninsured watches and jewelry in insured's safe.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1780; Dec. Dig. ~~669~~(12).]

5. INSURANCE ~~332~~ $\frac{1}{2}$. New, vol. 13 Key-No. Series—BURGLARY INSURANCE—INCREASE OF HAZARD.

Where the local agent who solicited a burglary insurance policy was a frequenter of insured's pool hall where a handbook was run, a

method of gambling on horse races, and where card games were played for brass checks good for merchandise, a practice in operation when the policy was taken out, the policy was not invalid as for an increase of hazard after its issuance.

6. INSURANCE ~~602~~—LOSS—NONPAYMENT—PENALTY—BURGLARY INSURANCE.

In an action on a policy of burglary insurance covering money in the safe in insured's pool hall, where there were facts disclosed after loss tending to throw suspicion on insured's claim that he had money in the safe at the time of the burglary, or at least that he had anything like the sum he claimed, while he claimed the amount of the policy as his loss, his suit being for such amount, but his evidence and the jury's finding for much less, the insurer was not liable for the penalty for vexatious delay and for an attorney's fee, having the right under the circumstances to require plaintiff to establish the proof of his loss and the extent thereof in court.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1498; Dec. Dig. ~~602~~.]

7. INSURANCE ~~602~~ — VEXATIOUS DELAY — QUESTION FOR JURY.

The question of vexatious refusal to pay a policy of insurance is ordinarily a question of fact for the jury.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1498; Dec. Dig. ~~602~~.]

Appeal from Circuit Court, Jackson County; Frank G. Johnson, Judge.

"Not to be officially published."

Suit by Vic Gueringer against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals. Judgment affirmed conditionally upon filing of a remittitur; otherwise reversed, and case remanded.

Lathrop, Morrow, Fox & Moore, Geo. J. Mersereau, and Hugh E. Martin, all of Kansas City, for appellant. Handy & Swearingen, of Kansas City, for respondent.

TRIMBLE, J. This is a suit upon a policy of burglary insurance. The plaintiff owned and conducted a pool hall known as the "Green Duck Billiard, Pool and Whist Parlor," at 1121-1123 Walnut street, Kansas City. The policy was issued December 18, 1913, and insured plaintiff for one year therefrom, to the amount of \$500, "on money and negotiable securities contained in fireproof safe described above as safe No. 1," against direct loss by burglary in consequence of the felonious abstraction thereof from said safe by any person or persons who shall have made entry into the safe by the use of tools or explosives thereon.

Some time after midnight of Sunday, February 15, 1914, the pool hall was entered by burglars gaining an entrance through the windows in the rear, and the safe was blown open by the use of nitroglycerin, and the contents of the safe stolen. The burglary was discovered about 7 o'clock Monday morning, February 16, 1914. Upon being informed of it, plaintiff immediately notified the police, and upon going to his hall sent one of his employes to the office of the insurance company to notify them of his loss, and shortly

thereafter a representative of the company came to the pool hall, examined the premises, and saw the evidences of the burglary, and told plaintiff to "go ahead and clean up."

[1] The testimony of plaintiff is also to the effect that two men came from the office of the defendant insurance company to the pool hall, and that he made a statement to them of what was in the safe and what he lost; that he went to the insurance office and made a statement, and then at his place of business the insurance man wrote up a proof of loss, which plaintiff signed and the man took away with him; and that he (plaintiff) went to the insurance office and made an affidavit to his loss; and that the young lady at the desk swore him to the affidavit. The young lady stenographer corroborates this and says she turned it over to the adjuster, Mr. Haynes, who the plaintiff says came to his place of business, talked over the loss, and wrote down plaintiff's answers to the questions in a four-page form, which Haynes had plaintiff to sign and took away with him, saying he would mail it to the company, and that as quick as the mails could carry it the check for the loss would be back. In addition to this, there was some evidence tending to show that the check for plaintiff's loss was sent to the Kansas City office; but, before it was delivered, the local agent advised the home office against payment, and therefore plaintiff did not get it. It seems that about this time plaintiff was arrested and placed in jail charged with the commission of a crime, and the local insurance agent advised against payment. The foregoing matters concerning notice and proof of loss are mentioned here for the reason that one of the points made by defendant for a reversal of this case is that plaintiff pleaded a compliance with all the terms of the policy and not a waiver of proofs of loss, and his evidence showed, if it showed anything, a waiver of such proofs, rather than the furnishing thereof. We think the evidence was sufficient to show that proofs of loss were furnished. The evidence tends to show they were made out and sworn to in the Kansas City office and delivered to the adjuster who was to send them to the company, and there is some evidence that the home office must have received and acted favorably on them until the local agent stopped further proceedings. In view of all this testimony in plaintiff's behalf as to the furnishing of proofs of loss, together with the fact that defendant offered no testimony to show that proofs were not furnished, and the further fact that defendant's own evidence showed that losses were handled in the local office through Haynes, the adjuster employed directly by the home office, and acting independently of the local office, it cannot be said that plaintiff failed to prove that notice and proofs of loss were given to the company itself.

Plaintiff, after waiting the required length

of time given the company in which to pay, brought suit for the full amount due on the policy, for 10 per cent. damages for vexatious refusal to pay said policy, and for a reasonable attorney's fee. The jury returned a verdict for plaintiff fixing his loss at \$366.80, and assessing a penalty of \$18.33 for vexatious refusal to pay and \$75 attorney's fee.

[2] The point that plaintiff failed to prove that he kept books showing the money he had on hand, so as to enable the company to determine the loss, as required by the policy, is also without merit. Both plaintiff and his manager testified that such a book was kept. As plaintiff owned the entire business, the books were very simple. All that was kept was the amount of money taken in and the amounts paid out, and the amount placed in the safe each day was shown to have been set down in this book. The record shows that this book was in court, and that a witness, in testifying to the amount of money on hand upon any day, refreshed his memory therefrom. It is true the record shows no formal offer of the book in evidence; but, if defendant had desired to show that it was not such a book as the policy required, it would have been an easy matter to have had the book put in evidence. The case is not like those where no books were kept at all.

[3, 4] The fact that plaintiff was allowed to prove that other property, consisting of watches and jewelry, was in the safe and stolen, and also to prove the value thereof, ought not to call for a reversal of the case. The insurance was not on these articles, it is true, and the trial court, at one place, appeared to recognize this fact, but ruled that plaintiff had a right to prove the contents of the safe and to mention such property in so doing. While the value of such property may have been immaterial, yet it was not prejudicial error unless the jury were led into incorporating its value in their verdict. We do not agree with defendant that plaintiff's instruction No. 1 authorized the jury to include any loss of such property in their verdict. Nor could the jury have been misled thereby. The instruction read, "if you further find from the evidence that money belonging to plaintiff was stolen therefrom and taken and carried away, and if you further find from the evidence that the same was lost to the plaintiff," and thereafter in the instruction the reference was to "such loss," and the instruction closed by saying that then the verdict should be for such sum as the jury believed from the evidence would cover plaintiff's loss, if any. Clearly, the only loss referred to was the loss of money, and the jury could not fail to understand that fact. This is further shown by the verdict, which was for the sum of money plaintiff's manager said was in the safe when he closed it Sunday night a few hours before the burglary.

[5] It is also contended that, since it was proven that one of the habitués of the place ran a "handbook" there, which was shown to have been a method of gambling on horse races, and because card games were played wherein brass checks, good for 2½ cents each in cigars, candy, or such other merchandise as the place sold, this increased the hazard so as to invalidate the policy. But it was shown that the place was run in this manner at the time the policy was taken out; that the local soliciting insurance agent who solicited the policy of plaintiff was, and had been, a frequenter of the place for some time. He must have known the character of the place he was insuring, and no evidence was offered to show that he did not. So that there was, in fact, no change in the business so as to create an increased risk.

Other minor objections are made, but, after examination, we find them to be without sufficient merit to warrant discussion.

[6, 7] The objection, however, to the penalty for vexatious delay and for attorney's fee, we think, should have been sustained.

The insurance was for money on hand, something that could easily be made the subject of an excessive and fraudulent claim. There were also other facts disclosed after the loss, but before the time plaintiff had in which to pay had elapsed, which tended to throw suspicion on the claim of plaintiff that he had money in his safe at the time of the burglary, or at least that he had anything like the sum he claimed to have had. In addition to this, the record shows that plaintiff appears to have been claiming the full amount of \$500 as his loss, and his suit was for that amount, while his evidence and the jury's finding was for much less. All these things being considered, we think that defendant had a right to require plaintiff to establish in court the question of his loss and the extent thereof without being subjected to a penalty for refusing to pay. It is true the question of vexatious refusal to pay is ordinarily one of fact for the jury to determine. But the facts and circumstances herein are such that certainly a prudent and reasonable man would submit the case to a court to be tried before paying the demand. Therefore the allowance of a penalty and attorney's fee should not, in our opinion, have been permitted.

If plaintiff's trustee, who, since this case was submitted, has been appointed and made a party hereto by consent of all parties, will, within ten days from the announcement of this opinion, enter a remittitur of the penalty and attorney's fee awarded herein, with all interest due thereon, the judgment will be affirmed; otherwise, it will be reversed and remanded. It is so ordered. The other Judges concur.

STATE v. FULTON. (No. 12531.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. COURTS ~~36~~—INFERIOR COURTS—JURISDICTION—PRESUMPTIONS.

The county court, though a court of limited statutory jurisdiction, stands on the footing of courts of general jurisdiction, and the same presumptions will be indulged in favor of the regularity of proceedings in the county court, and the validity of its judgments in matters within its exclusive jurisdiction, as are indulged in favor of judgments of courts of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 142-144; Dec. Dig. ~~36~~.]

2. COURTS ~~35~~—COURTS OF GENERAL JURISDICTION—PRESUMPTIONS.

Where the record of a court of general jurisdiction is silent about a matter necessary to confer jurisdiction, the existence of such matter will be presumed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146; Dec. Dig. ~~35~~.]

3. COURTS ~~36~~—JURISDICTION—PRESUMPTIONS.

In the absence of a showing to the contrary, the court must presume that the county court had jurisdiction at a special term of court to make an order for the publication of notice of the result of a local option election; jurisdiction in matters pertaining to local option elections being placed in the county court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 142-144; Dec. Dig. ~~36~~.]

4. COURTS ~~64(2)~~—COUNTY COURT—SPECIAL TERMS—STATUTES.

Under Rev. St. 1909, § 4088, authorizing the president or any two judges of the county court to order a special term when the business and interests of the county may require it, the power to determine when a special term is necessary is left exclusively to the presiding judge or judges, and the discretion in ordering a special term cannot be questioned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 219; Dec. Dig. ~~64(2)~~.]

5. COURTS ~~64(6)~~—SPECIAL TERMS—COUNTY COURT.

Under Rev. St. 1909, § 4088, authorizing the president or any two judges of the county court to order a special term when the business and interests of the county may require it, the president may order a special term to take steps necessary in a local option election, and the court at a special term called by the president may make an order for the publication of notice of the result of a local option election.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 228, 229; Dec. Dig. ~~64(6)~~.]

6. INTOXICATING LIQUORS ~~39~~—VIOLATION OF LOCAL OPTION LAW—EVIDENCE.

The state, on a trial of a violation of the local option law, need not show that notice of the result of a local option election was given, but the fact that notice was not given is a matter of defense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 33; Dec. Dig. ~~39~~.]

Appeal from Circuit Court, Wayne County: Jos. J. Williams, Judge.

"Not to be officially published."

P. H. Fulton was convicted for violation of the local option law, and appealed to the St. Louis Court of Appeals. The case was transferred under Act June 12, 1909, to the Springfield Court of Appeals, and there the

judgment was affirmed. 152 Mo. App. 345, 133 S. W. 95. The above act having been declared unconstitutional, and the proceedings under it in the Springfield Court of Appeals null, the case was transferred back to the St. Louis Court of Appeals, and is submitted. Affirmed.

James Orchard, of Eminence, and J. H. Ranney, of Greenville, for appellant. J. F. Meador, of Greenville, for respondent.

REYNOLDS, P. J. This is a prosecution for alleged violation of the local option law, which law, it is alleged, was adopted and in force in Wayne county prior to and at the time of the commission of the alleged offense. From a conviction in the circuit court of Wayne county, defendant appealed to this court.

[1-6] Proceeding under the Act of June 12th, 1909 (Acts 1909, p. 396), which provided for the transfer of causes from one Court of Appeals to another, the cause was transferred from our court to the Springfield Court of Appeals. There it was argued and submitted, and on January 3rd, 1911, the judgment of the circuit court was affirmed. The Supreme Court having declared the above cited act unconstitutional, and proceedings under it in the Springfield Court of Appeals null (State ex rel. Dunham v. Nixon, 232 Mo. 98, 133 S. W. 336), the cause was transferred back to our court by the Springfield Court of Appeals. Here it has been duly submitted. The opinion of the Springfield Court of Appeals, pronounced by Judge Cox, will be found under the title State v. Fulton, 152 Mo. App. 345, 133 S. W. 95.

On consideration of the points involved in the appeal, and of the opinion of Judge Cox as above reported, we find no reason to dissent from the conclusion arrived at by that learned judge, and we adopt it as the opinion of our court in the case. For the reasons and on the grounds there stated, the judgment of the circuit court of Wayne county is affirmed.

NORTONI and ALLEN, JJ., concur.

CITY OF ST. LOUIS, to Use of GILSONITE CONST. CO., v. McCULLY CONST. CO. et al. (No. 14257.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. TRIAL \S 39—ADMISSION OF EVIDENCE—WRITTEN CONTRACT.

In an action on the contractor's penal bond to recover for materials furnished to a contractor with the city, where plaintiff, before the amended answer of the contractor's surety, filed a copy of the bond and contract duly certified by the city register, which, though not formally introduced, were before the referee without question, and were quoted from by counsel as if in evidence, and where the surety's answer admitted the execution of the bond, but alleged that it had been incorrectly recited in the peti-

tion, the contract was properly proved and introduced in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 92-98; Dec. Dig. \S 39.]

2. MUNICIPAL CORPORATIONS \S 245—WORK INCLUDED.

In a subcontractor's action on the contractor's bond for materials furnished to and used by a contractor with a city for the reconstruction of a city poorhouse, extra work done at the request of the contractor by way of patchwork, while outside of the subcontractor's contract, was not outside the main contract, and was a proper charge against the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. \S 245.]

3. APPEAL AND ERROR \S 173(1)—PLEADING AND ISSUES.

In such action the defendant's failure to plead that the contractor had sublet part of the work in violation of the contract estopped it from insisting upon such ground on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1079, 1093; Dec. Dig. \S 173(1).]

4. MUNICIPAL CORPORATIONS \S 245—CONTRACTS—BONDS—CONSTRUCTION—SUBLETTING.

Under a contract for the reconstruction of part of a city poorhouse according to plans and specifications, and a bond entered into by the contractor in a penal sum conditioned to properly perform the contract according to its terms, and on its completion to pay to the proper parties all accounts due for material and labor, was to protect materialmen, and that it might be sued on at the instance of any materialmen in the name of the city, a materialman was a proper party to sue on the bond, notwithstanding a clause in the contract against subletting the work.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. \S 245.]

5. MUNICIPAL CORPORATIONS \S 245—CONTRACTS—BONDS—CONSTRUCTION OF CONTRACT—SUBLETTING.

Under a contract for the reconstruction of a part of a city building according to plans and specifications, providing that the contractor would give its personal attention to the contract and would not sublet the work, the furnishing of fireproofing material by plaintiff which was looked after and checked up by the contractor, who also directed and supervised the work, was not such a subletting of the contract as to deprive the subcontractor of its action for materials, etc., as against the contractor's penal bond.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. \S 245.]

6. APPEAL AND ERROR \S 1022(2)—FINDINGS—CONCLUSIVENESS.

In a subcontractor's action to recover for labor and material as against the contractor's penal bond, the referee's finding in his report, approved by the circuit court, that admissions and letters of the contractor's president were made in good faith and during the continuance of the joint liability of the principal and surety, supported by substantial evidence, could not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4015; Dec. Dig. \S 1022(2).]

7. EVIDENCE \S 471(25)—OPINION EVIDENCE—ACCOUNT.

In a subcontractor's action against a contractor and the surety on his penal bond to recover for material furnished and work done, the admission of statements of witnesses who were

familiar with the construction, the plans, and specifications, who had examined the work during its progress, and who were versed in building matters, that from their personal observation they could say that the work called for in the contract had been done in accordance with the plans and specifications, one of whom produced his notes and reports of his inspections during the work, who were offered by the court for cross-examination, was not error, as they were statements of fact within the knowledge of the witnesses in the nature of shorthand testimony, and not objectionable as opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2151; Dec. Dig. § 471(25); Witnesses, Cent. Dig. §§ 833-836, 988.]

Appeal from St. Louis Circuit Court; Thos. C. Hennings, Judge.

Action by the City of St. Louis, a municipal corporation, to the use and for the benefit of the Gilsonite Construction Company, against the McCully Construction Company and the Bankers' Surety Company. Report of referee confirmed, judgment for plaintiff, motion for new trial overruled, and defendants appeal. Affirmed.

Jeffries & Corum, of St. Louis, for appellant Bankers' Surety Co. S. C. Taylor, of St. Louis, for appellant McCully Const. Co. Jones, Hocker, Hawes & Angert, Vincent L. Bolsaubin, and Goodbar & English, all of St. Louis, for respondent.

REYNOLDS, P. J. The city of St. Louis, intending to reconstruct and fireproof the interior of the center portion of the main building of the City Poorhouse, entered into a contract with the McCully Construction Company to do the work according to plans and specifications for a total price of \$32,908, the McCully Construction Company entering into a bond in the penal sum of \$11,999.50, conditioned that it would faithfully and properly perform the contract mentioned according to all its terms and upon its completion pay to the proper parties all amounts due for material and labor used and employed in the performance of the contract. The Bankers' Surety Company joined in the bond as surety for the McCully Construction Company.

It is averred that the Gilsonite Construction Company, hereafter, for brevity, called plaintiff or respondent, relying upon the provisions of this contract and bond as security to pay materialmen, such as plaintiff avers itself to have been, for materials used and employed in the performance of the contract, did, at the special instance and request and under contract with the McCully Construction Company, furnish to that company certain materials, tools and labor used by the McCully Construction Company in the performance of the contract and in the reconstruction and fireproofing of the interior of the center portion of the main building of the Poorhouse at the agreed price and reasonable value of \$6,888.86, on which account it is averred plaintiff has received \$5,328.33.

Averring that the contract had long since been completed and that the balance, to wit, \$1,560.53 is long since due plaintiff and had often been demanded and requested of the McCully Construction Company but payment not made, plaintiff charges a breach for the obligation of the bond, asks judgment for the penalty thereof and execution in its favor, as provided by law in such cases, for the sum of \$1,560.53.

Attached to the petition is an itemized statement of account of material furnished, labor done, and the prices charged.

The McCully Construction Company answered by general denial. The Bankers' Surety Company, by separate answer, after admitting that it is a corporation organized under the laws of Ohio but authorized under the laws of this state to execute contracts of suretyship in this state, denies each and every other allegation in the petition. Further answering, it states that as surety for the McCully Construction Company it entered into an obligation in the penal sum of \$11,999.50, conditioned that the McCully Construction Company would faithfully and properly perform a contract entered into between it and the City of St. Louis. "But defendant states that neither the terms, provisions or effect of said contract, nor the terms, provisions or effect of said bond are correctly set forth in plaintiff's petition. For further answer defendant states that the plaintiff and the said McCully Construction Company from time to time and pursuant to agreement made between them, altered, changed and added to the plans and specifications of the contract on which this defendant was bound as surety, and by agreement altered the terms of said contract, and that such alterations, changes and additions in said contract and specifications were made without the knowledge or consent of this defendant," further charging that such alterations, deviations, changes and additions so made without its consent were in the amount of \$522.44, itemizing them.

By consent of the parties James E. King, Esq., was appointed referee to hear and determine all the issues therein involved.

At the conclusion of the hearing before him the referee made his report, finding for the plaintiff, and recommending that judgment be entered adjudging a forfeiture of the bond. The judgment to be satisfied on the payment of \$1,560.53, with six per cent. interest. Over exceptions of the defendants the report of the referee was affirmed and judgment rendered accordingly, the judgment also awarding interest from May 25th, 1910. Filing their motion for a new trial and excepting to the action of the court in overruling that, as they had also excepted to the action of the court in overruling exceptions to the report of the referee, defendants have duly appealed.

Appellants introduced no testimony. That

introduced by respondent is before us and is rather voluminous.

We have read the record of this testimony, as well as the proceedings at the hearing before the referee, with great care and find no occasion to overturn his action on the admission and exclusion of testimony, or his conclusion of law in the case.

[1] It is urged by learned counsel for appellants that the contract was not properly proved and introduced in evidence. The plaintiff, before the amended answer of the Surety Company was filed, did file a copy of the bond and contract, duly certified by the City Register, and while these do not appear to have been formally introduced, it is clear that they were before the referee, quoted from by counsel as if in evidence, and their execution in no way challenged under oath; in fact, as will be seen, the Surety Company, by its answer admitted the execution of the bond but pleaded that it had been incorrectly recited in the petition.

[2] The only extra work outside of that covered by the original contract and to which the averment in the amended answer of the Bankers' Surety Company, that there had been a change and alteration of the plans and additional work, can possibly relate, is extra work done by plaintiff in connection with some window bars in one of the rooms, and repairing cement at the foot of a stairway, that originally laid having been torn up in putting up the iron work of the stairway. The amount of these items is \$22.86. The work was done at the request of the McCully Construction Company. The referee found that there was no evidence as to alleged alterations in the plans and specifications, designating these things for which this \$22.86 was charged as "patchwork." While this was work outside the contract of plaintiff, it was not outside that of the McCully Construction Company, and was a proper charge by plaintiff against them.

[3] Under the claim that there had been an alteration of the contract entered into between the McCully Company and the City, counsel for appellants argue that the McCully Company had sublet part of the work to respondent, in violation of this clause of the contract, namely:

"The said party of the first part (McCully Construction Company) hereby further agrees that it will give its personal attention to the fulfillment of this contract, and that it will not sublet the aforesaid work, but will keep the same under its control; and it will not assign by power of attorney, or otherwise, any portion of the said work."

The City was the other party to this contract.

[4, 5] We might dispose of that by saying that it has not been pleaded and that the averment in the amended answer of the Bankers' Surety Company could not be held to embrace it. Moreover while the point seems to have been made before the referee in that he has noticed it in his conclusions

of law, a careful reading of the abstract of the proceedings at the hearing before the referee, as embodied in the abstract, fails to show that any point was made during the hearing on this proposition. The failure to plead this is sufficient to estop appellants from now insisting upon it. *Howard County v. Baker*, 119 Mo. 397, loc. cit. 406, 24 S. W. 200. The learned referee, however, disposes of this proposition by saying that the very object of the bond was to protect materialmen and those performing labor on the building in question, and he held that in view of the provisions of the bond, "that it may be sued on at the instance of any materialmen, laboring man or mechanic in the name of the city," and considering the provisions of the statute in such cases, that the Gilsonite Construction Company is a proper party to benefit by the security, notwithstanding this clause in regard to subletting the work. He further holds that if any advantage was to be taken by reason of this clause, it accrued to the City of St. Louis, which by its settlement with the McCully Construction Company, at the completion of the work, had waived it, evidently satisfied that the broader provision requiring the personal attention of the McCully Construction Company to the fulfillment of the contract had been properly complied with. He further held that a contract, the clauses of which are inconsistent, must be construed according to the subject-matter and the motive, and that the intention of the parties, as gathered from the whole writing, must prevail over the strictness of the letter, citing *Bent v. Alexander*, 15 Mo. App. 181. He further held that this clause is to be read in connection with the whole bond, the very object and purpose of which was to secure materialmen, laborers and mechanics in the payment of the work and material that they contributed to the making of the improvement. We think this conclusion is sound. Nor do we find, from consideration of the testimony, that there was any subletting of this contract or any part of it by the McCully Construction Company to the Gilsonite Construction Company, in the sense that the McCully Company relinquished control and supervision over the work done by respondent. The inference plainly to be drawn from the testimony in the case is, that during the whole progress of this work by the Gilsonite Company, the representatives of the McCully Construction Company were present in and about it, looking after it, checking it up. This clause relied upon must certainly be given a reasonable construction. It would be as reasonable to say that if under it, the McCully Construction Company did not, by its own employes, lay the brick, do the plastering, do the carpenter work, and out of its own yards and mills and warehouses furnish the material, that the plasterer and bricklayer and carpenter and outside materialman could not enforce any claim against the bond for the work and labor done and

material furnished. Although the Gilsonite Construction Company undertook to do this concrete and other work, it was doing it under the McCully Construction Company, acting under its direction and supervision, and it does not appear that the McCully Construction Company remitted its own supervision over the work or committed that supervision or control to the plaintiff in such manner as to take that from the McCully Construction Company itself. However the letter of this clause may read, we do not find that its spirit was in any way violated, to the extent of depriving the Gilsonite Company of the benefit of the bond in its character of materialman, if not as laborer, in supplying the material and actually doing the work.

[6] It is argued that a letter from the McCully Construction Company, purporting to be signed by T. R. McCully as its secretary, addressed to an attorney of the Gilsonite Construction Company, which admitted that the McCully Company owed a balance to the Gilsonite Company on the contract of \$1507.36, was not properly admissible as against the surety. A very careful reading of the abstract fails to show that when this letter was offered in evidence, any objection whatever was made to it, save as to the identification of the handwriting of the secretary. That objection was overcome by positive identification of the signature. The referee finds as to this letter that it was written subsequent to interviews between the president of the McCully Construction Company and the attorney for the Gilsonite Company, to whom it was addressed, and that these admissions in the letter and in the interviews were made in good faith by the McCully Construction Company's officers during the negotiations that grew out of the contractual relations and during the continuance of the joint liability of the principal and surety. That is a finding of fact, supported by substantial evidence, which we cannot disturb.

[7] Strenuous objections were made to the admission of what is charged to be "opinion" evidence, two or more witnesses being permitted to testify that they were familiar with the contract, plans and specifications, had examined the work during its progress, were by experience and occupation well versed in matters connected with building, and that from their personal observation they could say that the work called for in the contract between the city and the McCully Construction Company, and by the Gilsonite Construction Company, had been done in accordance with the plans and specifications of the contract. One of these witnesses, the expert inspector employed on this particular piece of work by the city, testified that upon the completion of the work, which he had examined through the whole of its progress, he had marked it as 100 per cent. completed, and that this was true as a fact. He produced before the referee his notes and reports on the progress of the work, comprising a

mass of manuscript memoranda, made by the witness himself from time to time as the work progressed and as he inspected it. In the course of the examination of these witnesses, and when objection was made to their stating their conclusions about the completion of the work, the court very properly, after allowing them to answer, said that if counsel for defendants questioned the accuracy or correctness of their statements, the witnesses were there for cross-examination.

As to all this evidence, the referee finds that it was not "merely opinion or expert testimony, but statements of fact within the knowledge of the witnesses." It is the kind of testimony that is sometimes referred to as "shorthand testimony," and present day authority recognize it as competent. See *Masonic Mut. Ben. Soc. v. Lackland*, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298, as also *State v. Findley*, 101 Mo. 217, 14 S. W. 185, a criminal case in which it was held that a witness who has examined books and papers too voluminous to be conveniently examined in court, can testify as to the result of his investigation. To have required each one of these reports to have been read into the record, or to the referee, and then sifted out by the referee, would have been a very useless, time-consuming operation.

In *Kreuzberger v. Wingfield*, 96 Cal. 251, 256, 81 Pac. 109, 110, the plaintiff being on the stand as a witness and testifying that he knew the terms of the contract, was asked this:

"And your work is in every way according to the contract that you agreed to do with Von Herlich? What is the character of the work on the Eighth Street side as regards the contract? Is it in accordance with the contract?"

Defendant objected to these questions on the ground that they were irrelevant and incompetent and called for the conclusion of the witness, the same objection that was made here. The trial court overruled the objection. In this the Supreme Court said that it did not err. Said the court:

"The questions did not call for the opinion of the witness, within the meaning of the law which excludes the opinions of the witnesses, but for facts within his knowledge."

So the Supreme Court of Michigan held in *Bellows v. Crane Lumber Co.*, 119 Mich. 425, 78 N. W. 536, as also did the Court of Appeals of New York in *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108, loc. cit. 115. Prof. Wigmore, in his work on Evidence (see 1 Wigmore on Evidence [Ed. 1904], §§ 659, 675-678, inclusive) holds to practically the same view. In the latter section he says:

"On the other hand, no harm is done if the skilled witness has had personal observation. His testimony may be based upon both forms of data. It will not always happen that persons having special skill will be totally devoid of actual observation of the matter in hand; they may have partially observed it, and their opinion may be desired upon premises partly furnished by personal observation, partly remaining to be supplied by hypothetical presentation. That

this is permissible follows from the preceding principles."

In the case at bar one of the witnesses, the city inspector, testified both from observation and on his opinion, experience and knowledge, his testimony given weight by the fact that he was a man who had engaged in supervising work in the city of St. Louis for over 40 years.

Learned counsel for appellants place great reliance on the decision of our court in *Zimmerman v. Conrad*, the case never officially reported but to be found in 74 S. W. 139. In that case, however, the question put to the witness, and which was criticized by our court, was as to whether the structure erected was in "substantial compliance by plaintiff with the terms of the contract." We have no such case here. The testimony was not that there was "substantial" compliance but full and complete compliance with the terms of the contract, plans and specifications. That case is not authority on the facts here present.

As covering the right of action on bonds of the character of that here in suit, our court has lately been over the question in *City of St. Louis to the use of Contracting & Supply Co. v. Hill-O'Meara Construction Co.*, 175 Mo. App. 555, 158 S. W. 98. We refer to what is there set out for a statement of the ordinances and law applicable to cases of this character.

Our conclusion upon the whole case is that there is no error to the prejudice of appellants.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

SMITH v. BECKER et al. (No. 11865.)

(Kansas City Court of Appeals. Missouri.
March 6, 1916. Rehearing Denied
April 3, 1916.)

1. SALES ⇨454—CONDITIONAL SALES—CHARACTER OF TRANSACTION—PLEDGE.

Where a doubt exists as to whether a transaction is a conditional sale or a pledge, it is to be deemed a pledge.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⇨454.]

2. CORPORATIONS ⇨123(2)—STOCK—PLEDGE—CHARACTER OF TRANSACTION.

Where plaintiff's assignor applied to defendant through a banker for a loan of \$100, which defendant agreed to make on the security of certain shares of mining stock, and thereafter more stock than was agreed to be given was sent by the banker to defendant, with a letter stating that he made the assignor put it all up to secure the loan of \$100, and "if he does not pay the same, plus \$10 interest on or before 15 days from date, he agrees to forfeit all his right, title, and interest to the same," to which was added assignor's statement that he accepted the above contract for the loan, the contract was a pledge of the stock as security, not a

conditional sale with option to repurchase at an increased price.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇨123(2); Pledges, Cent. Dig. § 9.]

3. SALES ⇨454—CONDITIONAL SALES—CHARACTER OF TRANSACTION—PLEDGE.

The intention of the parties at the inception of the contract determines whether it is a pledge or conditional sale, and its character is not changed by lapse of time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⇨454.]

4. CORPORATIONS ⇨123(2)—STOCK—PLEDGE—CHARACTER OF TRANSACTION.

The fact that a contract transferring corporate stock to secure a loan contained no express promise for the repayment does not prevent it from being a pledge, since the law imposed on the borrower the obligation to repay.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇨123(2).]

5. CORPORATIONS ⇨123(2)—STOCK—PLEDGE—CHARACTER OF TRANSACTION.

Where the testimony of the transferee of corporate stock shows that the title was not to pass to him until the expiration of the time for the repayment of the money loaned, the contract is a pledge and not a conditional sale, since an important distinction between a pledge and conditional sale is that in the former no title passes, while in the latter title passes with a right to repurchase.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇨123(2); Pledges, Cent. Dig. § 9.]

6. PLEDGES ⇨21—FORECLOSURE—NECESSITY.

The title to pledged property does not pass from the pledgor until there has been a sale or foreclosure.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 45; Dec. Dig. ⇨21.]

7. CORPORATIONS ⇨123(2)—STOCK—PLEDGE—CHARACTER OF TRANSACTION.

In a contract transferring corporate stock to secure a loan, a provision that if the loan was not repaid when due, all right, title, and interest in the property should pass to the lender does not make the transaction a sale instead of a pledge.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⇨123(2); Pledges, Cent. Dig. § 8.]

8. PLEDGES ⇨50—REDEMPTION—RELEASE OF RIGHT.

The parties to a pledge cannot therein make a valid agreement that there shall be no redemption after default, though by a subsequent agreement for valuable consideration the right of redemption may be released.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 118-121; Dec. Dig. ⇨50.]

9. USURY ⇨95—REMEDIES OF PARTIES—EQUITABLE RELIEF—TENDER.

Under Rev. St. 1809, § 7134, providing that in actions to secure possession of property pledged to secure indebtedness, proof that the party claiming the lien has received or exacted usurious interest for such indebtedness shall render the pledge invalid and illegal; one who pledged corporate stock to secure a usurious loan need not offer to redeem or tender the amount due in a petition in equity to have himself declared the owner of the stock, since the pledgee had no lien thereon.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 198-202; Dec. Dig. ⇨95.]

10. USURY — 129 — RIGHT TO RAISE QUESTION — ASSIGNEE OF PLEDGED PROPERTY.

The assignee of property pledged to secure a loan can raise the question of usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 884, 885; Dec. Dig. —129.]

11. ELECTION OF REMEDIES — 15 — EQUITABLE SUIT.

Where plaintiff had brought two actions for the conversion of corporate stock pledged to defendant to secure a usurious loan, based on defendant's misrepresentation that he had sold the stock, but, on learning from defendant's deposition that the latter had transferred the stock to his own name and still held it, dismissed those actions without prejudice and sued in equity to have himself declared the owner of the stock, the filing of the actions did not constitute a binding election to treat the stock as converted.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 17; Dec. Dig. —15.]

12. CORPORATIONS — 123(23) — STOCK — PLEDGE—REDEMPTION—LACHES.

A pledgee who neglected to foreclose the pledge of corporate stock, but without sale had it transferred to his own name on the books of the corporation, cannot urge laches as a defense to the pledgor's right to redeem, since it was in his own power to foreclose at any time, and the actions of the pledgor could not have misled him to fail to do so.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. —123(23); Pledges, Cent. Dig. § 124.]

13. CORPORATIONS — 123(16) — STOCK — PLEDGE—ADEQUATE REMEDY AT LAW.

Where a pledgee of corporate stock without a foreclosure sale had the stock transferred to his own name on the books of the corporation, the pledgor has no adequate remedy at law, as he would have if the certificates were still in the pledgee's possession, and he can sue in equity to have himself declared the owner of the stock.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. —123(16); Pledges, Cent. Dig. § 89.]

14. ASSIGNMENTS — 138 — EVIDENCE—SUFFICIENCY.

Where plaintiff, suing as assignor, proved a written assignment in regular form, and there was no evidence to show title in any one else, a demurrer to the evidence could not have been sustained on the ground that plaintiff was not the real party in interest.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 235-238; Dec. Dig. —138.]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

"To be officially published."

Suit by William F. Smith against Louis H. Becker and another to have plaintiff declared to be the owner of certain corporate stock. Decree for plaintiff, and defendants appeal. Affirmed.

Martin J. Ostergard, Henry C. Smith, and Frans E. Lindquist, all of Kansas City, for appellants. Chas. M. Bush and R. W. Crimm, both of Kansas City, for respondent.

TRIMBLE, J. Plaintiff, as the assignee of one Dana B. Cox, brought this suit in equity to have plaintiff declared to be the owner of 20,000 shares of stock in the Brandt Independent Mining Company, which stock plaintiff alleges Cox pledged to de-

fendant Becker to secure a loan of \$100, and which he (Becker) caused to be transferred upon the books of the company to himself without having any sale thereof made under said alleged pledge and without having taken any legal steps for the foreclosure of the same. The petition further prayed that defendant Becker be declared the trustee for the benefit of plaintiff, and that title to said stock be divested out of defendant and be vested in plaintiff, and that the defendant Brandt Independent Mining Company be directed to issue a certificate to plaintiff for said stock and place said stock in plaintiff's name upon its books. Ancillary to the main object sought by the suit, the petition also prayed and obtained a temporary injunction restraining Becker from selling, mortgaging, or disposing of said stock in any manner.

The petition also pleaded that the pledge of said stock was void for the reason that said loan from Becker to Cox was usurious in that an unlawful rate of interest was required and exacted.

The defendant Becker's answer admitted the existence of the defendant corporation the Brandt Independent Mining Company, under the laws of Arizona, with a capital stock of \$5,000,000, divided into 5,000,000 shares, of the par value of \$1 each. Said answer further admitted that said Cox was the owner of 20,000 shares of said stock, and set up that on or about the 3d day of September, 1909, said Cox made a conditional sale of said stock to Becker for \$100, with the option of buying said stock back on or before 15 days thereafter for \$110, and if said Cox did not exercise that option within 15 days after September 3, 1909, he agreed to forfeit all right, title, and interest to said stock, all of which, it was alleged, was shown by a written memorandum of agreement of said date between Cox and Becker, attached as Exhibit A to said answer. (This memorandum of agreement is the same as the one relied upon by plaintiff to show a pledge of said stock for the loan of \$100; so there is no dispute over the terms of this agreement.)

The answer further admits that defendant, after having waited a reasonable length of time after the expiration of said 15 days, to wit, until December 9, 1909, had said stock transferred to himself.

The answer of the defendant the Brandt Independent Mining Company, after admitting its incorporation and capitalization as hereinabove stated, alleged that on or about the 3d day of September, 1909, Cox was the apparent owner of 20,000 shares of the capital stock of said defendant, and that on the 9th day of December, 1909, the certificates therefor were surrendered, duly indorsed, and canceled, and new certificates were issued to defendant Becker. The answer further alleged that said defendant corporation knew nothing further of the controversy be-

tween the plaintiff and Becker, had no interest therein, and asked that strict proof be required of plaintiff. The reply denied that the stock was sold to Becker with an option of buying the same back at an increased price. The findings and decree of the chancellor were for plaintiff. Defendants have appealed.

The original ownership of the 20,000 shares of stock by Cox is conceded by the pleadings. Becker's answer also concedes, in effect, that after waiting a reasonable time for Cox to take up the stock, he (Becker) had the stock transferred on the books of the corporation to his own name, and that no sale of the stock or foreclosure of Cox's rights therein was had. Whether the answer does this or not, Becker's evidence clearly shows that he made no sale of the stock, but simply had it transferred on the books of the company to his own name and now has possession of the stock and claims it as his own.

It will be seen at once that the controlling question in the case is whether the agreement under which defendant Becker came into possession of said stock was a pledge as contended for by plaintiff, or was a conditional sale, as claimed by defendant.

Cox, offered as a witness in plaintiff's behalf, testified that shortly before September 4, 1909, he applied to one Joseph F. Gaume, then secretary and treasurer of the Missouri Savings Bank, for a loan of \$100; that Gaume did not lend him the money himself, but got defendant Becker to agree to make the loan on 15,000 shares of said stock; that when he (Cox) went to Gaume with the stock to get the money, he had 20,000 shares with him, and that he put up the whole 20,000 instead of the 15,000 Becker had agreed to accept. Gaume took the stock, and inclosed it in an envelope with a letter to Becker, and sent the office boy to the latter for the \$100. The boy delivered the stock and the letter to Becker, who gave the boy the \$100, and he returned to Gaume, and the money was turned over to Cox.

The letter accompanying the stock containing the terms of the transaction, together with Cox's acceptance of said terms, is as follows:

"Kansas City, Mo., September 4, 1909.

"Friend Louis: You will find inclosed 20,000 shares of Brandt Independent stock in the place of 15,000 shares. I made Cox put it all up to secure the loan of \$100.00, and if he does not pay the same, plus \$10.00 interest, on or before fifteen days from date, he agrees to forfeit all his right, title, and interest to the same.

"Please give the boy the check and oblige.

"Jos. F. Gaume.

"I accept the above contract for the loan of \$100.00. Dana B. Cox."

As hereinbefore stated, the parties concede that the foregoing is the memorandum of agreement under which the stock was transferred from the possession of Cox to that of defendant Becker.

We are of the opinion that the transaction

between the two, evidenced by the foregoing contract, was a pledge, and not a conditional sale. Certainly this is true when the contract is considered along with the testimony of Cox and Becker concerning the circumstances surrounding the transaction and out of which it grew.

[1] In the first place, if doubt exists whether a transaction is a conditional sale or a pledge, the doubt is resolved in favor of its being deemed a pledge. *Book v. Beasley*, 138 Mo. 455, loc. cit. 463, 40 S. W. 101; *Phillips v. Jackson*, 240 Mo. 310, 144 S. W. 112; *Bender v. Markle*, 37 Mo. App. 234; *Turner v. Brown*, 82 Mo. App. 30.

[2] In the next place, the language of the contract shows it was a loan and not a sale, and accords with Cox's testimony that the original agreement was for 15,000 shares, instead of 20,000. The letter to Becker from Gaume says he will find 20,000 shares "in the place of 15,000 shares. I made Cox put it all up to secure the loan of \$100." There is nothing said about any present transfer of the title nor indeed of any transfer. It is spoken of as being put up to secure a loan of \$100 for 15 days, at which time it, together with \$10 as interest, would be due. And Cox's acceptance reads, "I accept the above contract for the loan of \$100."

[3] Furthermore, the evidence shows that such was the intention of the parties. Not only does the contract show the transaction to be a loan with the stock pledged as security, but the evidence shows that it was a loan and not a sale Cox was seeking. As said by Ellison, J., in *Bender v. Markle*, 37 Mo. App. loc. cit. 246:

"The character of such transaction is ascertained by learning the intention of the parties, and is fixed at its inception and is not changed by lapse of time."

[4] Defendant seems to think that because there is no express promise in the contract on Cox's part to repay the \$100, this prevents, or aids in preventing, it from being a pledge. But the law imposes the duty upon Cox to repay, and hence there does not have to be an express promise on his part to that effect in order to create the relation of debtor and creditor between them the moment the contract went into effect and the money was paid over to Cox. It is not necessary that the duty to repay should be evidenced by a bond, covenant note, or other security. *Brant v. Robertson*, 16 Mo. 129, loc. cit. 143. This case also holds that, in order to determine whether a transaction was a conditional sale or a mortgage, the courts will not only look to the writings, but to all the circumstances of the contract.

In *Bobb v. Wolff*, 148 Mo. 335, loc. cit. 344, 49 S. W. 998, the Supreme Court lays down one prime test and several subordinate tests by which it may be determined whether a transaction is an absolute conveyance or a mortgage. The prime test is the "continued existence of a debt." The subordinate tests

are: (1) The collateral agreement to pay money, which we say in this case the law implies from the fact that Cox obtained the money as a loan. (2) Grantor's liability to pay interest. (3) An application for a loan pending the transaction. (4) Was the conveyance, when executed, intended as a security for a debt? And as to the existence of the debt, it does not have to exist prior to the transaction; but if it arises from a loan made at the time of the conveyance evidenced by an agreement not discharged or settled by the conveyance, the transaction is a mortgage. *Book v. Beasley*, 138 Mo. 455, loc. cit. 461, 40 S. W. 101. The opinion in *Sheppard v. Wagner*, 240 Mo. 409, loc. cit. 433, 144 S. W. 394, 145 S. W. 420, quotes the *Bobb Case* with approval, with the addition that the debt may be one to be created or arise in the future.

In *Cobb v. Day*, 106 Mo. 278, loc. cit. 295, 17 S. W. 323, it is said that where the parties originally meet upon the footing of borrower and lender, the transaction will be considered a mortgage and will continue to be such, unless the evidence shows the parties afterwards contracted for an absolute sale of the property without reference to the loan.

[5] We are of the opinion that not only the contract itself, but also the transaction between the parties, show that it was a pledge of stock and bring it within the tests above laid down. The testimony of both Cox and Becker shows that the transaction had its inception in a loan. Becker testified that the amount of the loan was \$100; that it was to be due in 15 days after the money was lent; that it "did not constitute a loan directly to Dana B. Cox, but to Mr. Cox through a man named Gaume"; and that he received as security for this loan the 20,000 shares to secure the payment of the \$100. In his pleaded answer, he says he "was compelled to and did look only to said stock for the security of his money." The testimony of both Cox and Becker also shows that no legal title passed to Becker at the time of the execution of the contract. Becker says himself that the sale of the stock to him did not arise until after the expiration of the 15 days, and then only in case Cox failed to pay the \$110. An important distinction between a pledge and a conditional sale is that in the former the legal title remains in the pledgor, while in the latter, such title passes to the vendee with a right reserved in the vendor to repurchase at a fixed price and at a specified time. 31 Cyc. 789; *Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723. There were no words in the contract between the parties granting or passing title; and 5,000 shares more than the number originally agreed upon were "put up" with Becker. It would seem that any idea of a sale is overcome by all these facts and circumstances.

[6] The transaction being a pledge, Cox's right to the stock remains until there has been a sale or foreclosure of the stock. But this, it is conceded, was never done.

[7, 8] The defendant's claim of conditional sale is based solely upon the clause in the contract which provided that if Cox did not repay the \$100, plus \$10 interest, on or before 15 days from date, "he agrees to forfeit all his right, title, and interest to the same." But such a clause does not constitute a sale. And a contract which is a pledge in the beginning continues a pledge until the debt is paid, or the right of redemption is foreclosed. The right of redemption is a part of the contract of pledge, and the parties cannot *therein* make any valid agreement that there shall be no redemption after default. For a valuable consideration and by a subsequent agreement, the right of redemption may be released. But such cannot be made a part of the original agreement. *Jones on Pledges and Coll. Securities* (2d Ed.) § 553. And the agreement in the original contract of pledge that the pledgor shall forfeit the property pledged upon failure to pay the debt at the time specified will not be enforced. *Jones on Pledges and Coll. Securities* (2d Ed.) § 554. See, also, *Lucketts v. Townsend*, supra; *Smith v. 49 & 56 Quartz Mining Co.*, 14 Cal. 242; *Wilson v. Drumrite*, 21 Mo. 325; *Reilly v. Cullen*, 159 Mo. 322, loc. cit. 331, 60 S. W. 126; *Sheppard v. Wagner*, 240 Mo. 409, loc. cit. 440, 441, 144 S. W. 394, 145 S. W. 420.

[9] It is urged that plaintiff's case is fatally defective because the petition contains no offer to redeem or tender of the debt due. (It may be observed here that Cox testified that at the end of the 15 days he got a short extension of time by the payment of \$5, and at the end of the extension he offered Becker the amount due him, but that Becker refused to accept it. It is also in evidence that the plaintiff, through his attorney, tendered Becker the amount due before this suit was brought, but this was also refused.) The contract shows on its face that \$10 interest was contracted for and exacted for the loan of \$100 for 15 days. This is concededly usurious if the transaction was a loan. The transaction being, as we have seen, a pledge for a loan, what is the effect of such usurious exaction? Section 7184, R. S. Mo. 1906, provides that:

In actions to secure possession of property pledged to secure indebtedness "or in any other case when the validity of such lien is drawn in question, proof upon the trial that the party holding or claiming to hold any such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property, or any lien whatsoever thereon given to secure such indebtedness, invalid and illegal."

By force of this statute, the *pledge* of the stock is void. The pledgee has no lien upon the property covered by the void pledge, and is not entitled to the possession of the stock.

The right of possession is in the owner without the condition of paying the amount borrowed. *Hilgert v. Levin*, 72 Mo. App. 48; *Holmes v. Schmeltz*, 161 Mo. App. 470, 143 S. W. 539; *Henderson v. Tolman*, 130 Mo. App. 498, 109 S. W. 76.

[10] This question of usury can be raised by the plaintiff, assignee of Cox, the same as Cox could raise it. *Keim v. Vette*, 167 Mo. 389, 67 S. W. 223; *Osborn v. Payne*, 111 Mo. App. 29, 85 S. W. 667. The same reasoning applies with equal force to the point that plaintiff must do or offer to do equity before he is entitled to any relief in this case, and that as plaintiff has not offered to do this in his petition his action must fail. But to require this of plaintiff is, in effect, to ignore and override section 7184. *Lyons v. Smith*, 111 Mo. App. 272, 86 S. W. 918; *Henderson v. Tolman*, supra; *Holmes v. Schmeltz*, supra; *Hilgert v. Levin*, 72 Mo. App. 48, loc. cit. 51.

[11] It is next urged that plaintiff, having filed two actions against defendant for conversion of the stock before bringing this suit, elected to consider the stock converted by Becker, and is now bound by such election and cannot sue for the stock itself. These suits were filed, but were dismissed without prejudice before any final action therein was reached and before trial thereof. The evidence is that up to the time of the bringing of these two suits, the defendant Becker claimed the stock was not in his possession, he saying he had sold the same. Shortly before the bringing of the equity suit now before us, the plaintiff learned, through the taking of defendant Becker's deposition, that he had not sold the stock, but was still the owner thereof, but had caused it to be transferred upon the books to his own name. Thereupon the suits in conversion were dismissed, and this suit in equity brought. The bringing of the suits which were dismissed before trial is not such an election as will prevent the plaintiff from bringing the present suit to recover the stock itself. *Steinbach v. Murphy*, 143 Mo. App. 537, 128 S. W. 207; *Otto v. Young*, 227 Mo. 193, loc. cit. 219, 127 S. W. 9; *Johnson, etc., Com. Co. v. Missouri, etc., R. Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675.

[12] The point that plaintiff has been guilty of laches cannot be allowed to prevail. The defendant had it in his power at any time to have foreclosed the pledge, but never did so. He is the one who failed to act. The transaction originated as a pledge, and the doctrine of "once a mortgage always a mortgage" applies. The pledgee held the property subject to the right of redemption until this right has been extinguished by a lawful sale of the pledged property. 31 Cyc. 858. The transaction being a pledge, it remained such until properly foreclosed or otherwise adjusted by an agreement of the parties. *Sheppard*

v. Wagner, 240 Mo. 409, loc. cit. 441, 144 S. W. 394, 145 S. W. 420; *Turner v. Brown*, 82 Mo. App. 30; *Reilly v. Cullen*, 159 Mo. 322, loc. cit. 331, 60 S. W. 126. Cox's attempts to regain his property and his position that he had been "skinned out of it" does not show an acquiescence in defendant's action, nor did Cox lead defendant into acting as he did.

[13] Nor can we uphold defendant's point that there is no jurisdiction in equity because plaintiff has an adequate remedy at law. The evidence shows that defendant Becker, without any proceeding or sale to foreclose, surrendered the certificates of stock to the company and had new certificates issued in his own name. If defendant had retained the original shares, plaintiff could have maintained an action at law for them. But since Becker had them transferred to himself, and they now stand in his name as owner, equity alone can order a redelivery. *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69; *Hagan v. Continental National Bank*, 182 Mo. 319, loc. cit. 337, 81 S. W. 171; *Jones on Pledges and Coll. Securities* (2d Ed.) § 558.

[14] Plaintiff proved a written assignment from Cox in due and regular form. There was no evidence to show title was in any one else. A demurrer could not have been sustained on the ground that plaintiff was not the real party in interest.

Numerous complaints are made concerning the refusal of the chancellor to admit evidence. The evidence offered and refused is set out in the record. We have considered it and the many assignments of error in regard thereto. In our opinion the admission of the testimony excluded could not have changed the result, even if it had been material and admissible. The transaction being a pledge and not a conditional sale, and the pledge being void under the statute because of the taint of usury, the defendant cannot withhold the stock.

The decree of the chancellor is correct, and should be affirmed. It is so ordered. The other Judges concur.

WHITE v. GRACE. (No. 11928.)

(Kansas City Court of Appeals. Missouri.
April 3, 1916.)

1. JUSTICES OF THE PEACE § 97—REPLEVIN—AFFIDAVIT—NECESSITY—STATUTE.

In an action of replevin before a justice of the peace, the affidavit, verifying the statement, as required by Rev. St. 1909, §§ 7759, 7760, is the basis of the action, without which the justice has no jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 333; Dec. Dig. § 97.]

2. REPLEVIN § 27—IN CIRCUIT COURT—AFFIDAVIT—NECESSITY—STATUTE.

Rev. St. 1909, § 2637, touching actions in replevin in the circuit court, authorizes an action by merely filing the petition without affida-

vit, and the case may proceed to judgment without taking the property.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 128; Dec. Dig. ¶ 27.]

3. JUSTICES OF THE PEACE ¶ 97—ACTION BY INFANT—AFFIDAVIT—STATUTE.

In replevin before a justice of the peace by an infant, the affidavit, verifying the statement, executed by such infant, was sufficient to give the justice jurisdiction of the action, in which, upon defendant's objection that the plaintiff was not of age, an attorney was appointed his next friend by the justice at the trial under Rev. St. § 7436, providing that if a suit is instituted by an infant before a justice without appointment of a next friend, as required by section 7435, it shall not be dismissed, if any suitable person, when the incapacity is questioned, will consent in writing to become the infant's next friend.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 333; Dec. Dig. ¶ 97.]

Appeal from Circuit Court, Worth County; W. C. Ellison, Judge.

Action of replevin by Odley White against Clark Grace. From a judgment for plaintiff, defendant appeals. Affirmed.

Du Bois & Miller and Kelso & Kelso, all of Grant City, for appellant. J. E. Engle, and Phil S. Gibson, both of Grant City, for respondent.

ELLISON, P. J. Plaintiff instituted this action of replevin in a justice of the peace court. On appeal to the circuit court he recovered judgment.

Plaintiff was an infant 19 years of age when he brought the action by filing his complaint verified by his affidavit. A next friend was not appointed. The justice issued a writ of replevin, the property was taken and on the day of trial defendant, discovering that plaintiff was an infant, moved to dismiss the case on that ground. Plaintiff's attorney thereupon filed his written consent to act as next friend; the justice appointed him, and then overruled the motion to dismiss. The next friend did not make affidavit to the complaint.

[1] Defendant made claim in the circuit court that the justice had no jurisdiction, nor had the circuit court on appeal, for the reason that there was no affidavit filed at the institution of the suit, as required by sections 7759, 7760, R. S. 1909. His point of objection is that without an affidavit, the justice has no jurisdiction to issue process, and that an infant could not make the affidavit. That there must be an affidavit we concede. The affidavit is the basis of the action, without which the justice has no jurisdiction. *Turner v. Bondaller*, 31 Mo. App. 582; *Commercial Bank v. Ketcham*, 46 Neb. 568, 65 N. W. 201; *Elliott v. Whitmore*, 5 Mich. 532; *Bloomington v. Chittenden*, 75 Mich. 305, 42 N. W. 836; *Evans v. Bouton*, 85 Ill.

579; *Cobbey on Replevin*, §§ 525-527, 529; *Wells on Replevin*, §§ 650, 651.

[2] The statute (section 2637, R. S. 1909) in reference to actions in replevin in the circuit court, is wholly unlike the foregoing statute governing such actions before a justice of the peace. It authorizes an action by merely filing a petition without affidavit, and the case may proceed to judgment without taking the property; while before a justice of the peace, there can be no such action except upon affidavit—in point of fact the affidavit stands for the statement of the cause of action. In consequence of confounding these statutes, this court, in *Zimmerman v. Downey*, 66 Mo. App. 106, and the St. Louis Court of Appeals in *Bingham v. Morrow*, 29 Mo. App. 450, stated that an affidavit was not necessary in an action before a justice of the peace, though the latter court, in a later case (*Undertaking Co. v. Jones*, 134 Mo. App. 101, 114 S. W. 1049), recognized the distinction. In both the *Zimmerman* and *Bingham* Cases, the authorities relied upon were cases instituted in the circuit court.

[3] The foregoing brings us to the question whether an infant can, in law, make an affidavit so as to give jurisdiction to a justice of the peace. The statute (section 7435) prohibits the bringing an action by an infant before a justice "until a next friend for such infant shall have been appointed" by the justice. But it is directed by section 7436 that if a suit is instituted by an infant without such appointment, it shall not be dismissed, if any suitable person, when the incapacity is questioned, will consent in writing to become his next friend. So when plaintiff's attorney was appointed his next friend by the justice, at the trial, we think the act was justified by the statute. But the next friend did not then make an affidavit, and, as we have just stated, the question is whether the infant plaintiff's affidavit is a legal affidavit so as to confer jurisdiction on the justice to entertain an action in replevin. We feel constrained to hold that it is. An infant, who is of sufficient age to understand the nature of the proceedings in which he is acting, including the nature of an oath, can testify in court, and to make affidavit in court is no more than that; the one being oral and the other written ought not to make any difference.

Defendant relies much on *Turner v. Bondaller*, 31 Mo. App. 582. But we think the case does not apply. We there held that an infant could not appoint an agent to make an affidavit for him. By reference to the case, it will be seen that that is no authority for the claim that he could not make the affidavit himself.

We think the judgment should be affirmed. All concur.

NIEHAUS et al. v. GILLANDERS.

(No. 14432.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. JUSTICES OF THE PEACE § 93, 100(2) — COUNTERCLAIM—AVAILABILITY TO DEFENDANT.

In suit in justice court on an account stated, where defendant appeared and answered distinctly denying that there was any account stated, and there was no account stated proven at the trial, he could put in a counterclaim, though plaintiff, pleading the account stated, could recover only on it.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 326, 341; Dec. Dig. § 93, 100(2).]

2. ACCOUNT STATED § 6(2)—CREATION.

Where an account is transmitted by mail or messenger to a party who receives and retains it for an unreasonable time and without objection, the law implies an agreement to pay on his part, resulting in an account stated between the parties.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 31-34, 36-38; Dec. Dig. § 6(2).]

3. DAMAGES § 218 — TRIAL § 199 — INSTRUCTION—SUBMITTING QUESTIONS OF LAW.

In an action on an account stated for installing heating apparatus, in which defendant counterclaimed for defective performance, an instruction that the jury could award defendant such damages under her counterclaims, not exceeding the amount sought, "as you believe from the evidence the defendant was damaged on account of plaintiffs furnishing such defective material and doing the labor in a defective manner, if you believe from the evidence that the material and labor furnished by plaintiffs was defective," was erroneous as too general, substituting the opinion of the jury for established rules of law as to damages, particularly in view of the evidence as to damages, vague and inconsequential at best.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 560-562; Dec. Dig. § 218; Trial, Cent. Dig. §§ 467-470; Dec. Dig. § 199.]

4. DAMAGES § 62(4) — CONTRACTS — AVOIDABLE CONSEQUENCES.

A boarding house keeper, who contracted for installation of a heating plant in her house, the work being defectively done, and who failed to make such heating plant good and sufficient herself, as she could have easily done before suffering any appreciable injury through want of such a heating apparatus, could not recover on her counterclaim against the parties who installed the apparatus any damages for defective performance beyond the cost of making the apparatus good and sufficient.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 128-131; Dec. Dig. § 62(4).]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by August L. Niehaus and others against Kate Gillanders. From a judgment for defendant, plaintiffs appeal. Judgment reversed, and cause remanded.

Henderson & Henderson, of St. Louis, for appellants. S. C. Taylor, of St. Louis for respondent.

REYNOLDS, P. J. Plaintiffs here, doing business under the trade name of Star Heat-

ing & Foundry Company, began their action before a justice of the peace, filing a statement as follows:

"Demand on account stated between plaintiff and defendant in the sum of \$446, on account of work and labor done for defendant in the installation and repairing of heating systems in buildings 3629 and 3631 Lindell Boulevard, St. Louis, Mo., as per statement filed herewith and made part hereof."

The account referred to is attached, the total of debits amounting to \$1,206.50, credits of \$760.50 reducing it to \$446. To this defendant filed an answer in which she specifically "denies that there ever was an account stated between plaintiffs and defendant," and denies each and every allegation in the account filed. By way of counterclaim defendant avers that under a contract with the plaintiffs for installing a heating plant in the building known as 3631 Lindell Boulevard, plaintiffs furnished material and labor in an attempt to carry it out; that the material furnished was defective and the labor that was done, was done in such an unworkmanlike and defective manner, that defendant had been damaged in the sum of \$3,000. In the second count of the counterclaim it is averred that in the fall of 1910, defendant had entered into a contract with plaintiffs to repair a boiler which it had installed in the building known as 3629 Lindell Boulevard and to repair the heating plant in the building, but that plaintiffs, in an attempt to carry out the contract, had furnished defective material and did the work in an unworkmanlike manner, to the damage of defendant in the sum of \$200, for which she demanded judgment.

We are not advised as to the result of the case before the justice. The case was appealed to the circuit court and on the trial there, resulted in a verdict against plaintiffs on their cause of action and in favor of defendant on her first counterclaim in the sum of \$300.00, and on her second counterclaim in the sum of \$200.00, and judgment following on the verdict, after filing a motion for new trial, which was overruled, and saving exception to the action of the court, plaintiffs have duly appealed to our court.

It is sufficient to say of the evidence that on behalf of plaintiffs it tended to prove that under a written contract with defendant, plaintiffs undertook to and did install a first-class low pressure steam heating apparatus at 3631 Lindell Boulevard, guaranteeing that the apparatus would be complete and that it would maintain heat in every radiator, and be capable of warming all rooms mentioned in a schedule to a given temperature when the outside temperature was zero and when directions were followed for managing the plant. It is further contracted that if the apparatus was accepted by defendant, if any part constructed by plaintiffs should fail to satisfy the guarantee by reason of any

defect in it, plaintiffs would remedy the defect at their own cost within a reasonable time after receiving written notice of the defect. The price for this was to be \$504, payable as the work progressed to the value of the material and labor furnished, less 15 per cent. retained until final settlement on completion of the work. In No. 3629 Lindell Boulevard the plaintiffs were to install a boiler at the price of \$325. Plaintiffs' evidence tended to prove due performance of their contract.

There was evidence for defendant tending to show that the radiators and boiler were so defective that heat could not be kept up in the houses, which defendant was occupying as boarding or rooming houses, and that in consequence thereof the tenants and boarders left, and defendant testified that she had in consequence lost her investment in one house, to the amount of \$5000 and in the other to the amount of \$3000.

For plaintiffs there was also evidence that the several plants had done their work; that defendant expressed her satisfaction with them; that she knew the radiators and boiler were second-hand and therefore priced at a low figure and that when she called attention to leaks and defects plaintiffs had promptly repaired them. The evidence for plaintiffs also tended to prove that they had sent defendant statements of the account, which consisted of the contract prices for the plants and also for merchandise outside of them and that defendant had never disputed the account but had made payments on it from time to time until there remained \$446 due; that the account showing this had been presented to her from time to time and she made no objection to it but said she was unable to pay it.

Defendant, testifying on her own behalf, denied that she had ever received any account showing a balance of \$446 due by her and denied ever promising to pay it.

As we are compelled to reverse the judgment for errors in the instructions, it is unnecessary to set out the evidence more at length.

It is insisted by learned counsel for appellants that in a case originating before a justice of the peace, the defendant's appearance operated as though the general denial was interposed as at common law, and that the validity of portions of the original account may not be inquired into on a general denial, and that in the absence of a showing of fraud or mistake, a counterclaim cannot be pleaded in an action on an account stated where the matter out of which the counterclaim grows is the same subject-matter as makes up the account. *Koegel v. Givens*, 70 Mo. 77; *Pickel v. St. L. Chamber of Commerce Ass'n*, 10 Mo. App. 191; s. c., 80 Mo. 65; *Columbia Brewing Co. v. Berney*, 90 Mo. App. 96, and *Barr v. Lake*, 147 Mo. App. 252, 126 S. W. 755, are the cases cited in support of these propositions.

[1] These points are argued with great earnestness by counsel for appellants. But there is a great and marked distinction between the cases cited and the one at bar. In the answer interposed before the justice, defendant distinctly denied that there was any account stated. In the cases cited there was either a mere general denial or an attempt to attack the account stated, it being admitted to be such. Here there was a specific denial of an account stated. In *Barr v. Lake*, supra, a case originating before a justice of the peace, and in which it appears that no formal pleadings had been filed by the defendant, our court held that defendant might show that there had been no settlement of the accounts, and that defendant had not consented to the alleged settlement. So it was held in *Columbia Brewing Co. v. Berney*, supra. (It is well to call attention to the fact that in the report of *Barr v. Lake*, supra, a typographical error occurs in line 15 from the top of page 259; the third word in that line—"validity," should read, "invalidity.") Hence, if there was no account stated proven at the trial, defendant was at liberty to put in a counterclaim. Pleading an account stated, plaintiff could only recover on that (*Barr v. Lake*, supra, 147 Mo. App. loc. cit. 257, 126 S. W. 755); but defendant, not admitting an account stated as existing, was not debarred, if she sustained that plea, from interposing a counterclaim, if one founded on or arising out of the same transaction did exist in her favor. So we hold that under the answer here made, defendant could avail herself of any lawful counterclaim.

But appellant attacks the action of the trial court in giving and refusing instructions.

At the instance of plaintiffs the court instructed the jury that if they found that defendant agreed and assented to a settlement on amount found due to plaintiffs, their verdict should be for plaintiffs in the sum so found to be due less the amount paid plaintiffs by defendant, if any, on account of said settlement. It further, at the instance of plaintiffs, instructed the jury that:

"To constitute an account stated, it is not necessary that the admission of the demand shall be made in express terms, and if you find that plaintiffs rendered their account to defendant, exhibiting the items thereof and the amount due from defendant to plaintiffs, and if the same was not objected to by defendant, within a reasonable time thereafter, then such failure to object to the demand may be taken by you as an admission that the account was truly stated."

At the instance of defendant, however, the court instructed the jury that before there can be an account stated between the parties, "there must be a meeting of the minds of the parties, and the defendant must have agreed to pay a certain amount claimed to be due by the plaintiffs after the parties have examined the accounts between them, and the burden of proof in this case is upon the plaintiffs to show by a preponderance or

greater weight of the evidence that the accounts were gone over by the plaintiffs and defendant, and that the defendant agreed upon the amount due upon an amount certain as due, and unconditionally promised to pay the same."

In the first place these instructions are inconsistent. If one is right the other is wrong. Both cannot stand. In the next place that given at the instance of defendant is wrong.

It is said by our Supreme Court in *Brown v. Kimmel*, 67 Mo. 430, to be a question for the jury whether the account rendered was retained by the debtor without objection a sufficient length of time to give it the status of an account stated.

In *Ottofy v. Winsor*, 137 Mo. App. 272, loc. cit. 276, 119 S. W. 40, we held that the fact that defendant retained without objection or protest subsequent statements, does not affect the case, if it appears that when the account was first presented to her, she denied its correctness or claimed an offset. So it is always a question for the jury, under proper instructions, to determine whether there was an account stated within the meaning of the law. While the acts referred to in this instruction might prove that it was an account stated, it is not essential that all of them shall be present to do so.

In *Alexander v. Scott*, 150 Mo. App. 213, 129 S. W. 991, we had occasion to inquire as to what constituted an account stated and what was necessary to establish one. We there said (150 Mo. App. loc. cit. 222, 129 S. W. 994): "An account stated need not be evidenced by a writing, nor need it be proved by a writing. There must be a fixed and certain sum admitted to be due;" that express assent by the debtor need not be given to the account, if the creditor renders it to the debtor, showing the items and the amount due, and the debtor does not object to it within a reasonable time.

[2] Comparing this instruction given at the instance of defendant with all accepted definitions of an account stated, it will be seen that it cannot stand. It is wrong in that it tells the jury that before they can find an account stated they must find that there was a meeting of the minds of the parties; that defendant must have agreed to pay a certain amount claimed to be due by plaintiffs after the parties have examined the accounts between them; that the burden of proof is on the plaintiffs to establish that the accounts were gone over by plaintiffs and defendant, and that the defendant agreed upon an amount certain as due and uncondi-

tionally promised to pay the same. The law implies an agreement to pay by the receipt and retention of the account for a reasonable time and without objection. The account may be transmitted by mail, or by messenger. No case holds that it is necessary that the accounts be gone over by the parties and that thereupon defendant agreed that it was correct.

[3] The instructions given at the instance of defendant on the measure of damages are also erroneous. The jury were told, in substance, that they could award defendant such damages under her counterclaim (in the first not exceeding \$300, and in the second not exceeding \$200), "as you believe from the evidence the defendant was damaged on account of plaintiffs furnishing such defective material and doing the labor in a defective manner, if you believe from the evidence that the material and labor furnished by plaintiffs was defective." This was too general; especially so, in the light of the evidence, which was at best vague and inconsequential as to damages. It substituted the opinion of the jury for the established rules of law. *Haysler v. Owen*, 61 Mo. 270, loc. cit. 273; *Morrison v. Yancey*, 23 Mo. App. 670, loc. cit. 674 et seq.; *Camp v. Wabash R. R. Co.*, 94 Mo. App. 272, loc. cit. 284, 68 S. W. 96.

[4] Nor can we sustain these instructions under the rule of mere non-direction. Plaintiffs asked three instructions on the measure of damages, which the court refused, and as we think improperly. One of these was to the effect that if the jury believed that the heating plant mentioned and the repair work done by plaintiffs "was done in a defective and unworkmanlike manner, then plaintiff was bound to make said heating plant good and sufficient; and if plaintiff failed to make it so then it became the duty of the defendant for her own protection to make said heating plant and repairs good and sufficient; and if the jury finds from the evidence that defendant might have easily made said heating plant good and sufficient before any appreciable injury would have been sustained by want of a good and sufficient heating apparatus, and that said defendant did not do so, she cannot recover in this action any damages in respect to said heating apparatus beyond the cost of making the same good and sufficient."

For the errors here pointed out the judgment of the circuit court is reversed and the cause remanded.

NORTONI and ALLEN, JJ., concur.

GLENCOE LIME & CEMENT CO. v. POLAR WAVE ICE & FUEL CO. (No. 14156.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

1. MECHANICS' LIENS §47—LIENABLE ITEMS—CEMENT SACKS.

Where cement was sold at a fixed price per sack under an agreement that the contractor should receive a refund on the sacks returned, the price of the sacks not returned is a lienable item.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 50; Dec. Dig. §47.]

2. MECHANICS' LIENS §239—APPLICATION OF PAYMENT—RIGHT OF CREDITOR.

As a creditor has the right of applying a payment where there is no specific direction, and if he fails to do so the law will apply the credit on the older debt, or unsecured debt, a materialman may apply a credit on nonlienable items instead of lienable items.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 420, 421; Dec. Dig. §239.]

3. MECHANICS' LIENS §157(6)—RIGHT TO LIEN—ALLOWANCE OF CREDITS.

Under Rev. St. 1909, § 8223, declaring that the court shall ascertain the amount of the indebtedness and may render judgment for any sum not exceeding the amount claimed in the demand filed with the lien together with interest and costs, although the creditor may have unintentionally failed to enter in his account filed the full amount of credits to which the debtor may be entitled, a materialman may have a lien, though he unintentionally failed to enter all the credits to which the contractor or subcontractor was entitled.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 273; Dec. Dig. §157(6).]

4. APPEAL AND ERROR §1011(1)—REVIEW—FINDINGS.

A finding by the trial court on conflicting evidence that a materialman unintentionally failed to enter a credit due the contractor is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. §1011(1).]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by the Glencoe Lime & Cement Company, a corporation, against the Polar Wave Ice & Fuel Company, a corporation, and another, begun in justice court and appealed to circuit court. From a judgment there for plaintiff, the named defendant appeals. Affirmed.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for appellant. Abbott, Edwards & Wilson, of St. Louis, for respondent.

REYNOLDS, P. J. The Glencoe Lime & Cement Company, hereafter called Cement Company, commenced three actions before a justice of the peace of the city of St. Louis, against one Abernathy, a contractor, and the Polar Wave Ice & Fuel Company, to establish and enforce a lien as materialman under the mechanic's lien law against three separate pieces of real estate in the city of

St. Louis, owned by the Polar Wave Ice & Fuel Company, hereafter called the Polar Wave Company. About the same time the Cement Company commenced an action in St. Louis county to enforce its lien for material furnished Abernathy for a superstructure on land in the county, also owned by the Polar Wave Company. From a judgment against both the contractor and owner before the justice in each of the three cases there pending, the Cement Company appealed to the circuit court, Abernathy, the contractor, however, not appealing from the judgment against him for the debt.

In the circuit court the three cases were tried together by agreement of counsel, a jury being waived, and at the conclusion of the trial the circuit court awarded judgments sustaining the lien against the several pieces of property in the city, and from these several judgments in each of the three cases the Polar Wave Company has prosecuted its appeal.

The judgment in each of the cases was for the amount demanded, less a credit for sacks returned, plus interest.

There are really just two points involved in this case: First, that the lien should fail because respondent had made a lumping charge of lienable and non-lienable items. Second, because respondent had not filed a just and true account within the meaning of the mechanic's lien law.

It appears that the charge in each of the three accounts is for cement sold and delivered by the Cement Company to Abernathy, the cement being used in the construction of improvements on the several lots owned by the Polar Wave Company. The cement was sold by the sack, some at 37½ cents a sack, some at 40 cents a sack, and was delivered on the premises by respondent to Abernathy in sacks. It further appears that there was an understanding between the Cement Company and Abernathy that the latter should have a credit of 10 cents a sack for each of the sacks he should return in good order to the Cement Company.

[1] Here arises the first claim of defendant; that is, that these sacks in which the cement was contained are not lienable items, and including the price for them in the account was the improper joinder of lienable and non-lienable items. We cannot agree to this proposition. The evidence was clear that the contract price for the cement was 37½ or 40 cents per sack, delivered in the sack; so that the price of the sack was, in the first instance, as much a part of the price of the cement as was that of the cement itself. That is what Abernathy agreed to pay. Hence the price of the sack entered into the price of the cement in the sack and was a lienable item. *Price v. Merritt*, 55 Mo. App. 640, loc. cit. 645. The principle of this case was affirmed in *E. R. Darlington Lumber Co. v. Westlake Construction Co.*,

161 Mo. App. 723, 141 S. W. 931, and in *Land-reth Machinery Co. v. Roney*, 185 Mo. App. 474, 171 S. W. 681. In the case at bar there was uncontradicted testimony tending to prove that Abernathy, the contractor, agreed to pay so much for the cement in sacks on the delivery of the cement to him at the places specified in the sacks. That price covered sack and contents. In point of fact, it does not appear that the cement could have been delivered in any other way than in sacks or containers of some sort. Abernathy, the contractor, was entitled to a credit of 10 cents a sack for such of the sacks as he returned, but that did not disturb the original contract, namely 37½ cents per sack for some, 40 cents per sack for others, and the refund of 10 cents for each sack returned in good condition, became a mere matter of application of credit on the account.

In *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069, we have a case very much like the one at bar, a case of a mechanic's lien where the appellant there charged for 18 barrels, in which the lime which he furnished was packed, at 25 cents for each barrel. It appeared that the lime furnished by appellant in that case was packed in barrels; that most of the barrels were returned to appellant after the lime had been used, and a credit given by appellant for the value of the barrels, at the rate of 25 cents each. Referring to this charge, which included the cost of the barrels as well as their contents, and which was the third ground of objection to the lien there involved, the Supreme Court of California, said:

"As to the third ground, we think that where material is usually delivered in certain packages, it is proper to charge for it as packed, although the small material constituting the package does not literally go into the construction of the building."

The Supreme Court of Idaho, in *Hill et al. v. Twin Falls, etc., Co.*, 22 Idaho, 274, 125 Pac. 204, has practically adopted the same view as that taken by the California court and by our courts in the cases above cited, saying:

"It is a well-recognized principle that a materialman who makes a contract for the delivery of material to be used, and which is actually used, in the construction of an improvement, may include in a claim of lien not only the value of the material but the cost of delivery to the place of use, and, this being the general rule, there can be no reason why, when the labor is done and the material furnished by different persons, each person should not be entitled to a lien."

In support of its theory that the return or refund price of the sacks was not lienable, appellant Polar Wave Company asked this declaration of law:

"If from the evidence the court finds and believes that the amount claimed by plaintiff in the claim of mechanic's lien sued on in this case included in one lumping charge the cost of the cement used by the defendant Abernathy in the construction of the building of the defendant Polar Wave Ice & Fuel Company and the cost of the sacks in which said cement was delivered, and that said sacks did not enter into and

were not used in the construction of said building, then the plaintiff is not entitled to a mechanic's lien for any amount against the property described in the plaintiff's petition or statement of plaintiff's cause of action."

This was refused. In refusing this the learned trial judge wrote this memorandum upon it:

"The cement was sold at a certain price per sack—not a certain price for the sack and a certain price for its contents. As to the sacks returned, that is a matter of credit to the account."

We think that the action of the circuit court in refusing this declaration of law was correct, and that the view it took, that the price or value of these sacks was a lienable item, is correct.

[2, 3] The second line of defense relied upon by appellant is that the account filed is not a just and true account. This is on the theory that in omitting a credit for the returned sacks, the account filed was not a just and true account.

The defendant, appellant here, asked this declaration, which the court gave:

"If from the evidence the court finds and believes that the plaintiff, in filing the claim of mechanic's lien sued on in this case, included in its account stated in such claim of lien more than was due to it from the defendant Abernathy and failed to give said Abernathy credit for all payments and offsets to which he was entitled, then plaintiff is not entitled to sustain its said claim of mechanic's lien unless the court shall also from the evidence find that the failure of plaintiff to give such credit to defendant was unintentional on the part of plaintiff."

So it will be seen that even appellant conceded that the omission to give the credit was not fatal if unintentional. That properly submitted the question of whether the omission was intentional or unintentional as a question of fact. There is no contention here that these amounts sued for had ever been paid; all that is contended is that the credit for the returned sacks was omitted. The manner in which the suit in the county between these parties figures here, is this: After the institution of these three actions in the city and the one in the county, the attention of the attorney who had charge of the cases for plaintiff was for the first time called to the fact that a credit had not been given for the sacks which had been returned. Whereupon, account being taken of the returned sacks, a credit was applied to the account sued on in the county sufficient to wipe out and extinguish that and it was dismissed by plaintiff. Objection seems to be made to the right of the plaintiff to apply this credit on this account but we cannot accede to that proposition. It is well settled that where one owes several debts to another and makes payment, the creditor has the right of applying the credit as it sees proper, no specific arrangement for other application having been made, and if it fails to do this, then the law will apply the credit on the debt which is older or is unsecured. See *Price v. Merritt*, supra; *St. Louis Sash & Door Works v. Tonkins*, 188 Mo. App. 1, 173

S. W. 47, and cases there cited. It was asserted by counsel for appellant in the trial of this case and when the question as to the St. Louis County case was raised, that that action had failed for the reason that it was for a non-lienable improvement. That being so, we are unable to see how applying the credit to it in any way affected these cases. The security afforded by the mechanic's lien law was not there present. Under such circumstances, that is, where there is a secured and an unsecured claim, it is the law that the court apply any payment made rather to the liquidation of the unsecured account than to one which is secured.

But the main trouble with the contention of the learned counsel for appellant here is that the trial court found as a matter of fact that there had been no fraudulent statement of the account; no intentional failure to enter the credit. When the attention of counsel for respondent was called to the fact that no credit had been given for the sacks which had been returned, he promptly and voluntarily entered a credit on the account for the whole number of sacks charged for, without putting the defendants below to the proof of how many of these sacks had in point of fact been returned.

Section 8223, Revised Statutes 1909, provides:

"The court shall ascertain, by a fair trial in the usual way, the amount of the indebtedness for which the lien is prosecuted, and may render judgment therefor in any sum not exceeding the amount claimed in the demand filed with the lien, together with interest and costs, although the creditor may have unintentionally failed to enter in his account filed the full amount of credits to which the debtor may be entitled."

These causes of action accrued when the statutes of 1899 were in force, but this section 8223 is identical with section 4213, Revised Statutes 1899.

In a great many cases our courts have held that a lien account is not vitiated by an "unintentional" failure to enter all of the credits to which an account is entitled. See, in passing, *Shepard v. Atchison, Topeka & Santa Fé R. R. Co.*, 150 Mo. App. 98, 129 S. W. 1003, and *Wilson-Rehels-Rolfes Lumber Co. v. Ware*, 158 Mo. App. 179, 138 S. W. 690, the latter a very extreme case. See, also, *Darlington Lumber Co. v. Pottinger*, 165 Mo. App. 442, 147 S. W. 179. As we said in the case last cited (165 Mo. App. loc. cit. 450, 147 S. W. 181):

"Unintentional," as used in the statute, means without fraudulent purpose to withhold a credit to which the debtor was entitled. It does not mean an omission of a credit when in law the right to the credit or correctness of a charge may be doubtful. See *Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 347, loc. cit. 353. Our court has said in *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535, referring to decisions holding that the blending of lienable and non-lienable items is fatal to the lien, that this applies only where the mechanic or materialman knew that under no circumstances could the objectionable charge sustain a lien."

[4] Whether it was unintentional on the part of plaintiff in omitting the credit for the sacks returned, was a question of fact for the determination of the trial judge, and his finding upon that is conclusive on us.

In *Snell v. Payne*, supra, the Supreme Court of California, in concluding the paragraph which we have heretofore quoted in part, holding that the price of the package was lienable, says (115 Cal. loc. cit. 222, 46 Pac. 1070):

"But, at best, the matter under consideration would merely be an overcharge; and it is quite clear that a recorded lien, good in other respects, cannot be rejected because the amount claimed is somewhat larger than can be sustained by the proofs, unless it be so willfully false as to amount to a fraud; and nothing of that kind appears here."

So our courts have held in many cases and the learned trial judge undoubtedly found for respondent here on that theory. As his finding is supported by substantial evidence, we cannot disturb it.

Appellant also asked a declaration of law to the effect that upon the pleadings and all the evidence in the case, plaintiff is not entitled to a mechanic's lien against the property. This was refused and from what we have here said, properly so.

We find no reversible error in the action of the trial court and its judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

GLENCOE LIME & CEMENT CO. v. POLAR WAVE ICE & FUEL CO. (No. 14157.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by the Glencoe Lime & Cement Company against the Polar Wave Ice & Fuel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for appellant. Abbott, Edwards & Wilson, of St. Louis, for respondent.

REYNOLDS, P. J. For the reasons stated in the opinion in *Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co.* (No. 14156) 184 S. W. 952, an action between the same parties, the judgment of the circuit court in this cause is affirmed.

NORTONI and ALLEN, JJ., concur.

GLENCOE LIME & CEMENT CO. v. POLAR WAVE ICE & FUEL CO. (No. 14158.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by the Glencoe Lime & Cement Company against the Polar Wave Ice & Fuel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for appellant. Abbott, Edwards & Wilson, of St. Louis, for respondent.

REYNOLDS, P. J. For the reasons stated in the opinion in *Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co.* (No. 14156) 184 S. W. 952, an action between the same parties, the judgment of the circuit court in this cause is affirmed.

NORTONI and ALLEN, JJ., concur.

GOOD v. ROBINSON. (No. 14115.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

BROKERS \S 44 — COMPENSATION — SPECIAL CONTRACT.

Where plaintiff broker, under a special contract from defendant to sell land for \$9,000, subsequently modified to \$8,750, after several weeks' effort failed to interest his proposed purchaser at those prices and his authority was revoked, the defendant, who, though not negotiating with the proposed purchaser during this time, some time thereafter sold to him directly for \$8,400, is not liable for commission to the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. \S 45; Dec. Dig. \S 44.]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

"To be officially published."

Action by Aaron H. Good against Joseph Robinson. From a judgment for plaintiff, defendant appeals. Reversed.

Davis Biggs, of St. Louis, for appellant. Frank H. Haskins, of St. Louis, for respondent.

NORTONI, J. This is a suit by a real estate agent for commissions on the alleged sale of defendant's property. Plaintiff recovered, and defendant prosecutes the appeal.

It appears that plaintiff, in company with his customer, one August Manegold, called at defendant's residence in the early part of May, and inquired if defendant desired to sell his property. Manegold was seeking similar property in that neighborhood. Defendant said he would sell it, and priced it at \$9,000. Thereupon plaintiff, together with Manegold and defendant, looked through the property, and it is said defendant agreed to pay plaintiff a commission of $2\frac{1}{2}$ per cent. if he sold it to Manegold at the price of \$9,000. Plaintiff instructed defendant to call at his office on the following morning, and this defendant did. On defendant's calling at plaintiff's office, plaintiff submitted an offer to him of \$8,250 for the property, but this was promptly declined. Nothing further was done about the matter until a week or two thereafter, when it is said defendant reduced his price to \$8,750, and agreed to pay plaintiff a commission on the sale at that figure. Plaintiff never obtained from Manegold an offer to exceed \$8,500 on the property, and defendant persistently refused to accept it. Finally, about the 10th of June, plaintiff approached defendant and sought

to induce him to accept \$8,500 for the property, but defendant declined to do so, and thereupon terminated his authority in respect of the matter. In July defendant sold the property directly to Manegold for \$8,400, and plaintiff sues for a commission on the purchase price, in the view that he was the procuring and inducing cause of sale. It is clear enough that the judgment for plaintiff may not be sustained on the evidence before us, in that plaintiff was not authorized to negotiate touching a sale of the property at all, except under special contract, and his authority was revoked by defendant after a reasonable time had expired. It appears from plaintiff's own evidence that in the first instance he was authorized to sell the property to Manegold for \$9,000 cash, and was to receive a commission of $2\frac{1}{2}$ per cent. on the sale. This he failed to do. Shortly thereafter he persuaded defendant to reduce the price, and he was authorized to negotiate the sale at \$8,750 and nothing less. This, it is conceded, he failed to do, for at no time did he receive an offer to exceed \$8,500 on the property. On the 10th of June defendant declined point blank to accept this amount, and notified plaintiff, as plaintiff says, that his authority was revoked entirely. This court has but recently, through Judge Allen, declared the law in such circumstances as follows:

"Where a special contract exists, it is elementary that the broker must show that he has fully complied with the terms and conditions thereof before he is entitled to recover, for otherwise he has not completed his undertaking and has earned no commission. In such a case the owner may, in good faith, insist upon the exact price, or the fulfillment of other terms of the contract, and refuse to make a sale to the broker's customer on any modified terms; and if the broker fails to perform, after being allowed full opportunity so to do, the owner may, in fact, thereafter, as a new deal, sell the property to the broker's customer on more favorable terms, without incurring liability to the broker. *Blackwell v. Adams*, 28 Mo. App. 61; *La Force v. Washington University*, 106 Mo. App. 517, 81 S. W. 209; *Tooker v. Duckworth*, 107 Mo. App. 231, 80 S. W. 963; *Stevens v. Bacher*, 162 Mo. App. 284, 141 S. W. 1143; *Hughes v. Dodd*, 164 Mo. App. 454, 146 S. W. 446; *McCormick v. Obanion*, 168 Mo. App. loc. cit. 615, 153 S. W. 267. But even in such cases, if the owner chooses to deal with the broker's customer at a lower price or upon other terms, while the broker's agency remains unrevoked, and he is still working with his customer at the price and upon the terms named to him, the owner will be liable to the broker for commissions upon a sale so consummated by him with the broker's customer. See *Wetzell & Griffith v. Wagoner*, 41 Mo. App. 509; *Row v. Bozarth*, 68 Mo. App. 407; *Grether v. McCormick*, 79 Mo. App. 325; *Nichols v. Whitacre*, 112 Mo. App. 692, 87 S. W. 594; *Hovey & Brown v. Aaron*, 133 Mo. App. 573, 113 S. W. 718; *Lane v. Cunningham*, 171 Mo. App. 17, 153 S. W. 525." *Jennings v. Overholt*, 186 Mo. App. 505, 511, 172 S. W. 449, 451.

In the instant case it appears that plaintiff's authority was under a special contract at first to sell at \$9,000, and subsequently

modified to sell at \$8,750. This was the limit of his authority, and defendant declined, when requested to do so, to authorize a sale for a less price. Moreover, after plaintiff had endeavored for several weeks to interest the proposed purchaser at the prices made, his authority in respect of the matter was revoked entirely. There is nothing in the case to suggest that plaintiff was authorized to find a purchaser on terms to be agreed upon between the defendant and purchaser, and there is no evidence to indicate that defendant negotiated with Manegold during the time that plaintiff was authorized to sell under the special contract above mentioned, although it does appear that some time after defendant had revoked plaintiff's authority defendant sold the property to Manegold at a less price than that at which plaintiff was authorized to sell it. It is clearly a case of special authority terminating after a reasonable time had elapsed. Obviously no recovery may be had by plaintiff in such circumstances on account of the sale made by defendant, for at most his authority and right of recovery, if any, arose from the special contract, under which he confesses he was unable to consummate a sale, and it was competent for defendant to revoke the authority of the agent, as he did, after a reasonable time for effecting the sale had elapsed, and sell the property to whomsoever he could at a price to suit him.

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

GARDINER v. McPIKE (No. 14198.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. LIMITATION OF ACTIONS § 47(2)—ACCRUAL OF ACTION—COVENANT OF WARRANTY.

Where the grantee of warranted land discovered adjoining owners plowing land claimed to be part of his land, and he started suit against them, and they gave a bond to account to him if successful, and he is defeated in his suit, his cause of action on the warranty accrues on the entry of judgment of the suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 255, 256; Dec. Dig. § 47(2).]

2. APPEAL AND ERROR § 1064(1)—HARMLESS ERROR—INSTRUCTION.

Where it does not appear that appellant's rights were prejudiced by an instruction, it is not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064(1); Trial, Cent. Dig. §§ 475, 525, 553.]

3. COVENANTS § 135—ACTIONS—TRIAL—INSTRUCTION.

An instruction asked by defendant that he is not liable for lack of title to lands not in the section warranted is properly refused, where his warranty was of a certain acreage described by

metes and bounds, and lack of title to a part of that so described was in issue.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 269; Dec. Dig. § 135.]

4. TRIAL § 115(5)—ARGUMENTS OF COUNSEL—COMMENTING ON FORMER PROCEEDINGS.

Sustaining objections to argument of counsel that his client was "let out" of a former proceeding in which the action was dismissed as to him is not error, especially where counsel actually succeeds in making considerable argument of this character.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 283; Dec. Dig. § 115(5).]

5. COVENANTS § 132(1)—DAMAGES—WARRANTY—COST OF LITIGATION.

Instructions permitting recovery for costs and expenses, including attorney's fees and plaintiff's personal expenses in a suit to defend title, are not error, where the actual judgment recovered thereunder is but sufficient to cover the original purchase price paid, with interest from the accrual of the cause of action.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 260, 262; Dec. Dig. § 132(1).]

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

"Not to be officially published."

Action by John Gardiner against James E. McPike. From a judgment for plaintiff, defendant appeals. Affirmed.

Hostetter & Haley, of Bowling Green, for appellant. R. L. Motley, of Bowling Green, and Pearson & Pearson, of Louisiana, Mo., for respondent.

ALLEN, J. This is an action for the alleged breach of covenants of warranty and seisin in a deed. Plaintiff recovered below, and the case is here on defendant's appeal.

By warranty deed of August 18, 1903, the defendant, James E. McPike, a resident of Pike county, Mo., conveyed to one Spevak two tracts of land in Harris county, Tex., one purporting to be a tract of 711.4 acres, constituting section or survey No. 14, located by virtue of a certificate issued by the state of Texas to the "H., T. & B. R. Co.," and being also described in the deed by metes and bounds. With the other tract conveyed we are not here concerned. By warranty deed of September 28, 1903, Spevak conveyed the two tracts of land to John Gardiner, Jr., plaintiff herein, a resident of Ohio.

It appears that plaintiff leased the lands so acquired by him to one Howell for a period of five years at a nominal rental; the lease terminating on January 1, 1909. Plaintiff testified that he inspected the tracts before purchasing them, and had the supposed lines pointed out to him, and that he visited the property every year thereafter. In the latter part of 1908 Howell leased section or survey 15, lying immediately west of section or survey 14, and which was owned by one Mochel and one Homrighous, jointly. In January, 1909, plaintiff visited his property, and found that Howell, or his subtenant, had plowed a strip of ground beyond the line supposed by him to be the true line between

sections 14 and 15, and consisting of 199.7 acres of the tract of 711.4 acres which the defendant's deed purported to convey.

The evidence shows that upon discovering this plaintiff conferred with Mochel and Homrighous, and found that they claimed the strip of land in question, asserting that the true line between sections 14 and 15 was located at the eastern boundary line of said strip, and that the same was a part of section 15, to which they had title. In March, 1909, plaintiff instituted suit in the district court of Harris county, Tex., against Mochel and Homrighous and their tenants, to determine the title to the strip of land mentioned. At or about this time, pursuant to an agreement between the rival claimants, Mochel and Homrighous gave to plaintiff a bond conditioned that they would account to plaintiff for the rents and profits of the strip of land in controversy in the event that he were successful in establishing title thereto. Plaintiff was unsuccessful in the suit; the court by its decree fixing the boundary line between sections 14 and 15 in accordance with the contention of Mochel and Homrighous. This decree was entered on December 9, 1911. On June 7, 1913, plaintiff instituted this action against defendant, McPike, to recover for a breach of the warranties contained in the latter's deed to Spevak. McPike had been made a defendant in the suit in Texas, in accordance with the practice in that state, and the evidence shows that he was notified of the pendency thereof; but he was not duly brought in by process, and prior to trial the cause was dismissed as to him.

The purchase price paid by Spevak to McPike amounted to \$17.50 per acre; and Spevak sold the lands to plaintiff for \$22.50 per acre. Plaintiff was permitted to show various items of expense incurred in and about the prosecution of the suit in Texas, which need not be here set out. The jury returned a verdict in plaintiff's favor for \$3,868.63; but plaintiff remitted \$17.63, and judgment was entered for him in the sum of \$3,851.

[1] I. Appellant urges that its demurrer to the evidence should have been sustained for the reason that plaintiff's cause of action was barred by the statute of limitations in force in the state of Texas. Under the Texas statute in evidence and the decisions of the courts of that state it appears that the Texas law allows but four years for the bringing of an action of this character. If the Missouri statute is applicable, the suit was brought in ample time. But it appears to be conceded that the Texas law applies, as the trial court held; the contention between counsel being as to the time when the statute began to run. On this phase of the case we shall therefore confine ourselves to this one question in dispute, assuming, without deciding, that the action is governed by the "four-year statute" of Texas.

The contention of learned counsel for appellant, is that plaintiff's cause of action ac-

crued when the tenants or subtenants of Mochel and Homrighous entered upon and plowed the strip of land in question in January, 1909, which was more than four years prior to the institution of this action. On the other hand, the contention of respondent's learned counsel, which was the theory upon which the trial court proceeded, is that plaintiff's cause of action did not accrue until the entry of judgment in the suit in Texas, to wit, December 9, 1911, which was less than two years prior to the institution of this action.

A consideration of this question has led us to the conclusion that the statute of limitations did not begin to run until the entry of judgment in the suit in Texas. It is true that the decisions of that state, as do our own, hold that a covenantee need not wait until he is actually evicted, either by a judgment of eviction or otherwise, but upon the assertion of a paramount title by a claimant to the land he may either surrender possession to the holder of the paramount title, or purchase the latter's claim, and proceed against his covenantor as for a breach of the latter's covenants; the burden then being upon the covenantee to show that the title to which he surrendered, or which he purchased, was in fact the paramount title. See *Groesbeck v. Harris*, 82 Tex. 411, 19 S. W. 850; *Johns v. Hardin*, 81 Tex. loc. cit. 41, 16 S. W. 623; *Clark v. Mumford*, 62 Tex. loc. cit. 535; *Leet v. Gratz*, 124 Mo. App. 394, 101 S. W. 696; *Eaker v. Harvey*, 179 S. W. 985. But this does not mean that the statute of limitations will necessarily begin to run from the time of the assertion of the paramount title. Certainly, where the covenantee acquires and remains in possession, and does not surrender to the paramount title, but disputes the same, the statute does not begin to run until there is a judgment of eviction against him. Appellant's argument, however, is that there was an actual eviction of plaintiff in January, 1909, when the tenants or subtenants of Mochel and Homrighous went upon this strip of land and plowed it, and that this caused the statute to begin to run. But we do not accede to this. Under the circumstances we are of the opinion that there was not then an actual eviction of plaintiff under the paramount title so as to start the statute running. Plaintiff was in possession under his deed, and the entry of the tenants or subtenants of the owners of the adjoining section was merely a trespass upon that possession. It appears that the location of the true line between these two sections was a matter of great uncertainty, and one which could be settled only by a proceeding in court. The rival claimants recognized this. Plaintiff began the proceeding in court; and Mochel and Homrighous agreed to and did give a bond conditioned that they would account to plaintiff for the rents and profits if he were successful in the suit to determine the true

boundary line. With matters in this shape no loss could accrue to plaintiff until a final determination was had of the proceeding in the Texas court.

Even as to those covenants in a deed which are broken when made, if at all, the modern doctrine is that the statute of limitations does not begin to run until there has been a substantial breach resulting in damage to the covenantee. See *Jones v. Hazeltine*, 124 Mo. App. 674, 102 S. W. 40; *Leet v. Gratz*, supra; *In re Estate of Hanlin*, 133 Wis. 140, 113 N. W. 411, 126 Am. St. Rep. 938, and note, 17 L. R. A. (N. S.) 1189. And this is the doctrine adhered to by the courts of Texas. See *Selbert v. Bergman*, 91 Tex. 411, 44 S. W. 63. Since it appears that no substantial breach resulting in damage to plaintiff occurred until judgment was rendered against him in the suit in the district court of Harris county, Tex., we are of the opinion that the statute then began to run. Under the circumstances the eviction, we think, cannot be said to have been complete until the boundary dispute was settled in the proceeding begun in Texas. And whether or not plaintiff was to suffer loss and damage could not be determined prior to the rendition of judgment in that cause. See *Hays v. Talley* (Tex. Civ. App.) 161 S. W. 429.

We therefore rule this assignment of error against appellant.

[2] II. Complaint is made of an instruction given for plaintiff in that it refers to the bond executed to plaintiff for the rents and profits aforesaid as having been given "at the time that Howell et al. entered into possession." It is true that under the evidence it appears that this bond was not given at the time when tenants or subtenants of the adverse claimants went upon this strip of land and plowed it; but the bond was given shortly thereafter, and remained in force during the entire period covered by the litigation in Texas. We do not perceive in what way defendant's rights were prejudiced by the instruction as given, and hence regard the giving thereof as not constituting reversible error.

[3] III. It is argued that the court erred in refusing two instructions offered by defendant which, in substance, told the jury that McPike did not warrant the title to any lands located in section or survey 15, and that, if the jury found the 199.7 acres mentioned in the evidence to be, in fact, located in survey 15, then in no event would defendant be liable in this action. But this argument, we think, is manifestly unsound. Though the tract of 711.4 acres was referred to in defendant's deed as being section 14, it was therein described by metes and bounds as well, whereby the boundary lines were definitely fixed, and the precise acreage was mentioned. The title failed as to a portion of the land which defendant's deed purport-

ed to convey, casting liability upon defendant as for breach of his covenants.

[4] IV. An assignment of error relates to the court's ruling in restricting the argument of defendant's counsel before the jury. Defendant's counsel commented on the fact that defendant was "let out" of the Texas suit shortly prior to trial, and sought to make it appear that this was tantamount to a victory for defendant in that action. Objections were sustained to argument along that line. In this we think that the court committed no error. And, furthermore, defendant's counsel, despite objections and the court's rulings thereon, appears to have succeeded in making no little argument of this character, though in the end he took occasion to gracefully "bow to the ruling of the court."

[5] V. Lastly it is urged that the court committed error in giving instructions for plaintiff on the measure of damages, in that such instructions permitted a recovery for the costs and expenses of the Texas suit, including attorney's fees and plaintiff's personal expenses incurred in connection therewith. But this question may be disposed of by saying that it appears that the amount of the judgment, as it now stands, is sufficient to cover only the original purchase price paid defendant for the 199.7 acres, with interest thereon, at the rate of 6 per cent. per annum from the date of the rendition of the judgment in the Texas suit.

These views result in an affirmance of the judgment; and it is so ordered.

REYNOLDS, P. J., and NORTON, J.,
concur.

PHILLIPS v. WESTERN UNION TELE-
GRAPH CO. et al. (No. 14433.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. MASTER AND SERVANT \Rightarrow 330(3)—LIABILITY TO THIRD PERSONS—EVIDENCE—COURSE OF EMPLOYMENT.

In an action for personal injuries to a woman who was struck and knocked down by a running boy, evidence held sufficient to warrant the jury in inferring that the boy was employed by defendant telegraph company, and that at the time he was returning from delivering a message for defendant, and was in the course of his employment, though a short time before he had deviated from his proper route to snatch a paper from a newsboy.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1272; Dec. Dig. \Rightarrow 330(3).]

2. MASTER AND SERVANT \Rightarrow 332(2) — LIABILITY TO THIRD PERSON—QUESTIONS FOR JURY—COURSE OF EMPLOYMENT.

Where a telegraph messenger, returning to the company's office, deviated from his route to snatch a paper from a newsboy, but had resumed his course before he ran into plaintiff's wife, it was a question of fact for the jury whether he

was acting in the course of his employment when he ran into plaintiff's wife.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275; Dec. Dig. ☞ 332(2).]

3. MASTER AND SERVANT ☞330(3)—LIABILITY TO THIRD PERSONS—PROOF OF RELATIONSHIP—UNIFORM.

The fact that a boy is wearing the uniform of a telegraph company and a cap having its letters on it is sufficient to establish his employment by the company at the time he ran into and injured plaintiff's wife.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272; Dec. Dig. ☞ 330(3).]

4. MASTER AND SERVANT ☞302(2)—LIABILITY TO THIRD PERSONS—ACTS OF SERVANT—COURSE OF EMPLOYMENT.

A telegraph company is liable for damages caused by its messenger boy running into a woman while he was returning to the company's office after the delivery of a message.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. ☞302(2).]

5. EVIDENCE ☞75—PRESUMPTIONS—FAILURE TO PRODUCE TESTIMONY.

While plaintiff, to recover for injuries inflicted by the employé of defendant, must prove that the employé was acting within the scope of his employment at the time the injuries were inflicted, where there was evidence that the injuries were inflicted by a messenger boy employed by defendant who was returning to the office, carrying an envelope similar to those in which the defendant's messages were delivered, the jury can infer from defendant's failure to introduce evidence that the boy was not then engaged in the discharge of his duties, that it could not do so, because such was not the fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. ☞75.]

Appeal from St. Louis Circuit Court, James E. Withrow, Judge.

Action by Gustave W. Phillips against the Western Union Telegraph Company and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Ferriss, Zumbalen & Ferriss, of St. Louis, for appellant. Wm. H. McClarin and Jones, Hocker, Hawes & Angert, all of St. Louis, for respondent.

Statement.

REYNOLDS, P. J. About 7 o'clock, on the evening of December 28th, 1912, plaintiff and his wife were standing at the southeast corner of Grand avenue and Olive street, in the city of St. Louis, awaiting an opportunity to cross to the west side of Grand avenue. Mrs. Phillips was standing on the east curb of Grand avenue, a few feet south of Olive, one of her feet resting on the sidewalk, the other on the street some 4 inches below the level of the sidewalk, when she was run into by Samuel Kennell, a boy between 16 and 17 years of age, and knocked down with such violence that her right femur or hip bone, and also her right wrist were broken.

It is charged in the petition that at the time he ran into Mrs. Phillips, Kennell was a messenger boy in the employ of the West-

ern Union Telegraph Company (hereinafter referred to for brevity as the Western Union), and at the time was engaged in the performance of his duties as such messenger boy, and that his act of running into and knocking Mrs. Phillips down was due to his careless, negligent and reckless conduct and done while in the line of his employment. Averring that the expense on account of hospital charges, etc., which plaintiff had paid, was in excess of \$1000, and that he had incurred other liabilities on account of the attendance of physicians and surgeons in excess of \$2500, and that he had been deprived of the society and services of his wife ever since the accident, plaintiff avers that he has been damaged in the sum of \$7500, for which, with costs, he demands judgment against the minor and the Western Union.

Each of the defendants, by separate answers, denied all the allegations in the petition save that the Western Union admitted that it was engaged at the time in the business of receiving, transmitting and delivering telegrams.

The trial was before the court and a jury. Without setting it out in detail, it is sufficient to say that there was evidence tending to show that at the time of the injury to Mrs. Phillips, the Western Union had in its employ messenger boys who generally wore a uniform consisting of a cap with the words "Western Union" on it, and a blue coat with brass buttons, and that at the time of the accident Kennell wore such a cap and coat. It was also in evidence that a messenger boy of the name of Kennell was carried on the payroll of the company at the time. There was also evidence tending to show that at the time of the happening of the accident the Western Union had a branch office in a drugstore situated on the southwest corner of Olive and Grand, with entrances on both streets; that Kennell was on duty at that office as messenger; that on the evening of the happening of the accident, Kennell was rapidly walking or running west on Olive street and about the center of the south pavement of that street, and when near the corner of Grand and Olive saw a newsboy named Pennington, with whom he was acquainted, standing about on the north curb of Olive street, on the south side of the street and near the corner of Grand avenue, with a bundle of newspapers under his arm. Running along and swerving toward Pennington, Kennell grabbed a paper from under Pennington's arm and carrying it in his left hand continued running rapidly toward Grand avenue, looking back over his shoulder toward Pennington. Mrs. Phillips, as stated, was standing on the west curb of Grand, a few feet south of Olive, and a few feet south and west of Pennington, so that Kennell, who had turned off slightly from his direct course to grab the paper from Pennington, then ran along Olive toward the southwest, and so

running ran into Mrs. Phillips and knocked her down. He then proceeded across Olive street and entered the drugstore in which the branch office of the Western Union was located. Directly after the accident he was found in that office and identified as the boy who had knocked Mrs. Phillips down. Two or more witnesses testified that at that time they saw an envelope in the right hand of Kenzell, which they recognized as the ordinary envelope used by the Western Union for the delivery of messages.

Beyond the testimony as to the extent of the injuries received by Mrs. Phillips, which are said to be permanent, disabling her from performance of her wifely household duties, and the expense to which plaintiff had been put, which was heavy, this is substantially the testimony for plaintiff, except that a statement said to have been made by Kenzell was read in evidence, but admitted solely as against him, and not now relevant on this appeal.

The only evidence introduced by defendant was a diagram of the locus in quo and some testimony tending to contradict statements by plaintiff as to his loss of earnings in attending upon his wife, and as to the circumstances under which he had left the service of various companies by which he had been employed.

At the conclusion of the testimony for plaintiff and again at the conclusion of all the testimony in the case, defendant Western Union Telegraph Company demurred, or, more accurately, asked instructions in the nature of demurrers, which the court refused.

The court gave three instructions at the instance of defendants, refusing one asked as to the measure of damages. We will refer to the pertinent instructions hereafter.

There was a verdict in favor of plaintiff and against both defendants in the sum of \$2000. The Western Union Telegraph Company, filing its motion for a new trial and in arrest of judgment, and excepting to the action of the court in overruling these motions, has alone appealed.

Opinion.

The assignment of error made before us is in permitting the case to go to the jury and in allowing the verdict to stand.

[1] Under this assignment it is contended that there was no evidence that at the time of the collision defendant Kenzell was engaged in the performance of any duties as an employé of the Western Union or that the alleged negligence was in respect to any act or deed on his part required by or incident to his employment, if any, and that by the facts shown by plaintiff's evidence, the doctrine of respondent superior is not applicable.

It is hardly denied by the learned counsel for appellant that Kenzell was, at the time of the happening of the accident, a messenger boy in the employ of appellant, and it may be added that the evidence tended to

show that at the time he was so employed at the branch office of the appellant located in the drugstore. The evidence also was of such a character as to warrant the jury to infer that at the time he, Kenzell, was on his way to that office and that he had in his hand an envelope identified as the kind used by appellant for the delivery or carrying of messages. It is true that one of the witnesses who testified that he recognized the envelope as a Western Union envelope used for messages received or transmitted by that company, admitted that he could not read, but he very positively testified that he was familiar with the appearance of the envelope used by the Western Union and that he recognized the one then carried by Kenzell as such an envelope.

The real point of contention is, whether, at the time, Kenzell was in the discharge of the duties of his employment as messenger.

It must be admitted that the evidence as to this cannot be said to be in itself positive. The question for us, as an appellate court, to determine, however, is whether it was of such a character as warranted the jury, in consideration of it and of all the other facts and circumstances in evidence, to draw the inference that at the time Kenzell was actually in the discharge of the duties of his employment; if he was, it can hardly be doubted that the appellant, Western Union, is liable.

The question, not only as to his employment, but as to whether at the time and place Kenzell was performing the usual duties of a messenger boy for appellant, such as delivering messages and returning to the office of appellant from the delivery or attempted delivery of messages, was distinctly placed before the jury, not only by the instructions asked and given at the instance of appellant but by those given at the instance of respondent. Thus, at the instance of respondent, the court told the jury that if they found that on the day named Mrs. Phillips, the wife of plaintiff, was standing on the east side of Grand avenue, near its intersection with Olive street, and while so standing at that place, the defendant Kenzell, in a careless, negligent and violent manner ran into and collided with her, and that as a direct result thereof plaintiff's wife was knocked into the street and injured, and that plaintiff has suffered loss thereby, then plaintiff is entitled to recover against the defendant Samuel Kenzell. This instruction continues:

"If the jury also finds from the evidence that at the time of said collision, the defendant Samuel Kenzell was in the employ of the defendant Western Union Telegraph Company as a messenger boy, and that at the time of said collision he was engaged in and about the performance of his duties as such messenger in returning from delivering a telegram, then the jury should also find in favor of the plaintiff and against the defendant Western Union Telegraph Company."

In another instruction, also given at the instance of plaintiff, the court directed the jury that as essential to recovery against

both defendants, they must find from the evidence and circumstances given in evidence, that at the time and place of the accident

"Samuel Kenzell was performing for defendant Western Union Telegraph Company, the usual duties of a messenger boy, such as delivering messages and returning to the Western Union office from the delivery or attempted delivery of messages."

At the instance of appellant the court instructed the jury, that plaintiff was not entitled to a verdict against the Western Union Telegraph Company

"merely upon proof that defendant Kenzell was a messenger boy in its employ when the accident occurred, but plaintiff must further prove, by the greater weight of the evidence, that Kenzell was actually engaged in the performance of his duties at the time of the collision, and that the injuries to Mrs. Phillips were caused by Kenzell's negligence in or about the performance of his said duties."

At the instance of appellant the court further instructed the jury that the fact, if it be a fact, that Kenzell was a messenger boy in the employ of the Western Union at the time of the accident

"does not of itself warrant or support the finding that he was actually performing his duties as such messenger boy at the time of the accident, but such finding can be based—if at all—upon independent evidence to that effect."

So that beyond all controversy the issue was distinctly presented to the jury at the instance of appellant and respondent as to whether at the time of the accident the boy Kenzell was actually engaged in the performance of his duties as messenger boy for the Western Union.

The question is, did the evidence warrant these instructions?

[2] It is strenuously argued by learned counsel for appellant that the deviation by Kenzell from his direct route along Olive street to the other side of the street to snatch the paper from the hands of the newsboy standing there, a friend and acquaintance of his, was such a deviation from the route and course which Kenzell should have pursued in returning to the office of appellant, and an act not in the line of his duty under his employment by the Western Union but for his own purposes, that the Western Union cannot be held responsible for the consequences of that deviation. As covering this point, the court, at the instance of respondent, added to the second instruction above given this: That they might find that Kenzell was then in the discharge of his duties as messenger notwithstanding the jury might find

"that shortly prior to the collision Samuel Kenzell may have grabbed, for his own use, a newspaper from a newsboy, and was running with the same in his hand."

At the instance of appellant the court further told the jury that even if they should find and believe that Kenzell was a messenger boy and was engaged in his duties on the evening of the accident,

"yet if you further find that he turned aside temporarily from the performance of his duties

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as messenger boy and undertook to get a newspaper solely for his own pleasure and purposes from the newsboy at Grand and Olive streets, and that his collision with Mrs. Phillips occurred while he was trying to get away with said newspaper against the consent of the newsboy, and not as the result of any act within the line of his duties as messenger boy, then the Telegraph Company is not liable for the results of said collision and your verdict will be in favor of said Telegraph Company."

These instructions clearly submitted the character of this so-called diversion to the jury as a question of fact. Properly so, for we cannot determine it as one of law. Admitting the deviation from his usual course and for the purpose of attending to a purely personal matter, the evidence is clear, that having accomplished that purpose, Kenzell resumed his course veering somewhat from a direct line for the entrance to the branch office of the Western Union on the west side of Olive street, and that it was while he was pursuing this course and returning to the office that he ran into Mrs. Phillips. We hold that point as to deviation from his direct course by Kenzell for his own purposes, so strenuously made by printed argument and brief and in the argument before the court, as we are advised, as not tenable.

[3] As before said, we do not think it can be seriously contended, we do not in fact understand that it is seriously contended, that at the time of the accident Kenzell was not in the employ of the appellant as messenger boy. His uniform and the letters on his cap would be sufficient, under the authority of our holding in the case of *Fleishman v. Polar Wave Ice & Fuel Co.*, 148 Mo. App. 117, 127 S. W. 660, to establish that. Learned counsel for appellant challenges our decision in this *Fleishman* Case as not in line with authority and refers to it as having been criticised by a very able text-writer. See 6 *Labatt's Master & Servant* (2d Ed.) note 4, § 2281a, p. 6387. As we understand the criticism of this decision by the text-writer, it goes more to that part of it which holds that it could be inferred, from the fact that the wagon belonged to the Polar Wave Ice & Fuel Company and was in charge of its servants, that they were acting in the course of their employment at the time of the accident, than to the identification of the wagon as belonging to the Polar Wave Ice & Fuel Company. It may be said with reference to the *Fleishman* Case that in *Wiedeman v. St. Louis Taxicab Co.*, 182 Mo. App. 523, 165 S. W. 1106, and which was written for our court by former Judge Goode, that in an opinion by Judge Allen, who was not a member of our court at the time of the decision in the *Fleishman* Case, the law then announced was distinctly recognized and applied. We see no reason to now depart from it, certainly not in so far as the identification of Kenzell as being in the employ of the appellant is concerned.

[4] It is argued by the very learned counsel

for appellant that a human being, even though an employé, is not owned by his employer, and his every movement is not under the exclusive control of his employer, and it is contended that the testimony as to the Western Union envelope being in his hand at the time of the accident is too weak and too much discredited and too inconclusive to be given any effect; that in every case in which the name of the defendant has been given special significance, the injury was caused by a wagon or a truck or a car, or some instrumentality of that sort, and that there the name was regarded as some evidence of ownership, but that this doctrine has never been extended to such a case as the one before us and cannot be logically extended. Hence it is argued that the plaintiff has totally failed to make out a prima facie case that Kennell was performing his duty as an employé of the Telegraph Company when the collision occurred.

We think that the point of this argument is conclusively covered by a decision of the Supreme Judicial Court of Massachusetts in *Ryan v. Keane et al.*, 211 Mass. 543, 98 N. E. 590, 47 L. R. A. (N. S.) 142. In that case Mr. Justice De Courcy, who wrote the opinion, after saying that there was no dispute but that one Boylan was an employé of defendants, and that he had run into and knocked down the plaintiff, who brought his action against defendants, Boylan's employers, for assault and negligence, has said (211 Mass. loc. cit. 544, 98 N. E. 590, 47 L. R. A. [N. S.] 142):

"As to the manner in which the two men came in contact the jury presumably believed the plaintiff's story, which was that he was crossing the yard toward the wagon which he had hired, when Boylan came along in a hurry, called out 'Get out of my way,' and immediately afterwards jostled the plaintiff or pushed him aside, when he had ample unobstructed space in which to pass. On these facts the plaintiff could recover under his count for an assault, or under that alleging negligence. That Boylan was in the employ of the defendants at the time of the accident was admitted by the defendant Keane and by Boylan, and is apparent from the uncontradicted testimony. He had been sent by his employer to get the wagon, had helped the driver to hitch in the horse, and was hurrying back in a direct course from the wagon yard to the stable in order to resume his other routine duties as stableman. Although he had completed one of his daily tasks he remained in the service of the defendants and subject to their directions; and the relation of employer and employé, with its accompanying legal rights and obligations, continued while the employé was going from one to another portion of his day's work. * * * The jury were warranted in finding that Boylan was acting within the scope of his employment at the time when he ran into the plaintiff. Probably this would not be questioned if he were driving the horse at the time and drove the wagon against the plaintiff. In the act of returning to the stable he was doing what he was ordered to do, and his purpose was to perform the work of his employer for which he was engaged. He was none the less acting in the course of his employment because his method of performing his duty was careless; and if in hurrying to do his work at a busy hour in the morning he care-

lessly or willfully jostled against and injured the plaintiff, the defendants are liable for his act."

It appears to us that the principle here announced is as applicable to the messenger boy running on his own legs as if he had been riding a bicycle, or a horse, or driving a wagon.

[5] Learned counsel for respondent make the point that the fact that defendant offered no evidence whatever as to the matter of employment of Kennell, or the business which he was at the time engaged in, in itself raises the presumption that the boy was about the business of the master. For this proposition counsel refer us to a decision of our court in *Long v. Nute*, 128 Mo. App. 204, 100 S. W. 511. In that case our court said (123 Mo. App. 209, 100 S. W. 513), treating of an accident brought about by the carelessness, as it is alleged, of a chauffeur said to be at the time in the employ and on the business of the defendant, that if the chauffeur was using the automobile surreptitiously, the fact that he was so using it was peculiarly within the knowledge of defendant. "No effort was made to procure the evidence of the chauffeur and defendant did not testify that the chauffeur was using the automobile without authority. The failure of defendant to testify that the chauffeur was using the automobile for his own ends and without authority, and his failure to procure the evidence of the chauffeur, raises the presumption that the latter was about the master's business at the time of the accident and was in possession of the automobile by his consent. *Baldwin v. Whitcomb*, 71 Mo. 651. Where a servant, who is employed for the special purpose of operating an automobile for the master, is found operating it in the usual manner such machines are operated, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master, and the burden is on him to overthrow this presumption by evidence which the law presumes he is in possession of."

In *McClanahan v. St. Louis & San Francisco R. R. Co.*, 147 Mo. App. 386, loc. cit. 412, 126 S. W. 535, 542, we held to the like effect, illustrating the rule and citing in support of it *Starkie on Evidence*, 6 Am. Ed. (1837), *p. 54, as the general rule, that

"the conduct of a party in omitting to produce that evidence, in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him; since it raises a strong suspicion that such evidence if adduced would operate to his prejudice."

We there cite many other authorities in support of this rule, and think what is held in these cases is applicable here.

It is true that plaintiff must make out his case by a preponderance of the evidence, but it is also true that it is within the province

of the jury to draw from the facts and circumstances in evidence such conclusions as those facts and circumstances warrant; such as legitimately follow from them; not meaning that they are to indulge in guesswork and mere supposition, but that they may act on such inferences as can naturally be drawn from the facts and circumstances in evidence. The Western Union Telegraph Company, a public utility, is so much in the use and eye and knowledge of all our people, that we may assume that the jury will apply their knowledge of the usual course of business of this great instrumentality of public service when considering facts connected with that service. We all know that the Western Union Telegraph Company uses messengers for the delivery and taking up of messages, dispatches, telegrams. The jury, as men of ordinary intelligence, had a right to infer that when they had the testimony before them that Kenzell was a messenger boy in the employ of the Western Union, clothed in its usual uniform, going along the street in the direction of one of the branch offices of that company, carrying in his hand an envelope recognized as the envelope ordinarily used by the Western Union in the transaction of its business, that he was at the time in the discharge of the duties of his employment. It certainly behooved defendant, in the light of the evidence introduced by plaintiff, and it was within its power to meet this and to show, if that was the fact, that at the time of this accident this messenger boy was not engaged in the discharge of his duties as such at the time. That defendant did not attempt to do this, undoubtedly led the jury to conclude that the appellant was unable to do so.

We hold that there was substantial evidence in this case warranting its submission to the jury and to uphold the verdict of the jury.

Discovering no reversible error, the judgment of the circuit court should be and is affirmed.

NORTONI and ALLEN, JJ., concur.

TATE ex rel. LOGAN v. ELLISON et al.,
Judges. (No. 18744.)

Supreme Court of Missouri. March 30, 1916.)

COURTS \S 86(2) — RULES — CONSTRUCTION.

The Supreme Court will not construe a rule of a Court of Appeals except perhaps in a case where it might become absolutely necessary.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 296; Dec. Dig. \S 85(2).]

COURTS \S 487(3) — CERTIFICATION TO SUPREME COURT — EXPIRATION OF TERM.

Under Const. Amend. 1884, \S 6, authorizing a Court of Appeals to certify the cause to the Supreme Court for specified reasons, but providing that the court must by its own motion make such transfer at the same term at which

the judgment is rendered, and not afterwards, an order and entry at the second or third term after a motion for rehearing was overruled, certifying the case to the Supreme Court, is unauthorized and confers no jurisdiction on the Supreme Court which will prevent the issuance of mandamus to compel the Court of Appeals to issue its mandate in conformity with its decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 703, 1309; Dec. Dig. \S 487(3).]

3. APPEAL AND ERROR \S 1217 — POWERS OF COURT — EXPIRATION OF TERM.

An order of the Court of Appeals entered on the last day of the term, giving parties 10 days to file motions in cases ruled on at that date, and continuing all motions and other matters pending until the next term, did not retain jurisdiction of a case in which a motion for rehearing had been made and passed on, and the court could not thereafter entertain a motion to certify the case to the Supreme Court and grant a rehearing on its own motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4717, 4718; Dec. Dig. \S 1217.]

4. APPEAL AND ERROR \S 818 — REHEARING — TIME FOR MOTION — EXPIRATION OF TERM.

Such an order is sufficient to retain jurisdiction in a case for which no motion for rehearing had been filed for the purpose of hearing such motion at the subsequent term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3199; Dec. Dig. \S 818.]

Bond, J., dissenting, and Woodson, C. J., and Revelle, J., dissenting in part.

In Banc. Original proceedings for mandamus by the State, on relation of W. G. Logan, against James Ellison and others, as Judges of the Kansas City Court of Appeals. On demurrer to return by respondents. Peremptory writ issued.

This is an original proceeding by mandamus brought in this court to compel the respondents, the judges of the Kansas City Court of Appeals, to set aside an order and judgment of reversal by them rendered, at the October term, 1914, thereof, on the 5th day of said month, in a cause then pending in said court, wherein the Kansas City Coal & Material Company was appellant and W. G. Logan, the relator herein, was the respondent, to reinstate a former judgment of affirmance rendered therein by said court at the October term, 1913, thereof, and on the 5th day of January, 1914; and to issue the mandate of said court upon the last-mentioned judgment.

In response to the alternative writ, the respondents made their return, which in substance discloses these facts: That on January 5, 1914, during the October term, 1913, of said court, a judgment of affirmance was by said court rendered in said cause. That on January 15, 1914, during the same term of said court, the appellants filed in said cause a motion for a rehearing. That on February 28, 1914, during the same term of court, said motion was overruled. On the last-named date, that being the last day of the October term, 1913, of said court, the court made a general order to the effect "that

all parties be given ten days to file motions in cases ruled on this day," and then finally adjourned the October term, 1913, to court in course. At the March term, 1914, of said court, and on the 2d day of said month, the appellant in the original cause filed a motion to have the cause certified to the Supreme Court, and on the 11th of the same month the appellants filed in said cause a supplemental motion to have the same certified to this court, and also a motion to set aside the order overruling the motion for a rehearing; that on April 15, 1914, during the same term, the motions to certify the cause to this court were overruled, and an order for a rehearing was granted. On June 1, 1914, during the same term, the cause was argued and submitted, and on July 6, 1914, said term of court was adjourned to court in course. On October 15, 1914, at the October term of said court, a judgment was by said court rendered reversing the judgment of the circuit court and remanding the cause, and at the same time it made an order certifying the cause to this court, of its own motion.

The order of February 28, 1914, made by the court, continuing all motions and other matters pending in said court until the March term, was as follows:

"Now, the court doth order that all motions and other matters pending be continued until the next March term of this court, and the court doth further order that all parties be given ten days to file motions in cases ruled on at this date."

The respondents base their right to set aside the judgment of affirmance in the original case and to reverse, remand, and certify said cause to this court upon the ground stated in their return, viz.:

"That in and by the order aforesaid, entered in said court on the 28th day of February, 1914, and in and by the filing of said motion by the said company to transfer said cause to the Supreme Court, filed on the 2d day of March, 1914, and in and by the said supplemental motion and motion to set aside the order overruling the motion for rehearing filed in said cause on the 11th day of March, 1914, and by each of said order and said motions the jurisdiction of the said Kansas City Court of Appeals, and the judges thereof, was retained in said cause in and to the said March, 1914, term of the said Kansas City Court of Appeals."

As a further defense, respondents also make the following statement in their amended return:

"Respondents further say that they, as judges of the Kansas City Court of Appeals, and the said Kansas City Court of Appeals, have no jurisdiction in this cause, because it has been certified to the Supreme Court of the state of Missouri, under the provisions of section 6 of the Amendment of 1884 to article 6 of the Constitution of the state of Missouri, as will appear from the record entry of judgment of the said Kansas City Court of Appeals, entered on the said 5th day of October, 1914, and as will appear from the copy of the opinion of this court, hereto attached and made a part hereof."

To this return counsel for relators filed a demurrer.

John I. Williamson, of Kansas City, for relator. Morrison, Nugent & Wylder, of Kansas City, for respondents.

WOODSON, C. J. (after stating the facts as above). I. There are but two legal propositions presented by this record for determination, and the first is: Did the Court of Appeals, under the order of February 28, 1914, before mentioned, have jurisdiction at the October term, 1914, thereof, to set aside the judgment of affirmance rendered by it at the October term, 1913, when no motion of any kind was pending in said cause?

Counsel for the relator contends that the Court of Appeals had no such jurisdiction, while the respondents insist that it had.

There is an irreconcilable conflict between authorities in this state upon this question.

The cases of *State ex rel. v. Phillips*, 96 Mo. 570, 10 S. W. 182, and *Childs v. Railway*, 117 Mo. 414, loc. cit. 428, 23 S. W. 373, squarely hold that the filing of a motion for a rehearing in an appellate court after the adjournment of the term, under an order allowing the motion to be filed in vacation, continues the cause so that the opinion filed does not become the opinion of the court until the motion is disposed of at the next term. There is this distinction between those cases and the case at bar: In those cases no motion for a rehearing had been filed at the time the order was made extending the time to the next term for parties to file such motions, while in the case at bar the motion for a rehearing had been filed and overruled at the time the order of extension was made.

[1] Under rule 21 of this court (169 S. W. x) regarding motions for a rehearing, that fact alone would be a finality of the case, without the court of its own motion, during the same term, should for some good cause resting in the breast of the court set the judgment aside; but rule 24 of the Kansas City Court of Appeals (169 S. W. xiv), governing motions for a rehearing is not so definite and clear as is said rule of this court.

But from the view we take of this case it is not necessary for us to construe or give effect to said rule 24; it is more becoming to leave that duty with the Court of Appeals, except perhaps in a case where it might become absolutely necessary for this court to do so, in order to properly decide the case. The rule invoked by counsel for relator is firmly established in this state, as well as many others; and the two cases before cited seem to be the only cases in conflict with it. In fact, it is elementary that after a final judgment has been rendered in a cause, at one term of the court, in the absence of a statute to the contrary, with no motion or other proper step has been taken therein, to carry the cause over to the next term of court, the court possesses no jurisdiction to set aside, modify, or annul that judgment at such succeeding or any subsequent term of

the court. *Jende v. Sims*, 258 Mo. 26, 166 S. W. 1048.

In discussing this question, this court, in the former case, on page 39 of 258 Mo., on page 1052 of 166 S. W., used this language:

"In all cases, except those provided for by these statutes, a court has no authority to disturb its judgment after the lapse of the term. This has been so universally ruled that citations would be to become superfluous. The defendants therefore are in no position to lay hold of either of these two statutes, and the original judgment was wrongfully set aside after the lapse of the term, unless such action can be upheld upon one of the other two theories remaining to be discussed."

The same question was under consideration in the case of *State ex rel. v. Reynolds*, 209 Mo. 161, on page 176, 107 S. W. 487, on page 491 (15 L. R. A. [N. S.] 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198), and in disposing of it this court used this language:

"If the circuit court of St. Louis county had made in express terms an order at a subsequent term setting aside the final decree granting the injunction and ordering the receiver appointed, it would have been absolutely void and of no effect, because that court had no authority to make such order after the expiration of the term at which the decree was made. And there is nothing in the *Hirzel Case*, supra, which indicated anything to the contrary. *State ex rel. v. Walls*, 113 Mo. 42 [20 S. W. 883]; *Appo v. People*, 20 N. Y. 531. In the former case the judge of the court which tried the case, after overruling the motion for a new trial, died, but before signing the bill of exceptions. His successor in office attempted at a subsequent term of the court to set aside the judgment and grant a new trial. In that case this court held that prohibition would lie to prevent the successor in office from setting aside the judgment previously entered for want of jurisdiction in the court to make the order. The decision was not based upon the ground that the matter involved had been adjudicated and could not on that account be again litigated, but was based squarely upon the ground that the court had no jurisdiction to make the order.

"The same proposition was involved in the *Appo Case*, supra, and it was there contended that, when the inferior court or tribunal has jurisdiction of the action or of the subject-matter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition. In the discussion of that proposition the Court of Appeals of New York said: 'It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case.' * * * These cases prove that the writ lies to prevent the exercise of any unauthorized power, in a case or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction. The broad remedial nature of this writ is shown by the brief statement of a case by *Fitzherbert*. In stating the various cases in which the writ will lie, he says: 'And if a man be sued in the spiritual court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition directed unto them for a surcease,' etc., until they have delivered the copy of the libel, according to the statute made Anno, 2 H. 5 (F. N. B. title Prohibition). This shows that the writ was never governed by any narrow techni-

cal rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed. I have no hesitation, therefore, in holding that this was a proper case for the use of the writ.' *Appo v. People*, 20 N. Y. loc. cit. 541, 542. And the same conclusions have been reached by this court in the following cases: *Morris v. Lenox*, 8 Mo. 252; *Railroad v. Wear*, 135 Mo. loc. cit. 256 [36 S. W. 357, 658, 33 L. R. A. 341]; *State ex rel. v. Scarritt*, 128 Mo. loc. cit. 338, 339 [30 S. W. 1026]; *High on Ex. Legal Rem.* § 789; *Spelling on Ex. Legal Rem.* § 1741."

The following authorities are also directly in point: *Padgett v. Smith*, 205 Mo. 122, 103 S. W. 942; *Gratiet v. Mo. Pac. Ry. Co.*, 116 Mo. loc. cit. 470, 21 S. W. 1094, 16 L. R. A. 189 (concurring opinion of Barclay and Brace, JJ.); *Danforth v. Lowe*, 53 Mo. loc. cit. 218; *Hill v. City of St. Louis*, 20 Mo. loc. cit. 587; *Black on Judgments* (1st Ed.) vol. 1, § 306, p. 383; *Freeman on Judgments* (4th Ed.) vol. 1, § 96, pp. 132, 133; 3 Cyc. 474, subsec. b; 17 Am. & Eng. Encyc. of Law (2d Ed.) 816, § 7; *Sibbald v. United States*, 12 Pet. 491, 9 L. Ed. 1169; *Bank v. Moss*, 6 How. 39, 12 L. Ed. 335; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. loc. cit. 799; *Hawkins v. C. C. & St. L. Ry. Co.*, 99 Fed. 322, 39 C. C. A. 538; *Brown v. Aspden's Adm'r*, 14 How. 25, 14 L. Ed. 312; *Priddy v. Hayes*, 204 Mo. 358, 102 S. W. 976; *Wilson v. Darrow*, 223 Mo. 520, 122 S. W. 1077.

We have been cited to no statute or rule of common law or chancery which authorized the Court of Appeals to make the order of February 28, 1914, extending the time to the next term of court in which to file motions in the causes mentioned therein. That authority existed, if at all, upon the rule announced in the cases of *State ex rel. v. Phillips*, supra, and *Childs v. Railway Co.*, supra. Those cases were not well considered, nor was any authority cited in support of the rule there announced. They stand alone in this state, and have no foreign support that I know of; they are against the consensus of authority in this state and elsewhere, and should, in my opinion, be overruled, which is accordingly done.

It therefore follows that the order of the Court of Appeals made on February 28, 1914, extending the time to the next term of the court for appellants in the original case in which to file the motion mentioned was and is null and void, and all orders and judgments of the court made therein at said succeeding term are likewise null and void, and of no force or effect whatever.

[2] II. It is next insisted by counsel for respondents that notwithstanding the fact that the order of February 28, 1914, may have been unauthorized by law, and therefore null and void, yet the Court of Appeals, under section 6 of the Amendment of 1884 of article 6 of the Constitution, had the au-

thority to certify the original cause to this court for any of the reasons stated therein, and, the cause having been certified here by it, the peremptory writ of mandamus should be denied, and the cause decided by this court upon its merits.

While that section of the Constitution authorizes the various Courts of Appeals of the state to certify cases to this court for any of the grounds stated therein, yet in express terms it further provides that said Court of Appeals must, of its own motion, make such transfers to this court at "the same term" at which the judgment is rendered, "and not afterward."

The return discloses the fact that the certification of the original cause to this court was made at the second or third term of the court subsequent to the one at which the original judgment was rendered. Upon that state of facts, under the plain mandate of said constitutional provision, the order of the court certifying the original cause to this court was not authorized, and is therefore coram non iudice.

It is true this court may, in the exercise of its constitutional control of all other courts of the state, require the Court of Appeals to certify a cause to this court after the expiration of the term at which the judgment therein was rendered, but that fact does not signify that said court may so do of its own motion. *State ex rel. v. Phillips*, 96 Mo. loc. cit. 575, 10 S. W. 182; *State ex rel. v. Patterson*, 207 Mo. 129, 105 S. W. 1048.

For the reasons stated, we are of the opinion that the peremptory writ of mandamus should issue; and it is so ordered.

REVELLE, J., concurs. BOND, J., dissents.

FARIS, J. [3, 4] I concur in the result of the opinion of the learned Chief Justice, but I do not think that any necessity exists in this case to overrule the cases of *State ex rel. v. Phillips*, 96 Mo. 570, 10 S. W. 182, and *Childs v. Railway*, 117 Mo. 414, 23 S. W. 873. I am of opinion that sufficient differences are apparent between the facts of those cases, and the facts of the case at bar, to clearly distinguish those cases from the instant one. It may be that both of the cases marked for overruling in the Chief Justice's opinion were incorrectly decided—touching that I do not think we need here to give an opinion—therefore I do not think we need here trouble ourselves with their correctness or incorrectness. In the case on which the one at bar is bottomed a motion for rehearing had been filed and overruled, and appellant therein had come absolutely to the end of all legal steps for a review. In the *Phillips* Case, no motion for rehearing had ever been filed; in the *Childs* Case, the ruling appears merely arguendo. In fair-

ness, since time to file a motion for a rehearing in the *Phillips* Case—absent the order—was lacking, the Kansas City Court of Appeals gave by its general order time in the next term to file such motion for a rehearing, and upon mandamus brought here we approved their action fully. Since the matter strikes me largely as one of practice, touching which we possess inherent power to make rules, and since we have a rule—as also has the Kansas City Court of Appeals—allowing 10 days after judgment to file a motion for rehearing, and since no statute expressly forbids, it would be to curtail both our convenience and the expediting of business, and to run the risk of doing great injustice, if we thus cut off our right to retain by express order jurisdiction in a case so that time (otherwise lacking) might be had to file therein a motion for rehearing. In short, our convenience and the hurry of events might necessitate our deciding a case on the last day of any given term. If we have no right to make an order to the end that the losing party may have the same opportunity to file a motion for rehearing as we give by our rules to others, it may be questionable whether the loser in such case has been accorded due process of law. *State v. Guerringer*, 265 Mo. 408, 178 S. W. 65. Certainly this is so, if the privilege given by a rule of an appellate court to file a motion for a rehearing and have it considered is a right given by law at all.

Under the facts at bar as they are so lucidly set out by the learned Chief Justice, so patent a difference appears to me that I vote not to overrule the cases mentioned, but to distinguish them upon their facts from this one; and, so voting, I concur fully otherwise.

GRAVES, WALKER, and BLAIR, JJ., concur in these views.

RAMSEY v. HUCK, Judge, et al. (No. 19297.)
(Supreme Court of Missouri. March 30, 1916.)

1. COURTS \S 207(5) — JURISDICTION OF SUPREME COURT.

Under Const. art. 6, § 3, providing that the Supreme Court shall have general superintending control over all inferior courts and the power to issue the writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same, the Supreme Court has the right to issue a writ of prohibition in the exercise of its supervisory control over any inferior tribunal as the circuit court.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. \S 207(5).]

2. COURTS \S 207(5) — JURISDICTION OF SUPREME COURT—PROHIBITION.

Under Const. art. 6, § 12, and Const. Amend. 1884, § 5, providing that the Supreme Court shall have exclusive jurisdiction in cases involving title to any office under the state, the Supreme Court has jurisdiction to issue a writ

of prohibition to prevent the circuit court from entertaining jurisdiction of an appeal from the county court in a proceeding to contest the right to the office of justice of the peace.

[Ed. Note.—For other cases, see Courts, Dec. Dig. **⚡**207(5).]

3. COURTS **⚡207(5) — JURISDICTION OF SUPREME COURT — PROHIBITION — APPELLATE JURISDICTION.**

Appellate jurisdiction of a contest of the right to the office of justice of the peace is not a prerequisite to the right of the Supreme Court to issue the writ of prohibition to prevent the circuit court from entertaining jurisdiction of an appeal from the county court in such contest.

[Ed. Note.—For other cases, see Courts, Dec. Dig. **⚡**207(5).]

4. ELECTIONS **⚡275 — CONTEST — JURISDICTION OF COUNTY COURTS — STATUTE.**

Under Const. art. 8, § 9, providing that the General Assembly shall by general law designate the court or judge by whom the several classes of election contests shall be tried, and Rev. St. 1909, §§ 5924, 7372, enacted pursuant thereto, giving county courts, except in cities of 300,000, jurisdiction in contests of township offices, and providing that the county court shall decide contested elections for the office of justice of the peace, county courts have power to hear and determine contested elections to such office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250-256; Dec. Dig. **⚡**275.]

5. COURTS **⚡83 — COUNTY COURTS — SHOWING OF JURISDICTION — NECESSITY.**

County courts are inferior tribunals, not proceeding according to the course of the common law, but confined to the authority given them by statute, and the grounds of their jurisdiction must appear affirmatively on the face of their records.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 135, 136, 138; Dec. Dig. **⚡**83.]

6. ELECTIONS **⚡280 — CONTEST — SERVICE OF NOTICE — STATUTE.**

Service of notice of contest of an election to the office of justice of the peace, as required by Rev. St. 1909, § 5924, apportioning jurisdiction of election contests in part to county courts, and providing that notice of contest shall be served 15 days before the term of court at which the election is to be contested, by delivering a copy thereof to the contestee, etc., is jurisdictional and essential to the validity of the proceeding, since the notice stands in lieu of and performs the functions of a writ and petition in an ordinary suit; and, where the jurisdiction of a court is made to depend upon the time of giving notice or taking an appeal, the requirement is peremptory.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 264; Dec. Dig. **⚡**280.]

7. ELECTIONS **⚡288 — CONTEST — NOTICE — AMENDMENT.**

An amendment may be made to a notice of contest of an election only where the court has obtained jurisdiction of the contest by proper notice to the contestee as directed by Rev. St. 1909, § 5924, since, unless the notice of contest has been served, giving the court jurisdiction, the court is without authority to make any order, except to dismiss the proceeding, and, upon proper application, grant the contestant an appeal.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 280-283; Dec. Dig. **⚡**288.]

8. ELECTIONS **⚡305(1) — CONTEST — JURISDICTION ON APPEAL.**

Where the county court was without jurisdiction over a contest of an election to the office of justice of the peace on account of the contestant's failure to serve notice of contest 15 days before the term at which the election was to be contested, as required by statute, the circuit court acquired no jurisdiction by reason of an appeal from the county court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 318; Dec. Dig. **⚡**305(1).]

In Banc. Prohibition by R. G. Ramsey against Hon. Peter H. Huck, Judge of the Twenty-Seventh Judicial Circuit and ex officio Judge of the Circuit Court of St. Francois County, and George W. Covington. Preliminary writ of prohibition made absolute.

Edward A. Rozler, B. H. Boyer, and Clyde Morsey, all of Farmington, for relator. Benj. H. Marbury, of Farmington, for respondents.

WALKER, J. Prohibition. Relator invokes this writ to prevent the circuit court of St. Francois county from entertaining jurisdiction in a proceeding to contest the right to the office of justice of the peace.

At the general election held in November, 1914, Ramsey, the relator, and Covington, one of the respondents, were opposing candidates for the office of justice of the peace in one of the townships of said county. Ramsey at said election received the greater number of votes, a commission was delivered to him, and he was inducted into office. On November 25, 1914, Covington notified Ramsey, by delivering to him a copy of the petition in the proceeding, that "at the next term of the county court of St. Francois county, to wit, on Monday, December 7, 1914, he would contest Ramsey's right to said office." On said day Ramsey, appearing to plead to the jurisdiction of the court, filed a motion therein which alleged, among other things, that the return of the sheriff of the service of notice of contest showed upon its face that it was served on the 25th day of November, 1914, and that he was, in fact, served on said day, or only 12 days before the next term of said county court, whereas section 5924, R. S. 1909, provides that in all such matters a notice shall be served upon the contestee 15 days before the term of court at which such election is to be contested, and hence said county court was without authority to hear said cause. Covington thereupon asked leave to amend the notice which constituted the petition by striking out these words "on Monday, December 7, 1914," and by inserting in lieu thereof the following: "And on the first day of said term which shall be held 15 days or more after November 25, 1914, or the day of the service of this notice of contest." The court refused to permit this amendment to be made, and sustained Ramsey's plea to the jurisdiction, and dismissed the proceeding. Covington thereupon applied for and was granted an appeal to the circuit court. Upon

the perfecting of this appeal Ramsey appeared therein and challenged the jurisdiction of the circuit court to hear said cause on the ground that the county court had no authority to hear same and that the circuit court had acquired none by reason of the appeal. This motion was by the circuit court overruled, whereupon Ramsey applied for the writ herein.

[1] It has been questioned whether this is the proper forum in which to invoke this writ in a case of this character. The Constitution (section 8, art. 6, Amend. 1884) gives express power to this court to issue the writ to regulate the actions of the Courts of Appeals, but such power is not expressly given in regard to other inferior tribunals; the provision in regard thereto being as follows:

"The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same." Section 3, art. 6, Const. Mo.

However, the general words "and other original remedial writs" were held in *Thomas v. Mead*, 36 Mo. 232, to authorize the issuance of the writ of prohibition against a circuit court in a case involving title to the office of clerk of the Supreme Court. This ruling has been followed in a number of subsequent cases in which the court has supervised circuit courts and other inferior tribunals; the last expression on the subject being found in *State ex rel. v. Williams*, 221 Mo. loc. cit. 256, 120 S. W. 740.

Whatever individual opinion may therefore be entertained as to the correctness of the construction of the rule in regard to general words following particular words as announced in *Thomas v. Mead*, supra, must be subordinated to the conclusion reached in that case and subsequent cases, and discussion in regard thereto is foreclosed, and the right of the court to issue the writ in the exercise of its supervisory control over any inferior tribunal is completely established.

[2] The proceeding sought to be prohibited involves title to the office of justice of the peace. The Constitution provides that the Supreme Court shall have exclusive jurisdiction "in cases involving title to any office under this state." Section 12, art. 6, Const. Mo.; section 5, art. 6, Amend. 1884. This provision means any office held under the authority of the laws of this state, and has been held to apply to give this court jurisdiction in contests involving title to the following offices: Clerk of the circuit court (*State ex rel. Blakemore v. Rombauer*, 101 Mo. loc. cit. 502, 14 S. W. 726); members of a school board (*State ex rel. Macklin v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502; *State ex rel. Rogers v. Rombauer*, 105 Mo. 103, 16 S. W. 695; *State ex rel. Walker v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616); school directors (*State ex rel. Sutton v. Fasse*, 189 Mo.

532, 88 S. W. 1; *State ex rel. Frisby v. Stone*, 152 Mo. loc. cit. 204, 53 S. W. 1060; *State ex rel. Frisby v. Hill*, 152 Mo. 234, 53 S. W. 1062; and county collector (*Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653); and certain township officers (*Macrae v. Coles*, 183 S. W. 578). Under these rulings the conclusion is authorized that the office of justice of the peace is one held under the authority of the laws of this state, and hence this court has jurisdiction.

[3] The court's power in the premises, as defined in the cases cited, is based primarily upon its jurisdiction to hear and determine upon appeal the original cases out of which the application for the writs arose. Such appellate jurisdiction, however, is not a prerequisite to the right of this court to issue the writ herein. *State ex rel. v. Eby*, 170 Mo. loc. cit. 516, 71 S. W. 52.

[4] We come now to a consideration of the jurisdiction of the county court to hear and determine the contest proceedings upon which the application for the writ herein is based. The Constitution provides in this regard that:

"The General Assembly shall, by general law, designate the court or judge by whom the several classes of election contests shall be tried," etc. Section 9, art. 8, Const. Mo.

Under this provision section 5924, R. S. 1909, was enacted, giving county courts, except in cities now or hereafter attaining 300,000 inhabitants, jurisdiction in contests of township offices, and section 7372, R. S. 1909, which provides that in contested elections for justice of the peace the county courts shall decide same. Under these sections county courts are given power to hear and determine contested elections for the office of justice of the peace. *Taafé v. Ryan*, 25 Mo. App. 563.

[5] Such courts being therefore clothed with general power herein, it remains to be determined whether the statute prescribing the procedure relative hereto has been complied with, because to the statute alone, upon which contests of elections are solely based, we must look to determine the regularity of the court's proceeding. *State ex rel. v. Hough*, 193 Mo. loc. cit. 645, 91 S. W. 905. Furthermore, the fact must be borne in mind that county courts are inferior tribunals, not proceeding according to the course of the common law, but confined to the authority given them by statute, and that the grounds of their jurisdiction must appear affirmatively on the face of their records. *Ex parte O'Brien*, 127 Mo. 477, 30 S. W. 158; *Strouse v. Drennan*, 41 Mo. 289; *State ex rel. v. Johnson*, 138 Mo. App. 306, 121 S. W. 780.

[6] It is contended here that the notice of the contest of election was insufficient. The statute requires, among other things, that "the notice shall be served fifteen days before the term of court at which the election shall be contested," etc. The object of the statute in requiring the notice has two dis-

inct purposes. One is to bring the party in to court, and the other to set forth and advise the court of the grounds of the contest. The notice therefore stands in lieu of and performs the functions of a writ and a petition in an ordinary suit. *State ex rel. Wells v. Hough*, 193 Mo. loc. cit. 642, 91 S. W. 905; *Hale v. Stimson*, 198 Mo. loc. cit. 145, 95 S. W. 885. Possessed of this importance, the service of the notice as required by law becomes jurisdictional, and is absolutely essential to the validity of the proceeding. *State ex rel. Sale v. McElhinney*, 199 Mo. loc. cit. 78, 97 S. W. 159. The rule is well established and uniform in its operation that, where the jurisdiction of a court is made to depend upon the time either of the giving of notice or of taking an appeal, the requirement is peremptory. In *Castello v. Court*, 28 Mo. 259, we held that the notice required in a contested election case must be given within the time prescribed by the statute, and in *Wilson v. Lucas*, 43 Mo. 290, which was a contest of an election to the office of circuit judge, the statute required a certain number of days' notice of the contest, and the petition was dismissed because the requirement was not observed. In *Bowen v. Hixon*, 45 Mo. 340, involving a contest for the office of county clerk, the notice of the contest required by the statute was not complied with, and the proceedings were held to be invalid. In *Adcock v. Leconte*, 66 Mo. 40, a contest for the office of county collector, the proceeding was dismissed on account of a defective notice. In *State ex rel. v. Ross*, 245 Mo. loc. cit. 46, 149 S. W. 451, Ann. Cas. 1913E, 978, it was held that notice of the contest within the time designated in the statute was one of the rights of the contestee, and a failure to give same forfeited the right to the contest.

[7, 8] In the instant case the notice of contest was served on the contestee on the 25th day of November, 1914, in which he was notified that at the next term of the county court of St. Francois county, to be begun on Monday, the 7th day of December, 1914, a proceeding would be begun and prosecuted in said court by contestant to determine the contestee's right to the office of justice of the peace. From these facts it is evident that the contestee was only given 12 days' notice of said contest, which was not sufficient under the statute, and it was so held by the county court. It is contended, however, that this defect was cured by the amendment proposed to be made after the filing of the contestee's plea to the jurisdiction, which attempted to fix the time of hearing of the proceeding at 15 days from the date of the service of the notice on the contestee. This proposed amendment was not permitted by the county court. It is only where jurisdiction has been obtained by proper notice in the manner pointed out by the statute that an amendment may be made to a notice

of contest. It was so held in *Nash v. Craig*, 134 Mo. 347, 85 S. W. 1001, which ruling was approved in *State ex rel. v. Hough*, 193 Mo. loc. cit. 650, 91 S. W. 905. The correctness of this ruling is evident from the nature of the proceeding. The notice constitutes the petition in the case. Jurisdiction is acquired by properly serving it upon the contestee. Unless it has been so served, the court is without authority to make any order in the premises except to dismiss the proceeding and upon a proper application to grant the contestant an appeal. The county court being without jurisdiction, the circuit court acquired none by reason of the appeal (*Tie & Tim. Co. v. Drainage Co.*, 228 Mo. loc. cit. 444, 126 S. W. 499; *Sidwell v. Jett*, 213 Mo. 601, 112 S. W. 56), and it should have so ruled by sustaining the contestee's motion to dismiss.

It is therefore ordered that the preliminary writ of prohibition issued be made absolute, and that the circuit court refrain from further exercise of jurisdiction herein. All concur.

STATE ex rel. WABASH RY. CO. v. ROACH,
Secretary of State. (No. 19904.)

(Supreme Court of Missouri. March 24, 1916.)

1. RAILROADS §194(1)—FRANCHISES—SALE OR MORTGAGE.

While a railway company's franchise or right to be a body corporate is not subject to barter and sale, its other franchises or grants of powers or privileges, including the right to do an intrastate business as a railroad, are subject to sale or mortgage and pass under a mortgage foreclosure sale.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 643; Dec. Dig. §194(1).]

2. RAILROADS §143—FRANCHISES—SALE OR MORTGAGE.

Where, pursuant to law authorizing such consolidation, a Missouri railroad corporation consolidated with other railroad corporations having a line of railroad running to the Mississippi river opposite the Missouri side of such river, the franchise right to do an intrastate railroad business in Missouri passed to the consolidated company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 392, 448-450; Dec. Dig. §143.]

3. RAILROADS §18 — FRANCHISES AND RIGHTS—STATUTORY PROVISIONS.

Acts 1850-51, p. 483, as amended by Act 1852-53, p. 323, and Acts 1865, pp. 89, 90, granting to a railroad company therein named, its successors and assigns, the franchises, rights, and privileges to locate, construct, maintain, and operate a railroad, granted it the right to do an interstate business upon the railroad which it was authorized to build and construct.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 39-44; Dec. Dig. §18.]

4. RAILROADS §18 — FRANCHISES AND RIGHTS—STATUTORY PROVISIONS.

The grant of the right of doing an intrastate business was a grant which the state could make to a railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 39-44; Dec. Dig. §18.]

5. CORPORATIONS — 31 — CHARTER AS CONTRACT.

The charter of a corporation is its contract with the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 101, 102; Dec. Dig. — 31.]

6. CORPORATIONS — 6 — GRANT OF FRANCHISES—CONSTITUTIONAL PROVISIONS.

Const. art. 12, § 1, providing that existing charters or grants of special or exclusive privileges under which a bona fide organization should not have taken place and business been commenced in good faith should thereafter have no validity, recognized the validity of corporate charters where the corporation was organized and the contemplated charter powers exercised.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 30-34; Dec. Dig. — 6.]

7. RAILROADS — 6 — GRANT OF FRANCHISES—CONSTITUTIONAL PROVISIONS — "POLICE POWER."

While the state cannot deprive itself of its police power, the grant of a right to construct and build a railroad and to do an intrastate railroad business thereover is not an exercise of the "police power" and does not contravene Const. art. 12, § 5, providing that the exercise of the police power shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 7; Dec. Dig. — 6.]

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

8. RAILROADS — 33(1) — FOREIGN COMPANIES — STATUTES — CONSTRUCTION AGAINST INVALIDITY.

Laws 1913, p. 179, § 1, providing that no railroad corporation except one incorporated under the laws of Missouri shall be authorized or permitted to carry passengers or freight from one point in the state to another point in the state, should be given a prospective rather than a retroactive construction, and construed as applying to railroads built after its enactment rather than as affecting railroads already operating, and should not be so construed as to make it contravene existing rights.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 70; Dec. Dig. — 33(1).]

9. RAILROADS — 19 — AMENDMENT OR REPEAL OF CHARTER—INTERFERENCE WITH CHARTER.

As the charter rights granted by the state to a railroad company to own and operate a railroad and do an intrastate business thereon are such as can be properly granted and do not pertain to the police powers, the state cannot, in the exercise of mere assumed police powers, pass a law violative of such charter rights.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 62; Dec. Dig. — 19.]

10. RAILROADS — 33(1) — RIGHT TO CONSTRUCT AND OPERATE — STATUTORY PROVISIONS.

Laws 1913, p. 179, § 1, providing that railroad corporations other than those incorporated under the laws of Missouri shall not be authorized or permitted to carry passengers or freight between points within the state, has no application to a corporation which in due course has acquired the right to own and operate a railroad for the doing of intrastate business granted by the state to its predecessor in title, prior to the enactment of such act, as, if so construed, it would violate the constitutional provisions against the taking of property rights without

due process of law and against the striking down of contract rights.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 70; Dec. Dig. — 33(1).]

11. CONSTITUTIONAL LAW — 48 — CONSTRUCTION AGAINST INVALIDITY.

A statute should be so construed, if possible, as to make it valid under all constitutional provisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. — 48; Statutes, Cent. Dig. § 56.]

12. CORPORATIONS — 636 — FOREIGN CORPORATIONS—POWER TO EXCLUDE.

A state, save where it has previously granted the right, can stop any foreign corporation at the state line.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. — 636.]

Woodson, C. J., dissenting.

In Banc. Original mandamus action by the State, on the relation of the Wabash Railway Company, against Cornelius Roach, Secretary of State. Alternative writ made peremptory.

James L. Minnis and Nagel & Kirby, all of St. Louis, for relator. John T. Barker, Atty. Gen., and S. P. Howell, Asst. Atty. Gen., for respondent.

GRAVES, J. Original action in mandamus against the Secretary of State. The relator, Wabash Railway Company, is a new corporation, organized under the laws of Indiana, in October, 1915, and more particularly under the act of March 3, 1865, of that state. The petition has been treated as and for the alternative writ, and a demurrer has been filed thereto, which reads:

"Now at this date comes the respondent, Cornelius Roach, Secretary of State of the state of Missouri, and, after entering his appearance and waiving the issuance of an alternative writ in this case, demurs to the petition of relator for the following reasons: (1) Because said petition does not state facts sufficient to constitute a cause of action. (2) Because it appears upon the face of relator's petition that relator is not entitled to the relief asked. (3) Because under the law of Missouri, as enacted by the Legislature of said state and approved April 16, 1913, relator cannot operate a railroad in the state of Missouri and transport passengers or freight from one point in the state to another point in the state unless relator is incorporated under the laws of the state of Missouri, and upon the face of relator's petition it appears that it is not thus incorporated. (4) Because under the laws of the state of Missouri relator is not entitled to a certificate to do business in the state of Missouri. (5) Because the laws of the state of Missouri do not authorize the formation of a corporation of a character similar to that of the relator. Wherefore, respondent prays the court to quash the alternative writ and to deny relator the relief asked and for such further orders as to the court shall seem just and proper."

The petition is one of great length, but counsel for relator has fairly summarized its pertinent features thus:

"The relator is a railroad corporation organized under the laws of the state of Indiana, and particularly under an act approved March 1, 1865, by which it was provided in substance and

in part: (1) That a railroad situated in Indiana and other states may be sold as an entirety under foreclosure of a mortgage, at one time and place. (2) That the purchasers at such a sale, by filing a certificate as therein provided, may form a new corporation and become a body corporation, 'with power to sue and be sued, contract and be contracted with, and maintain and operate the railroad in the said certificate named, and transact all business connected with the same.' (3) That 'such corporation shall possess all the powers, rights, privileges, immunities and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and all of the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this state, or of any state in which any part of said railroad is situated, not inconsistent with the laws of this state.' (4) That 'said corporation shall have capacity to hold, enjoy and exercise, within other states, the aforesaid faculties, powers, rights, franchises and immunities, and such others as may be conferred upon it by any law of this state, or of any other state in which any portion of its railroad may be situated, or in which it may transact any part of its business.'

"Relator was incorporated for the purpose of acquiring, owning, maintaining, and operating the Wabash Railroad, and acquiring, owning, and exercising the franchises pertaining to it.

"With a view to laying a foundation for our contentions, we will indicate briefly the facts stated in the petition.

"By the acts of 1851 (Acts 1850-51, p. 483), as amended by the act of 1853 (Acts 1852-53, p. 323), and the amendatory act of 1865 (Acts 1865, pp. 89, 90), the state of Missouri created the North Missouri Railroad Company, and granted to it, its successors and assigns, the franchises, rights, and privileges to locate, construct, own, maintain, and operate a railroad as a common carrier for hire, and it accordingly thereafter constructed or acquired, maintained, and operated as a common carrier for hire substantially the lines of the Wabash Railroad, now existing in Missouri.

"On October 1, 1868, pursuant to express power conferred by said acts, the North Missouri Railroad Company mortgaged its railroad, franchises, rights, and privileges, which were sold, pursuant to said mortgage, to one Jessup, acting for himself and his associates, who, on January 2, 1872, conveyed said railroad, franchises, rights, and privileges to the St. Louis, Kansas City & Northern Railway Company (hereinafter called the 'Northern Company'), a Missouri railroad corporation organized for the purpose of acquiring, owning, maintaining, and operating said railroad as a common carrier for hire.

"On August 14, 1879, the Northern Company, pursuant to the provisions of what is now sections 3077 and 3078, R. S. 1909, entered into a contract of consolidation with the Wabash Railway Company, a consolidated corporation organized under the laws of the states of Illinois, Indiana, and Ohio, which owned substantially the lines of the Wabash Railroad east of the Mississippi river as they now exist, and the franchises, rights, and privileges to maintain and operate the same as a common carrier for hire. By virtue of this consolidation, the Wabash lines east and west of the river were consolidated or unified, so that the two railroads became a single, continuous railroad, and the rights, privileges, and franchises granted by the above states to the constituent companies were unified so that they pertained to each and every part of the continuous railroad, and the contract vested this road and the rights, privileges, and franchises pertaining thereto, in the consolidated corporation, the Wabash, St. Louis & Pacific Railway Company.

"On June 1, 1880, the Wabash, St. Louis & Pacific Railway Company, pursuant to express power, mortgaged its railroad, rights, privileges, and franchises, which were hereafter, pursuant to said mortgage, sold to a purchasing committee. The purchasing committee caused a railroad corporation to be organized under the laws of each of the states of Missouri, Illinois, Indiana, Michigan, and Ohio, and conveyed to each of said corporations the railroad, rights, privileges, and franchises local to the state in which it was organized.

"In May, 1889, these several corporations entered into a contract of consolidation pursuant to what is now sections 3077 and 3078, R. S. Mo. 1909, and the laws of said other states, and thereby formed the Wabash Railroad Company and vested in it the consolidated or continuous railroad and the unified rights, privileges, and franchises to own, maintain, and operate the same as a common carrier for hire.

"On December 26, 1906, the Wabash Railroad Company, pursuant to express power conferred by all of said states, mortgaged its railroad, rights, privileges, and franchises, and thereafter made default, and appropriate proceedings were instituted in the federal court at St. Louis, Mo., to foreclose the mortgage. A decree was entered on January 30, 1914, wherein it was adjudged that the mortgaged railroad, rights, privileges, and franchises 'were indivisible, of such a nature, and so situated' that they should be sold as an entirety, and they were, pursuant to said decree, sold as an entirety to a purchasing committee who organized relator corporation pursuant to the Indiana act hereinbefore set out. The purchasers assigned to relator their bid, and pursuant to the decree of foreclosure a special master conveyed to relator the Wabash Railroad and the rights, privileges, and franchises pertaining thereto.

"Thereafter, on October 23, 1915, on the coming in of the special master's report that the purchasing committee had assigned its bid to relator, and that he had, accordingly, conveyed the Wabash Railroad and franchises to relator, an order was entered, approving and confirming the master's report and adjudging relator to be the assignee of the purchasing committee.

"On November 1, 1915, relator entered into the possession, use, and enjoyment of the Wabash Railroad and the rights, privileges, and franchises pertaining thereto, and shortly thereafter tendered to the Secretary of State, for filing in his office, a copy of its charter or certificate of incorporation duly authenticated by the Secretary of State of the state of Indiana, together with a sworn statement under its corporate seal, setting forth the business in which it was engaged in Missouri, viz., that it owned the Wabash Railroad and the franchises pertaining thereto, was operating same as a common carrier for hire, and was exercising or would exercise all the rights and privileges vested in it by virtue of said special master's deed and by the law under which it was incorporated; and also a statement of the proportion of the capital stock represented by its property and business transacted in Missouri, and other statements required by law, and also tendered to the Secretary of State \$19,671.50, being the corporation tax and fees due from relator to the state of Missouri, and demanded that he issue to relator a permit or license to do business in Missouri. No point is made on the form of the statement, and it is agreed that the amount of money tendered is correct.

"The Secretary of State refused to file the papers and accept the money for reasons heretofore stated.

"It is also conceded that relator has kept its said tender to the Secretary of State good by insisting continuously on the filing of said documents and the acceptance of said money."

The facts well pleaded stand confessed by the demurrer as a matter of law. Among others, the following pertinent propositions are suggested: (1) Does the act of 1913 apply to this relator, and (2) if it does, is it violative of constitutional provisions?

I. The real foundation of respondent's objection to granting a license to relator is evidently our act of 1913 (Laws of 1913, p. 179), which reads:

"That no railroad corporation, whether steam, street, electric, transfer or terminal, except one incorporated and chartered in and under the laws of the state of Missouri, shall be authorized or permitted to carry passengers or freight of any kind from one point in this state to another point in this state."

[1, 2] The foregoing is section 1 of the act. Sections 2 and 3 of the act are penal in character, and provide penalties and fines as to violators of the act. It stands admitted by the pleadings that the predecessors in title to the railway lines involved here had the right or franchise (given them by this state) to do an intrastate business. The franchises of a railway company are divisible into two classes: (1) The mere right of being a body corporate; and (2) all other grants of power or privileges by the sovereign power. The first is not subject to barter and sale, but those rights and privileges falling within the second division, *supra*, are subject to barter and sale. In this case, among those rights of franchises was the right to carry passengers and freight from point to point in Missouri. In other words, was the right to do an intrastate business as a railroad. This franchise or right was subject to sale or mortgage along with the physical property. This right or franchise was first granted to the "North Missouri Railroad Company, its successor or assignors," by the state. Under a mortgage sale this right passed to Jessup and associates, who in turn assigned it to the St. Louis, Kansas City & Northern Railway Company. By law this corporation, a Missouri product, was authorized to consolidate with other corporations of like character, and in 1879 did consolidate with railroad corporations east of the Mississippi river, having a line running to such river opposite the Missouri side of such river. This consolidation was under the name of Wabash, St. Louis & Pacific Railway Company. The franchise right to do intrastate business passed to this consolidated company, both by virtue of our laws and our Constitution. By foreclosure sales these rights passed from the Wabash, St. Louis & Pacific Railway Company to the "Wabash Railroad Company," where they remained until in 1915, when, by virtue of a mortgage foreclosure sale, they passed to the relator herein.

That the franchise rights of the old North Missouri Railroad Company passed through Jessup to the St. Louis, Kansas City & Northern Railway Company has been twice held in this state. *Daniels v. St. Joseph, Kansas City & Northern Railway Co.*, 62 Mo. 43;

State ex rel. v. St. Louis, Kansas City & Northern Railway Co., 3 Mo. App. loc. cit. 193. It should be noted that this was a sale under a mortgage at which Jessup acquired the rights which he afterward conveyed. Besides these express authorities in this state, it seems to be the general rule that at a foreclosure sale, where the franchise rights have been conveyed by the mortgage, all such franchise rights will pass to the purchaser, save and except the mere right to be a corporation. *Daniels v. Railway Co.*, 62 Mo. 43; *State ex. rel. v. Railway Co.*, 3 Mo. App. loc. cit. 193. *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. loc. cit. 510, 5 Sup. Ct. 1009, 29 L. Ed. 244; *Julian v. Central Trust Co.*, 193 U. S. loc. cit. 106, 24 Sup. Ct. 399, 48 L. Ed. 629.

On December 26, 1906, the Wabash Railroad Company, then being possessed of the right, privileges, and franchise to do an intrastate railroad business in the state of Missouri, mortgaged such rights, privileges, and franchises, and these passed by the sale in 1915 to the relator. In other words, since the building of the North Missouri Railroad under the act of 1851, there has been a state grant to a right to do intrastate business over that particular railroad, and its after-acquired and constructed portions. This was a substantial property right, and has passed successively to the divers successors of the old railroad company, and is now vested in the present relator. Every step taken, by which the right of franchise has passed from one to the other corporation, has been taken by statutory authority. The corporations were all along authorized to mortgage their roadbeds and other property rights, including franchise rights. The Missouri corporation had both constitutional and statutory authority for consolidation. So that if the right to do an intrastate business is one not violative of the police power of the state, the relator here acquired a valuable existing and vested right. But more of this in another connection.

[3] II. Whatever else may be said of the legislative grant of rights to the predecessor in title to the relator here, it is clear that by these acts the state granted the original corporation the right to do an intrastate business upon the railroad it was given authority to build and construct. Not only so, but the original act (Acts of 1850-51, p. 483) further contemplated that the road to be built by the corporation then chartered by the Legislature would also do an interstate business, because in section 7 of the act after providing for the construction of the road from St. Charles, Mo., to the northern boundary line of the state, it is added:

"With a view that the same may be hereafter constructed northwardly into the state of Iowa, in the direction of Ft. Des Moines, in that state."

[4, 5] This valuable right of doing an intrastate railroad business was a grant which

he state could make. In other words, it was a proper subject-matter of a contract between the state and the corporation. The charter of a corporation is its contract with the state. *Gantt, J., in Mathews v. Railway Co.*, 121 Mo. loc. cit. 310, 24 S. W. 591, 25 L. R. A. 161, said:

"It is wholly unnecessary to review the decisions which sustain the view adopted in the Dartmouth College Case, that defendant's charter is a contract between it and the state. It has been uniformly followed by this court."

[8] As to grants made prior to 1875, the Constitution of that year expressly recognized the validity thereof. Section 1 of article 12 reads:

"All existing charters, or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place, and business been commenced in good faith, at the adoption of this Constitution, shall thereafter have no validity."

The converse would be the case where the corporation was organized and the contemplated charter powers exercised.

[7] It must, of course, be conceded that the state cannot by grant disrobe itself of its police powers, but the grant of a right to construct and build a railroad within her borders, and the further grant of the right to use such railroad in the transportation of passengers and freight, for hire, between points and places within this state, is not the exercise of the police power of the state. It has been said that such a power is an indescribable one, but we find no case where he grant to construct and use (within this state) a railroad has ever been held to be an exercise of the police power of the state. If the state by such grant, and in addition hereto, undertook to divest itself of the power to regulate such corporation in the use of the railroad, to the detriment of the health, safety, and general welfare of the public, then such attempted release of the power might be invalid; for our Constitution (article 12, § 5) says:

"The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state."

But this is not the case here. A grant of the right to do an intrastate railroad business does not of itself contravene this section of the Constitution. *Sloan v. Railroad Co.*, 61 Mo. 24, 21 Am. Rep. 397; *State ex rel. Haeussler v. Greer*, 78 Mo. 188-195; *Scotland County v. Railroad Co.*, 65 Mo. 123; *State ex rel. v. Laclede Gaslight Co.*, 102 Mo. loc. cit. 486, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789.

The control of common carriers under and by virtue of the police power is a totally different question. The general terms of the rule pertaining to control under the police power is well expressed in 8 Cyc. p. 874, thus:

"Common carriers have from the earliest time been controlled by police power; accordingly, railroad companies being allowed to charge only

reasonable rates, the Legislature may make a valid enactment that certain maximum rates shall not be exceeded; likewise railroad companies may be compelled to make connections with other railroads suitable to the convenience and safety of the public, and to obey many other kindred regulations."

[8] But these matters of regulation under a proper exercise of the police power do not cover the right of the state to grant the privileges to construct and operate a railroad in this state and to do intrastate business. This act of 1913 (Laws of 1913, p. 179) should be given a construction which would, if possible, save it from constitutional darts. In other words, it should be given a prospective rather than a retroactive construction. It should be construed and read as to railroads thereafter built, rather than as affecting railroads already operating in the state. It should not be so construed as to make it contravene existing rights. We have adopted this method of construction even as to constitutional provisions. *State ex rel. Haeussler v. Greer*, 78 Mo. 188, supra. We have no doubt that if a foreign corporation, without a railroad in this state, and without any previous grant of rights, by this state, should apply for admission to do business in this state, and ask to construct and operate a railroad in this state, that under this law it might be kept out of the state. But that is not this case.

[9] In the *Greer Case*, supra, *Haeussler*, the relator therein, was a stockholder in the German Savings Institution, and he and some other friendly stockholders tendered their votes for *Haeussler* as director of such corporation under the cumulative plan of voting provided for by section 6 of article 12 of the Constitution. The corporation was one created by legislative charter prior to the Constitution of 1875. Under this legislative charter, the other system of voting was provided for, and the respondent *Greer* was elected over *Haeussler*. The action was by quo warranto to test *Greer's* right to hold the office. This court, through *Henry, J.*, said that, whilst the language of the Constitution was broad enough to apply to all corporations, yet it should not be so construed as to give it retroactive action, when such would strike down existing contract or charter rights. So in the case at bar. This law should not be given an application or a construction which would strike down contract or charter rights. The relator in this case is the legal owner of certain charter rights granted by the state, i. e., the rights to own and operate a railroad in Missouri, and to do an intrastate business thereon. These rights are such as could be properly granted by the state, and do not pertain to the police powers of the state. *State ex rel. Laclede Gas Co.*, supra, and other cases cited. The state cannot in the exercise of mere assumed police powers pass a law violative of charter rights. In the *Laclede Gas Co. Case* (102

Mo. loc. cit. 486, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789) Sherwood, J., said:

"It is not to be doubted that there is a limit to the power of the Legislature to tie the hands of subsequent Legislatures in respect to the exercise of what is termed the 'police power,' thus it is said: 'No Legislature can bargain away the public health or the public morals.' Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079. But certainly there is a limit in this regard over which Legislatures and municipalities cannot pass; they cannot, in the exercise of assumed police powers, violate charter contracts and overthrow vested rights. On this subject, Judge Cooley aptly says: 'The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.' Cooley, Const. Lim. (5th Ed.) 712."

This and the other cases cited announce the proper general rules, but they may not accord fully with the present line of demarcation, between the police and other powers of the state. Some of these cases discuss rates allowed by state grant. The modern rule as to grants of this character is that they fall within the category of regulatory measures in the interest of the general public welfare, and therefore are within the police power of the state. But we repeat, the grant of the right to construct and own a railroad in Missouri and do an intrastate business thereon is not such a right as falls within the police power of the state.

[18] We hold therefore that the act of 1913 should not be given a construction which would make it strike down the vested rights of relator or other corporations similarly situated. We hold that it has no application to a corporation which in due course has acquired the right to own and operate a railroad in this state for the doing of intrastate business, which right to so own and operate such road has been previously granted by this state.

III. If this act of 1913 is to be construed as contended for by the state officials, it would be violative of several constitutional provisions. It would be the taking of valuable property rights without due process of law. It would be the striking down of contract rights in violation of both the state and federal Constitutions. This relator, as to these contract rights, stands in no different situation than do the other foreign corporations now owning and operating railroads in this state. The other foreign corporations now operating railroads in this state in intrastate business are doing so by virtue of grants heretofore made. The only difference is (and in law that is no difference) the relator has but recently acquired these rights, whilst the others have possessed them for some years.

[11, 12] It is a fundamental rule that a

statute should be so construed, if possible, as to make it valid under all constitutional provisions. As previously said, if a foreign corporation, possessed of no contract or charter rights from this state, should apply for license to do business in this state, and to construct and operate a railroad therein, the act of 1913 would apply and prevent such a corporation from coming into the state. The state, save where it has previously granted the right, can stop any foreign corporation at the state line. The law, whether wise or otherwise, seems to have that effect; but it should not be construed to apply to corporations owning or legally acquiring railroads already in the state, where, in the acquisition of them, they also acquire the franchise right to do an intrastate as well as other business in the state. We so construe this act. To otherwise construe it would make it violative of more than one constitutional provision, both of state and federal Constitutions.

It follows that the alternative writ of mandamus should be made peremptory, and the respondent herein required to accept and receive the license fees tendered and issue to relator a license to continue the business of its railroad in this state. It is so ordered.

All concur, except WALKER, J., absent and WOODSON, C. J., who dissents in opinion filed.

WOODSON, C. J. (dissenting). That portion of the plaintiff's railway lying in this state was constructed and owned by a Missouri corporation, and was so owned at the date of the adoption of the Constitution of this state in 1875; and, that being so, the plaintiff and those through whom it claims took that part of the road located in this state with all the rights, powers, duties, burdens, and limitations granted and imposed upon it by the Constitution and laws of this state.

At the date of the consolidation of the roads mentioned in the majority opinion, under the name of the Wabash Railway Company, section 18 of article 12 of the Constitution of 1875 was in full force and effect. It reads as follows:

"Sec. 18. Consolidation with Foreign Companies.—If any railroad company organized under the laws of this State shall consolidate, by sale or otherwise, with any railroad company organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation; but the courts of this state shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place. In no case shall any consolidation take place, except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law."

According to the plain letter and spirit of this constitutional provision, the company which owned that part of the road lying within this state at the date of said consolidation remained and still remains a domestic corporation, and its property, rights, and duties, in so far as intrastate transportation is concerned, remain subject to and are govern-

ed by the laws of this state to the same extent as if the consolidation had never taken place.

The consolidations mentioned become new companies, so is this reorganized company. *State ex rel. v. Keokuk & W. Ry. Co.*, 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222; *State ex rel. v. Chicago, Burlington & K. C. Ry. Co.*, 89 Mo. 523, 14 S. W. 522. But that is not true regarding interstate commerce, for under both the state and federal Constitutions, as well as under the statutes of this state authorizing the consolidation of the railroads of this state with those of other states, those parts of the consolidated road situate in Missouri are authorized and required to carry interstate commerce; and consequently the act of 1913 (*Laws of 1913*, p. 179) does not and could not apply to that character of commerce. *State ex inf. v. Standard Oil Co.*, 218 Mo. 1, loc. cit. 376, 116 S. W. 902. In other words, in my opinion, in construing said act of 1913, we must view that part of plaintiff's road located in this state from two aspects, viz.: First, that as a matter of law the Missouri company still owns the physical property and possesses all the rights, powers, and privileges it possessed, and owes all the duties to the public imposed upon it prior to the date of its consolidation with the plaintiff, in so far as intrastate shipments are concerned; and, second, that said company, property, rights, powers, and privileges are subjected by said statutes and constitutional provisions to the paramount duty of carrying interstate commerce but not totally destroyed, as I understand the majority opinion in effect holds.

If I am correct in the foregoing observations, then the act of 1913 is only applicable to intrastate commerce and is valid in that regard.

I am therefore of the opinion that the alternative writ of mandamus should be quashed.

BOARD OF EDUCATION OF CITY OF ST. LOUIS v. CITY OF ST. LOUIS et al.
(No. 17596.)

(Supreme Court of Missouri, Division No. 1,
March 30, 1916.)

MUNICIPAL CORPORATIONS — 601 — POLICE POWER — BUILDING REGULATIONS — INDEPENDENT BOARDS OF EDUCATION.

Under Const. art. 11, § 1, for establishing a public school system by the General Assembly, and the act of 1897 (*Laws 1897*, p. 220), amended by act of May 28, 1909 (*Laws 1909*, p. 846), providing that cities of 500,000 inhabitants shall constitute a school district and have certain corporate powers, including the care of school buildings, their ventilation, etc., a regulation of the St. Louis board of public improvements as to building ventilation does not apply to the construction of school buildings, notwithstanding the city charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1333; Dec. Dig. 601.]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by the Board of Education of the City of St. Louis against the City of St. Louis and another. From a judgment for the plaintiff, defendants appeal. Affirmed.

William E. Baird, of St. Louis, for appellants. Robert Burkham, of St. Louis, for respondent.

BROWN, C. This suit was instituted April 11, 1912, against the defendant city and Stephen H. Gilmore, its supervisor of plumbing, to obtain an injunction restraining them from interfering with work in course of construction under contract for a new school building in said city to be known as the Horace Mann School. The contract provided for a system of vents from the water-closets known as "a continuous venting system, doing away with all local vents to the fixtures"; while a regulation of the board of public improvements of the city of St. Louis provided for a different system, requiring "sewer, soil, waste, and ventilation pipes to be arranged and constructed to admit of a free circulation of air from the fresh air inlet to each fixture trap and through the roof." It charged that the defendants threatened to apply the ordinances and rules of the city, which are fully set out, to this work, and cause the arrest of any and all of plaintiff's agents, servants, or employes who may go upon the premises under plaintiff's direction to prosecute said plumbing work, on the charge of violating said ordinances, rules, and regulations. There is no question raised as to reasonableness of the ordinances of the city or regulations of its board of public improvements, nor as to whether either system of venting is superior to the other, but the case is presented and discussed upon the broad proposition as to whether or not the board of education, in this particular, is subject to the ordinances and regulations of the city in this respect. A general demurrer to the petition was sustained, and, defendants declining to further plead, final judgment was rendered granting the injunction, and the case is here upon the defendants' appeal.

Section 26 of article 3 of the charter then in force provided, among other things, that the mayor and assembly shall have power, within the city, by ordinance not inconsistent with the Constitution or any law of this state or of this charter, to do the following things: In clause 2, to construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof; in clause 12, to provide for the safe construction, inspection, and repairs of all private and public buildings within the city; and in clause 14, to pass all ordinances not inconsistent with the provisions of the charter or the laws of the state as may be expedient in regard to

the peace, good government, health, and welfare of the city.

It also provides (section 3, art. 4) for a board of public improvements to consist of an elective president and five commissioners with certain prescribed powers, and adds the following provision (section 42):

"The municipal assembly shall provide by ordinance such additional duties of and requirements from the board of public improvements and its several members as it may deem necessary, and for the appointment by them of such assistants and employes as the demands of the several departments may require."

It was under these powers and ordinances passed in pursuance of them that the defendant superintendent of plumbing was appointed, and the rule related to the ventilation of water-closets which the city is now attempting to apply to the Horace Mann School was made.

When the framers of the present Constitution conferred upon the freeholders of the city the power to make their present charter, they provided with the most careful foresight (section 23, art. 9) that:

"Such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri, except only that provision may be made for the graduation of the rate of taxation for city purposes in the portions of the city which are added thereto by the proposed enlargement of its boundaries."

In the same Constitution, and in pursuance of the uniform policy of the state from the beginning, it was provided (section 1, art. 11) that:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly [not the freeholders of the city of St. Louis] shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years."

It was in obedience to this constitutional mandate that the act of 1897 (Laws 1897, p. 220), as amended by the act of May 28, 1909 (Laws 1909, p. 846), under which the public schools of the city of St. Louis have ever since been operated, was enacted. It provided that:

"Every city in this state now having or which may hereafter have five hundred thousand inhabitants or over, together with the territory now within its limits, or which may in the future be included by any change thereof, shall be and constitute a single school district, shall be a body corporate, and the supervision and government of public schools and public school property therein shall be vested in a board of twelve members, to be called and known as the Board of Education of * * *."

The powers and duties of this board were highly specialized in the act, and included the "general and supervising control, governing, and management of the public schools, and public school property in such city," the power to appoint such officers, agents and employes as it may deem necessary and proper, to make, amend, and repeal rules and by-laws for the government, regulation, and management of the public schools and

school property in such city, and exercise generally all powers in the administration of the public school system therein, and have all the powers of other school districts under the laws of the state except as herein provided. Particularizing further, it provides for the appointment by the board of education of a commissioner of school buildings who "shall be charged with the care of the public school buildings of such city, and with the responsibility for the ventilation, warming, sanitary condition and proper repair thereof, and shall prepare, or cause to be prepared, all specifications and drawings required, and shall superintend all the construction and repair of all such buildings." In the performance of these duties he was required to appoint such assistants as should be authorized by the board of education, one of whom "shall be a trained and educated engineer, qualified to design and construct the heating, lighting, ventilating, and sanitary machinery and apparatus connected with the public school buildings.

It will be noted that this act not only gives the board of education plenary power with reference to the construction, maintenance, and care of the public school buildings of the city, but descends into matters connected with the health and comfort of the pupils, including the designing as well as the construction and maintenance of the very appliance which are the subject of this litigation, ventilating and sanitary machinery and apparatus to be installed and maintained for the removal from the building of foul and noxious air necessarily generated in the use of the water-closets.

We have been favored by counsel on both sides with exhaustive and highly interesting briefs and arguments relating to the presumptions which should prevail in determining whether laws of the character of the charter of St. Louis and ordinances passed in pursuance of its terms are applicable to the sovereign, and whether they are repealed by general laws which do not in terms mention them. We cannot appreciate the application of either of these questions to this case. The first does not rest upon presumption, for the sovereignty itself has dealt with the subject of the construction and management of the property which is held and used by its agents for the highest governmental purposes, and we have to look no further than its legislative declarations to determine in whom the authority claimed by each of the parties to this proceeding is vested; and as to the second question so ably argued we have only to look to the converse of the proposition stated by counsel for appellant. The question is not whether a law of general application in the city of St. Louis impliedly repeals any of the provisions of a special act or charter for the government of that community, but it is whether the general charter yields to the provisions of a law having special application to particular matters and

things within the field of its operation. The statement of this question includes its answer.

It cannot even be claimed that there is a question in this case relating to the intention of the Legislature to apply the act of 1897 from which we have quoted to the schools of the city of St. Louis. By its terms it describes the city of St. Louis as the only community in the state in which it can apply. That it gives to the board of education through its lawfully constituted officers the power to design, construct, and maintain the very apparatus now in question is not and cannot be denied by any English-speaking person, and the constitutional power of the Legislature to enact it is unquestioned and unquestionable. We have carefully examined the authorities cited by the appellant, and find but one, *Pasadena School District v. Pasadena*, 166 Cal. 7, 184 Pac. 985, 47 L. R. A. (N. S.) 892, Ann. Cas. 1915B, 1039, which seems to question the view we have taken with reference to the effect we give to the statute giving authority to the board of education to supervise and govern public school property within the city and charging it through its officers possessing special qualifications for that purpose with the responsibility for the ventilating, warming, and sanitary condition of such building and the designing as well as the construction of the machinery and appliances for that purpose. In the California case the city by ordinances established an elaborate building code providing that only certain classes of buildings should be erected in certain fire districts and the inspection of plumbing construction and electrical wiring and equipment of buildings, the use of permits, and the collection of fees therefor, and making it unlawful to commence the erection of any building within the city other than those erected by the United States, unless plans and specifications are submitted to the building inspector and a permit for the erection thereof first obtained and the fee paid. The school district denied that it was subject to these regulations and an agreed case was submitted to the court to determine it. The court stated, in substance, that the Constitution of the state had invested the city with the powers to make these regulations, and that the sole contention of the school district was that it was an independent governmental agency of the state created under a general law which invested its trustees with the control and management of all school property within its limits, and hence insisted that its authority in that respect was not subject to be controlled by the police regulations of a municipality in which a part of the territory of the school district was embraced.

The trustees of the school districts were required by statute before building school-houses to submit the plans to the superin-

tendent of schools. The court stated that it was not claimed that these Code provisions expressly gave any power to the trustees or enjoined upon them the duty of adopting sanitary building regulations, or regulations in the nature of provisions for the public health and comfort and safety in the construction of such buildings, and held that in the general powers mentioned no such power was conferred, and that their power was not different from that possessed by private corporations and other owners of land to control it and plan and erect buildings thereon, and sustained the city in its contention that a permit was required.

It will be seen that the issue in that case was entirely different from the issue in this. Here the right to erect a building within the limits of the city is not involved, but only the question as to which of those two contending municipalities is clothed by statute with the right to determine interior sanitary arrangements for the ventilation of its water-closets, so as to promote the health and comfort of the pupils and teachers who should be its inmates. We think it is peculiarly appropriate that those charged with the custody and control of the pupils while in the building should also be charged with the protection of their health while engaged in their studies. The Legislature seems to have taken this view of the matter, and has, in our opinion, in unmistakable terms placed that responsibility upon the board. We therefore affirm the judgment of the circuit court.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

BUCK v. MEYER et al. (No. 17900.)

(Supreme Court of Missouri, Division No. 1.

March 30, 1916.)

COURTS \Leftarrow 231(2) — JURISDICTION — MISSOURI
COURT OF APPEALS.

A petition presenting two aspects; one for the recovery of \$5,000 and the other for the enforcement of an alleged oral agreement whereby deceased, if plaintiff came to the United States, was to adopt her as his child and make her his legal heir, was within the jurisdiction of the Kansas City Court of Appeals as presenting no matter of dispute beyond its pecuniary jurisdiction, and no question within the appellate jurisdiction of the Supreme Court as defined by the Constitution.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 648, 650; Dec. Dig. \Leftarrow 231(2).]

Appeal from Circuit Court, Monticau County; J. G. Slate, Judge.

Action by Anna C. Buck against Martin T. Meyer, administrator of the estate of John H. Asahl, deceased, and E. O. Nischwitz, executor of the last will of Anna Margaret Asahl, deceased. Judgment for plaintiff, and defendant Nischwitz appeals. Transfer-

red to the Kansas City Court of Appeals for final determination.

R. M. Embry and S. C. Gill, both of California, Mo., for appellant. Jay L. Oldham, of Kansas City, and Roy L. Kay, of California, Mo., for respondent.

BOND, J. I. Plaintiff sues to enforce an alleged oral agreement with her natural father that, if she would leave her home in Germany and locate where he lived in the United States, he would "adopt her as his child and make her his legal heir." Plaintiff alleges full performance on her part and nonperformance by her father, who has since died; wherefore she prays for a judgment of \$5,000 against the administrator of his estate. To this action the executor of the estate of the second wife of plaintiff's father was afterwards made a defendant. There was a joinder of issues, and after the hearing of proofs the trial court found for plaintiff, concluding his judgment, to wit:

"Wherefore it is considered, adjudged, and decreed by the court that plaintiff be and she is hereby declared a pretermitted heir of John H. Asahl, deceased, and entitled to a share as an heir in the estate of John H. Asahl, deceased."

An appeal was duly taken to this court.

II. It is obvious the appeal in this cause should have been taken to the Kansas City Court of Appeals, within whose territorial jurisdiction the judgment was rendered. The petition only presents two aspects, one for a recovery of \$5,000, the other for the enforcement of the oral agreement therein alleged. Neither of these purposes dislodges the jurisdiction of the Kansas City Court of Appeals, for they present no matter of dispute beyond the pecuniary limit of the jurisdiction of that court, nor do they present any question which falls within the appellate jurisdiction of this court as defined in the Constitution.

The cause is therefore transferred to the Kansas City Court of Appeals for final determination.

It is so ordered. All concur.

HASSLER v. MERCANTILE BANK OF LOUISIANA, MO. (No. 17008.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

1. MORTGAGES \Leftrightarrow 353—FORECLOSURE—NOTICE—SUFFICIENCY.

Though one of the owners of the equity of redemption, who had transferred his interest to a corporation, was not named in a trustee's notice of foreclosure sale, as required by Rev. St. 1909, § 2843, yet, as the representative of a corporation which had acquired the entire equity was present and a full and fair price was obtained, such omission did not render the sale void.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1050; Dec. Dig. \Leftrightarrow 353.]

2. EVIDENCE \Leftrightarrow 383(7)—MORTGAGES—FORECLOSURE—TRUSTEE'S DEED.

Under Rev. St. 1909, § 2858, recitals in a trustee's deed are prima facie evidence as to compliance with the statute relating to foreclosure of deeds of trust; and so, where not contradicted, are a sufficient showing of compliance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1668; Dec. Dig. \Leftrightarrow 383(7).]

Appeal from Louisiana Court of Common Pleas; B. H. Dyer, Judge.

Action by Augusta E. Hassler against the Mercantile Bank of Louisiana, Mo. From a judgment for defendant, plaintiff appeals. Affirmed.

John W. Matson, of Louisiana, Mo., for appellant. David A. Ball and Robert A. May, both of Louisiana, Mo., for respondent.

BLAIR, J. This is an appeal from a judgment for defendant in an action in ejectment, instituted in the Louisiana court of common pleas. In the view we take of the case it is unnecessary to state all the facts in detail, since plaintiff's case depends upon the question whether a sale under a trust deed was valid or invalid.

Plaintiff's husband, M. J. Hassler, and his brother, S. C. Hassler, formerly owned the land in suit, and executed a deed of trust thereon to secure a \$5,000 note they gave to defendant. In this trust deed plaintiff joined with her husband. Subsequently the equity in the property was conveyed to a corporation whose capital stock was almost all owned by plaintiff. A few shares were in her husband's name, and he was president of the concern and plaintiff was its secretary. Default in the payment of the \$5,000 note was followed by the advertisement and sale of the property in suit under the trust deed, and at this sale one McCune bought and later conveyed the property to defendant. Plaintiff's husband and agent, M. J. Hassler, president of the corporation owning the equity, attended the sale. S. C. Hassler, one of the signatories of the trust deed, but who had conveyed his interest in the equity to the corporation mentioned, is not shown to have been present at the sale. The amount bid by McCune was the full and fair value of the property sold, and this sum was credited on the note secured, leaving an unpaid balance of several hundred dollars. By a subsequent transfer of other property and all the stock of the corporation mentioned, its books and papers, and certain personal property, this unpaid balance was extinguished and the note fully paid. Subsequently certain sales of the property in suit were made under judgments against the corporation obtained in actions begun about the time of the transfer of the corporate stock to defendant, service being had upon M. J. Hassler as president of the corporation. One of these judgments was upon a claim by plaintiff for an alleged

dividend declared some years previously. M. J. Hassler furnished the data for the institution of this suit and then was served as president of the defendant corporation. The other judgment is also subject to some suspicion. The title acquired under these sales is of no value unless the trustee's sale is void.

[1] Plaintiff contends the trustee's sale was and is a nullity because the name of S. C. Hassler, one of the grantors in the deed of trust, was omitted from the notice. Section 2843, R. S. 1909, requires that:

"Such notice shall set forth the date and book and page of the record of such mortgage or deed of trust, the grantors, the time, terms and place of sale, and a description of the property to be sold, and shall be given by advertisement, inserted, * * *" etc.

The question is whether, under the section, the omission from the notice of sale of the name of one of two grantors renders void the sale, all other requirements being met, the person whose name has been omitted having parted with his equity and the representative of the owner of the entire equity being present at the sale, a full and fair price being obtained for the property, and the balance of the secured note afterward being paid so that the person whose name was omitted from the notice is no longer liable, directly or indirectly, for any sum by reason of his signature on the note secured. We have no hesitancy in saying the omission of S. C. Hassler's name from the notice in the circumstances in no way affects the validity of the trustee's sale, and the full title passed thereby to McCune and by his deed now resides in defendant.

The principle necessitating this conclusion was substantially approved in *Trust Co. v. Ellis*, 258 Mo. loc. cit. 708 et seq., 167 S. W. 974. In that case the trustee's notice of sale omitted to give the book and page of the record of the trust deed, and this court held the facts of the case failed to show loss or injury on account of the omission and declared the sale valid. In this case the owner of the equity, the corporation, was represented at the sale by its president; the public was advised sufficiently, since the book and page of the record was given and a reference thereto disclosed the deed of trust; full value was bid and paid for the property. S. C. Hassler no longer owned the equity, and was in no wise injured by the sale, since he had no equity to protect, and since, also, the subsequent payment of the balance due on the notes entirely extinguished his obligation. In accordance with the ruling in the case cited, we hold the sale valid. We are aware there are decisions in other states rigidly holding trustees to exact compliance with statutes as to notice, but this court has long adhered to the rule announced in the *Ellis* Case and sees no good reason for departing from it.

[2] The trustee's deed is criticized somewhat, but an examination of it discloses it

contains language apt to convey the entire title. Neither is there any substance in the suggestion that there should have been further evidence of the time during which the notice was published. The recitals in the trustee's deed showed compliance with the statute and were not contradicted. This was sufficient. Section 2858, R. S. 1909.

The judgment is affirmed. All concur.

GAREY v. JACKSON. (No. 17890.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

1. LIBEL AND SLANDER \Leftrightarrow 123(1) — TRIAL — QUESTIONS FOR JURY.

In a slander suit it is the duty of the court by appropriate instructions to advise the jury as to the law of the case, and the duty of the jury to pass upon the facts under the law as declared by the court.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 356; Dec. Dig. \Leftrightarrow 123(1).]

2. LIBEL AND SLANDER \Leftrightarrow 123(1) — TRIAL — QUESTIONS FOR JURY.

In a slander suit it is just as much the duty of a trial court to direct a verdict for defendant where there is no substantial evidence sustaining the plaintiff's case, as it was under the same circumstances at common law.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 356; Dec. Dig. \Leftrightarrow 123(1).]

3. JURY \Leftrightarrow 34(3) — RIGHT TO JURY TRIAL — RESTRICTION OF FUNCTIONS OF JURY.

It is not a deprivation of the right of jury trial protected by Const. art. 2, § 23, for the trial judge to err in withholding evidence from or in submitting it to a jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 235; Dec. Dig. \Leftrightarrow 34(3).]

4. COURTS \Leftrightarrow 231(13) — APPELLATE JURISDICTION — MISSOURI SUPREME COURT — RIGHT TO JURY TRIAL.

Merely erroneous withholding evidence from or submitting it to a jury is not such infringement of the constitutional right to jury trial as to give the Supreme Court jurisdiction in a case.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 658; Dec. Dig. \Leftrightarrow 231(13).]

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Action by C. E. Garey against C. M. Jackson. From a judgment for plaintiff, defendant appeals. Transferred to St. Louis Court of Appeals.

On May 17, 1911, plaintiff instituted in the circuit court of Boone county, Mo., an action for slander. By stipulation the venue was changed and the cause sent to Audrain county, where an amended petition was filed, and on which the cause was finally tried.

The amended complaint alleges that defendant, a member of the medical faculty of the State University at Columbia, Mo., was the president of the board of directors of a corporation operating a book and stationery store, known as the "University Co-operative Store," and that plaintiff was the

owner and operated a book and student supply store, known as the "Missouri Store." Without further inducement, colloquia, or extrinsic averments, it charges that at a public meeting held in the auditorium of the University on December 8, 1910, the defendant uttered and published of and concerning the plaintiff and his methods of business as proprietor of the "Missouri Store," the following false and defamatory words, viz.:

"That about two years ago, in the summer when the students were away, Mr. Garey, who was then the manager of the student co-operative store, which was conducted for and owned by the University body, resigned his position and opened up a rival store, taking with him a quantity of secondhand books; he, Garey, deserted the cause of the students, and expressed a determination to put the Co-operative Store out of business altogether, but Mr. Maddox after a short time was persuaded to take the management of the Co-operative Store; that Mr. Maddox with all his faults is human, but he is certainly not the sort of a man to desert the students' interest and go over and start an opposing store and attempt to injure the interests of the students in every way possible. That it was made clear to the board that, under the plan of issuing stock broadcast, some unscrupulous person might buy enough of the available stock to secure a controlling interest in the business, and in that way injure the interests of the students. As a matter of fact there was in reality an attempt of that sort made. That we thought the Missouri Store ought to be satisfied with the profits to be gotten out of the café and confectionery business. The Missouri Store has not been satisfied, and they insist on war. Mr. Garey said to me in the presence of witnesses not less than two weeks ago that it was still his determination to put the Co-operative Store out of business. Now what is he so anxious to put the Co-operative Store out of business for?"

"Here is a man asking for your patronage and at the same time trying to put you out of business. * * * If you do not like the Co-operative Store or its management, do not go to its competitors and enemies and ask them about it. The Co-operative Store has a shrewd and unscrupulous enemy."

The complaint contains numerous innuendoes not necessary to mention at this time. It concludes with the general averment that the defendant thereby charged the plaintiff with the larceny of certain secondhand books, and with being unscrupulous in his trade and business of running and operating the Missouri Store.

Defendant's answer pleaded: First, a general denial; second, that the words were true in the sense that the plaintiff had taken advantage of his position as manager of the Co-operative Store to purchase secondhand books for its rival and competitor, the Missouri Store; third, that the statements were made in good faith at a business meeting of the students financially interested in the Co-operative Store and its business.

The reply was a general denial.

In order to determine whether this court has jurisdiction over the cause by appeal, we will adopt, as a matter of convenience, appellant's theory as to what occurred at the trial at the June term, 1913, of above court, as follows:

"That some 10 years before, a co-operative store was organized at the University for the purpose of selling to students text-books and other student supplies at low prices. This concern was incorporated as the University Co-operative Store, with a capital stock of \$2,000, divided into shares of \$1 each, which were sold to the students. The plaintiff, Garey, was employed as the business manager of this concern, and managed it quite successfully for a number of years. After a few years the original shareholders graduated or left school, and became so scattered that it was becoming difficult to keep up the organization. Garey himself suggested a further danger that some enterprising individual might buy enough of this scattered stock to obtain control, and thus run the business for profit instead of on a co-operative basis. Accordingly, a plan was devised and carried out of getting the stock assigned to trustees for the benefit of the body of students; that directors, consisting in part of students and in part of faculty members, were nominated each year by a mass meeting of the students, and formally elected by the trustees holding the stock. The store did a large annual business, but was not operated for profit. In the early part of 1909 the management of the business had been criticized by some of the student publications and the solvency of the concern questioned. The board of directors accordingly called on Garey for a full financial statement, and at the same time temporarily stopped the purchase of books, etc., until the condition of the store could be determined. In a short time the financial condition was found satisfactory and the business continued as usual. Garey claimed that he had no notice to go ahead with purchases, but admits that he did make quite a number of purchases of goods as they were needed after this time.

"About the same time, in the early spring of 1909, the board decided to change Garey's compensation from a commission to a salary basis, and were negotiating with him on this subject for the next year. Whether Garey took offense at this action of the board, or merely desired to start in business for himself, is not clear; at any rate, in the early spring of 1909, he quietly began the organization of a new corporation to deal in books and student supplies.

"It had been the practice at the close of each school year for the management of the store, in connection with a firm of secondhand dealers, to advertise to buy the books which the students had just used. In this way the store obtained what secondhand books it needed for the next year and any surplus was taken by the secondhand dealer. At the end of May, 1909, Garey had the usual notice published that the Co-operative Store would buy secondhand books, and the board of directors took it for granted that he would secure a supply for that store as usual. Garey bought no books for the Co-operative Store; but did at this sale secure a supply for the new concern which he was then secretly organizing. There is some controversy as to the amount of the books thus obtained, but none as to the fact that he secured several hundred for himself, and none for the Co-operative Store.

"These details appear to be necessary in order to understand the subsequent controversy.

"About the last of June, Garey resigned his position as manager, and soon completed the organization of a new corporation, known as the Missouri Store Company, in which he and some four or five others became the first stockholders. When a new manager was secured for the Co-operative Store, he discovered the fact that Garey had not renewed its stock of secondhand books, but had cornered the supply for the new store. During the fall of 1909 and the spring of 1910 there was a sharp fight on between the old and the new concern. The plaintiff Garey gives the following account of this

period in his cross-examination: 'Well our prices was cut the lower; we cut prices. Q. You cut prices and had a commercial war that year? A. You may call it that. Q. You were trying if you possibly could to take all the business away from them and force them out of business? A. I would have done so if I could. Q. Each one was making its boast that it was going to bust the other—that's a fact, isn't it? A. Yes, sir; I expect it is.'

"This was the state of affairs between the business managements of the two store companies when a meeting of students was held at the University on December 6, 1910, to nominate a new board of directors for the Co-operative Store. The defendant as chairman of the old board, presided at the meeting, and as a preliminary to the nomination of directors, made a 15 or 20 minute talk, in which he explained the origin and organization of the Co-operative Store; the interest of the students in it; Garey's former connection and his present hostility. The language complained of was used in this speech. Garey had his stenographer (a student who did stenographic work) to report the proceeding. The stenographer reported the proceedings, and Garey sent a copy of the speech thus reported to the defendant.

"According to this stenographic report, which is admitted to be substantially correct, the defendant made the following statement in reference to the secondhand book deal and Garey's resignation: 'Said it was a matter of common knowledge that about two years ago, during the summer, when the students were away, Mr. Garey, who was then manager of the Co-operative Store, resigned his position and opened up a rival store, taking with him a quantity of secondhand books, but whether he took them in a proper manner he could not say; or, in other words, he (Garey) deserted the cause of the students, and expressed a determination to put the Co-operative Store out of business. * * * The Co-operative Store is a public institution. Do not criticize its managements, its goods, etc., but if you are not satisfied with its directors, its management or its manager, say so, and elect new ones. * * * The Co-operative Store has a shrewd and unscrupulous enemy.'

"Plaintiff was permitted to show by his stenographer, and his business associate, Orr, that they understood the words to charge plaintiff with stealing. All the other witnesses simply understood the language to mean that there was some dispute about the books and that the speaker did not think that Garey had a right to them. The defendant frankly admitted using substantially the language reported by the stenographer, but disclaimed any intention of charging the plaintiff with larceny.

"The court refused to direct a verdict for defendant, and refused to charge, as requested, that section 28, art. 2, of the Constitution of Missouri, preserved the common-law functions of the judge and the jury, and that the construction of the language set out in the petition was a question for the court, and that the jury could not construe the words as imputing the crime of theft or larceny.

"The instructions given for the plaintiff defined larceny in general terms and left it to the jury to find whether the words imputed such offense. They likewise informed the jury that it was actionable to charge a man with being unscrupulous in his trade or business, and left it to the jury to find whether the language contained this imputation.

"The jury returned a verdict for plaintiff for \$2,250, and after an unsuccessful motion for a new trial, the defendant has brought the case to this court on the ground that section 28, art. 2, of the Constitution of Missouri, has preserved the common-law functions of the judge and jury, and therefore he was entitled to have the words alleged construed by the court as a question of

law, instead of by the jury as a question of fact."

Respondent filed herein a motion to transfer this cause to the St. Louis Court of Appeals, on the ground that this court has no jurisdiction over the case, as the amount of the judgment recovered was less than \$7,500, etc. Appellant filed suggestions in opposition to respondent's motion supra. Said motion to transfer and the suggestions in opposition to same were submitted with the case.

E. W. Hinton, of Chicago, Ill., and McBaine & Clark, of Columbia, for appellant. J. L. Stephens, of Columbia, E. S. Gantt, of Mexico, Mo., and Fauntleroy, Cullen & Hay, of St. Louis, for respondent.

RAILEY, C. (after stating the facts as above). I. It is asserted by appellant, and denied by respondent, that this court has jurisdiction of the cause. In support of his contention, appellant relies upon the action of the trial court in refusing, at the close of all the evidence, his instruction numbered two, which reads as follows:

"The court instructs the jury that section 28, art. 2, of the Constitution preserves the respective functions of the judge and jury as defined by the common law in actions for slander, and that under the law the jury cannot determine or pass upon the meaning of the words alleged to have been spoken by the defendant, but that the meaning of such words is a question exclusively for the court; and the court accordingly instructs the jury that the words set out in the petition in this case do not impute to or charge the plaintiff with the crime of theft or larceny, and the jury cannot so construe them."

It is not claimed by defendant that there was any irregularity in the selection and impaneling of the jury which tried this cause, nor does it appear that any of said jurors were not qualified to hear and determine the case. Furthermore, the record discloses that the jury received the law, as declared by the court in the instructions given, and passed upon the facts in the light of the law, as thus declared.

If the case had been tried under the common law, the jury would have had the same office to perform as in the case at bar. It is just as much the duty of the trial court now, as it was at common law, to direct a verdict in favor of defendant, if the facts in the case warrant it. So that appellant's real complaint is based upon the action of the trial court in failing to tell the jury that the facts set out in the petition did not state a cause of action against defendant. An inspection of the record will disclose the above to be the real ground of complaint.

At the commencement of appellant's case, the following occurred:

"Objection by Mr. Hinton: If the court please, I desire to make objection to the introduction of any testimony, for the reason that the petition fails to state facts sufficient to constitute a cause of action, and for the further reason that under the opening statement of the attorney for the plaintiff it appears that the

words were not actionable, and no cause of action.

"Mr. Hay: Counsel for the plaintiff at this time would like to request the gentleman to point out the specific defects in the petition so the court may pass on it.

"The Court: I take the objection to be a general one. The objection will be overruled.

"To which ruling of the court defendant then and there by his counsel duly excepted and saved his exceptions."

Here was a ruling of the court, whether right or wrong, to the effect that the petition contained facts sufficient to constitute a cause of action against defendant.

At the conclusion of appellant's case, defendant asked the court to declare the law as follows:

"The court instructs the jury that under the pleadings and the evidence in this case, the verdict must be for the defendant."

This instruction was refused by the court and an exception saved. In thus ruling the court not only held that the petition stated a good cause of action, but that the evidence warranted the court in submitting the case to the jury. Again, at the conclusion of all the evidence in the case, the defendant asked the court to declare the law as follows:

"At the close of all the evidence the Court instructs the jury that the verdict must be for the defendant."

This instruction was likewise refused, and an exception saved. The court for the third time held, that the petition stated a good cause of action, and for the second time held, that the plaintiff was entitled to go to the jury on the facts presented at the trial.

It is no part of our duty, in passing upon the motion to transfer the case to the St. Louis Court of Appeals, to either consider or determine whether the action of the trial judge was right or wrong in sustaining the validity of the petition, and in overruling the demurrers to the evidence. We express no opinion as to either of these questions.

In *Howland v. Railway Co.*, 184 Mo. loc. cit. 479, 36 S. W. 30, Judge Sherwood, in discussing the jurisdiction of a justice of the peace in Iowa said:

"His jurisdiction to decide contrary to law was just as great as to decide in conformity with law. His power to decide right necessarily included the power to decide wrong. Error does not diminish jurisdiction. There is a broad and turnpike-like distinction between the existence of jurisdiction and its mere exercise."

A number of authorities are cited in support of above quotation.

We are at a loss to understand how defendant has been deprived of a common-law right of trial by jury in this case, when the record shows that the jury reached its conclusion, just as a common-law jury would have done, after the court had declared the law by which they were to be governed, in disposing of the case. We are therefore of the opinion that section 28 of article 2 of our Constitution, has no application to the question before us. If the trial court has made a mistake—in respect to which we express no opinion—the St. Louis Court of Appeals is

the tribunal authorized by law to review its action. If jurisdiction could be conferred upon this court, as attempted, in the present case, then in every action, regardless of the amount involved, where defendant saw fit to demur to the evidence, and the same was overruled, he could then frame an instruction like the one under consideration here, and insist that he had been deprived of the right of a common-law jury trial, in order to give this court jurisdiction of the appeal after he had been defeated. There would be but few cases that could not be brought to this court, where the defendant interposes a demurrer to the evidence, if jurisdiction can be conferred by injecting into a case an instruction like the one under review. The law conferring jurisdiction upon the Courts of Appeal would be practically nullified in many cases if this practice were to obtain; and this court would be flooded with actions that properly belong to other jurisdictions.

II. Appellant relies upon section 28 of article 2 of the Constitution 1875 of Missouri, which provides that:

"The right of trial by jury, as heretofore enjoyed, shall remain inviolate."

This provision of our Constitution has been construed by this court in a number of cases, and it has been held that the above refers to the right as it existed at the time of the adoption of the Constitution of 1875. *State ex rel. v. Withrow*, 133 Mo. loc. cit. 519 and following, 34 S. W. 245, 36 S. W. 43; *State v. Bockstruck*, 186 Mo. loc. cit. 358, 38 S. W. 317; *Ice Co. v. Tamm*, 188 Mo. loc. cit. 385, 39 S. W. 791; *State v. Hamer*, 168 Mo. loc. cit. 173, 174, 67 S. W. 620, 57 L. R. A. 846; *Lee v. Conran*, 213 Mo. loc. cit. 412, 111 S. W. 1151; *Berry v. Railroad*, 223 Mo. loc. cit. 306, 367, 122 S. W. 1043; *State ex rel. v. Holtcamp*, 235 Mo. loc. cit. 236, 237, 138 S. W. 521.

In *State ex rel. v. Withrow*, 133 Mo. 519, 36 S. W. 48, this court had under consideration the construction of rule 37 of the St. Louis circuit court, in regard to the selection of jurors. The defendant had called for a special jury under the law as it then existed in this state. Judge Sherwood, in discussing this question, said:

"Our Legislature, by adopting as it did the term 'special jury,' must be presumed to have done so with a full understanding of the meaning, force, and effect which that expression had acquired during its long sojourn at common law. And section 28 of our bill of rights declares that 'the right of trial by jury, as heretofore enjoyed, shall remain inviolate,' which means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existing at common law."

On page 520 of 183 Mo., page 48 of 36 S. W., Judge Sherwood, proceeding as follows, said:

"There can be no question but that the term 'special jury,' under the authorities, bears with it as an inevitable concomitant the idea of selection, of choice, by the exercise of judgment

and discretion, by the jury commissioner, not the blind turning of a wheel!"

[1, 2] It will be observed in the above, as in the other cases reviewing this provision of our Constitution, that they largely relate to the manner in which the jury is selected. So far as the question under consideration is concerned, the procedure before the jury, after it has been legally selected, is just the same as it was at common law. That is to say, it is the duty of the court, by appropriate instructions, to advise the jury as to the law of the case, and it becomes the duty of the jury to pass upon the facts under the law as declared by the court. The same proceeding existed at common law. It is just as much the duty of a trial court at the present time, to direct a verdict in favor of defendant, where there is no substantial evidence sustaining the plaintiff's case, as it was under the same circumstances at common law.

As heretofore suggested, there is no claim made that the jury selected in the present case was not chosen and impaneled in strict conformity to the law. No objection is made as to the qualification of any member of the jury. They passed upon the facts under the law declared by the court exactly as would have been done had the jury been drawn and impaneled under the common law. The defendant, therefore, has not been deprived of any constitutional right of trial by jury, but if he has suffered on account of any violation of law at all, it must have been on account of the refusal of the court to direct a verdict in favor of defendant.

In *Powell v. Railway Co.*, 76 Mo. loc. cit. 83, decided in 1882, Judge Sherwood, speaking for this court, said:

"And it is as much the duty and province of the trial court to direct the jury to find a verdict for the defendant, where the undisputed facts show no legal liability to have been incurred, as it is the province of the jury where there is conflicting evidence, evidence tending to establish the demand of the plaintiffs and the defense of the defendant, to return a verdict for either party. This is well-settled law, both in this state and elsewhere."

This, from time immemorial, has been recognized as the law in this state, whether dealing with contracts, actions for damages, slander, or otherwise. The trial courts, however, may not always take the same view of the issues as the appellate court, and hence may reach a conclusion in conflict with the later ruling of the appellate court in respect to the same matter. The fact, however, that the trial court in its judgment commits an error—if one should be committed—and leaves to the consideration of the jury the matter that ought to be disposed of by the court, does not confer upon the defendant any legal right to have the case transferred to this tribunal on appeal, on the theory that the defendant has not had a constitutional jury trial as provided in section 28 of article 2, *supra*.

In *Powell v. Crawford*, 107 Mo. 600, 601, 17 S. W. 1008, it is said:

"The defendant at the trial objected to the introduction of any evidence, on the ground that the petition does not state facts sufficient to constitute a cause of action. This objection being sustained, plaintiff took a nonsuit with leave, etc. The court refused to set aside this nonsuit, and plaintiff appealed. We think the court committed no error in holding that the petition in this case failed to state a cause of action."

It will thus be seen, in running over the cases, that the practice has been in this state for the trial court to sustain a demurrer to the evidence in a slander case, or in any other case, where the petition fails to state a cause of action, and where the evidence adduced at the trial is insufficient to warrant a recovery on the part of plaintiff.

Appellant, in his brief, after reviewing the proceedings at common law, says:

"This, then, was the common-law trial which existed when the Constitution was adopted—the jury was to take the construction of the language from the judge who must have directed a verdict for the defendant, unless he could say with sufficient certainty that the language bore the defamatory meaning claimed. And it must still be the right of the defendant to have these questions of law decided by the court, unless the common law on this point has been validly changed in this respect."

[3, 4] It thus appears that appellant's real contention is based upon the refusal of the trial court to direct a verdict in behalf of his client. The constitutional provision is injected into the case in order to get it into this court for the purpose of having the ruling of the trial court reviewed on the demurrer to the evidence. So far as the jury is concerned, the defendant has been deprived of no right which existed at the common law. It is perfectly manifest that in proceedings at the common law, the trial judge is liable to err in construing either the petition or the evidence adduced at the trial. The same is true under the practice which prevails in this state. Numerous cases find their way to the appellate courts where complaint is made in respect to the ruling of the trial judge. In some instances, cases are brought here on the ground that the trial judge invades the province of the jury in directing a verdict in behalf of defendant. On the other hand, many cases appear before this and other appellate courts, based upon the idea that the trial judge has ignored the duty devolving upon him, and submitted the case to the jury without any substantial evidence warranting a recovery.

The lawmaking power, in its wisdom, has established tribunals to sit in review upon errors, if any, which have been committed in respect to these matters. The amount of the verdict in this case is less than \$7,500. If the defendant has suffered any injustice on account of the failure of the trial court to direct a verdict in his behalf, it can be corrected by the Court of Appeals when the case reaches it for consideration.

We accordingly sustain respondent's motion to transfer this cause to the St. Louis Court of Appeals for its determination.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur.

STATE ex rel. BARKER, Atty. Gen., v. SAGE.
(No. 18950.)

(Supreme Court of Missouri. Feb. 25, 1916.
On Motion to Modify, March 24, 1916.
Rehearing Denied April 10, 1916.)

1. COURTS — 231(6) — APPELLATE JURISDICTION — SUPREME COURT.

The Supreme Court has constitutional power to construe all constitutional provisions and legislative enactments of the state applicable to private banks and bankers organized and existing under the laws of the state, and to decide to whom the assets belong, as well as their priority of rights thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. —231(6).]

2. BANKS AND BANKING — 3 — REGULATION — PRIVATE BANKS.

There being no constitutional prohibition against a person engaging in any business he may choose, nor any limitation on the power of the Legislature to enact general laws providing for the organization of private banks, the Legislature has constitutional authority to enact provisions for incorporation of general banking companies, and the organization of private banks and bankers, to declare their status before the law, and to prescribe the terms and conditions on which they may do business in the state.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 9; Dec. Dig. —3.]

3. BANKS AND BANKING — 2 — REGULATION — "PRIVATE BANKERS" — "CORPORATION."

Under Rev. St. 1909, § 1116, defining private bankers as those who carry on the business of banking by receiving money on deposit with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, uncurrent money, bonds or stock, or other securities, and of loaning money without being incorporated, section 1117, providing for the creation of an individual or private bank and forbidding any person or company from engaging in the business of private bankers without complying with its provisions, and Const. art. 12, § 2, providing that the term "corporation" shall be construed to include all joint-stock companies or associations having any powers or privileges not possessed by individual partnerships, a private bank or banker is a corporation or quasi corporation whose assets are distinct from those of the owner of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 2; Dec. Dig. —2.]

For other definitions, see Words and Phrases, First and Second Series, Corporations; Private Bank.]

4. BANKS AND BANKING — 80(4) — PRIVATE BANKS — PRIORITIES OF CREDITORS.

Under Rev. St. 1909, §§ 1113, 1119, placing the business of a private bank in the same situation as that of an ordinary incorporated bank, and providing that the general banking act shall so far as applicable apply to private bankers, section 1087, forbidding a private banker to make a loan to the proprietor of more than 10 per cent. of the paid-up capital and surplus,

section 1089, requiring private banks to be examined by the bank commissioner and prescribing a penalty for refusing to submit to such an examination, and section 1091, providing that when the bank commissioner shall neglect or violate any of the duties of his office regarding private bankers, he shall be guilty of a felony, the assets of a private bank belong to it separately, and its creditors have a priority of right over the creditors of the proprietor on his insolvency, and the assets of the bank should be applied first, in the payment of the creditors of the bank, and second, to the payment of individual creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 187, 188; Dec. Dig. —80(4).]

5. APPEAL AND ERROR — 782 — DISMISSAL — JURISDICTION OF LOWER COURT.

An appeal from an order vacating the appointment of a receiver of a private bank will not be dismissed on the ground that the order appointing the receiver, entered after a petition in bankruptcy against the bank owner, which was filed after the bank commissioner had taken possession of the bank through a special agent, as authorized by Rev. St. 1909, § 1081, was not within the authority of the circuit court, since such taking possession was the commencement of the suit for receivership under sections 1082, 1083, and the filing of the petition in bankruptcy did not place the assets of the bank, but only the general assets, in custodia legis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3123, 3124; Dec. Dig. —782.]

Bond, J., dissenting.

On Motion to Modify.

6. BANKRUPTCY — 20(1) — JURISDICTION — CONFLICTING JURISDICTION.

The circuit court in a suit for the appointment of a receiver of a private bank has the legal right to administer the assets of a bank notwithstanding bankruptcy proceedings against the proprietor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. —20(1).]

Woodson, C. J., and Bond, J., dissenting.

In Banc. Appeal from Circuit Court, Clark County; N. M. Pettingill, Judge.

Suit by the State, on the relation of John T. Barker, Attorney General, against D. H. Sage, doing business under the name of Sage Banking Company of Alexandria, Mo. Johnson B. Angle, trustee in bankruptcy, filed an interplea, and McDermott Turner, receiver of the Sage Banking Company, and others, filed separate pleas or answers to the interplea. From an adverse judgment, certain parties appeal. Reversed and remanded.

This suit was instituted in the circuit court of Clark county, under the banking laws of this state, to determine the priority of the rights of the depositors and other creditors of the Sage Banking Company, of Alexandria, Mo., a private bank, duly organized under the laws of this state to the assets thereof, to the rights of the general creditors of D. H. Sage, the owner of the bank, who is a bankrupt. The facts, in so far as this case is concerned, are briefly as follows:

On December 31, 1910, D. H. Sage subscribed and swore to, and acknowledged the regular application or form for establishing

or creating a private bank, under the provisions of articles 1 and 2, chapter 12, Revised Statutes of Missouri, 1909, and particularly sections 1116 and 1117 thereof, naming the person interested therein as D. H. Sage, residence Alexandria, Mo., the amount of capital as \$10,000, the name in which the business was to be conducted as Sage Banking Company, and the business to be conducted at Alexandria, Mo. This application was regularly filed in the office of the recorder of deeds for Clark county, Mo., on the 3d day of January, 1911, and a certificate to that effect made by the recorder. Afterwards, the recorded document was filed with the bank commissioner of Missouri, and on the 9th of January, 1911, he duly issued his certificate to that effect, establishing the Sage Banking Company, at Alexandria, Mo., with a capital of \$10,000.

The Sage Banking Company, as thus organized and created, continued in the general banking business, receiving deposits, paying checks, etc., until October 17, 1914, when, under the provisions of section 1081, it posted on its door the following notice: "This bank is in the hands of the bank commissioner." Thereupon the bank commissioner appointed McDermott Turner special agent, under the provision of that section, who took charge of the bank and the assets thereof. He held the custody and charge of the bank and its assets until November 21, 1914, when the state, upon proper notice to the Attorney General, by the bank commissioner, instituted the suit of "The State of Missouri, at the Relation of John T. Barker, Attorney General, Plaintiff, v. D. H. Sage, Doing Business under the Style and Firm Name of Sage Banking Company, of Alexandria, Missouri, Defendant," in the circuit court of Clark county, Mo., this suit, and, upon proper application and petition, the judge of that court, under the provisions of section 1081, appointed said McDermott Turner, theretofore special agent, the receiver of said Sage Banking Company, who immediately qualified and took charge of the bank and its assets as receiver of the Sage Banking Company.

On November 19, 1914, there was filed in the United States District Court for the Eastern Division of the Southern District of Iowa, a petition in bankruptcy, by creditors of David H. Sage, individually, praying that he be adjudged an involuntary bankrupt. On November 25, 1914, an answer was filed for Sage, alleging that he had been domiciled at Keokuk, Iowa, for more than six months past, but that his actual residence during all of that time and prior thereto was at Alexandria, Mo. Sage also admitted therein his willingness to be adjudged a bankrupt.

On November 27, 1914, David H. Sage, individually, was adjudged a bankrupt by the referee in bankruptcy of the federal court, reference having been made to him on November 25, 1914, by the clerk of that court.

On December 28, 1914, the attorney for Sage filed a schedule of his assets for him in the bankruptcy proceedings. The schedule is sworn to by the attorney, who, in affidavit, alleges the absence of Sage from Keokuk at that time. The schedule also alleges that the bankrupt was not sufficiently advised to know whether or not he should schedule the assets and liabilities of the Sage Banking Company, but undertook to attach a list of them.

David H. Sage, at the time of the filing of the petition in bankruptcy, was engaged in business at Keokuk, Iowa, operating a retail grocery store, under the name and style of Sage Bros. He was also engaged in the general mercantile business at Alexandria, Mo., in his own proper name, David H. Sage, and also engaged in the general mercantile business, at Wayland, Mo., under the name and style of Sage Mercantile Company.

On January 7, 1915, at a meeting of the creditors of David H. Sage, they elected and appointed Johnson B. Angle trustee in bankruptcy, which action was approved by the referee.

On March 8, 1915, Johnson B. Angle filed his interplea in this case in the circuit court of Clark county, setting forth the filing of the petition in bankruptcy, the adjudication of David H. Sage as a bankrupt, the appointment and qualification of Johnson B. Angle as trustee, and praying for an order vacating the appointment of the receiver, Turner, and to have the receiver turn over to the trustee in bankruptcy the property of the Sage Banking Company.

On April 5, 1915, the plaintiff, the state of Missouri, filed its verified plea or answer to the trustee's interplea or application, and on the same day McDermott Turner, the receiver of Sage Banking Company, by leave of court, and Erwin Fox, George W. Cannon, and James Fulton, depositors and creditors of Sage Banking Company, for themselves, and all others similarly situated, filed their separate verified pleas or answers to said interplea or application, and denying his right to the assets of said bank, and claim them for the use of the creditors of the bank.

Thereafter a hearing was had in the circuit court, evidence introduced, and the cause decided by the court in favor of the trustee in bankruptcy. It was shown that at the hearing the receiver, with the amount that had been turned over by the special agent, had collected and had on hand \$30,068.32, and there were notes not yet collected in the sum of \$43,236.34, making the amount involved, at least of \$70,000. It was also shown that the claims of the depositors against the bank amounted to \$59,517.16, and that there were 205 depositors. In due time the state filed motions for a new trial, and in arrest of judgment, which were by the court overruled, and it duly appealed the cause to this court.

Thereupon the trustee in bankruptcy pre-

sented an application in the United States District Court of Missouri for an order on Turner to turn over the assets of the bank to him, and on June 20, 1915, the application was sustained. From that order and decision the appellants in this court have taken an appeal to the United States Circuit Court of Appeals, but without giving a supersedeas bond, and the appellant McDermott Turner has complied with the order and turned over all of the assets in his possession belonging to "D. H. Sage, doing business in the name of Sage Banking Company," to the trustee in bankruptcy, as shown by exhibits to the motion to dismiss, the originals of which are filed with the clerk of this court.

The trustee in bankruptcy contended that the property and assets of the Sage Banking Company passed to him, and that he was vested with the right of possession thereto and the administration thereof. The state, the receiver, and the depositors and creditors contended that no title or right of possession ever passed to the trustees; that the Sage Banking Company was really a corporate entity, by virtue of the statutes of Missouri, or, in any event, an artificial being or entity, separate and apart from Sage, individually; that the character of bank or banker involved was not within the meaning of the bankruptcy act; that the depositors and creditors of the bank were the beneficial owners thereof; that the capital, surplus, and assets of the bank were separate and apart from the property and assets of Sage, individually; that they were pledged and dedicated solely to the banking business, when the bank was established, and that, in any event, the depositors and creditors had a lien on or preferential, primary, and exclusive claim thereto, which must be satisfied and discharged prior to any rights of the other creditors of Sage attaching to any interest of his therein; that the property and assets of the Sage Banking Company were in custodia legis prior to any time involved that would give the Iowa court any right to take the same, and that the state court first became possessed of them, and that its jurisdiction could not be in any way affected by the proceedings in the federal court.

John T. Barker, Atty. Gen., and W. T. Ruth-erford, Asst. Atty. Gen., for the State. T. L. Montgomery, of Kahota, for Turner. W. M. Fitch, of St. Louis, and James P. Gilmore, of Tulsa, Okl., for Fox and others. Boyd & McKinley, of Keokuk, Iowa, for respondent Angle.

WOODSON, C. J. (after stating the facts as above). I. Counsel for the interpleader, the respondent, contends that there is but one legal proposition presented here for determination, and they state it in this language:

"The sole and only question for consideration is the right to the control of the assets of the

Sage Banking Company. It is not a question of priority among creditors or preferred liens as those questions are not an issue in this controversy and cannot be injected into the same through any straw men put up by appellants. Preferences and priority would have to come up on a proper issue in either the circuit court of Clark county, Mo., or in the United States Bankruptcy Court. The sole question in this litigation is to determine who shall administer the assets of the bankrupt."

This contention is most vigorously denied by counsel for the appellants; and upon the contrary, they insist that the primary and controlling questions are: First, that the Sage Banking Company is in the nature of a corporation sole, or is such a distinct entity that it and its business are entirely separated from D. H. Sage individually and his general business; and consequently that his bankruptcy in no manner affects the banking company; and, second, that because of said corporate character or distinct entity of said banking company, the acts of Congress regarding bankruptcy matters have no application thereto.

In my opinion the contention of counsel for the respondent is not sound; and I am also of the opinion that the contentions of counsel for the appellants correctly state the law of this state regarding the character of the Sage Banking Company, and that said acts of Congress were never designed to apply to or embrace such an institution, any more than they would apply to an ordinary banking corporation, where one of its stockholders has been adjudged a bankrupt. In each case, the surplus of his interest in the bank, if any, remaining, after the paying the corporate creditors, would be available under proper proceeding, for the payment of the bankrupt's general creditors.

[1] Before proceeding to the discussion of the laws of this state, which, in our opinion, sustain the contentions of counsel for appellants, as before stated, we will dispose of a preliminary question regarding the authority of this court to decide the questions of law involved in this case, as presented by the record thereof. Counsel for appellants insist that this court possessed that authority, while counsel for respondent denies that insistence.

There can be no question but what this court has the constitutional power to construe all constitutional provisions and legislative enactments of this state applicable to private banks and bankers organized and existing under the laws thereof, and to decide to whom the assets thereof belong, as well as their priority of rights thereto; but we do not deem it wise or proper to decide the incidental question thereto, as to whether or not the circuit court of Clark county has the legal right to administer the assets of the bank, for the reason the federal court has the actual custody of the same; whether rightfully or wrongfully, we express no opin-

ion, and we presume that court will finally dispose of the assets according to law.

II. This brings us to the discussion of the questions, what is a "private bank" and "a private banker," within the meaning of the laws of this state, and to whom do the deposits and assets thereto belong?

[2] It should be borne in mind that there is no constitutional prohibition against a person engaging in any business he may choose, which is not *malum in se*, nor is there such a provision limiting the power of the Legislature to enact general laws providing for the organization of private banks to engage in and carry on a banking business. That being true, and the Legislature being thusly unrestrained in that regard, possessed the constitutional authority to enact the statutes of this state providing for the incorporation of general banking companies, and for the organization of private banks and bankers, and to declare their status before the law, and to prescribe the terms and conditions upon which they may do business in this state. Conceding that much to be true, which must be done, the constitutionality of said statutes must also be conceded, which only leaves the two questions for this court to decide, viz.: (1) What is a private bank or banker? and (2) to whom do the assets thereof belong, within the meaning of said statutes?

I will undertake to answer those questions in the order stated: First. This statement of the case necessarily calls for a careful consideration of the statutes providing for the organization of "private banks" or "private bankers" (the two being used interchangeably by the Legislature), their status before the law, as well as those conferring their power, imposing their duties and those which prescribe the terms and conditions upon which they may transact business in this state.

In order to correctly interpret those statutes, it should be remembered that prior to the act of 1877 (Laws 1877, p. 34, §§ 22 to 29), there was no statutory law specially applicable to private banks. Prior to the enactment of those statutes all such institutions were practically, if not literally, established by the person or persons desiring to enter into such business, who conducted the same according to his or their own ideas, as a part and parcel of his or their general business, the precise thing counsel for respondent is here contending for, with the exception as to the organization of the bank and its supervision by the state—similar to the state's supervision of public warehouses.

Under those conditions counsel for respondent contend that when the owner of the bank failed in business, the bank constituting an integral part of it, the deposits or assets of the same constituted a part and parcel of the general assets of his estate and should be administered accordingly in the payments of all

of his creditors, and that the bank depositors have no preference over other creditors. That condition of things, in many cases, led to great injustice and many hardships, in that the depositors parted with their money without receiving anything in return therefor, usually deposited it only for safe-keeping, while other creditors became such for value received.

That act has been amended from time to time, with the design to protect the depositors from the injustice and hardships before mentioned; and as amended it has been carried into the various revisions of 1879, 1889, 1899, and 1900, and now constitutes a part and parcel of articles 1 and 2 of chapter 12 of the last-named revision. We will now set forth such of those statutes and parts thereof as are material to the legal propositions presented.

Section 1116, R. S. 1900, declares what private bankers or private banks are, in the following language:

"Sec. 1116. *Private Bankers Defined.*—Private bankers are declared to be those who carry on the business of banking by receiving money on deposit, with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, uncurrent money, bonds or stocks, or other securities, and of loaning money, without being incorporated."

Section 1117 prescribes the terms and conditions upon which private bankers may conduct business in this state, which reads as follows:

"Sec. 1117. *Requirements for Private Banker—Change of Ownership.*—No person or company of persons shall engage in the business of banking as private bankers without a paid-up capital of not less than ten thousand dollars, and if said banking business is to be carried on in a city having a population of one hundred and fifty thousand inhabitants or more, then without a paid-up capital of not less than one hundred thousand dollars, nor until he or they shall have made a statement, subscribed and sworn to as correct and true before a notary public by each person connected with such business as owner or partner, setting forth: First, the names and places of residence of all persons interested in the business, all of whom shall be residents of this state, and the amount of capital invested; and second, the name in which the business is to be conducted and the place at which it is to be carried on; which statement shall be acknowledged, recorded in the office of the recorder of deeds of the county in which the bank is to be located, and a certified copy of such recorded instrument shall be filed in the office of the bank commissioner: Provided, however, that in order to accomplish a change in the ownership of a private bank, it shall be necessary for all the partners of the new bank to make, record and file in the office of the bank commissioner a statement in form and manner required by this section for establishing a new bank."

And section 1118 confers upon a private banker the same powers and rights, and imposes upon him the same duties and obligations that are imposed upon duly incorporated banking companies; and in so far as is here material is as follows:

"No private banker, who receives general deposits after the manner of banks of deposit and discount, shall employ any part of his capital, or any funds deposited with or borrowed by him,

in dealing or trading in, buying or selling lands, goods, chattels, wares or merchandise, but he may sell and dispose of all kinds of property which may necessarily come into his possession in the collection of his loans or discounts. Nor shall any such banker use or employ his capital or funds deposited with or borrowed by him in any other manner than banks of deposit and discount are by this article permitted, or loan a greater amount to any person or loan any sum whatever, except upon like security as is required to be taken by banks of deposit and discount. Neither shall the profits of such private bank be distributed to the owners thereof without first setting apart to surplus account at least twenty per cent. of the net profits of each year until the surplus equals twenty per cent. of the capital, and said surplus shall not be diminished except for the payment of any losses which may occur: Provided, if there are undivided profits, these shall first be used in the payment of such losses."

Section 1119 provides that:

"All the provisions of this article shall, so far as the same are applicable, apply to all private bankers doing business in this state."

Section 1095, Revised Statutes 1909, provides that, when any banking corporation, individual banker or trust company shall have filed the requisite certificate, paid incorporation fees and other fees, before such banking corporation or individual banker shall be authorized to do business, the bank commissioner shall ascertain whether or not the capital of the same has been paid in cash. It further provides as follows:

"In case the bank commissioner shall find that all the provisions of the law have been complied with by the institutions herein named, which desire * * * to do business, he shall grant them a certificate to that effect. Such certificate, or certified copies thereof, shall be taken in all the courts of this state as evidence of such incorporation."

Section 1087 provides that:

"No private bank or banker in this state shall make any loan or discount on account of the personal security or obligation of the proprietor, owner or partner in such private bank in excess of ten per cent. of the paid-up capital and surplus of such private bank or banker. For any violation of the provisions of this section, the bank commissioner shall have authority, in his discretion, to make application for the appointment of a receiver for such private bank or banker, as now provided by law in case of insolvent banks and trust companies."

Section 1081, R. S. 1909, places individual or private banks under the same regulations as those incorporated under the first sections of article 2 of chapter 12. It reads:

"If, from an examination made by the bank commissioner, or by one of his examiners, it shall be discovered that any bank, private banker, savings and safe deposit company or trust company is insolvent, or that its continuance in business will seriously jeopardize the safety of its depositors or other indebtedness, and if the action is taken from an examination by an examiner and such examiner shall recommend the closing of the bank, then it shall be the duty of the bank commissioner, if he approve of such recommendation, by himself or one of his examiners, immediately to close said bank, private bank, savings and safe deposit company or trust company, and to take charge of all the property and effects thereof. Upon taking charge of any bank, private bank, savings and safe deposit company or trust company the bank commissioner shall, as soon as practicable, ascertain, by a thorough exami-

nation into its affairs, its actual financial condition, and whenever he shall become satisfied that any such bank, private banker, savings and safe deposit company or trust company cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, he shall report the fact of its insolvency to the Attorney-General, who shall immediately upon the receipt of such notice, institute proper proceedings in the proper court for the purpose of having a receiver appointed to take charge of such bank, private bank, savings and safe deposit company or trust company, and to wind up the affairs and business thereof, for the benefit of its depositors, creditors and stockholders; and it is made the duty of the court, or the judge thereof in vacation, summarily to appoint said receiver to take possession of the property and assets of said bank, private banker, savings and safe deposit company or trust company, for the purpose of winding up the business thereof; any complaints or opposition of the bank, private banker, savings and safe deposit company or trust company or its officers subsequently to be heard in open court. The bank commissioner may appoint a special agent to take charge of the affairs of an insolvent bank, private banker, savings and safe deposit company or trust company temporarily, until a receiver is appointed; such agent to qualify, give bond and receive compensation the same as a regularly appointed examiner of the department of banking; such compensation to be paid by such bank, private banker, savings and safe deposit company or trust company, or allowed by the court, as costs in case of the appointment of a receiver: Provided, that in no case shall any bank, private banker, savings and safe deposit company or trust company continue in charge of such special agent for a longer period than sixty days. Any bank, private banker, savings and safe deposit company or trust company receiving deposits and doing business in this state under the laws cited in this chapter, may place its affairs and assets under the control of the bank commissioner by posting a notice on its front door as follows: 'This bank (or trust company) is in the hands of the bank commissioner.' The posting of this notice or of a notice by the bank commissioner that he has taken possession of any bank, private bank, savings and safe deposit company or trust company, shall be sufficient to place all its assets and property, of whatever nature, in the possession of the bank commissioner, and shall operate as a bar to any attachment proceedings whatever."

This section uses the words "individual" bank or banker and "private" banks or bankers as synonymous terms.

Section 1088 makes it the duty, among other things, of every bank, private bank or banker, savings and safe deposit company or trust company, receiving deposits, to cause to be made, not less than once each year, by a committee of at least three of its shareholders, an examination of the condition of its affairs, assets, and liabilities, and the books and other documents thereof, and file their written report one copy thereof with the institution, and a duplicate thereof with the bank commissioner:

"Provided, however, that should any such corporation or private bank or banker not have any owners or directors, other than the officers thereof, that then, in such event, said examination and report may be made by such officers, and it is hereby made their duty so to do, under the same penalties as above provided."

[3] By a careful reading of statutes before set out, it will be seen that section 1116 de-

finances a private bank or banker to be one or more—

"who carry on the business of banking by receiving money on deposit, with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, uncurrent money, bonds or stocks, or other securities, and of loaning money, *without being incorporated.*" (Italics are ours.)

Private bankers have no other rights and powers than those just stated, for the reason that "*expressio unius est exclusio alterius*"; and section 1117 provides for the creation of an individual or private bank, and forbids any other person or company from engaging in the business of private bankers without they comply with the provisions thereof, which have been hereinbefore copied.

From the foregoing observations it will be seen that no person or persons can engage in the private banking business, except upon compliance with the terms of said section 1117; and not until then are they private bankers, nor until then do they possess the rights and powers of private bankers, which are stated in said section 1116; but when they have complied with the provisions of that section, then they become and are private bankers; and consequently possess the powers and privileges not possessed by other individuals or partnerships. That being true, then under the plain and unambiguous language of section 2 of article 12 of the Constitution of 1875, all such bankers constitute a corporation.

That section reads as follows:

"The term corporation, as used in this article, shall be construed to include all joint stock companies or associations *having any powers or privileges not possessed by individuals or partnerships.*"

A foreword before proceeding: The Sage Banking Company was originally organized by D. H. Sage and his brother; the latter having retired from business, the former re-organized the bank individually, as provided for by said section 1117.

It has been suggested that the last three words, "*without being incorporated,*" of section 1116, declaring what is a private bank, are inconsistent with the idea that private banks are corporations. That would be true if read alone; but when read in connection with all the other statutes applicable to such banks and those governing banks incorporated and to be incorporated under the general banking laws, it will be seen that those words were used to designate private banks from banks incorporated under the general banking laws of the state.

It has been suggested that because of the facts that a private bank may, under the statute, be organized by a single individual or more, that no charter is issued to it; that no provision is made for the issuance of stock to the incorporators, or for the election of officers and a board of directors, etc.; it cannot be logically maintained that it was the

design of the Legislature that private banks should be incorporated.

It is true private banks are not incorporated under the statutes as other banks are, yet under a general statute, the bank commissioner is empowered to issue to such person or persons, as may desire to engage in the private banking business, a certificate authorizing him or them to so do, upon complying with the provisions of section 1117, which at least constitutes such an institution a separate legal entity, or a quasi corporation, completely separating its business from the general business of the proprietors thereof. This idea will be enlarged upon during the course of the opinion.

I fully appreciate the force of that argument; but if we consider the unlimited power of the Legislature in that regard, as I have previously pointed out, with no design expressed on its part to abolish private banks which were numerous at the time of the adoption of the Constitution and at the time the statutes mentioned were enacted, I am of the opinion that the Legislature intended to remedy the evils previously mentioned and not to abolish the private banking business, and that in order to do so, it was necessary to completely segregate the private banking business of the state from the solidarity of the owner's general business and make each rest upon its own bottom, and thereby make a private bank a separate and distinct entity from the general business of the owner and subject the assets thereof, first, to the payment of the bank's creditors, and, second, if, thereafter, any remains, they might go under the general laws to the payment of the general creditors, and yet not to disturb the ownership of the bank or its management or control by the owners, as provided by law.

Such an entity, as before suggested, might more properly be designated as a quasi corporation when owned by more than one person, and a quasi corporation sole, when owned by but one person, with their rights, powers, duties, and obligations conferred and defined by statute. This is the clear common-sense reading of the statutes, and they fully remedy the evils which lead to their enactments.

[4] Sections 1118 and 1119 before quoted place the business of a private bank in the same situation as that of an ordinary incorporated bank under the laws of this state, and provide that:

"All the provisions of this article (II) shall so far as the same are applicable, apply to all private bankers doing business in this state."

Further clarity will be added to the conclusions before stated when we consider those sections of the statute governing general banks and general banking business in connection with those that are specially applicable to private banks.

The following provision found in section 1087 strongly indicates a complete separation of the private bank and its business from all

other business of the organizers and owners thereof, viz.:

"No private bank or banker in this state shall make any loan or discount on account of the personal security or obligation of the proprietor, owner or partner in such private bank in excess of ten per cent. of the paid-up capital and surplus of such private bank or banker. For any violation of the provisions of this section, the bank commissioner shall have authority, in his discretion, to make application for the appointment of a receiver for such private bank or banker," etc.

This language of the statute clearly indicates that the Legislature understood that it had segregated the private bank from the general business of the owner thereof, had formed it into a separate entity or a quasi body corporate, and had thereby prevented the assets thereof from being commingled with and owned by the organizers of the bank in his individual capacity; and at the same time had subjected those assets to the payment of its creditors in preference to the other creditors of the owner of the bank as previously stated. If that was not the intention of the Legislature, then why did it provide in said section that a *private bank* shall not lend more than 10 per cent. of its paid-up capital stock and surplus to the owner of the bank, etc? If the money deposited in and the assets of the bank belong individually to the proprietor or owner thereof, as contended for by counsel for respondent, and that, therefore, the bank is only a coffer or a vault in which they are placed by him for safe-keeping, then why did the Legislature make it unlawful for that coffer or that vault to lend to the owner of the same more than 10 per cent. of his own money, which he had placed therein for safe-keeping, and could lawfully use any or all of it as he saw proper to do? I am unable to understand how a strong box or an arched structure with strong doors can act in any manner whatever, much less to count out and lend money, and to distinguish its owner from other persons. Nor can I understand, if counsel for respondent is correct, why a receiver should be appointed for said coffer or vault, or how it could be dissolved by an order of court, and its business affairs wound up and its assets distributed among its creditors, as is provided for by section 1081, when it never had any being (except a physical one), assets, or creditors. In that case the bank or coffer and its contents belong to the organizer of the bank, and all may be seized and taken to pay the owner's general creditors. In other words, according to the contention of counsel for respondent, a private bank, under the laws of this state, has no legal existence, nor capacity to transact business upon its own account; but at most, it is only a depository for the safe-keeping of the money deposited therein, which belonged to the owner of the bank, and it may be taken for the payment of his individual debts in general.

If that is true, then there is but one theory

under the sun, known to man, by which it can be lawfully done, and that is upon the theory that when a person deposits money in a private bank he is simply lending the same to the owner of the bank, through it as his agent, and therefore it may be taken for the payment of his general indebtedness. No such design can be gathered from the legislation of this state upon that subject, and I am sure that such is not the understanding of the depositors of such institutions. Moreover, if such banks are not separate entities, then the law of the state has clothed the wolf in sheep's clothing, and thereby induced the people of this state to lend their money to individuals under the belief and understanding that they were depositing them in such institutions for safe-keeping, safeguarded by stringent penal laws against being used and speculated with by the proprietors thereof. All of these matters point to the fact that such banks are separate entities, transacting business upon their own account, just the same as all other classes of banks do, and their assets must be first used for the payment of their liabilities.

Again, by section 1089, all private banks of this state are required to be examined so often by the bank commissioner, and a penalty is prescribed for any such bank refusing to submit to such examination.

Is that consistent with the idea that the bank and all of its assets are the individual property of the owner of the bank? I think not; for the very object of such examinations is to ascertain the solvency or insolvency of the bank, for the protection of the depositors and other creditors of the institution, as well as the community at large. That being true, what good purpose would be served by such examinations if the bank is not a corporate body and does not transact business on its own account, but is, as contended for by counsel for respondent, only an instrumentality with which the owner of the bank transacts a part of his individual business, and that the assets thereof belong to him in the same sense that he owns a farm with the stock thereon, a store with the merchandise therein or any other business enterprise? I submit no good whatever would be realized therefrom, for the obvious reason that if the bank is not a separate entity, but is an integral part of the general assets of its owner, then his solvency or insolvency would determine the solvency or insolvency of the so-called bank; and the financial condition of the latter could not be ascertained by an examination made by the bank commissioner without he should also investigate the financial condition of the owner of the bank. The owner of the bank might be indebted, for instance, in the sum of \$250,000, and have only \$50,000 worth of individual assets outside of those deposited in the bank, and \$100,000 deposited therein. In that case his indebtedness would exceed his combined assets, those in and out of the bank,

by the sum of \$100,000; yet that fact would not and could not appear from an examination of the financial condition of the bank only, and consequently the examination of the bank would not be worth a penny to any one.

Again, suppose the contention of counsel for respondent is right, and that a private bank is absolutely solvent (that is, it has more money and other valuable assets on hand than are necessary to pay every dollar of its indebtedness), and at the same time the owner of the bank is hopelessly insolvent (that is, his assets in and out of the bank are wholly insufficient to pay his indebtedness, which, of course, according to the contention of said counsel, includes the indebtedness of the bank); and suppose, further, that under those conditions the owner of the private bank should receive deposits for the bank when he knew of said insolvency, would the owner in that case be guilty, under the statutes of this state, of the crime of receiving deposits for the bank after he knew of his *insolvency*? In my opinion, that question should be answered in the negative, for the reasons that the statute refers to the insolvency of the bank itself, and not to the insolvency of the individual owner thereof; and there is no statute of that character applicable to a person who receives deposits of money from others in his individual capacity.

Moreover, section 1089 provides that if the bank commissioner shall report that any such bank is insolvent when it is solvent, or solvent when it is insolvent, he shall be liable on his official bond for all damage done thereby.

Now, if the contention of counsel for respondent is correct, then how could the commissioner ascertain whether the bank is solvent or insolvent if it is not a separate entity, and he having no authority to investigate the financial condition of the owner of the bank? Under that assumption he could by no possible means ascertain the financial condition of any private bank in the state, and would thereby render himself liable on his bond in every case where the owner of the bank should happen to be insolvent at the time the examination is made, notwithstanding the fact that the bank itself was perfectly solvent.

Not only that, section 1091 provides that whenever the bank commissioner shall neglect or violate any of the duties of his office regarding such banks, etc., he shall be deemed guilty of a felony, etc.

This clearly shows that such a bank is a separate institution from all other business of its owner, for otherwise the commissioner would have no authority to examine such banks or discharge his numerous other duties regarding them.

There are other provisions of the statutes lending strength to the views herein expressed; but in my opinion those considered clearly establish the fact that *all private banks*

in this state are *separate entities* from all other business enterprises of the owners or proprietors thereof, and therefore no good would flow from a further consideration of those statutes.

The St. Louis Court of Appeals, in the case of *Gupton v. Carr*, 147 Mo. App. 105, 125 S. W. 849, held contrary to the views here expressed; but we are clearly of the opinion that our learned brothers of that court misconceived the very object and purpose the Legislature intended to accomplish by the enactment of the statutes under consideration, and therefore drew erroneous conclusions as to the meaning of said legislation. We are therefore of the opinion that said case should be overruled, and it is accordingly done.

I am therefore clearly of the opinion that the assets of the Sage Banking Company belong to that institution, and for that reason its creditors have a priority of right to them over the rights of the creditors of D. H. Sage, and that they should be, first, applied in payment of their claims, and, second, if any remains thereafter, then in payment of his individual creditors as provided by law.

[6] III. The respondent has filed a motion in this court to dismiss the appeal for the reason that the act of the circuit court of Clark county, appointing Turner receiver of the Sage Banking Company, was coram non jure; the application for said appointment having been made subsequent to the filing of the petition asking that said Sage be adjudged an involuntary bankrupt.

There are other grounds also assigned, but they are all germane to the one stated, and the disposition of that will dispose of all.

There is no merit in the motion for two reasons: First, because the bank was in the hands of the bank commissioner, through his agent, Turner, before the petition in bankruptcy had been filed against D. H. Sage. The taking possession of the bank under section 1081 is the first step taken in bringing suit under sections 1082 and 1083, for the appointment of a receiver thereof, and to wind up the affairs of the bank; and that possession thereof by the commissioner was sufficient custody of the property to give the circuit court jurisdiction of the cause; and, second, the filing of the petition in bankruptcy against D. H. Sage, individually, did not place the assets of the Sage Banking Company in custodia legis; evidently not to the extent of depriving the circuit court of its jurisdiction to decide to pass upon the questions here presented.

For the reasons stated, the motion to dismiss the appeal is overruled.

For the reasons stated the judgment of the circuit court is reversed, and the cause remanded.

GRAVES, BLAIR, and REVELLE, JJ., concur. BOND, J., dissents. WALKER and FARIS, JJ., absent.

On Motion to Modify.

GRAVES, J. [8] The motion to modify the opinion should be sustained in toto. All except the first ground of the motion refer to mere clerical oversights, and should be granted without argument, and, as I understand, the opinion will be corrected in these details.

The first ground of the motion requests us to strike out the following clause from the opinion:

"But we do not deem it wise or proper to decide the incidental question thereto, as to whether or not the circuit court of Clark county has the legal right to administer the assets of the bank, for the reason the federal court has the actual custody of the same; whether rightfully or wrongfully, we express no opinion, and we presume that court will finally dispose of the assets according to law."

This clause should be stricken out because it conflicts with the real holding in this case. The opinion elsewhere decides just what this clause says we will decline to decide. To get the connection we will state the facts. The opinion holds, and rightfully holds, that this court can decide the question as to whom these assets belong. The opinion then discusses our state laws, and very rightfully concludes that the circuit court of Clark county rightfully became possessed of these assets by and through a receiver appointed by it. The opinion, in the last paragraph thereof, after correction by inserting the word "not," rightfully holds that:

"The filing of the petition in bankruptcy against D. H. Sage, individually, did not place the assets of the Sage Banking Company in custodia legis."

Further, the appeal in this case was taken from the order of the circuit court directing its receiver to turn over these assets to the trustee in bankruptcy of the federal court, appointed on an application which we say did not place the assets in custodia legis. This judgment of the circuit court of Clark county our opinion reverses. In other words, we say the judgment directing the receiver in the circuit court to transfer the assets to the trustee in bankruptcy was wrong, and that the circuit court should have held that the trustee in bankruptcy had no title or interest in the assets, and was not entitled to the possession.

These holdings in the opinion are in direct conflict with the clause asked to be stricken out by this motion. That clause says we will not decide whether or not the circuit court has the legal right to administer the assets of the bank, which directly contravenes all else that is said in the opinion. When we reverse the judgment of the circuit court, as we do, it is tantamount to saying that the administration of the estate was properly in that court. This for the reason that the judgment we reverse is one by which the circuit court of Clark county divested itself of the administration of the estate. Not only this, but when we said that the peti-

tion in bankruptcy did not place the assets involved here in custodia legis, we in effect said that the bankruptcy court could not administer these assets. And yet, further, when we say, as we do in the opinion, that the Sage Banking Company is under our law, such a legal entity as not to bring it within the terms of the Bankruptcy Act, we necessarily say that the administration of these assets is in the state court.

The clause mentioned in appellant's motion to modify our opinion should be stricken from the opinion. It escaped my attention at the time I concurred in the opinion.

We should do in this case, just as this court did in *State ex rel. v. Woodson*, Judge, 164 Mo. 440, 64 S. W. 774. In that case, as in this, the court of the state had divested its receivers of the right to administer the estate and directed them to turn over the assets to the receivers of the federal court. In that case, as it is claimed in this case, the receivers in the state court had turned over to the receivers in the federal court.

The appeal in that case, just as in this case, was from the order of the state court divesting itself and its receivers of the administration of the estate. This court held that the administration was properly in the state court, and quashed the order which took such administration from the state court to the federal court. In other words, we decided which court had jurisdiction of the estate, as we have done in this case, save and except what is said in the clause mentioned.

The motion to modify opinion should be and is sustained, and opinion modified, as herein indicated.

FARIS, BLAIR, and REVELLE, JJ., concur. WOODSON, C. J., dissents to this opinion, and BOND, J., dissents as to both opinions.

STATE ex rel. BARKER, Atty. Gen., v. SAGE et al. (TURNER et al., Interveners). (No. 18968.)

(Supreme Court of Missouri. Feb. 25, 1916.)

In Banc. Suit by the State, on the relation of John T. Barker, Attorney General, against D. H. Sage, doing business under the name of Sage Banking Company of Alexandria. Johnson B. Angle, trustee in bankruptcy, filed an interplea, and McDermott Turner, receiver of the Sage Banking Company, and others, filed separate pleas or answers to the interplea. From a judgment for the interpleader, the remaining parties appeal. Reversed and remanded.

WOODSON, C. J. This case involves the same facts and presents the same questions of law that were involved in case No. 18950, 184 S. W. 984, decided this 25th day of February, 1916.

The opinion in that case is controlling in this; and for the reasons there stated, the judgment of the circuit court is reversed, and the cause remanded.

GRAVES, BLAIR, and REVELLE, JJ., concur. BOND, J., dissents. WALKER and FARIS, JJ., absent.

HOWARD et al. v. HOWARD. (No. 17732.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

WILLS 6539, 674—CONSTRUCTION—ESTATE
DEVISED—FEE SIMPLE—TRUSTS.

Where a testator devised a share to a son in fee, with a later clause of the will that his other three children act as guardian of the devise, giving him every 12 months the interest or proceeds of his share of the estate, and providing that, should said son die, his share should be divided amongst his heirs, title vested in devisee in fee, unaffected by any testamentary trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1163, 1302-1309, 1585; Dec. Dig. 6539, 674.]

Blair, J., dissenting.

Error to Circuit Court, Livingston County.

Action by Alpheus M. Howard and others against Augustus Howard. Judgment of partition, and defendant brings error. Reversed and remanded.

Craven & Moore, of Excelsior Springs, for plaintiff in error. W. E. Fowler, of Excelsior Springs, for defendants in error.

BROWN, C. This is partition. The petition (omitting caption) is as follows:

"Plaintiffs state: That Nicholas Howard, late of Clay county, Mo., died seized in fee of the following described tracts or parcels of land situate in the county of Livingston and state of Missouri, to wit: The southwest quarter of section No. 1, township No. 59, range 24, and the southeast quarter of section 2, township No. 59, range No. 24. That said Nicholas Howard left as his sole heirs the following named children: Alpheus M. Howard, Lenora E. Howard, Peter G. Howard, and Augustus Howard. That the said Nicholas Howard left a will, which has been duly probated according to law in Clay county, Mo., and that by the terms of said will he left one-fourth of all his real and personal property to Alpheus M. Howard, one-fourth to Lenora E. Howard, one-fourth to Peter G. Howard, and one-fourth to Augustus Howard, according to the terms of said will herein set forth. That the will of said Nicholas Howard is in words, signs, and figures as follows:

"Owing To the Brevity and uncertainty of Human Life and while my mind is clear and sound I wish to make a Disposal of my Property amongst or Between my Children.

"First, I will Bequeath to Lenora E. Howard, one-fourth of all my Real and Personal Property.

"Second, I will and Bequeath to Augustus Howard, one-fourth of all my Real and Personal Property.

"Third, I will and Bequeath Alpheus Howard, one-fourth of all my Real and Personal Property.

"Fourth, I will and Bequeath to Peter G. Howard, one-fourth of all my Real and Personal Property.

"It is also Both my will and desire that Lenora E. Howard, Alpheus Howard and Peter G. Howard act as Guardian (after my Death) for Augustus Howard giving To him every twelve months the interest or Proceeds of his fourth of my estate this is Done to keep Augustus Howard from spending or squandering

same and should said Augustus Howard Die then will is that his share of my estate Be legally Divided amongst his heirs.

"July the 6th, 1906. Nicholas Howard.

"Witness:

"C. M. Ewing.

"W. N. McKinney."

"That the parties hereto have title to said land as follows: The said Alpheus M. Howard, Lenora E. Howard, and Peter G. Howard are each entitled to the undivided one-fourth part of said land in fee; that the said Alpheus M. Howard, Lenora E. Howard, and Peter G. Howard as guardians and trustees of and for Augustus Howard, under the terms and conditions of the last will and testament of the said Nicholas Howard, deceased, as herein set forth, are entitled to the remaining undivided one-fourth part of said land, and to hold the interest and proceeds of the same for the use and benefit of said Augustus Howard as set forth in said will. That all debts against said estate have been paid in full out of the personal property of said estate, and none of said real property will be needed for the payment of debts.

"Plaintiffs pray that partition be made of such land in accordance with the respective rights of the parties, and that if partition cannot be made in kind that said land may be sold and the proceeds appropriated according to the respective rights of the parties hereto, and for such other and further relief as to the court may deem meet and just in the premises."

At the September term the defendant by attorney, appeared and waived process, but did not answer. The court thereupon entered its interlocutory judgment for partition as follows:

"That Nicholas Howard, late of Clay county, Mo., died seized in fee of the following described tracts or parcels of land situated in the county of Livingston and state of Missouri, to wit: The southwest quarter of section No. 1, township No. 59, range 24, and the southeast quarter of section 2, township 59, range No. 24. That Nicholas Howard left as his sole heirs the following named children: Alpheus M. Howard, Lenora E. Howard, Peter G. Howard, and Augustus Howard. That the interests of the several parties hereto in the described real estate is as follows: Alpheus M. Howard, an undivided one-fourth interest; Lenora E. Howard, an undivided one-fourth interest; Peter G. Howard, an undivided one-fourth interest; Augustus Howard (or Alpheus M. Howard, Lenora E. Howard, and Peter G. Howard, as trustees for Augustus Howard), an undivided one-fourth interest. It being ascertained and determined that Augustus Howard is the lawful owner of said one-fourth interest, but whether he is entitled to the same absolutely or with said named persons who were by the last will and testament of Nicholas Howard, deceased, ancestor and former owner of said land attempted to be appointed testamentary guardian of said Augustus Howard and of his interest in said real estate, is by agreement of parties in open court left open to the further decision and determination of this court or of some other court having jurisdiction of the subject-matter and of the parties.

"It is further ordered that George Gardner, Hal Baker, and L. L. Lauderdale, three disinterested persons, residents of Livingston county, Mo., and possessing all of the statutory qualifications, be and they are hereby appointed commissioners to make partition of the premises in plaintiffs' petition described among the parties in interest according to their respective rights as herein ascertained and determined, with instructions to set off to Alpheus M. Howard one-fourth, to Lenora E. Howard, one-fourth, to Peter G. Howard, one-fourth, and to

set off the other one-fourth as the interest of Augustus Howard; that whether the same shall be held by him individually and in fee or by said guardians or trustees shall be determined by this court or some other court having jurisdiction of the subject-matter and of the parties in the future, and that said commissioners make their report at the next January term, 1912, of this court."

The commissioners divided the land in kind among the four children of the testator, and reported at the April term, 1912, and the court entered the following judgment:

"And the court having heard and being duly satisfied that said report is just and correct, and no objections to the confirmation thereof being made, although said report has been filed 56 days, it is by the court considered, ordered, adjudged, and decreed that the said report be in all things confirmed, and held as firm and effectual forever, and that the costs and charges incurred in these proceedings be taxed against the parties in interest, according to their respective rights, as heretofore ascertained and declared by the court. It is further ordered that the report of the commissioners herein referred to set off and assigned to Augustus Howard, the following described tract or parcel of real estate, to wit: Beginning at the northeast corner of the southwest quarter of section 1, township 59, range 24, running west 67 rods; thence south 160 rods; thence east 67 rods; thence north 160 rods to the place of beginning—containing 67 acres, more or less, under and by the terms of the will of Nicholas Howard, deceased, the above land set off to said Augustus Howard is to vest in Lenora E. Howard, Alpheus M. Howard, and Peter G. Howard, as trustees or guardians for the said Augustus Howard, and the court so finds. That a copy of this decree, duly certified by the clerk of this court, be recorded in the office of the recorder of deeds of Livingston county, Mo., and that the fees therefor be taxed and paid as other costs in this cause."

The record was brought to this court by writ of error to obtain a judicial construction of the foregoing will so far as it affects the interest of the plaintiff in error in the land devised. We have not been favored by the defendants in error with either a brief or argument, and for this reason take for granted that their only interest is to obtain an adjudication of the matter involved which will put the title at rest, and thereby determine their own duties with respect to it.

The second clause of the will, standing alone, vests the whole title of the testator in the plaintiff in error. The devise is of the land, and the title included in its terms is the fee simple absolute. The question before us is how, if at all, this is modified by the last paragraph.

The rule is well settled:

"That, where a certain estate is granted in plain and unequivocal language in one clause in a will, the same cannot be lessened or cut down by a subsequent clause of the will unless the language used in such subsequent clause is as clear, plain, and unequivocal as the language of the first grant." *Middleton v. Dudding*, 183 S. W. 443 (Mo. Supreme Court in Banc, not yet officially reported); *Sevier v. Woodson*, 205 Mo. 202, 214, 104 S. W. 1, 120 Am. St. Rep. 728.

Is the last paragraph of this unequivocal character? In answering this we will first notice the last expression used in the para-

graph—"should said Augustus Howard Die then will is that his share of my estate be equally divided amongst his heirs." The use of the word "should" in the introduction of this clause, implying, as it does, an uncertainty, indicates its meaning as referring to his death before the will should take effect by the death of the testator; for his death at some time was a certainty. The law with reference to this expression is well settled. 30 Am. & Eng. Enc. of Law, 708, and cases: *Fifer v. Allen*, 228 Ill. 507, 512, 81 N. E. 1105; *Karsten v. Karsten*, 254 Ill. 480, 488, 98 N. E. 947; *Bacon v. Sayre*, 84 Misc. Rep. 462, 147 N. Y. Supp. 522; Same case, 164 App. Div. 909, 148 N. Y. Supp. 1105. This being true, it is unnecessary to consider the clause as referring to the death of the devisee after the will should become effective.

The testator by his will vested the absolute estate in fee in the plaintiff in error. His will and desire that his other children should act as his guardian, collect the income, and pay it over to the plaintiff in error annually did not divest or annul the absolute title already devised under the rule we have stated. The only intention shown by the words used was to enjoin a voluntary service in behalf of a willing beneficiary, who, if not a spendthrift, had aroused the fears of his father in that respect. Were his fears well founded, it lay in his power to protect the property and provide for his son by creating a spendthrift trust in the same property. The requisites of this were clearly stated by this court in *Kessner v. Phillips*, 189 Mo. at page 524, 88 S. W. at page 68, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005, as follows:

"In order to create a spendthrift trust certain prerequisites must be observed, to wit: First, the gift to the donee must be only of the income; he must take no estate whatever, have nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support, and an equitable interest only in the income; second, the legal title must be vested in a trustee; third, the trust must be an active one, not a mere dry trust which may be executed under the statute of uses."

Not having done this, the title to the undivided one-fourth of the land in suit devised to Augustus Howard passed upon the death of the testator to the plaintiff in error in fee, and unaffected by any testamentary trust.

The judgment of the circuit court will be reversed, and the cause remanded, with directions to enter judgment in accordance with the views we have herein expressed, as per stipulation of the parties filed in this court.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. GRAVES, P. J., and BOND, J., concur. WOODSON, J., concurs in result. BLAIR, J., dissents.

DOWNS v. UNITED RYS. CO. OF ST. LOUIS. (No. 17876.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

1. EVIDENCE — 8 — JUDICIAL NOTICE — STOPPING OF CARS.

The courts may take judicial notice that a street car running at 10 to 15 miles an hour can be stopped in less than 250 feet, that being a matter familiar to all urban residents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 7; Dec. Dig. — 8.]

2. NEW TRIAL — 69 — GRANTING OF NEW TRIAL — RIGHT TO.

Under Rev. St. 1909, § 2022, declaring that in every case where the court is satisfied that a mistake has been committed by a witness, and that an improper verdict or finding was occasioned, it may grant a new trial, the court, in an action for the death of a teamster run down by a street car, may properly grant a new trial, plaintiff having taken nonsuit after the court directed a verdict for defendant, it appearing that an expert witness called by plaintiff to testify as to the time it would take to stop the car, either through stupidity or drunkenness, testified that the car, if running at the rate of 10 to 15 miles, could not be stopped in 250 feet, which was contrary to the well-known facts.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 141; Dec. Dig. — 69.]

3. STREET RAILROADS — 117(5) — INJURY TO PERSONS ON TRACKS — ACTIONS — EVIDENCE — JURY QUESTION.

In an action for the death of plaintiff's father run down by defendant's street car, evidence of defendant's negligence held sufficient to go to the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 243; Dec. Dig. — 117(5).]

4. DEATH — 21 — ACTIONS — ABATEMENT.

R. S. 1909, § 5425, declares that when any person, including an employé, is killed by reason of the negligence, unskillfulness, or criminal intent of any officer, servant, agent, or employé while running or managing any locomotive, car, or street car, the owner of such railroad or street car shall forfeit and pay as a penalty a sum not less than \$2,000, and not exceeding 10,000, which may be sued for and recovered by the spouse of the deceased, or if there be no spouse, or he or she fails to sue within six months, then by the minor child or children of the deceased; or if such deceased be a minor and unmarried, then by the father and mother, or either be dead, by the survivor, and if all such beneficiaries should fail, suit may be had by the administrator or executor of the deceased. Section 5438 declares that causes of action upon which suit has been or may thereafter be brought by the injured party for personal injuries, other than those resulting in death, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued. A teamster was run down by defendant's street car, and before his death he instituted suit against defendant, which suit after his death was continued by his administratrix. Judgment was entered against the administratrix. Held that, as the injury resulted in death, and as the death statute provides for suit by a minor child of the deceased before suit by the administrator, the judgment against the administratrix was not a bar against a suit for the death by the teamster's minor child; section 5438 applying only to actions not resulting in death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 23, 30-32; Dec. Dig. — 21.]

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

Action by Mary Downs, by next friend, against the United Railways Company of St. Louis. From an order setting aside a nonsuit, and granting new trial, defendant appeals. Affirmed, and cause remanded.

This is a suit instituted May 3, 1911, by the plaintiff, an infant daughter of David Downs, aged 14 years, to recover the penalty prescribed by the statute for the death of her father, resulting from the striking of a loaded wagon which he was driving across the defendant's track on Olive street at the intersection of Newstead avenue in the city of St. Louis, by defendant's street car. No complaint is made of the sufficiency of the petition which charges that the accident was caused by the negligence of defendant: (1) In that its motorman failed to keep a vigilant watch for vehicles on the track, or moving towards it, and failed to stop the car within the shortest time and space possible upon the first appearance of danger to the wagon, as provided by an ordinance of the city fully pleaded; and (2) that the car was being run at a speed in excess of 15 miles an hour as provided in another ordinance pleaded. Judgment was asked for \$10,000, as provided by the statute.

The answer admitted the collision and the death of Downs on August 28, 1910, denied the acts of negligence charged, and denied that his death resulted from any injury received by him in the collision and charged that whatever injuries, if any, were sustained by him were caused by his own carelessness and negligence.

It then stated, in substance, that on the 17th day of March, 1910, Downs instituted a suit against defendant in the circuit court for the city of St. Louis for the same injuries, which suit was still pending in said court at the time of his death, which occurred August 28, 1910; that on the 6th day of September, 1910, Johanna Downs was duly appointed the administratrix of his estate; and that on the same day the suit was revived in her name as such administratrix and was thereafter prosecuted by her in that capacity, and on March 16, 1911, was tried before a jury, which found a verdict for the defendant, upon which judgment was duly entered, and a motion for a new trial filed by plaintiff and overruled, and the judgment still remains in full force, whereby the plaintiff is barred and estopped from maintaining this action.

To this last plea the plaintiff demurred on the ground that the facts did not constitute a bar to this action. The demurrer was sustained by the court on that ground, to which action the defendant filed its bill of exceptions at the same term. The plaintiff replied, and the cause went to trial on February 5, 1913, and when the evidence of plaintiff was all in the court instructed the jury

to return a verdict for defendant. The plaintiff thereupon took a nonsuit, with leave to move to set aside, which motion was filed and sustained, and an order entered, setting aside the nonsuit and granting a new trial, from which this appeal is taken. The evidence showed that the plaintiff was the only child of the deceased; that the mother, Johanna Downs, had not brought suit for the death of her husband up to the time of the institution of this suit, the injuries of deceased in the collision mentioned and his death from their effects. William Steele, a teamster, testified for the plaintiff that at the time of the accident he stood at the south curb of Olive street about 30 feet east of Newstead avenue waiting for a load, and was looking west; that he saw defendant, who was driving north on Newstead avenue with a mule team and wagonload of sand; that as the team approached the railway track the witness saw the car coming east on Olive street about 150 feet west of it, at a speed of 12 or 15 miles an hour. He did not see that the speed of the car was checked until it struck the wagon, which was then on the track, and that it struck it with such force that one mule was knocked down, the other broke loose, and the wagon was carried on the fender at least 40 feet along the track and driven into the curb in front of a store. This was the only witness who saw the accident, although the Olive street merchant testified that he heard the noise and immediately went out to where the wagon was lying. Herman Ellis was also a witness for plaintiff, whose testimony will be mentioned later.

In setting aside the nonsuit the court, referring to Mr. Ellis as *the expert*, said:

"The defendant's demurrer offered at the close of plaintiff's case was sustained in this case principally because the testimony of plaintiff's witness, the expert, who testified that it would have required a space of from 50 to 90 feet to have stopped the defendant's car in question after the power had been reversed and the brakes applied, and that it would have required from 10 to 15 seconds to have reversed the power and applied the brakes. On this basis it would have required a space of over 250 feet to stop the car, and the motorman would have had to begin stopping it when the deceased was about 60 feet south of the crossing.

"As a matter of law, I think it cannot be questioned that the motorman cannot be held to have seen that the deceased was in a position of danger when his wagon and team were 60 feet away from the track, yet if the testimony of this witness is true, the motorman must have seen this danger this far ahead in order to have stopped his car in time to have avoided the collision. For this reason the demurrer was sustained.

"In her motion for a new trial plaintiff urges the point that this witness was under the influence of liquor at the time, unknown to plaintiff, when put on the stand, and that he was mistaken in this regard and his testimony erroneous, and she has submitted in support thereof an affidavit of another expert familiar with the cars and track in question, wherein he states that the car going at the rate of 15 miles per hour could have been stopped in a space of 40 to 55 feet, including all movements necessary to reverse the power and apply the brakes. . .

"It was apparent to me at the time this witness was either under the influence of liquor or very stupid. I believe that, independent of the affidavit filed, the court can take judicial notice of the fact that it would not take 250 feet within which to have stopped the car in question. That the court can take judicial notice of such matters was held in the case of *Latson v. St. Louis Transit Company*, 192 Mo. 449, 91 S. W. 109; at least the Supreme Court did so in that case.

"I am therefore satisfied that this witness was mistaken within the contemplation of section 2022, R. S. Mo. 1909. I do not think the demurrer should have been sustained, except for the testimony of this witness, and I therefore think that a new trial should be granted to plaintiff."

Boyle & Priest and Paul U. Farley, all of St. Louis, for appellant. John Lally, of Kansas City, and Sam H. West, of St. Louis, for respondent.

BROWN, C. (after stating the facts as above). [1-3] 1. It will be seen from the foregoing statement that there are two questions involved in this appeal: (1) The propriety of the action of the court in setting aside the nonsuit; and (2) the propriety of its holding that this action is not barred by the judgment in the suit brought by the deceased and continued by his administratrix who is prosecuting this action as next friend of the child. Without examining in detail the statement of the court of the reasons for its action in setting aside the nonsuit, we are impressed by it that there was prominent in the mind of the court something more than the evident mistake of the witness Ellis in the statement that it would take from 10 to 15 seconds for the motorman to apply the means at his hand to stop the car, which he attributed to the fact that the witness was either under the influence of liquor or very stupid, which was not known to plaintiff at the time he was placed on the stand. Looking beyond the affidavit showing it to be wrong, it determined that it could take judicial notice of the fact that it would not have taken 250 feet in which to make the stop, citing *Latson v. St. Louis Transit Co.*, 192 Mo. 449, 91 S. W. 109, in which this court took judicial notice of a similar fact, saying that it needs no expert testimony to show that a car driven at the rate of $6\frac{1}{2}$ or 7 miles an hour could have been stopped within a distance of 40 feet. Every urban citizen is to some extent familiar with this question. He stands upon the street and signals to the car in which he desires to become a passenger and knows that the signal is, as a rule, promptly obeyed, and that when it is not the driver has been guilty of inattention or willful neglect of his duty of watchfulness and prompt action. In this case watchfulness would have shown him that a pair of mules harnessed to a loaded wagon was approaching the track, and duty would have indicated that he have the appliances for the control of his car well in hand in order, if necessary, to give the driv-

er the measure of protection to which he might be entitled in enjoying the common right of use in the public thoroughfare.

In setting aside the nonsuit the court expressed the theory that while it was necessary to prove by some witness possessing peculiar knowledge of the distance within which a car like the one in question, equipped with air brakes and running from 12 to 15 miles an hour on a level track could be stopped, the only witness available at the time for plaintiff had made an evident blunder in his testimony due to stupidity arising from intoxication or other cause while upon the stand, and upon that theory and in obedience to the provision of section 2022 of the Revised Statutes 1909 that:

"In every case where * * * the court is satisfied that * * * mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action or of defense, it shall, on motion of the proper party, grant a new trial."

The motion in this case was founded not only upon the ground that the witness was certainly and obviously mistaken as to the length of time consumed by a motorman in preparing to bring his car to a stop, that an improper finding was occasioned by the mistaken testimony of this witness, that counsel was not aware of his condition, but also that the evidence offered by the plaintiff was ample and sufficient to authorize and entitle plaintiff to a finding on the issues. This places the question squarely before the court as to whether, upon either of these grounds so stated and relied upon, the plaintiff had a right to the verdict of the jury. If so it was the duty of the court to set aside the nonsuit to which plaintiff had been forced by its erroneous direction, and to grant her the trial to which she was entitled. It could not evade this duty by framing and stating a reason which did not cover the ground taken in the motion. We think the motion was well taken on both grounds. The jury had the facts surrounding the accident vividly before it. They were informed of the stop of the car; that it was being driven to the point of collision along a level track; that as it approached, a large team of mules attached to a load of sand was in plain sight approaching the same point at right angles; and that while it went upon the track and across it so as to place the wagon between the rails the car did not visibly slacken its speed, but struck the wagon with such force as to carry it with its load and one mule about 40 feet and deposited them at the curb outside the wagon way. With this picture before them we think the jury had the evidence from which the law would permit them to form a judgment as to whether there was negligence in the person operating the car which contributed to the collision and its result. This being so, there was error in the direction of the court to return a verdict for the defendant, and that the nonsuit was

properly set aside upon a demand of the plaintiff founded upon that reason.

[4] 2. The real and controlling question in this case is: Did the cause of action upon which the deceased sued survive to his administratrix? In *Gilkeson v. Railroad*, 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763, the plaintiff was the administrator of Clifford Ragel, a minor. While he with his father and mother were riding as passengers on one of defendant's trains, it collided with another train of defendant running in an opposite direction upon the same track. The father and mother were instantly killed, while the child survived 4 days, when he died of the injuries received. *Gilkeson* was appointed administrator of his estate and brought suit in that capacity for the death of his parents under the statute then in force. He recovered judgment in the Johnson county circuit court, which was brought here by appeal, where, in our division No. 1, the judgment was reversed for reasons stated in an exhaustive opinion of Woodson, J., in which a great number of authorities, including our own decisions bearing upon the question involved, were cited and reviewed, and it was held that under the common law no right of action existed in such cases, but that the right to recover for the death of the parent depended entirely upon the terms of the statute that created it; that the statute then in force prescribed the parties to whom it was given and did not include the personal representative; and that therefore the cause of action thus created did not survive to such representative. In *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 120 Am. St. Rep. 761, 12 Ann. Cas. 457, cited in the opinion referred to, it was held that a cause of action of this character did not survive against the legal representative of a defendant who died while it was pending, and in *Millar v. Transit Co.*, 216 Mo. 99, 115 S. W. 521, it was held in this division that a suit of this character by the wife for the death of her husband cannot, if she should die during its pendency, be revived in favor of her administrator. These cases and the numerous authorities to which they refer us have settled the law in this state to the effect that the statute upon which this suit is brought creates a cause of action which did not exist at common law, and which only inures to those whom the statute describes as its beneficiaries, and it does not pass to the personal representative upon the death of the one to whom the law gives it whether that death occurs before or after suit brought for the injury. It can no more be appropriated by other than the statutory beneficiary by revival of an existing suit than by the institution of an original one. The appellant cites us to the decision of this court in *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084, from which it ar-

gues that the cause of action for the death is, as stated in the opinion in that case, a derivative one in the sense that it grows out of the common-law action in which the deceased is entitled to recover damages for the same injury, and that therefore it must, if he has brought suit to recover such damages, pass to his personal representative. The reasoning is far from clear. While we can understand that, as held in that case, when a cause of action out of which it grows is extinguished by the deceased in his lifetime, there is nothing left to be transmitted, but we cannot understand why, so long as the cause of action subsists, either in or out of court, it should not, upon its extinguishment in the injured party by his death be transmitted to whoever, by the terms of the statute which created it, it was to pass whether such statutory beneficiary might be the personal representative or the wife or the child. It was a cause of action which by the common law did not survive the injured person. Its survival is a statutory right, and we must look alone to the statute for its vesting.

3. The appellant points to section 5438, to which we have already referred, as the statute upon which he relies, being foreclosed by the decisions of this court to which we have already referred, against relief from any other direction. The cause of action accrued under section 5425, which provides that:

Whenever any passenger "shall die from any injury * * * occasioned by any defect or insufficiency in any railroad" the owner of such railroad "shall forfeit and pay as a penalty, for every such person * * * so dying, the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; * * * or, third, if such deceased be a minor and unmarried, * * * then by the father and mother, * * * or if either of them be dead, then by the survivor;" and that if all these beneficiaries should fail, "then in such case suit may be instituted and recovery had by the administrator or executor of the deceased, and the amount recovered shall be distributed according to the laws of descent."

It will be seen that this section provided specifically for the case in which the administrator might sue and recover, who should be the beneficiaries of such a recovery.

Having provided for the transmission to specified beneficiaries of causes of action for injuries resulting in the death of the injured party, it was, in the opinion of the Legislature, just and proper that actions for damages for injuries not so resulting should be preserved and transmitted in other cases, and for this purpose the act of 1907 (section 5438) was passed. It is as follows:

"Causes of action upon which suit has been or may hereafter be brought by the injured par-

ty for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representatives; and the liability and the measure of damages shall be the same as if such death or deaths had not occurred."

It will be observed that this applies only to injuries "other than those resulting in death," and provides a different measure of damages from that applicable to injuries resulting in death, which had already been provided for. It is a recognition of the just principle that those having an interest in one's life should have some remedy for its wrongful destruction. The wife or husband, each of whom has an interest in the society and services of the other, come first; then the minor children interested in the parents to whom they have the right to look for the care and nurture depending upon that relation; then the parents entitled to the services and society of their minor children; and, last of all, others entitled to the estate of deceased through the personal representative who was limited in damages to the amount sustained by deceased. Since the passage of this act, our appellate courts, as in duty bound, have given full effect to this benign legislative intention. *Shoven v. Street Railway*, 164 Mo. App. 41, 148 S. W. 135; *Greer v. Railroad*, 173 Mo. App. 276, 158 S. W. 740; *Roth v. St. Joseph*, 180 Mo. App. 381, 167 S. W. 1155, 171 S. W. 944. In the two cases first cited it was held that under this section the petition should expressly state that the injury complained of did not result in death, and in the *Roth Case* it was as clearly implied.

It necessarily follows from what we have said that the verdict and judgment in the case brought by the deceased and revived and continued by his administratrix did not foreclose this daughter from recovery in this action, which accrued with his death, at the time of the occurrence of which the cause of action of the deceased from which it sprang was still in existence. The demurrer to the plea of estoppel by former adjudication was therefore properly sustained.

The order setting aside the nonsuit is affirmed, and the cause remanded for further proceedings.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

**GOLD ISSUE MIN. & MILL CO. v.
PENNSYLVANIA FIRE INS. CO. OF
PHILADELPHIA.** (No. 17298.)

(Supreme Court of Missouri. March 24, 1916.
Rehearing Denied April 10, 1916.)

**1. INSURANCE — 627(2) — FOREIGN INSURANCE
COMPANIES — ACTIONS — SERVICE OF PROCESS.**

Rev. St. 1909, § 7042, provides that any foreign insurance company desiring to transact business in the state shall first file with the superintendent of the insurance department a written instrument or power of attorney, appointing and authorizing him to acknowledge or receive service of process from any court and upon whom such process may be served in behalf of the company, and consenting that service of process upon him shall be held to be as valid as if served upon the company, and that such service shall be valid and deemed personal service upon the company so long as it shall have any policies or liabilities outstanding in the state. *Held*, that this authorizes service of process upon the superintendent in an action against a foreign insurance company doing business in the state and having complied therewith, upon a contract of insurance made outside the state and covering property outside the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1573; Dec. Dig. — 627(2).]

2. CONSTITUTIONAL LAW — 309(3) — INSURANCE — 610 — FOREIGN CORPORATIONS — SERVICE OF PROCESS — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Rev. St. 1909, § 7042, requiring foreign insurance companies doing business in the state to file a written instrument, authorizing the service of process on the superintendent of the insurance department, and providing that such service shall be valid and deemed personal service upon the company, construed as authorizing such service in suits on contracts made outside the state, is not unconstitutional as denying due process of law in violation of Const. U. S. Amend. 14, § 1, and Const. Mo. art. 2, § 30.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. — 309(3); Insurance, Dec. Dig. — 610.]

3. INSURANCE — 610 — FOREIGN CORPORATIONS — SERVICE OF PROCESS — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Rev. St. 1909, § 7042, requiring foreign insurance companies doing business in the state to file an instrument authorizing the service of process on the superintendent of the insurance department, construed as applying to actions on contracts made outside the state, is not unconstitutional on the theory that the Legislature had no constitutional power to confer jurisdiction upon the courts to try and determine suits against foreign insurance companies licensed and doing business in the state, based upon contracts of insurance executed outside the state.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. — 610.]

4. INSURANCE — 610 — FOREIGN CORPORATIONS — SERVICE OF PROCESS — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Rev. St. 1909, § 7042 is not unconstitutional, as authorizing service of process on the superintendent of the insurance department in suits against foreign insurance companies doing business in the state without authority, based upon policies of insurance issued in another state, it being expressly limited in its application to foreign insurance companies doing business in the state under authority from the state fully granted to them, and not applying to such companies doing business without authority.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. — 610.]

5. INSURANCE — 604 — ACTIONS ON POLICIES — CONVERSATIONS WITH AGENTS.

In an action on an insurance policy covering a smelter and providing that the property should not be idle for more than 30 days without defendant's written permission, and also prohibiting incumbrances upon the property, it appeared that the property was shut down, and that a mortgage was executed, but subsequently paid before the fire. Evidence was admitted that when the policy was issued plaintiff informed defendant's general agents through whom the policy was issued that the smelter might be idle at times for more than 30 days, and asked what he should do, and was told by the agents that this would be all right; that after the issuance of the policies the same inquiry was made and answered in the same way; that when it was found that the business would have to be shut down, the agents were told thereof, and said it would be all right, and that subsequently they were notified that the mill was idle, and asked what should be done and made no objections thereto; and that they were told of the mortgage and made no objection. *Held*, that the admission of the evidence as to the conversations with the agents, prior to and at the time the policy was issued and subsequently respecting the incumbrances upon the property and the vacancy of the property, was not error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. — 664.]

6. TRIAL — 252(14) — INSTRUCTIONS — CONFORMITY TO EVIDENCE.

In an action on an insurance policy, prohibiting incumbrances on property, and providing that the property should not be idle for more than 30 days without permission, there was evidence that defendant's general agents through whom the policy was issued were told of a mortgage on the property and of the vacancy of the property, and though defendant claimed that the agents were acting in collusion with plaintiff, there was no evidence of such collusion. *Held*, that the modification of instructions, so as to tell the jury that they could not find for defendant on the question of waiver unless they believed from the evidence that plaintiff agreed and consented that defendant's agents should conceal from defendant the facts constituting the breaches of the conditions of the policy, was not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. — 252(14).]

7. CORPORATIONS — 661(2) — FOREIGN CORPORATIONS — RIGHT TO SUE — COMPLIANCE WITH STATUTE.

In an action by an Arizona corporation on an insurance policy on property in Colorado, the evidence showed that at the time the policy was issued plaintiff had not procured a license to do business in Colorado, and had not done so at the time it purchased the property and received a deed, but that subsequently, and long before the fire occurred, it took out a license to do business in the state, and paid all fees and taxes due on the property. *Held*, that an instruction that, if prior to the institution of the suit, plaintiff paid all necessary corporation fees to the state of Colorado and obtained from the secretary of state of Colorado a certificate of authority to do business in the state, the fact that it had not paid such fees and obtained such certificate of authority prior to its acquisition of title to the property or prior to the issuance of the policy, or to the fire, was immaterial was not erroneous.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542, 2544, 2564; Dec. Dig. — 661(2).]

Graves, Bond, and Walker, JJ., dissenting.

In Banc. Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Action by the Gold Issue Mining & Milling Company against the Pennsylvania Fire Insurance Company of Philadelphia. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit instituted June 8, 1911, in the circuit court of Audrain county, Mo., by the plaintiff against the defendant, to recover the sum of \$2,500, alleged to be due the former under the terms of a policy of insurance dated October 5, 1909, insuring certain property in the state of Colorado against damage and loss by fire. A trial was had, which resulted in a judgment for the plaintiff, and the defendant, in proper time and in due form, appealed the cause to this court.

We will briefly state the pleadings. The petition was in due form, charging that the plaintiff was a corporation duly organized under the laws of Arizona. That at all the times therein stated the defendant was a foreign insurance company, organized under the laws of Pennsylvania, and was duly licensed under the laws of this state to carry on a general fire insurance business herein, and was at all of said times, carrying on said business herein. That the plaintiff, on October 5, 1909, was the absolute owner of the property insured, situated in the state of Colorado, and that upon that date the defendant issued the policy mentioned, insuring the same against loss or damage by fire for a period of one year, for a consideration of ——— dollars. That on August 13, 1910, said property was struck by lightning, and destroyed and damaged to the amount of \$134,000; and that proofs of loss were duly given. The policy was a regular standard policy, containing the usual terms and conditions. At the September term, 1911, of said court the defendant filed in the cause a motion to quash the summons and the return of service thereof made by the sheriff of Cole county on the superintendent of insurance of this state, which was by the court overruled. Thereupon the cause was passed to await the decision of this court in the case of *State ex rel. v. Barnett*, 239 Mo. 193, 143 S. W. 501. That after that case had been decided, the defendant, after leave of court had been obtained, filed answer, which is substantially as follows: The answer alleges the service was had upon the superintendent of insurance; that the court acquired no jurisdiction over defendant because neither party was a resident of Missouri and the action accrued in Colorado, and therefore section 7042, R. S. 1909, did not apply; that said section is unconstitutional and void, because in violation of section 30, art. 2, of the Missouri Constitution, and section 1, Amend. 14, of the federal Constitution; also that section 7042 was enacted in 1885, Laws of Missouri 1885, p. 183, in violation of section 28 and of section 34, art. 4, of the Mis-

souri Constitution, and therefore void, so that the service of process gave no jurisdiction over the defendant. That in violation of the terms of the policy the property had been permitted to remain idle more than 30 days without the written permission of the defendant. Also that, in violation thereof, said property had been incumbered by the execution of a mortgage thereon, to secure the sum of \$25,000 without defendant's knowledge or consent. Further, that the item "gold in process," mentioned in the policy, was not destroyed. That contrary to the terms of the policy, the property insured was not in operation at the time of the fire, nor for more than six months prior thereto. That the property was mortgaged at the time of the issuance of the policy and at the time of the fire without the consent of the defendant, and that the plaintiff was guilty of fraud and false swearing in claiming in its proofs of loss that "gold in process" to the value of \$9,000 was destroyed. That the plaintiff was not the sole and unconditional owner of the property insured, nor did it own the property in fee simple, because it had not been licensed to do business in Colorado under the provisions of sections 904 and 910, R. S. Colo. 1908, and therefore it did not have title to the property, pleading decisions of Colorado to this effect, and that the defendant had tendered to the plaintiff all the premiums with interest thereon.

The reply denied the unconstitutionality of section 7042; admitted that the building was not in operation as charged by defendant, but pleaded waiver of such condition of the policy; that the mortgage on the property was paid off before the insurance was taken out; denied making false statements regarding "gold in process"; denied any information sufficient to form a belief as to whether section 910, R. S. Colo. 1908, and cases cited by defendant, were ever in force or rendered by the court; alleged that it paid taxes upon the property prior to the fire; pleaded that the courts of Colorado had decided that after a foreign corporation has paid a license fee, it may sue in the courts of Colorado; and pleaded that the doctrine of waiver was the law of Colorado.

The policy in suit was dated and delivered, along with the other policies amounting to about \$50,000, to a Mr. Doepke, president of the respondent company, on or about October 5, 1909, and covers the insured property for one year thereafter. The insured property was destroyed by fire on August 13, 1910, and this action was instituted in the circuit court of Audrain county on June 8, 1911, summons being served upon Frank Blake, superintendent of the insurance department of the state of Missouri, on June 7, 1911.

We will first state the undisputed facts of the case, and then briefly state what the evidence tended to show regarding those that were disputed, viz: The plaintiff herein is

a corporation duly organized under the laws of the state of Arizona. The defendant is a fire insurance corporation duly organized under the laws of the state of Pennsylvania, and at all times mentioned in this suit, and at the time this suit was commenced, was, and ever since had been, duly licensed as a foreign insurance company to do business in the state of Missouri. On October 5, 1909, the defendant duly made and delivered its policy and contract of insurance to plaintiff herein at Cripple Creek, Colo., where it had a general insurance agency, which was represented by Kilpatrick & Hanley. In that section of Colorado the insurance company had no other representative, and Kilpatrick & Hanley had authority to make contracts of insurance. At the time the insurance was effected plaintiff owned certain valuable mining property, and was engaged in the building of a large smelter for the purpose of smelting gold from its mines, which were located two or three miles out of Cripple Creek, Teller county, Colo. On October 5, 1909, for and in consideration of a premium of \$74.12, defendant, through Kilpatrick & Hanley, its general agents at Cripple Creek, did issue its policy and contract of insurance to plaintiff, whereby it was insured against all loss or damage by fire for a period of one year from October 5, 1909, to October 5, 1910, to the smelter, buildings, machinery, etc., which went to make up the smelter, which are described in the policy and which were owned by plaintiff, and which was finished and ready for use the day it was destroyed by lightning. Lightning struck the buildings August 13, 1910, and they were all destroyed by fire resulting therefrom. The evidence shows that the insured buildings and property, which were totally destroyed by fire, were worth \$134,000, and that the loss and damage occasioned thereby was about that sum. There was a large amount of other insurance upon the property besides that which was issued by appellant herein, amounting to about \$50,000. The insurance premiums were not paid in cash when the policies were delivered, but a credit was given to plaintiff therefor by Kilpatrick & Hanley, and prior to the fire plaintiff paid \$500 to Kilpatrick & Hanley on the premiums, which amounted to between \$1,500 and \$1,600. August 15, 1910, two days after the fire, Kilpatrick & Hanley sent a telegram from Cripple Creek, Colo., to J. F. W. Doepke, the president of respondent, and one who was in sole charge of respondent's business, and the only one with whom Kilpatrick & Hanley ever had any business, requesting that respondent send the balance of the premiums, which amounted to \$1,124. The telegram is as follows:

"Cripple Creek, Aug. 15, 1910.

"J. F. W. Doepke, Mercantile Building, St. Louis, Missouri—Mail draft for your protection eleven hundred and twenty-four dollars.

"Kilpatrick & Hanley."

Immediately upon receipt of that telegram Doepke sent a draft to Kilpatrick & Hanley

for said sum of \$1,124, which made payment in full of all the premiums upon all the policies, including the policy of defendant herein, which Kilpatrick & Hanley had issued upon the property in question. At the time the insurance was effected, and at the time the fire occurred, the plaintiff had not received a license to do business in the state of Colorado from that state, although it had, for a long time past, owned the mining property in question, and had been engaged in the erection of the smelter and buildings which were insured and destroyed by fire, and had been regularly paying taxes to the state of Colorado upon the property in question. After the fire the plaintiff gave due notice of the fire to defendant, and made due proofs of loss through the Kilpatrick & Hanley agency, the agents of the defendant. The policy provided that the property should not be idle for more than 30 days without the written permission of defendant. The evidence for plaintiff tended to show: That at the time the policy was issued and delivered to plaintiff, its president informed the agents of defendant that because of the scarcity of fuel and the difficulty in delivering it at the plant, a tramway might have to be constructed, and on account of those matters the smelter might be idle at times for periods of more than 30 days at a time, and asked them what he should do in the premises. That in reply thereto said agents stated to him that that would be all right, and thereupon he accepted the policies and paid the premium as previously stated. That thereafter, and before the fire occurred, the same inquiry had been addressed a number of times to said agents, to which they made substantially the same answer, as that before stated. This was corroborated by Kilpatrick one of defendant's agents and witnesses. That when it was found out that the business would have to shut down, Doepke, the president of the plaintiff company, went to defendant's agents and informed them that he was unable to procure the necessary fuel with which to operate the smelter, and would have to close down on that account, and asked them what was necessary for him to do in regard to the insurance, as he did not want any question raised as to its validity. This was on January 10, 1910; and Kilpatrick said to him, "All right; go ahead." That each and every month thereafter, said agents were notified of the fact that the mill was idle, and inquiry made of them as to what should be done. That at no time did they make "any objections to it." Kilpatrick, one of defendant's agents, says that was true, and that he made no objection—

"because I (he) expected he (Doepke) would start up in a short time, and I didn't want to lose the business and premiums."

The policy prohibited incumbrances upon the property; and at the time of the issuance of the policy, or shortly thereafter, the company executed to one Peters a mortgage on

the property to secure the sum of \$25,000. The undisputed evidence shows that in "June, 1910," Doepke informed Kilpatrick & Hanley about "this mortgage" and the agents made no objection "whatever" to it. They did not, upon being informed of the existence of this mortgage, cancel the policy or offer to return any of the premiums. Under date of July 11th and 21st, respectively, 1910, Kilpatrick & Hanley wrote to plaintiff, and canceled certain other policies which they had issued to it upon this property, for the reason that the Peters mortgage of \$25,000 was upon the property, and in the place of the canceled policies wrote other policies to take the place of the canceled ones. On July 10, 1910, more than a month before the fire, the Peters mortgage was paid off and satisfied in full. A second mortgage on the property is mentioned in the evidence, but not set out, and the amount it was given to secure is not made clear, but whatever was the amount, it was fully paid and satisfied June 11, 1908, more than two years before the fire. The note had been "surrendered up and canceled." The testimony in regard to both of these mortgages, having been fully paid and released before the fire is proven by the uncontradicted testimony in this case. It is conceded that the plaintiff company had not complied with the laws of Colorado, and secured a license to do business therein, at the time the policy in question was issued.

Such additional facts as may be necessary for a proper disposition of the case will be stated in the opinion.

David H. Robertson, of Mexico, Mo., and Fred Herrington and Lewis & Grant, all of Denver, Colo., for appellant. Fauntleroy, Cullen & Hay, of St. Louis, Fry & Rodgers, of Mexico, Mo., and Fred D. Shaw, for respondent. Percy Werner, of St. Louis, and Sutton & Huston, of Troy, amici curiæ.

WOODSON, C. J. (after stating the facts as above). I. Counsel for the appellant (defendant) assign many grounds for a reversal of the judgment of the circuit court. A number of them are constitutional questions. We will dispose of the latter first, because if appellant's position is sound in that regard, then there will be no necessity for a determination of the former. Counsel for appellant state their position in the following language:

"The court erred in overruling defendant's motion to quash the writ and in refusing to sustain the defense, set forth in the first paragraph of defendant's answer, which defense was based upon the grounds that the superintendent of the insurance department of the state of Missouri, upon whom service was attempted to be made, was not authorized by the laws of the state of Missouri to acknowledge or receive service of process for the defendant in this action, and that section 7042, R. S. of Missouri, 1909, is unconstitutional and void because it denies to the defendant due process of law as guaranteed to it by the Constitution of the state of Missouri and by section 1, Amend. 14, of the Constitution of the United States."

While counsel state their general proposition in the language just quoted, yet when they come to brief and argue the same they subdivide it, at least by necessary implication, into five propositions, which, if I correctly understand them, are as follows:

First. That said section 7042, R. S. 1909, was only designed to provide for service of process issued in suits against foreign insurance companies doing business in this state founded upon contracts of insurance made in this state, and not elsewhere.

Second. That, if said section 7042 was designed to authorize service of process issued in suits against foreign insurance companies doing business in this state under authority of the statute properly granted, growing out of contracts of insurance made in another state or country, then it is unconstitutional, null, and void under both the state and federal Constitutions, as stated by counsel in their general proposition before quoted.

Third. That the Legislature has no constitutional power to enact laws, conferring jurisdiction upon the courts of this state to try suits against foreign insurance companies based upon contracts of insurance executed in another state or country.

Fourth. That said section 7042 was not designed to provide for service of process issued in suits against foreign insurance companies doing business in this state unlawfully, that is, without permission of the state, founded upon contracts of insurance made in this state; but if that was the design, then the section is unconstitutional for the reasons before stated.

Fifth. That, if said section 7042 was designed to authorize service of process, in suits against foreign insurance companies doing business in this state, based upon a contract of insurance made in another state, with or without a license from that state, then it is unconstitutional, null, and void, for the reasons before stated.

[1] Regarding the first: While this question is embraced within the general proposition before mentioned, yet in fact it presents no constitutional question whatever, but simply involves the meaning of section 7042.

A foreword: Because of the misapprehension, in my opinion, of counsel for appellant, and some of my learned Associates regarding the meaning of section 7042, R. S. 1909, and its constitutionality under the ruling of the Supreme Court of the United States in the cases of *Old Wayne Life Association v. McDonough*, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345, and *Simon v. Southern Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, and because of the far-reaching, detrimental, and injurious effect such a rule would have upon the jurisprudence of this and the other states of the Union and upon the speedy and orderly administration of justice, I feel justified in devoting more time and space to the case than would otherwise be necessary. This may, and doubtless will, lead to more

or less repetition, and some illustrations to show the application of the principles of law to the facts, and consequently a prolongation of the opinion.

Returning to that statute: Every phase of this statute save its constitutionality was carefully considered and determined by this court in the case of *State ex rel. v. Grimm*, 239 Mo. 135, loc. cit. 159, 143 S. W. 483. Since, however, its meaning has again been questioned and its constitutionality assailed, I will add some additional views as to its meaning, and then carefully consider its constitutionality. In order to grasp the real meaning of this statute we should have it before us. It reads as follows:

"Section 7042. Any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business by any agent or agents in this state, shall first file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served for and in behalf of such company, * * * in any court of this state, * * * and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state. Service of process as aforesaid, issued by any such court, as aforesaid, upon the superintendent, shall be valid * * * and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state. * * * Every such instrument of appointment executed by such company shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of a resolution of the board of directors or trustees of such company similarly attested, showing that the president and secretary, or other chief officers of such company, are authorized to execute such instrument in behalf of the company; and if any such company shall fail, neglect or refuse to appoint and maintain, within the state, an attorney or agent, in the manner hereinbefore described, it shall forfeit the right to do or continue business in this state."

This section should be read with sections 7040 and 7041 R. S. 1909, for the former prohibits all foreign insurance companies from doing business in this state without first taking out a license, etc., and the second prescribes the mode of procuring such license, etc. This statute was first enacted in 1845 (*Laws 1845*, p. 110, § 3), and was carried into the Revised Statutes of 1845 as section 3, on page 610. This statute was amended in 1885 (*Laws 1885*, p. 163, § 1), so as to read as we now have it in said section 7042, and it was first carried into the Revised Statutes of 1889 as section 5912.

On May 11, 1899, the appellant filed with the superintendent of insurance an instrument in the nature of a consent and appointment in compliance with the requirements of the Revised Statutes of Missouri, 1889, stating the desire of the appellant to transact business in the state of Missouri pursuant to the laws thereof, setting forth fully

said section 5912. And thereupon, and under that authority, the appellant has continued to the present time to transact its said business in this state under said license. This places before us clearly the law under which the appellant came into the state to transact an insurance business, and its status before the law of the state, including its agreement for service of legal process upon it through the insurance commissioner of this state.

It is one of the elementary rules of statutory construction that in trying to ascertain the meaning of a statute or an amendment thereto, we should first look at the status of the subject-matter of the contemplated legislation, as well as the law, or lack of law, governing the same. If there is no law upon the subject, and some evil exists in connection therewith, which the Legislature desires to remedy, then a new statute must be enacted in order to remedy the evil; but if there is an existing law governing the matter, statutory or common law, which is defective or insufficient to properly govern the same, and that in consequence thereof evil lurks in or about the same, which should be abolished, then that end is generally accomplished by an enactment supplementing the deficient statute or the insufficiency of the common law, as the case may be. *Dowdy v. Wamble*, 110 Mo. loc. cit. 283, 19 S. W. 489; *Mooney v. Buford & George Mfg. Co.*, 72 Fed. loc. cit. 36, 18 C. C. A. 421.

Prior to 1845 the insurance business transacted in this state, both life and fire, was comparatively small, and principally done by foreign companies. For that reason there had been but little legislation needed or enacted upon the subject; no means were provided by which service of process could be had against such a company issuing policies in this state. This led to great injustice and hardship in many cases, because when a loss occurred the insured was compelled to settle with the company upon its own terms or go to the state of its incorporation and sue it for the sum due on the policy. This led to much loss of time, trouble, and expense on the part of the policy holders in going to and from the place of trial, to say nothing of the cost and expense of the litigation. This injustice appealed to the Legislature, and in 1845, for the first time in so far as I have been able to ascertain, it undertook by legislation to remedy that injustice in so far as concerned contracts of insurance made in this state, and thereby authorized suit to be brought on such policies in the courts of this state, and provided for service of process against any such company in the manner stated therein, which will presently be copied. As previously stated, the first legislation in this state which took any definite form, looking to a remedy of the injustice and hardships mentioned, was enacted in 1845 (*Laws 1845*, p. 110), which is chapter 87, R. S. 1845.

While this entire chapter should be considered in connection herewith, as throwing light upon the general design the Legislature had in mind, yet space compels me to confine my observations to section 3, p. 610, R. S. 1845, thereof. It reads as follows:

"The agent or agents of any such company aforesaid, shall also be required, before commencing business, or, in case he or they have already commenced business, then, on or before the first day of July, eighteen hundred and forty-five, to furnish to the clerk of the county court, to be placed on the records of said court, a resolution of the board of directors of the company for which he or they may propose to act, or are already acting, duly authenticated, authorizing any citizen or person residing in the state of Missouri, or elsewhere, having a claim against any such company aforesaid, growing out of a contract of insurance, made with the agent or agents of any such company aforesaid, doing business in this state, to sue for the same in any court in said state having competent jurisdiction; and further authorizing service of process on said agent or agents to be sufficiently binding on said company to abide the issue of said suit, and that such service shall authorize judgments in the same manner that judgments are taken against private individuals; and it is hereby enacted, that the service of process on the said agent or agents, in any action commenced against such company, shall be deemed a service upon the company, and shall authorize the same proceedings as in case of other actions at law; the process shall be served and returned in the same manner, as if the action were against the agent or agents personally."

In addition to what was held by this court in the case of *State ex rel. v. Grimm*, 239 Mo. 135, loc. cit. 159 to 171, 143 S. W. 450, as to the meaning of section 7042, I have this to say: That section 3 of the act of 1845 required all foreign insurance companies desiring to do business in this state to first place on record a resolution of the board of directors—

"authorizing any citizen or person residing in the state of Missouri or elsewhere, having a claim against any such company aforesaid growing out of a contract of insurance made with an agent or agents of such company aforesaid doing business in this state to sue for the same in any county in said state."

The italics are ours, and are made for the purpose of accentuating the fact that this original statute did, as contended for by counsel for the petitioner, provide and was designed to limit the service of process in suits against such companies growing out of contracts of insurance made by them in this state. This statute was amended by an act of 1855 (Rev. St. 1855, p. 885, § 1), which also required a resolution of the board of directors of such foreign insurance company—

"authorizing any person having a claim against such company growing out of a contract of insurance made in this state with the agent, or agents thereof doing business in this state, to sue such company for the same, in any court of this state."

This amendment also limited the service of process in suits against such company growing out of contracts of insurance made in this state. This statute was further amended in 1865 (Gen. St. 1865, p. 402, § 3),

by adding, among other things, the following:

"* * * And the service of process on such agent or agents as aforesaid shall be deemed a service upon the company sued, and shall authorize the same proceedings in such suit as in the case of other suits in such court," etc.

And the following amendment was added to section 6013, R. S. 1879:

"Service of process as aforesaid, issued by any such court, as aforesaid, upon any such attorney appointed by the company, or by the superintendent, as aforesaid, shall be valid and binding and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state," etc.

The latter amendment was designed to limit the time of service of process upon the company "*to such time as it has policies or liabilities outstanding in this state,*" etc. As time passed the insurance business grew by leaps and bounds, in proportion to the general business of the country, and policies of insurance were issued by the thousands in and out of this state by foreign corporations on property located herein and elsewhere, and in order to meet the new order of things, additional legislation was necessary. Under this new order of things there was no provision contained in the act of 1845, or in any of the amendments thereof prior to 1885, by which a resident or a nonresident of this state could sue a foreign insurance company doing business herein, upon a policy of insurance issued by it out of this state, insuring property located in this state or elsewhere, and in order to meet that condition section 3 of the act of 1845, as amended, as previously stated, was further amended by the act of 1885 (Laws 1885, p. 183). After the various amendments mentioned had been enacted, this statute, as before stated, passed into the Revision of 1889, and is section 5912, and into the Revision of 1909, and is now section 7042. Section 7042 was in full force and effect when appellant applied for a license to do business in this state, and on the 11th day of May, 1899, it fully complied with the requirements of that statute, and among other things, filed with the superintendent of insurance of the state, the instrument mentioned in said section, appointing him its agent to accept service of such process as therein provided for as might be issued against it by any court of proper authority in this state, and consented that service had upon him as such should be legal and personally binding upon it in the same manner as other proceedings had in said court. By the amendment of 1885, which is now section 7042, the Legislature broadened and extended the scope and operation of the act of 1845, and the various amendments thereto, by striking out the words which limited it to suits brought on contracts of insurance *made in this state*, and by inserting in lieu thereof the provision requiring all such companies to appoint the insurance commissioner of this state as their agent to accept service of process for them.

and to acknowledge receipt of the same when "issued by any court of record, justice of the peace or other inferior court, and upon whom such process may be served for and in behalf of such company in all proceedings that may be instituted against such company in any court of this state or in any court of the United States in this state, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state," and that service of process, as aforesaid, issued by any such court, as aforesaid, upon the superintendent of insurance, "shall be valid and binding and be deemed personal service upon such company so long as it shall have any policies or liabilities outstanding," etc.

The omission from this statute the limitation of the process of the courts of this state to causes of action arising out of contracts of insurance made in this state, as originally enacted, and enlarging or extending the process of the courts to "*all proceedings that might be instituted against such company in any court of this state*," clearly authorized the superintendent of insurance to acknowledge the receipt and service of process for any such company in any and all transitory causes of action that might be brought by any one against it in the courts of this state, except those mentioned in section 7044, R. S. 1809, regardless of place where the contract of insurance was entered into; and the language of this amendment is sufficiently comprehensive to embrace residents and nonresidents of the state at the time of the issuance of the policy and at the time of the institution of the suit thereon. This it seems to me is too plain for argument, and to attempt to do so would but confuse the plain meaning of the language of the amendment of 1885, and the steadfast purpose the Legislature had in mind when the amendment was enacted. Nor does the amendment of 1869, which, in substance, provides that the authority of the superintendent of insurance to acknowledge and accept service for such company shall continue "so long as it shall have any policies or liabilities outstanding in this state," militate in the least against the construction heretofore placed upon this section of the statutes, for the obvious reason that said amendment is a limitation upon the duration of the authority of the superintendent of insurance to act for such company, and not a limitation upon the character of suits that may be brought and prosecuted in the courts of this state under such a service of process. This court in the case of *Dowdy v. Wamble*, 110 Mo. loc. cit. 283, 19 S. W. 490, in discussing this rule, said:

"There are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of any statutory change thereof."

In discussing the same question the United States Court of Appeals for the Seventh Circuit, in the case of *Mooney v. Buford et al.*, 72 Fed. loc. cit. 36, 18 C. C. A. 426, said:

"The earlier provisions quoted from the Indiana Code and statutes expressly limit the right to process against foreign corporations to suits arising out of transactions had in the state, and from the mere omission of that limitation in the later enactments, there would arise a just inference that an enlargement of jurisdiction in this particular was intended; but the broad terms employed in the act of 1883, 'process in any suit against such company may be served,' etc., need not be helped out by inference. * * * There is no reason to be found in the context, or in the course of previous legislation in the state, or in considerations of policy, for believing that in the enactment before us the word was intended to be used in a more restricted sense."

I am therefore clearly of the opinion that said section 7042 embraces the policy mentioned in this case, and authorized the holders thereof to sue thereon in the circuit court of Audrain county.

[2] II. This brings us to the consideration of the constitutional questions presented. We will try to discuss these questions in the order stated, but they are so closely related and interdependent that what is said of one may necessarily apply to others; and, for the purpose of preventing confusion in discussing the constitutionality of said section 7042, it should be borne in mind that it does not apply to suits arising out of contracts of insurance written in this state by a foreign insurance company, without a license from it to do business herein. All such suits are governed by section 7044. Nor do either of those sections authorize service of process in suits brought in the courts of this state against foreign insurance companies doing business herein *without a license from the state to so do, based upon a policy of insurance issued thereby in another state or country*. That question will be considered in paragraph 5 of this opinion.

In discussing sections 7042 and 7044, even though our language may be general, yet what is said of the one is not intended to apply to the suits mentioned in the other.

Regarding the first constitutional question presented, which is the second subdivision of appellant's general contention, before quoted: In brief, counsel for appellant contend that section 7042 is violative of section 30, art. 2, of the Constitution of Missouri and section 1 of the Fourteenth Amendment of the Constitution of the United States, because: First, it does not afford appellant due process of law, and, second; because the Legislature of this state has no power to authorize suits to be brought in the courts of this state for a breach of a contract of insurance not made in this state. These two propositions are so closely and inseparably connected, we will discuss them together. Does said section 7042 provide for due process of law, and was the appellant served with due process of law? The respondent answers

this question in the affirmative, while the appellant answers it in the negative. The latter bases its answer upon the authority of the dissenting opinion filed in the Grimm Case, *supra*, and the opinion of the Supreme Court of the United States in the case of *Simon v. Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. By reading the dissenting opinion in the Grimm Case it will be seen that it was predicated upon the idea that said section 7042 only applied to service of process in cases involving controversies growing out of insurance contracts made in this state with a foreign insurance company doing business herein under a license duly issued to it, and therefore service of process upon such a company, under that section of the statutes, conferred no jurisdiction upon the courts of this state to try a case arising out of such a contract made in some other state or country. This contention of the petitioner, in my opinion, is a clear misconception of the meaning of said section 7042, and of the class of cases to which it applies. In addition to what was said upon this question in the Grimm Case, I wish to say that in the light of the history of this statute, as shown by the various amendments made thereto from time to time and the evils the Legislature intended thereby to remedy, there is no longer a shadow of doubt but what it was the design of the Legislature, by enacting section 7042, to provide for process in suits involving controversies arising out of all lawful contracts of insurance issued by such companies outside of this state as well as those made in it, except those mentioned in section 7044 and the classes of cases mentioned in the case of *Old Wayne Life Association v. McDonough*, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345, which will be carefully considered later. That being unquestionably true, then if that section is constitutional, then clearly the petitioner here was served with due process of law within the meaning of the due process clauses of the state and federal Constitutions. The Grimm Case, therefore, has no bearing whatever upon the constitutional questions presented.

While there is some language used in the opinion of the court in the case of *Simon v. Southern Ry. Co.*, *supra*, which seems to lend support to the contention of counsel for the petitioner, yet when read in the light of the facts of that case and the statute the court had under consideration, both of which are totally different from those presented by this record, it does not, in my opinion, bear the construction placed upon it by counsel for the petitioner, nor is it applicable or controlling in the case at bar. In order to get a clear comprehension of that case I will briefly state the principal facts thereof, as they appear in the statement of them, as made by that court. In that case the petition charged that the plaintiff was a resident of Louisiana, and the defendant was a Virginia railroad corpo-

ration, doing business in the former state; that the plaintiff purchased a ticket from defendant, from Salem, Ala., to Meridian, Miss., and that, while traveling over the lines of the defendant in Alabama, through its negligence a collision occurred in which the plaintiff was injured. The suit was brought in the district court for the parish of Orleans in the state of Louisiana, and the petition alleged several items of damages aggregating something over \$13,000. At all the times mentioned there was in force in the state of Louisiana, an act of the Legislature, known as "Act No. 54 of 1904," two sections of which are as follows:

"Section 1. That it shall be the duty of every foreign corporation doing any business in this state to file in the office of the secretary of state a written declaration setting forth and containing the place or locality of its domicile, the place or places in the state where it is doing business, and the name of its agent or agents or other officer in this state upon whom process may be served."

"Sec. 2. * * * Whenever any such corporation shall do any business of any nature whatever in this state without having complied with the requirements of section 1 of this act, it may be sued for any legal cause of action in any parish of the state where it may do business, and service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served."

Having availed himself of these statutes the plaintiff had a summons issued for the defendant, directed to "the Southern Railway Company, through Hon. John T. Michel, Secretary of State of Louisiana, New Orleans," and required the defendant to answer in 10 days. The deputy sheriff, on December 3, 1904, served the citation and petition—

"on the within named Southern Railway Company in the parish of East Baton Rouge, state of Louisiana, by personal service on E. J. McGroney, assistant secretary of state; Jno. T. Michel, secretary of state being absent at the time of service."

The assistant secretary of state filed the citation and petition in his office. No notice, however, was given to the defendant by the secretary of state of the service of the citation upon him, or of the fact that suit had been brought against it. It, therefore, made no appearance in the suit, and on January 10, 1905, a judgment by default was entered against the defendant; and thereafter, on January 20th, upon evidence introduced by the plaintiff, the court rendered a judgment for him for the full amount sued for. That on February 6, 1905, the defendant having heard of the rendition of the judgment against it, filed a bill in the Circuit Court of the United States for the District of Louisiana, asking that Simon be perpetually enjoined from enforcing said judgment. The bill of the railway company, asking for the injunction, charged fraud on the part of Simon in procuring the judgment. Proceeding, that court says:

"The bill further alleged that the Southern Railway was not doing business in the state of

Louisiana; that the service upon the secretary or assistant secretary of state was not a citation upon the railway company, and was null and void for the purpose of bringing it under the jurisdiction of the civil district court; that any judgment rendered upon such attempted citation would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of the Constitution; that the railway company had never received the citation issued in the suit, nor was it advised, nor had it any knowledge, of the pendency of said proceedings until after the rendition of the judgment; that the verdict of the jury having been rendered upon false testimony and without notice, it would be against good conscience to allow the judgment thereon to be enforced against the railway company, which has no remedy at law in the premises, and has a complete meritorious defense to the claim on which the judgment is based; that by fraud and accident, unmixed with its own negligence, the railway company has been prevented from making such defense."

The cause was by the Circuit Court referred to a master to hear the evidence and to report his conclusions of law and facts. He found that the railway was not doing business in Louisiana in the sense of the statute; that the judgment was not fraudulent, but was void because service upon the assistant secretary of state was not the "service upon the secretary of state," required by the statute. The Circuit Court found that the railway company was doing business in New Orleans, but ruled that the Act 54 did not provide for service on the assistant secretary of state, and hence that the judgment by default in the state court was void for want of jurisdiction of the person of the defendant. The Circuit Court did not consider the question of fraud, but, as before stated, held that the state judgment was void because the Louisiana statute providing for service on foreign corporations was unconstitutional; and it entered a permanent injunction against said Simon, as prayed for in the bill. From that judgment Simon appealed the case to the Supreme Court of the United States.

Before taking up the Simon-Railway Case, it should be borne in mind that section 1 of the Louisiana statute before quoted was not before the Supreme Court of the United States for consideration, because the service of Simon in that case was had, if at all, upon the Railway Company, under the authority of section 2 of that act, and was served upon the assistant secretary of state instead of the secretary, as the act required. This is made clear and set at rest by the following language, quoted from page 129 of 236 U. S., page 260 of 35 Sup. Ct., 59 L. Ed. 492, of opinion of Mr. Justice Lamar, who delivered the opinion in that case:

"The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We, therefore, purposely refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here

on the special fact, relied on in the court below, that in this case the cause of action arose within the state of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute. Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein, to require such companies to name agents upon whom service may be made, and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147 [23 Sup. Ct. 707, 47 L. Ed. 987]; *Mutual Life Ins. Co. v. Spartley*, 172 U. S. 608 [19 Sup. Ct. 308, 43 L. Ed. 569]."

After thusly stating the facts of the Simon-Railway Case, copying the statute under which service of process in that case was attempted to be had, and what the court in that case *did not consider or decide*, we will now review what it *did decide therein*. Following immediately the quotation last made from that opinion, the Supreme Court of the United States held that the second section of the statute of Louisiana, the one under which the pretended service was had, was unconstitutional, in the following language:

"But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made, and suits for torts wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might, at any time, be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association v. McDonough*, 204 U. S. 22 [27 Sup. Ct. 236, 51 L. Ed. 345], that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states. In that case the Pennsylvania statute, as a condition of their doing business in the state, required foreign corporations to file a written stipulation, agreeing 'that any legal process affecting the company served on the insurance commissioner * * * shall have the same effect as if served personally on the company within this state.' The *Old Wayne Life Association* having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania was sued thereon in Pennsylvania. The declaration averred that the company 'has been doing business in the state of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said county and state,' and service was made on the commissioner of insurance. The association made no appearance, and a judgment by default was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings, and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to the company having done any business in the state of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that state. This court said: 'But even if it be assumed that the company was engaged in some business in Pennsylvania at the time the contract in

question was made, it cannot be held that the company agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania. * * * Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have consented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * * As the suit in the Pennsylvania court was upon a contract executed in Indiana, as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney, or by agent in the suit, and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the state within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the * * * judicial proceedings of the several states, and was void as wanting in due process of law."

As before stated, it should be remembered that in that case Simon purchased his ticket at and from Salem, Ala., to Meridian, Miss., and that while riding on that ticket he was injured in Alabama; also that service of the summons in that case was not had under the authority of the first section of the Louisiana act mentioned, which authorizes service of process in such cases upon one of the company's own agents or officers in the state; but said service was had under the second section of said act, which only applies whenever any such company transacts any business in that state without having complied with the requirements of section 1 of said act, and then, and only then, could service of process be had upon the secretary of state. That is, service under the second section could never be had where the railway company had complied with the requirements of the first section of the act, for in that case the service would have to be had under it, and not the second section; and there was not a *scintilla* of evidence introduced in that case which tended to show said company had not complied with the requirements of that section, which, of itself, was sufficient to render inoperative the second section, for the obvious reason that it expressly provides, whenever any such company transacts any business in that state without complying with the requirements of the first section, then service may be had under the authority of the second section. But concede that the railway company had complied with the requirements of the first section, then of course, in the express language of the second section it could not apply or become operative in that case, for the company had complied with the requirements of the first section.

And it should also be noted, in this connec-

tion, that two concurring facts had to affirmatively appear before the second section could, under its express provisions, apply to that case: First, that the railway company had not complied with the requirements of section 1; and, second, that the company was doing business in that state without authority from the state to do so. There was no showing of noncompliance with the former, and therefore all business shown to have been transacted in that state by the railway company must be presumed to have been lawful, and not unlawful, under the laws of that state, as well as that of other states. In other words, the second section was designed to provide for service upon all such corporations which were poachers or interlopers, transacting business illegally in that state. In other words, by reading the second section of the Louisiana act, it will be seen that it *only applies* to suits brought against a foreign corporation doing business in that state without authority therefrom, and therefore it could not apply to the Simon-Railway Case, because that suit was based upon a tort committed, not in Louisiana, but in the state of Alabama. The mere fact, if it was a fact, of which there was no evidence either way, that the railway company may have been doing business illegally in Louisiana, that is, without authority from the state, could not expand the provisions of that section so as to embrace suits based upon torts committed or contracts executed in another state. Nor was the railway company in that case guilty of any conduct from which the law could, or would, presume that it had, by implication, consented to service upon the secretary of state or the assistant secretary. Such implication can only arise from the fact that the transaction out of which the suit grew was transacted in the state without authority.

The second section, therefore, in the very nature of the case, was only applicable to suits growing out of said illegal transactions. That must be true, for the reason that said section by express terms limits its operation to suits brought in that state growing out of such illegal operations. Let me make this point clear, for it is the differentiation between this and the Simon Case and the one upon which the members of this court differ. The second section of the Louisiana act was designed to afford redress, in the courts of that state, to only such persons who had been induced to make contracts therein with a foreign corporation which had not complied with the requirements of the first section thereof; and consequently the process authorized to be issued and served by the second section was, of necessity, limited to suits growing out of said poaching contracts so made in that state; and it could not possibly apply to any contract made in any other state or country. This is the principle upon which the cases of Mutual Reserve Association v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707,

47 L. Ed. 987, and Mutual Life Insurance Co. v. Spratley, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569, are based; and that is the reason, and the sole reason, upon which the learned judge who wrote the opinion in the Simon-Railway Case used this language:

"But this power [the power to serve the secretary of state without the consent of the company] to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law."

This is clearly the meaning of the second section; and I am unable to see what other meaning that court or any other court could give to it.

Moreover, under the second section, because of the fact that a foreign corporation illegally transacted business in Louisiana—perchance just one transaction (and the record discloses in that case it was not extensive)—it may be sued in the courts thereof upon all lawful business transactions conducted in another state, as well as upon the illegal transactions conducted in that state, then why was the first section, which is general in its provisions, enacted? I respectfully submit, none whatever; and to answer the question otherwise would permit the second section (which is an exception to, or, more accurately speaking, is an assisting adjunct to the first, designed to cover the poaching transactions not embraced in the first) not only to control first the principal part of the act, but would practically repeal it and wipe it from the statutes of Louisiana; and that, too, would be brought about by the illegal act of a wrongdoer. This was the identical question that was involved in the case of Old Wayne Life Association v. McDonough, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345; and the ruling of the court in that case was just as it was on the Simon-Railway Case. This is made clear from the following language quoted from the former:

"But even if it be assumed that the company was engaged in some business in Pennsylvania [which was without authority] at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania. * * * Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have consented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * * As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney, or by agent in the suit, and as the act of the Pennsylvania court in rendering the judgment must be deemed

that of the state within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the * * * judicial proceedings of the several states, and was void as wanting in due process of law."

By the use of the words:

"Conceding, then, that by going into Pennsylvania, without first complying with its statute [which made its contract illegal] the defendant association may be held to have consented [by implication] to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth [which was without permission of the state, and therefore illegal], such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania."

—the court meant to say, and did in effect say, that because of the fact that the Old Wayne Company had, previously to the time it executed and delivered the policy there in suit to the insured in the state of Indiana, been transacting business in Pennsylvania without authority constituted no ground, within the meaning of the Pennsylvania statute, from which the court could presume that the company had consented by implication that the insurance commissioner of Pennsylvania might accept service of process in a suit based upon the policy so executed and delivered in the state of Indiana, notwithstanding the fact that such a presumption would have been indulged in against the company had that suit been based upon one of the policies mentioned, executed and delivered by it in Pennsylvania, without authority given by that state. In that case, as in the Simon Case, there was no express agreement that service might be *had upon any one*, yet the court stated that it might have implied consent of service in that case had the company illegally entered said state, and there have transacted the business out of which that litigation arose in violation of its laws; but in that case it refused to indulge in such presumptions because the uncontradicted evidence showed that the transaction out of which that litigation arose was not conducted in the state in which the suit was brought and process served, and therefore held that in the very nature of the case it could not be presumed that the company, by implication, consented to service in the state of Pennsylvania from the mere fact that it had illegally transacted other business therein than that out of which that litigation arose, without first complying with the laws of that state, when it affirmatively appeared that the illegal transaction sued on, and upon which the implied consent was predicated, was not conducted in Pennsylvania, but was transacted in the state of Indiana, and in the Simon Case, in the state of Alabama; but neither of those suits were brought in the state where the policy was executed. It was for this reason that the Supreme Court of the United States held, in the Old Wayne and the Simon

Cases, that such a statute, as the second section of the Louisiana act, was unconstitutional and void if its design was to authorize service of process upon any such company in a suit based upon other than illegal transactions conducted in the state where the suit was brought, and that was correct because that section only applies to suits based upon policies illegally issued in that state. Suppose the service in the Simon Case had been under the first section of the Louisiana act, which provides for service upon the statutory agent of the company (I use the words, "statutory agent," in the sense that those mentioned in the first section are statutory agents as well as actual agents, in so far as service of process is concerned), then could it be seriously contended that the service in that case would not have been valid, that is, if it was doing a legitimate business there at the time? I think not. Otherwise, no suit could be brought in the courts of this, that, or any other state against any foreign corporation doing business here, by *any one, resident or nonresident, upon any cause of action accruing outside of this state*. That is not the law, nor never will be, as long as the immaculate flower of justice continues to bloom in the human heart. The service in this case was had under the authority of section 7042, R. S. 1909, which corresponds to the first section of the Louisiana act, and not under section 7044, R. S. 1909, which is substantially the same, and designed to serve the same purpose as did the second section of the Louisiana Act. Section 7044 reads:

"Additional Service.—Service of summons in any action against an insurance company, not incorporated under and by virtue of the laws of this state, and not authorized to do business in this state by the superintendent of insurance, shall, in addition to the mode prescribed in section 7042, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collect or receive any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either."

Had this suit been brought under section 7044 instead of section 7042, then the case would have been on all fours with the Old Wayne and Simon Cases, for the reason the former section only applies where the policy sued on is issued in this state by such a company without first complying with sections 7040, 7041, and 7042, R. S. 1909. This is based upon the express authority of *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569, and the *New England Life Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379, and the same process of reasoning used by the Supreme Court of the United States in the Old Wayne and the Simon Cases, that is, the said stat-

ute only applies to poachers or interlopers who have issued policies in a state without first complying with her laws. Consequently, had the policy sued on been illegally issued in this state, then, as the court said in the Old Wayne and Simon Cases, there would have been an implied consent that service of process in a suit brought thereon in the courts of this state might have been had upon the persons specified in said section 7044. Since, however, it affirmatively appears that the appellant had fully complied with the requirements of said section 7042, and the policy having been issued in the state of Colorado, the case is not embraced within the provision of said section 7044, but falls squarely within the letter and spirit of section 7042, and therefore removes it from the operation of the rule announced in the Old Wayne and Simon Cases, and brings it completely within the principles of law laid down in the case of *State ex rel. v. Grimm*, 239 Mo. 135, loc. cit. 159 to 171, 143 S. W. 483.

The case of the *New England Life Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379, is directly in point here. It was an action upon a life insurance policy issued upon the life of Anne E. Woodworth, who was domiciled at the time the policy was taken out in the state of Michigan, and who died at Seneca Falls, N. Y. She had never been domiciled in the state of Illinois, and had no assets in the state of Illinois, unless the policy of insurance constituted assets. The probate court of Champaign county, Ill., appointed the husband, S. E. Woodworth, administrator of the estate of Anne E. Woodworth, and he brought suit in the court of the state of Illinois against the New England Mutual Life Insurance Company, a corporation of the state of Massachusetts. Stephen E. Woodworth, appointed administrator, was the husband of Anne E. Woodworth, and the said Stephen E. Woodworth, since the death of his wife, has been a resident of the county of Champaign and state of Illinois, and had possession of the policy at the time the suit was instituted. On this state of facts, the defendant requested the presiding judges to rule that the plaintiff, as administrator appointed in Illinois, could not maintain this action. The request was overruled, and the case carried to the Supreme Court of the United States, and that court sustained the proceeding, though the service was upon the defendant by virtue of a statute requiring the defendant to appoint a person upon whom lawful process could be served. In deciding the case, the Supreme Court of the United States said:

"In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be re-

garded as having a domicile there, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there. The corporation will be presumed to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died. The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in *Wyman v. Halstead*, 109 U. S. 654 [3 Sup. Ct. 417, 27 L. Ed. 1068]. But the reason why the state which charters a corporation is its domicile in reference to debts which it owes is because there only can it be sued or found for the service of process. This is now changed in cases like the present; and in the courts of the United States it is held that a corporation of one state, doing business in another, is suable in the courts of the United States established * * * in the manner provided by those laws. *Lafayette Insurance Co. v. French*, 18 How. 404 [15 L. Ed. 451]; *Railroad Co. v. Harris*, 12 Wall. 65 [20 L. Ed. 354]; *Ex parte Schollenberger*, 96 U. S. 369 [24 L. Ed. 853]; *Railroad Co. v. Koontz*, 104 U. S. 5, 10 [26 L. Ed. 643]."

This cause had been cited and approved in the following cases: *Southern Pacific Co. v. Denton*, 146 U. S. 202, loc. cit. 207, 13 Sup. Ct. 44, 36 L. Ed. 942; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, loc. cit. 452, 12 Sup. Ct. 935, 36 L. Ed. 768; *Fitzgerald Const. Co. v. Fitzgerald*, 137 U. S. 98, loc. cit. 106, 11 Sup. Ct. 36, 34 L. Ed. 608; *In re Louisville Underwriters*, 134 U. S. 488, loc. cit. 493, 10 Sup. Ct. 587, 33 L. Ed. 991; *In re Magid-Hope Mfg. Co. (D. C.)* 110 Fed. loc. cit. 353; *Burger v. Grand Rapids & I. R. Co. (C. C.)* 22 Fed. loc. cit. 563; *Kibbler v. St. Louis & S. F. R. Co. (C. C.)* 147 Fed. loc. cit. 881; *Elk Garden Co. v. T. W. Thayer Co. (C. C.)* 179 Fed. loc. cit. 558; *Mich. Aluminum F. Co. v. Aluminum Castings Co. (C. C.)* 190 Fed. loc. cit. 883; *Mooney v. Buford & George Mfg. Co.*, 72 Fed. loc. cit. 40, 18 C. C. A. 421; *Hazeltine v. Mississippi Val. Fire Ins. Co. (C. C.)* 55 Fed. loc. cit. 745; *Overman Wheel Co. v. Pope Mfg. Co. (C. C.)* 46 Fed. loc. cit. 579; *Riddle v. New York, L. E. & W. R. Co. (C. C.)* 39 Fed. loc. cit. 291; *Zambrino v. Galveston, H. & S. A. Ry. Co. (C. C.)* 38 Fed. loc. cit. 452.

Since the opinion in the *Simon-Railway Case* was handed down a case similar to the one at bar came before the United States District Court of New York, and it was there said:

"In *Simon v. Southern Railway*, 236 U. S. 115, 35 Sup. Ct. 255 [59 L. Ed. 492] the Supreme Court decided that a court of Louisiana had not acquired jurisdiction under the following facts: The defendant was a railroad com-

pany organized in another state, having none of its railroad in Louisiana, but doing some business there. The statutes of Louisiana directed all foreign corporations doing business in the state to appoint an agent on whom process should be served, and provided that, if the corporation failed to make an appointment, service might be made upon the secretary of state. The defendant not having appointed any such agent, Simon served his process on the assistant secretary of state, in an action arising upon the tort of the defendant committed within the state of Alabama. The ground of the decision was that the implied consent of the corporation, arising from its doing business within Louisiana, must be limited to actions arising out of the business done within the state. The same rule was laid down in *Old Wayne Life Association v. McDonough*, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345; the action there being in Pennsylvania upon a life insurance contract executed in Indiana by an Indiana corporation.

"In *Simon v. Southern Railway*, supra, the court especially reserved from the decision a case, such as those at bar, where a foreign corporation has complied with the state statute and appointed an agent upon whom process may be served. Such a case at first blush presents an apparent contradiction. Since 1839 (*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274) it has been the doctrine of the Supreme Court that a foreign corporation was a fictitious entity, which had no existence outside of the territory of the sovereign which created it. All its acts elsewhere must be viewed as those of an absent principal, acting through an authorized agent. It resulted that personal jurisdiction could arise only when some agent had been appointed who was expressly authorized to appear or to accept service for the absent principal. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. Otherwise, the foreign state must proceed in rem against the property of the corporation, or in personam against agents within its borders. In 1855 (*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451), the court modified the extreme application of this doctrine by holding that, when a corporation did business within a foreign state which required as a prerequisite the appointment of an agent, consent to such an appointment must be assumed from the doing of the business, and that jurisdiction in personam would be acquired, just as if there had been in fact an appointment. *St. Clair v. Cox*, supra.

"The defendant here argues that the terms of such an implied consent cannot be supposed to be other than those which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the defendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute. The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent (section 16, General Corporation Law; section 432, Code of Civil Procedure) must be interpreted in the light of the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar residents of New York may, under the New York Code, § 1780, sue foreign corporations upon any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state.

statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state? *State ex rel. v. Vandiver*, 222 Mo. 230 [121 S. W. 45] where the opinions of the Supreme Court of the United States are reviewed. These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises, I think, from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state quite independently of any intent. The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway*, supra, and *Old Wayne Insurance Co. v. McDonough*, supra. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consents covered such actions as these. This does not, of course, touch the question of the jurisdiction of this court over the subject-matter in either case.

"Motions denied."

Smolik v. Philadelphia & Reading Coal & Iron Co. (D. C.) 222 Fed. 148.

Of course I know that the District Court has no power to overrule the United States Circuit Court of Appeals or the Supreme Court, yet the opinions of that court, when founded upon reason and authority and not in conflict with those superior tribunals, are worthy of careful consideration in trying to ascertain the meaning of the opinions of either of those great courts upon any question left in doubt by them, and for that reason I have quoted quite extensively from the case last cited.

There is another marked distinction between this case and the *Old Wayne* and *Simon* Cases, and that is the statute there under consideration was only applicable to exceptional cases, as previously stated, while in the case at bar, section 7042 constitutes an important part of article 7, ch. 61, R. S. 1909, which contains the *general provisions* applicable to all kinds of insurance transacted in this state, including life, fire, and accident, whether by a domestic or a foreign company. That article places all of said foreign companies upon an equality before the law

with domestic companies, including the rights to open offices, appoint agents, issue policies in every portion of the state, and to sue and be sued. Any such foreign company which has complied with sections 7040, 7041, and 7042, R. S. 1909, for all practical purposes becomes a citizen of this state in the same sense as do domestic companies of the same character; and are considered citizens of this state and possess all of the rights, privileges, and immunities that are possessed by the latter. Of course the foreign company must renew its license to do business within the state every year, but so long as that license remains in force, there is no distinction between the rights, powers, duties, and obligations of the foreign and domestic corporation; and such a "corporation must be regarded as having a domicile" in this state. *New England Life Insurance Co. v. Woodworth*, supra.

And "within the contemplation of the statute relating to service of summons upon foreign insurance companies, such companies are regarded as residing in each county in this state." *State ex rel. v. Grimm*, 239 Mo. loc. cit. 166, 143 S. W. 492. *Meyer v. Ina Co.*, 184 Mo. loc. cit. 486, 83 S. W. 479.

And "it must be conceded that the only mode by which a foreign insurance company can be served with process in this state is by the method provided for in said section 7042." *State ex rel. v. Grimm*, 239 Mo. loc. cit. 160, 143 S. W. 490. *Baile v. Equitable Fire Ina Co.*, 68 Mo. 617; *Middough v. Railway*, 51 Mo. 520.

But how about section 7044, R. S. 1909, the statute of this state corresponding to the second section of the Louisiana act, under which the service of summons in the *Simon* Case was had? This section was not dealing with the general rights, powers, duties, and obligations of foreign insurance companies duly licensed to do business in this state, as section 7042 does, but was designed for a single purpose, viz., to procure service upon *poaching companies issuing policies of insurance in this state without permission from her to so do*. The service provided for by this section is therefore *confined to suits brought in the courts of this state, upon policies unlawfully issued herein*; and, as previously stated, *does not and cannot, in the very nature of the case, apply to suits brought in the courts of this state upon policies issued in another state or country, nor to policies lawfully issued in this state, provided of course, such a company is domiciled here; that is, has authority to transact business herein*. If this was not the law, then the courts of this state could never acquire jurisdiction over the person or subject-matter of any suit brought in the courts hereof against any insurance, railroad, telegraph, telephone, or other foreign corporation, either lawfully or unlawfully doing business in this state, *upon any cause of action growing out of any transactions not negotiated in this state, notwithstanding the fact that the plaintiff might be a resident of Missouri and the transaction may have been negotiated*

in California or New York. In such a case the party having the cause of action would have to go to one of those states, the one in which his cause of action arose, and sue there, notwithstanding such company was lawfully domiciled in this state, with equal powers and rights of the domestic companies of like character. But in principle it is wholly immaterial whether the plaintiff is a resident or nonresident in such case, if the position of counsel for the appellant is correct. But if that of counsel for the respondent is sound, and the cause of action is transitory in character, then a person owning the same may sue any such company thereon in the courts of this state and have due process of law, regardless of the place, state, or nation where the cause of action arose. Of course service in such cases would have to be had under section 7042, and not 7044; only under the latter when the cause of action arose in this state under a poaching transaction. *New England Life Association v. Woodworth*, supra; *King of Prussia v. Kuepper*, 22 Mo. 550, 66 Am. Dec. 639; *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569.

I am therefore clearly of the opinion that section 7042 is not unconstitutional, for the reason assigned by counsel for appellant in the second subdivision previously stated; and their contention in that regard is ruled against them.

[3] III. This brings us to the third subdivision of appellant's contentions. In effect counsel for appellant contend therein that the Legislature of this state has no constitutional power to enact laws conferring jurisdiction upon the courts of this state to try and determine suits against foreign insurance companies duly licensed and doing business in this state, based upon contracts of insurance executed in another state or country, whether the property is located in this state or not.

The contention is that such legislation would do violence to section 30, art. 2, of the Constitution of Missouri, and section 1 of the Fourteenth Amendment of the Constitution of the United States, known as the "equal rights" and "due process" clauses of those beneficent instruments. If this contention is true, such a ruling would be no less novel than astounding. In the light of the constitutional provisions just referred to, and others to be presently mentioned, and those of similar import contained in the Constitutions of the various states of the Union, also in the light of the numerous other statutes of this and those states enacted in pursuance thereof, giving force and effect to them, as well as the common law governing transitory actions, coupled with innumerable decisions of the courts of last resort of the various states and those of the Supreme Court of the

United States, it seems to me that the mind which discovered the pregnable point here contended for, hidden behind such a barricade of constitutional provisions, legislative enactments, common-laws rules and judicial decisions, possessed a keener perception for the discovery of the vulnerable points in our jurisprudence than any of the great military geniuses of the world has ever possessed for the discovery of the weak positions in the enemy's position, and was more daring and self-reliant in his attack than any of the bold knights mentioned in the Legends of the Rhine.

But before taking up the question of the power of the Legislature to enact laws conferring jurisdiction upon the courts of this state to try such cases, I will briefly consider what is a transitory action, and where it may be brought, both at common law and under the Constitution and laws of this state and of the United States. It is elementary that all transitory, or what are known as "personal" actions, may be brought by any one capable of suing in any county, state, or nation where the defendant may be found, subject, or course, to any express constitutional or valid statutory restrictions that may exist. After treating of local actions, Mr. Boote, in the fourth edition of his *Historical Treatise of an Action or Suit at Law*, on page 96, in considering transitory actions, says:

"With respect to the venue, it is said, that on the settling of *nisi prius*, they obliged the plaintiff to try his action where it accrued because the jury was to come from where the act was committed. But while the process was by attachment and distress, which could be only where the defendant's goods were, it begat a distinction between actions; the one being called 'transitory,' which related to goods and chattels, and was to follow the defendant wherever he could be found; the other was called 'local,' because it related to lands, and the process was to be on the lands. These were to be laid in the county where the lands lay; but in transitory actions the plaintiff had liberty to try his action in the county wherein the defendant was summoned. But this came at length to be much abused, for the plaintiff would lay his action far from the place where the action arose, which put the defendant under a necessity of carrying his witnesses into a county far from the place. In order to prevent this 6 R. 2, was made, which enacts that writs of account, debts, etc., should be commenced in the county where the contracts were made; for if the contracts were made in another county than contained in the original, the writ should abate. But this statute, it is said, was never put in use, for it was thought the plaintiff could not then follow the defendant into another county, and it was foreseen that many other mischiefs would arise."

Blackstone announces the same rule. In volume 3 (4th Ed.) page 294, he states the law thusly:

"In transitory actions, for injuries that might have happened anywhere, as debt, detinue, slander and the like, the plaintiff may declare in whatever county he pleases, and then the trial must be had in that county in which the declaration is laid."

Mr. Gould, in the fifth edition of his work on Pleading, p. 103, § 104, lays down this rule:

"In the application of this ancient rule, however, a distinction, suggested by general convenience, was soon established between things local and transitory; and consequently between local and transitory actions. In local actions, * * * but in actions transitory, the ancient rule as to the locality of actions and trials is now, and has long been, entirely disregarded, or rather *evaded*, to every purpose except the mere *form of laying some venue*, and the power of the court, under special circumstances, to change it, i. e., to change the county, on motion. In transitory actions, therefore, the plaintiff is at liberty to lay the venue in what county he pleases."

See, also, Bac. Abr. Actions Local, etc., B.; Com. Digest Pleading, § 9; Cowp. 177; 1 Saund. 74 (note 2); Glb. C. H. pp. 89, 90.

Mr. Gould, also on page 108, § 112, says:

"But personal actions, that is to say, actions which seek nothing more than the recovery of money, or personal chattels of any kind, are in most cases transitory, whether they sound in tort or in contract; because actions of this class are, in most instances, founded on the violation of rights which, in contemplation of law, have no locality. And it will be found true, as a general position, that actions *ex delicto*, in which mere personalty is alone recoverable, are, by the common law, transitory, except when they are founded upon, or arise out of some local subject. Thus actions for injuries to the person, or to personal chattels, trover, trespass on the case for escapes, false returns, deceit in the sale of goods, etc., are in general transitory; and may consequently be laid in any county, even though the cause of action arose within a foreign jurisdiction" (citing Com. Digest, Actions, note 12; Coke's Littleton, 282; Cowp. 161; 1 T. R. 571; 2 Black. Rep. 1058; 2 Chitty on Pleading, 242, note "p"; 2 Salk. 670; 12 Mod. 408; Sayer, 54; 1 Wils. 336; 1 East, 114; Cro. Car. 444; 9 Johns. R. 67, and 4 East, 162, 163).

See, also, Browne on Actions at Law, pp. 228, 229.

The common-law definitions of local and transitory actions were in full force and effect when the Constitution of the United States was adopted, and consequently section 2, art. 4, thereof, has an important bearing upon all the common law adopted and statutes enacted by this state since that time (as will be presently shown), which provides:

"*The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.*" (Italics ours.)

And in connection with said section 2 of the Constitution must be read section 1 of the Fourteenth Amendment thereof, for the reason it relates to the same subject-matter, and greatly enlarges the provisions of said second section. This amendment reads:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 30 of the Missouri Bill of Rights is along the same line, and reads:

"That no person shall be deprived of life, liberty or property without due process of law."

So, also, will section 10, art. 2, of the Constitution of Missouri shed much light upon this question, especially when read in the light of article 6 of the Constitution of Missouri. Said section 10 reads as follows:

"*Courts of Justice must be Open.*—The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

Upon the ancient common law character of personal or transitory actions, and their venue, or places where to be brought and tried, Judge Bliss, in his excellent work on Code Pleading, page 413, § 284, says:

"I am not speaking of the obsolete venue. At common law the pleader must allege a place in reference to every traversable fact, and that place, wherever the fact occurred, is charged as being within the county where the cause is to be tried. The Code obligation to state the facts of itself forbids a fictitious venue; and, unless the place is material, it does not become one of the facts which constitute the cause of action. But actions are still divided into local and transitory, and as to the former, the issues must be tried in the county where the cause of action has arisen. The several states have designated the classes of actions which require such trial, and they are usually made to conform to local actions at common law."

So I feel safe in saying that if not predicated upon and enacted in pursuance to that common-law doctrine, the Legislature of this state largely followed and fashioned the Code of Civil Procedure of this state closely after it, especially sections 1751, R. S. 1909, the general statute providing *where suits* instituted by summons shall be brought except as otherwise provided for therein. That section of the statute reads:

"*Suits by Summons, Where Brought.*—Suits instituted by summons shall, except as otherwise provided by law, be brought: First, when the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found; second, when there are several defendants, and they reside in different counties, the suit may be brought in any such county; third, when there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides; fourth, when all the defendants are nonresidents of the state, suit may be brought in any county in this state; fifth, any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them may be found."

This statute, in substantially the same form in which we now find it, has been upon the statute books of this state almost from its organization. This section of the statute, with all kindred sections which were enacted at the same time or subsequently thereto, were designed to open the doors of the courts of this state to all persons who

have valid claims against any and all persons within the jurisdiction of this state; and it was never the intention of the framers of the Constitution, state or federal, or the Legislature, to close them against justice and to shield wrong. These and all kindred laws are designed to make effective the old maxim, "Ubi jus, ibi remedium." In fact, that is one of the chief corner stones of all government. This appears in section 4 of the Bill of Rights, which, among other things, provides:

"That all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design."

With these objects and those designs in view, whenever the lawmakers of the state discovered that for any deficiency in the law exact and even justice could not be done and measured out to each and all, whether plaintiff or defendant, they have steadfastly endeavored, by enacting new laws or amending old ones, to remedy that injustice, and at the same time deprive no one of life, liberty, or property without due process of law, as provided for in the state and federal Constitutions, previously mentioned. Among the numerous laws so enacted by the Legislature of this state for the purposes mentioned are those providing where foreign railroad companies, telegraph companies, telephone companies, insurance companies, including life, fire, and accident, doing business in this state, may be sued in the courts hereof, and how they may be served with process. Moreover, there are many private corporations organized under the laws of other states doing business herein, and we have statutes providing where they may be sued and how served. And in addition to the constitutional provisions and statutory enactments before mentioned governing the questions in hand, the Legislature of this state, by an amendment in the year 1905, of sections 547 and 548, R. S. 1890, provided *generally* that whenever any cause of action has accrued under or by virtue of any of the laws of any other state or territory, such cause may be brought in the courts of this state by the person entitled to the proceeds of such cause of action. Those statutes are now sections 1736 and 1737, R. S. 1900, and read as follows:

"Sec. 1736. *Parties to Suit When Cause of Action Accrues in Another State.*—Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state, by the person or persons entitled to the proceeds of such cause of action: Provided, such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued.

"Sec. 1737. *When Parties Not Authorized by Laws of Other States, Action to be Brought by Whom.*—Whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or per-

sons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to prosecute such action in his, her, or their own names, then, in every such case, such cause of action may be brought and prosecuted in any court of this state by the person or persons authorized under the laws of such state or territory to sue in such cases. Such suits may be brought and maintained by the executor, administrator, guardian, guardian ad litem, or any other person empowered by the laws of such state or territory to sue in a representative capacity."

From this reading of these two sections it will be noticed that they place no limitation whatever upon the persons who may bring such a suit, save, of course, that it must be brought by the party who, under the law of said state or territory, is entitled to the proceeds of said cause of action, and of course that might be either an individual or a corporation. The clear purpose of all of our statutes, when taken together, was to give full force and effect to said section 10, art. 2, of the Missouri Constitution, which provides that, "The courts of justice shall be opened to *every person*." Not a part of them. Not to the citizens or residents of Missouri only, nor to the citizens of the United States only, but to all persons of the world who demand justice at the hands of our courts against any one who may be found within the jurisdiction of this state, whether resident or non-resident, individual or corporation. This is perfectly clear from the reading of that section of the Constitution which says *every person* may sue. Not only that, but the same section further provides that a "certain remedy [shall be] afforded for *every injury to person, property or character*," etc. This provision is not limited to *some of the injuries* that have or may be done to the person, property, and character of those mentioned in the preceding clauses, but by clear and unambiguous words includes *every one of the character mentioned*.

The case of the King of Prussia v. Kuepper et al., 22 Mo. 550, 68 Am. Dec. 639, while not discussing all of the questions suggested regarding this section of the Constitution, yet in fact recognizes and gives full force and effect to most, if not all, of them; and by the express terms of section 1 of the Fourteenth Amendment all the constitutional and statutory provisions of this state regarding these questions, which apply to the citizens of Missouri, are extended to all other citizens of the United States, even though said section 10 of our Constitution did not include them. But in a sense that is a moot question, for the reasons as previously shown, said section 10 embraces, not only the citizens of Missouri, but those of the United States also, as well as all persons of the world. This is not a theory, but cold, stern law; and our reports and those of the Supreme Court of the United States are full of cases recognizing and enforcing those laws. Such of these legal propositions as are material to this case will be considered at the proper place in con-

nection with the facts they govern. Of course, all constitutional and statutory provisions, state and federal, are limited, in their scope and operation, to those cases which the court acquires jurisdiction of by summons duly served; and if, perchance, through the imperfection of the law, there should be a cause of action for which no provision is made for due process of law, then the person interested would have a loss without a remedy, an exception to the maxim, "No right without a remedy." It was for the purpose of embracing these exceptional cases that the various amendments of the act of 1845 were enacted, and the various new statutes mentioned were passed by the Legislature, all of which, in my opinion, amply provide for due service in all cases they were designed to embrace.

I have given this brief summary of the origin, growth, and history of transitory actions in England, and their importation, adoption, and expansion by means of legislative enactments, which are along the lines of the state and federal constitutional provisions before mentioned, providing a remedy for every wrong and guaranteeing equal protection to all, and preventing any one from being deprived of life, liberty, or property without due process of law, whether residents or non-residents, corporations or individuals.

I will now address myself to the question, Has the Legislature of this state the constitutional authority to enact a statute conferring jurisdiction upon the courts of this state to try a case against a foreign insurance company, duly licensed and doing business in this state, upon a policy issued in another state or country? The answer must be in the affirmative if not restricted by state or federal Constitution. Counsel for appellant answer that question in the negative, but assign no reason therefor, except the contention that the Supreme Court of the United States has so held in the *Old Wayne* and *Simon* Cases, previously mentioned. If our conclusions announced in paragraph 2 of this opinion, as to the holding of those cases, are correct, then counsel for appellant have no solid basis upon which to predicate that answer. This is for the reason that, if those cases do not support their contention, then the case at bar must be determined according to the rules of law governing ordinary transitory actions. That this suit is transitory in character cannot be questioned, and therefore, according to the authorities cited, a suit on the policy might have been brought in any state where the defendant might have been found. This is not denied by counsel for appellant, but they contend that the appellant was not a resident of this state at the time this suit was instituted, except as to the business transacted herein, and that in regard to all other matters it was a nonresident. This contention was decided against the appellant in paragraph 2 of this opinion, and correctly so, we think. But, concede for the sake of

the argument that the defendant was not a resident of this state in the strict sense of that term, at the time this suit was brought, yet it voluntarily came here and was, by permission of this state, authorized to transact all kinds of business that a domestic company of like character could have transacted, and that it could sue and be sued in the courts of this state. The mere fact that the appellant was not, technically speaking, a resident of this state makes no difference, in my opinion, since it was found within the jurisdiction of Missouri, whose laws provide that it might be sued in the courts hereof, and prescribed ample means for service of due process of law upon it, in all transitory actions brought against it. That is all the state and federal Constitutions require.

As previously stated, all such companies doing business in this state under authority of our laws and precisely upon the same footing and equality with domestic companies of like character, yea, even with individuals, whether residents or nonresidents, if found within the jurisdiction of this state. In such a case, what possible difference does it make where such a contract was made? I submit, none whatever. To illustrate, suppose an individual, a resident of New York, should execute a note in California, promising to pay another a certain sum of money, and should then come to this state and remain until the note matures; could it be seriously contended that the maker of the note could not be sued thereon in the courts of this state simply because the note was not made in this state, and that the maker was not a resident of the state of Missouri? I apprehend not. The test in transitory actions, as laid down by all of the authorities, is, Does the law of the state where the defendant is found provide: First, that suit may be brought upon such a cause against any and all persons found within the jurisdiction of the state, whether residents or nonresidents thereof; and, second, does the law amply provide for due process of law upon the defendant in such a case? If so, then it is wholly immaterial where the cause of action arose, and what is the residence of the defendant. Not only that, if the contention of counsel for the appellant is sound, then our general statutes (articles 3, 4, ch. 20, R. S. 1909), prescribing the place where transitory actions must be brought in the courts of this state, against residents and nonresidents found in the jurisdiction of Missouri, and how service of process may be had upon them, in so far as nonresidents are concerned, and in so far as it relates to all causes of action not originating in this state are void also. This would be true inevitably; and not only as to this state, but to every other state in the Union, because said section 1 of Amendment 14 applies equally to all of the states. Yea, even the attachment laws of this and other states, authorizing the property of nonresidents to

be attached, would be unconstitutional in all cases where the cause of action is based upon a transaction which was made in some other state or country. This would be true because, as said by counsel for appellant, the Legislature of this state has no constitutional power to draw to its jurisdiction a cause of action arising elsewhere. The fallacy of this position is this: The Legislature of this state has never attempted to draw to its jurisdiction any cause of action that it did not possess at common law. Said section 7042, in that regard, is declaratory of the common law, only changing it as to the country where suit may be brought, and prescribing the mode of service of process, which is ample, as is shown by the record in this case. The appellant was duly served and given ample time and opportunity to make its defense. Not only that, but section 1 of the Fourteenth Amendment of the Constitution of the United States prohibits just what counsel for appellant is contending for, namely, that no resident or nonresident of this state can sue a foreign insurance company in the courts of this state, although it is authorized to and is doing business here, upon a contract of insurance executed in another state or country; yet, they admit, which is true, that such a suit may be brought against such a company on a contract executed elsewhere, in the courts of this state. If that is not true, then according to appellant's contention, it could not be sued at all, anywhere. What difference is there, in legal effect, between the two? None; both companies are of the same character. They issue the same class of contracts within and without this state. They possess the same rights and powers, and the same duties and obligations are imposed upon them. The contracts of each are transitory in character. Both may sue and be sued in the same courts of this state. When plaintiffs, they have the same character of process issued in their behalf and served alike for them upon the defendants; and, when defendants, the same kind of summons is issued in their behalf, and served upon their respective agents, appointed by the respective companies, differing only in that, in the case of the domestic company, the statute providing for service of process is upon certain persons who have been chosen by the company as its agents or officers to represent it in other capacities, that is, persons who are in the employ of the company, to perform its ordinary business, while in the case of the foreign company, the service is had upon a person also chosen by the company, but not in the employ of the company, but who is an officer of this state, the superintendent of insurance.

Again, if not conceded, it is true, nevertheless, that if an individual nonresident of this state should execute a note outside of this state, it could not be sued thereon in the courts hereof, when it becomes due. Why

not? Each had the right to execute the note mentioned. Both were made outside of this state. Both are transitory causes of action, the laws of the state provide the same courts in which such suits thereon may be brought, and provide for the same kind of process and upon whom service may be had. In the case of the individual it must be served upon him personally, or upon some member of his family, if not found, etc., while in the case of the company, domestic or foreign, because of its artificial character, the service *must be had upon its duly constituted agent* (whether sued at home or abroad), the superintendent of insurance.

Upon this state of facts, there can be no question, in my opinion, but what said Fourteenth Amendment equally applies to foreign insurance companies doing business in this state under license duly issued to it, as it does to domestic companies engaged in like business, and to transactions of like character transacted by individuals; otherwise they would not enjoy the equal protection of the laws, either in suing or being sued. If that is not the law, then a person residing or stopping in this state, or a corporation organized under the laws hereof, might execute a note for \$1,000, in the state of Illinois to a foreign insurance company doing business in this state, yet it could not sue and recover the money due thereon from the individual nor from the domestic company, for the reason that the note was not executed in this state, and for the further reason, as contended for by counsel for appellant, that this "state has no constitutional power to draw to its jurisdiction a cause of action arising elsewhere." Nor in such a case could suit be brought in the federal court, because the amount of the note would not bring the case within its jurisdiction. I think that is indisputable (*International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. [N. S.] 493, 18 Ann. Cas. 1106 and cases cited), yet if the same note had been executed by the same party or company, at the same place, to an *individual* instead of a foreign corporation, he could, under a long unbroken line of decisions of this court and of the Supreme Court of the United States, have maintained the suit.

This question has been decided by the Supreme Court of the United States in the case of the *International Text-Book Co. v. Pigg*, supra. That court in that case cited the case of *Chambers v. Baltimore & Ohio Ry. Co.*, 207 U. S. 142, loc. cit. 148, 28 Sup. Ct. 34, 35 (52 L. Ed. 143), and quoted with approval therefrom the following language:

"This court held in *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148 [28 Sup. Ct. 34, 52 L. Ed. 143], that a state may, subject to the restrictions of the federal Constitution, 'determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.' But it also said in the same case: 'The right to sue and defend in the courts is the alternative of

force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the *highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal Constitution.*"

While it is true the former case involved a question of interstate commerce, yet that question was but one of the two questions presented and decided; and it had but little, or no, bearing upon the question of the validity of the state statute, barring state courts to nonresidents while they were left open to those within the jurisdiction of the state. This is clear, for the obvious reason that the interstate commerce clause of the Constitution of the United States in no "manner, shape or form" attempts to confer or define the jurisdiction of state courts; nor was any such authority necessary to be lodged in that clause of the Constitution in order to give Congress full and complete power to regulate that subject.

The remedy for the violation of the laws of the United States, including those governing interstate commerce, rests primarily with the federal courts, and secondarily with the state courts, which are and have ever been open to all persons, natural and artificial, residents and nonresidents, by section 2, art. 4, and section 1 of the Fourteenth Amendment of the Constitution of the United States. In other words, the commerce clause of the Constitution confers upon Congress the power to regulate interstate commerce, but the remedy for the violation thereof must primarily be in the courts created by article 3 of the Constitution of the United States, and supplemented by section 1 of Amendment 14 thereof, which guarantees to every citizen of the United States the same right and privilege to sue in the courts of this state upon all transitory causes of action on which a citizen of this state might sue, under the laws hereof. Or, in other words, if, under the laws of this state, a citizen hereof may maintain a suit on a given cause of action, then under said constitutional provision, any citizen of any other state of the Union may do likewise.

This court in the case of *International Text-Book Co. v. Gillespie*, 229 Mo. 397, 129 S. W. 922, followed the rule announced by the Supreme Court of the United States in the case of *International Text-Book Co. v. Pigg*, *supra*. See, also, *Cement Co. v. Gas Co.*, 255 Mo. 1, 164 S. W. 468, Ann. Cas. 1915C, 151; *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086; *United Shoe Machinery Co. v. Ramlose*, 231 Mo. 508, 132 S. W. 1133; *State ex rel. v. Grimm*, 239 Mo. 135, loc. cit. 179, 143 S. W. 483. All of those cases decided by this court were instituted under section 1751 of our Practice Act, before quoted, and those decided by the Supreme Court of the

United States were brought under similar statutes of other states where the suits were instituted; but that makes no difference in principle, in so far as this question is concerned, for the reason that it does not involve the question as to who may sue or be sued, or upon whom service of process may be had in such cases, for those questions were decided in paragraph 2 of this opinion, but the question in hand is, *where may suits on contracts, torts, and other transitory actions be brought?* Of course it cannot be said, nor do any of the cases cited hold, that nonresidents can sue *all persons within the jurisdiction of this state*, under the section of the Practice Act before mentioned, but they do hold that if a resident of this state can sue any or all persons within the jurisdiction of this state in the courts hereof on any transitory cause of action, under that or any other statute of this state, or under the rules of the common law, then, under said section 1 of the Fourteenth Amendment, any citizen of the United States, though residing elsewhere, whether an individual or a corporation, is guaranteed the same right to sue upon a similar cause of action in the courts of this state. In other words, the effect of that section of the Constitution is to extend to all citizens of the United States, who are residents of other states or countries, the same right to sue persons found within the jurisdiction of this state, upon the same causes of action, that is enjoyed by our citizens under the Constitution and laws of this state, or, to express the same idea in different language, the Constitution and laws of this state, in the regard mentioned, were designed principally for the citizens of Missouri, and secondarily for all persons of the world, as previously stated; but, be that as it may, the first section of the Fourteenth Amendment extends all such constitutional provisions and statutory enactments of this state, of the character mentioned, to all citizens of the United States residing elsewhere. That is the plain meaning and effect of the ruling of the Supreme Court of the United States in the cases before cited upon this question; and also of the rulings of this court in the cases cited in connection therewith. Therefore, if we are correct in the conclusions reached in paragraph 2 of this opinion regarding that clause of section 7042, providing for process against foreign insurance companies doing business in this state and upon whom process may, or rather must, be served, and also in our conclusions, just stated, regarding the legal rights of citizens of the United States residing elsewhere to sue in the courts of this state upon the same causes of action that our own citizens enjoy, then it necessarily follows that the respondent, a citizen of Arizona, had the legal right to sue appellant in the courts of this state upon the policy mentioned in the petition and evidence.

IV. This brings us to the consideration of

the fourth ground assigned by counsel for appellant in support of their general contention that section 7042 is unconstitutional. In substance, that contention is that said section, in so far as it authorizes service of process on a suit based upon a policy of insurance issued in this state by a foreign insurance company doing business herein without authority of law, is unconstitutional, null, and void under both the state and federal Constitutions. This contention can easily and briefly be disposed of. It is purely a moot question in this case. The policy sued on was not issued in this state, but in the state of Colorado. Therefore it was not unlawfully issued in this state, and this contention of counsel has no foundation whatever upon which to stand. If, however, the policy had been issued in this state *without authority of the state first had and obtained*, then clearly the service for process could not have been had under said section 7042, for the reason that its express terms excludes service of process thereunder in suits founded upon all such policies; but service in all such cases could be had under section 7044, which was enacted for the express purpose of providing for service in suits on a policy of insurance issued in this state against a foreign company doing business herein *without authority of law*. This was expressly decided by the Supreme Court of the United States in the cases of *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987, and *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569, *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, and that ruling is expressly approved by the same court in the case of *Simon v. Southern Ry. Co.* 236 U. S. 115, loc. cit. 130, 35 Sup. Ct. 255, 59 L. Ed. 492.

The same result was correctly reached by the Court of Civil Appeals of Texas in the case of *El Paso & South Western Ry. Co. v. Chisholm*, 180 S. W. 156; but on page 159 that court undertook to state what the Supreme Court of the United States held in the *Simon Case*, which shows that that court, like counsel for appellant here, misconceived and did not understand the ruling in the *Simon Case*. The latter case has no application whatever to this case, as I think I have clearly shown.

My attention has just been called to the case of *Fry v. Denver & R. G. Ry. Co.* (D. C.) 226 Fed. 893. In that case the opinion does not disclose the statute under which process therein was served, and for that reason sheds but little light upon the question here presented; but the language used indicates that the manner of service was wholly immaterial. The opinion seems to proceed upon the theory that a suit cannot be maintained in a state without the transaction out of which it arose occurred in the state where the suit was brought. The *Old Wayne* and *Simon Cases*

are cited in support thereof, regardless of the statute under which process was had. If I correctly understand the opinion, then I have no hesitancy in saying that the court does not understand those cases. Instead of those cases supporting the views there expressed, they hold directly to the contrary.

But in the case at bar it must be remembered that the service was had under section 7042, and not under section 7044; but, had the service in this case, under the facts thereof, been had under the latter section, then clearly the appellant would not have been served with due process of law, as was held and properly so, by the Supreme Court in the *Simon-Railway Case*, supra. But the court in that case did not decide the moot question here presented, but expressly declined to express an opinion upon it because not properly before the court. In that case, as in this, the cause of action did not accrue in the state where the suit was brought, and therefore in neither case could the second section of the statute apply. What is here said about section 7044 is clearly obiter, but is said to dispel some of the confusion it seems to me counsel are laboring under regarding the *Simon-Railway Case*.

[4] V. The fifth and last ground assigned by counsel for appellant in support of their general contention that said section 7042 is unconstitutional is substantially as follows: That said section 7042 is unconstitutional, because it authorizes services of process in suits brought in the courts of this state against foreign insurance companies doing business herein *unlawfully, that is, without authority first had and obtained* from the state, based upon a policy of insurance issued in another state. In support of this contention we are cited to the cases of *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345, and *Simon v. Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. This contention may also be briefly and easily disposed of. In the first place, it may be stated generally that neither section 7042 nor 7044 applies to the state of facts upon which counsel's contention is predicated, nor to the facts of this case. Section 7042, in express terms limits the service of the process therein mentioned to foreign insurance companies doing business in this state *under authority from the state duly granted to them*; and there is no language contained in that section which remotely indicates that it applies to any such company doing business in this state *without such authority*. Therefore this contention of counsel is not well founded; and the cases cited in support thereof have no application whatever to this case. Those cases, however, will be further considered presently.

Nor does section 7044 authorize service of process in suits brought in the courts of this state against a foreign insurance company, based upon a policy issued in another state.

By its express terms the process mentioned therein is limited to *suits brought upon policies of insurance issued in this state* by such companies *without authority* from the state first had and obtained. Not only that, there is no other statute or law of this state that I am familiar with, which authorizes service of process in a suit brought in the courts of this commonwealth against a foreign insurance company *not authorized to do business* herein, based upon a *policy issued by it in another state or country*; but if there are any such, then they would *clearly be unconstitutional* under both the state and federal Constitutional provisions previously mentioned. This is precisely what was held by the Supreme Court of the United States in the Old Wayne and Simon Cases. In the Old Wayne Case, the policy was issued in the state of Indiana, and the suit based thereon was brought in the state of Pennsylvania, where the company had *no authority to transact business*, but had (at least presumably, as that court stated) issued *some other policies* in that state *without authority*. Upon that state of fact, the plaintiff sued the company in Pennsylvania, and had service under a statute similar in all respects to section 7042, R. S. 1909, of this state. In that case the court, in effect, held that said section of the Pennsylvania statute did not apply to policies issued in another state, without the company was lawfully doing business in Pennsylvania; and, because it was not lawfully doing business in that state, and because the policy was not issued therein, the court held that the service had under that statute was void. That ruling was clearly correct because that statute, like said section 7042 of this state, in express terms *limited the service therein mentioned* to suits on policies *issued in that state under permission therefrom*, and did not embrace policies issued in another state. In the Simon Case the injury occurred in the state of Alabama, and the suit was brought in the state of Louisiana, and service was had under the second section of the Louisiana act, which is similar to section 7044 of our statutes. In that case the court ruled, and correctly so, that the service mentioned in that section was, by its express terms, limited to suits based upon torts committed in that state by a foreign corporation, *not authorized to do business therein*; and therefore the service had upon the defendant was void because the injury did not occur in Louisiana. The court went further in both of those cases, and held that if the Pennsylvania statute mentioned authorized the service had in that case, then it would have been unconstitutional.

But suppose in the Old Wayne Case the company had been doing a lawful business in Pennsylvania in pursuance to its authority, and service of process had been had upon the company under the same statute, then could it be said that said statute was not applicable

and did not authorize the service? Certainly not; for any other answer would be in direct conflict with the plain language of the statute, and would violate section 1 of the Fourteenth Amendment of the Constitution of the United States. The same would have been true in the Simon Case, had the railway company been doing business in Louisiana under permission of the state and the service had been had under the first section of the act instead of the second. Likewise, the same rule applies to the case at bar, because the appellant was *doing business in this state under its authority*, and service was had upon it *under section 7042*, which in express terms authorized service of process in suits brought in the courts of this state against all such companies *so doing business in this state*, regardless of the place where the policies are issued, as before shown.

In this class of cases there would not exist that inconvenience and hardship mentioned by the court in the Simon Case, for the reason that all such companies lawfully doing business in this state are domiciled here and have their offices, agents, and attorneys, just as they have in the states of their creation. Any such company can try any such case in the courts of this state with as little expense and inconvenience as they could be tried in the state of its organization, or in the state where the policy was issued; but, be that as it may, it has nothing whatever to do with the question of jurisdiction of the courts of this state in such cases, and the hardship and inconvenience mentioned would not be one-tenth as great upon the company as it would be upon the various policy holders, should they be compelled to go to the various states where the various companies were incorporated, or to those where the policies were issued, in order to enforce their claims. Certainly the inconvenience and hardship which might be imposed upon such a company lawfully doing business here, when required to defend suits in the courts of this state, based upon a policy issued in another state, where it has its offices, agents, and attorneys, would not be greater than they would be in a suit brought here against such a company, based upon a policy issued by it in this state unlawfully, where it would have no office, agent, or attorney; yet the Supreme Court of the United States in the cases of Mutual Reserve Ass'n v. Phelps, supra, Mutual Life Ins. Co. v. Spratley, and Simon v. Southern Ky. Co., supra, hold that the latter class of suits may be maintained in the courts of this state.

If according to those cases, such a company may be sued under section 7044 in the courts of this state on a policy unlawfully issued here, then why may it not be sued under section 7042 on a policy lawfully issued elsewhere? But, as stated by the Supreme Court of the United States in the Simon Case, as to inconvenience, etc., this is foreign to the question of jurisdiction.

Again: If such a company can, by implica-

tion, consent to the trial of such cases in the courts of this state, and agree to the impositions of such hardship and inconveniences as are incident to the necessary defense of the case, then why may not such a company consent thereto by express agreement, as the appellant has done in this case?

I am therefore clearly of the opinion that said section 7042 is constitutional, and that it provides for ample service of process in all cases which it was designed to embrace, one of which is the case at bar. I am also of the opinion that appellant was duly served according to the provisions of that statute, and was properly in court. We are therefore of the opinion that the general contention of counsel for appellant, as well as the five subdivisions thereof, are without merit, and should be disallowed, which is accordingly done.

[5] VI. Counsel for appellant assign as error the action of the trial court in permitting the witness Doecke to testify to certain conversations had between him and Kilpatrick & Hanley, the general agents of the company at Cripple Creek, prior to and at the time the policy was issued, regarding the binding force of its terms and conditions respecting incumbrances upon and the vacancy of the property; also that the court erred in permitting said Doecke to testify as to conversations had between himself and said agents after the policy had been issued, regarding the vacancy of the property, and cite scores of cases in support thereof. We will consider these two assignments together, as the same principle of law underlies each. While there is some conflict of authority on these questions in other states, but, in so far as Colorado, Missouri, and many other states are concerned, it is well settled that where the general agents of an insurance company, at the time of or subsequent to the issuance of the policy, are informed of the existence of any fact regarding the property which is violative of any of the terms or conditions thereof, and which would work a forfeiture, and assent thereto, then the company is estopped from interposing such conditions of forfeiture as a defense to a suit brought upon the policy to recover the damages sustained. It is undisputed, in this case that the respondent, at the time the policy was issued, informed the general agents of the company that the scarcity of fuel and the difficulty in getting it to the smelter until a tramway could be built would, in all probability, necessitate the shutting down of the smelter for periods of more than 30 days at a time, and asked said agents what effect such idleness would have upon the policy. In reply, the agents, in substance, said, that is "all right; go on." Not only that, the same matters were discussed between the same parties each and every month, from the time the policy was issued until the date of the fire, and upon each occasion the insured asked

said agents what effect would the vacancy of the smelter have upon the policy, and each time they answered, that is "all right; go ahead." Upon these undisputed facts there can be no doubt but what the appellant is estopped from interposing these forfeiture clauses as a defense in this case. A long line of authorities so hold. *Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Ins. Co. v. Nixon*, 2 Colo. App. 265, 30 Pac. 42; *Thompson v. Ins. Co.*, 160 Mo. 12, 69 S. W. 889; *Rissler v. Ins. Co.*, 150 Mo. 366, 51 S. W. 755; *Ins. Co. v. Allis*, 11 Colo. App. 204, 53 Pac. 243; *Huestess v. Ins. Co.*, 88 S. C. 31, 70 S. E. 406; *Millis v. Ins. Co.*, 95 Mo. App. 211, 68 S. W. 1066; *Rudd v. Ins. Co.*, 120 Mo. App. 1, 96 S. W. 237; *Weinberger v. Ins. Co.*, 170 Mo. App. 266, 156 S. W. 79; *Combs v. Ins. Co.*, 43 Mo. 150, 97 Am. Dec. 383; *McCullough v. Ins. Co.*, 113 Mo. 607, 21 S. W. 207; *Loeb v. Ins. Co.*, 99 Mo. 55, 12 S. W. 374; *Prentice v. Ins. Co.*, 77 N. Y. 487, 33 Am. Rep. 651; *Hartley v. Ins. Co.*, 91 Minn. 382, 98 N. W. 198, 103 Am. St. Rep. 512; *Ins. Co. v. May* (Tex. Civ. App.) 43 S. W. 73; *Trustees St. Clara Academy v. Ins. Co.*, 96 Wis. 257, 73 N. W. 768; *Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593; *McCullum v. Ins. Co.*, 67 Mo. App. 80; *Harness v. Ins. Co.*, 76 Mo. App. 410; *Gandy v. Ins. Co.*, 52 S. C. 224, 29 S. E. 655; *Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 992; *Trust Co. v. Ins. Co.*, 79 Mo. App. 369; *Ass'n v. Tucker*, 157 Ill. 191, 42 N. E. 398, 44 N. E. 286; *Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606; *Pechner v. Ins. Co.*, 65 N. Y. 195; *Frye v. Equitable Society*, 111 Me. 287, 89 Atl. 57; *Wilson v. Ins. Co.*, 77 N. H. 344, 91 Atl. 913; *Ins. Co. v. Stanley*, 15 Ga. App. 263, 82 S. E. 826; *Clay v. Ins. Co.*, 97 Ga. 44, 25 S. E. 417; *Blass v. Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392; *Prendergast v. Ins. Co.*, 67 Mo. App. 426; *Wich v. Ins. Co.*, 2 Colo. App. 483, 31 Pac. 389; *Ins. Co. v. Smith*, 3 Colo. 422; *Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249; *Kittering v. Ass'n*, 22 Colo. 257, 44 Pac. 595; *Strauss v. Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822.

Also, under the facts of this case, the authorities hold that Kilpatrick & Hanley were the alter ego of the insurance company, and their knowledge of the fact that the smelter was shut down, and their assurances to Doecke that it was "all right," is a waiver. *Thompson v. Ins. Co.*, 160 Mo. 25, 68 S. W. 889, and cases there cited; *Rissler v. Ins. Co.*, 150 Mo. 368, 51 S. W. 755; *Shutts v. Ins. Co.*, 159 Mo. App. 441, 141 S. W. 15; *Prentice v. Ins. Co.*, 77 N. Y. 487, 33 Am. Rep. 651; *Wooldridge v. Ins. Co.*, 69 Mo. App. 413; *Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Crouse v. Ins. Co.*, 79 Mich. 249, 44 N. W. 496; *Andrus v. Ins. Co.*, 91 Minn. 358, 98 N. W. 200; *Hart v. Ins. Co.*, 9 Wash. 620, 38 Pac. 213; 27 L. R. A. 86; *Haight v. Ins. Co.*, 92 N. Y. 51; *Burnham v.*

Ins. Co., 63 Mo. App. 85; *Montgomery v. Ins. Co.*, 80 Mo. App. 500; *Ross Langford v. Ins. Co.*, 97 Mo. App. 79, 71 S. W. 720.

A waiver may be inferred from the acts and conduct of the agents of the insurance company, and need not be proved by express agreement. When Doecke informed Kilpatrick, the agent of the insurance company who wrote this policy, that the mill was shut down, even though Kilpatrick had not assured him that everything was "all right," yet if he expressed no dissent, such conduct on his part would be a waiver. At least, it would be such conduct as would send the question of waiver to the jury. *Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606; *Bowen v. Ins. Co.*, 69 Mo. App. 272; *Millis v. Ins. Co.*, 95 Mo. App. 217, 68 S. W. 1066; *Appel v. Ins. Co.*, 148 App. Div. 70, 132 N. Y. Supp. 200; *Hatcher v. Ins. Co.*, 71 Wash. 79, 127 Pac. 588; *Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Ins. Co. v. Johnston*, 42 Ill. App. 73; *Draper v. Ins. Co.*, 190 N. Y. 12, 82 N. E. 755; *Loeb v. Ins. Co.*, 99 Mo. 58, 12 S. W. 374; *Coppoletti v. Ins. Co.*, 123 Minn. 325, 143 N. W. 787; *Bank v. Ins. Co.*, 109 Mo. App. 660, 83 S. W. 534; *St. John v. Ins. Co.*, 107 Mo. App. 700, 82 S. W. 543; *Ins. Co. v. Lewis*, 187 U. S. 353, 23 Sup. Ct. 126, 47 L. Ed. 204; *Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689.

A policy of insurance is not void by reason of the plant being shut down, but only voidable, and the insurance company must cancel and return unearned premium. Not having done so, policy continues in force. *Patterson v. Ins. Co.*, 174 Mo. App. 37, 160 S. W. 59; *Flannigan v. Ins. Co.*, 20 Misc. Rep. 539, 46 N. Y. Supp. 687; *Springfield Co. v. Ins. Co.*, 151 Mo. 98, 52 S. W. 238, 74 Am. St. Rep. 521; *Miller v. Ins. Co.*, 106 Mo. App. 211, 80 S. W. 330; *Anthony v. Ins. Co.*, 48 Mo. App. 73; *Brix v. Ins. Co.*, 171 Mo. App. 518, 153 S. W. 789; *Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45; *Ins. Co. v. Smith*, 3 Colo. 422; *Prentice v. Ins. Co.*, 77 N. Y. 488, 33 Am. Rep. 651; *Ins. Co. v. Koehler*, 108 Ill. 293, 48 N. E. 297, 61 Am. St. Rep. 108; *Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Ins. Co. v. Johnston*, 42 Ill. App. 76; *Born v. Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300; *Cassimus v. Ins. Co.*, 135 Ala. 256, 33 South. 163; *Viele v. Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Ins. Co. v. Knutson*, 67 Kan. 71, 72 Pac. 526; *Schreiber v. Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *McCollum v. Ins. Co.*, 61 Mo. App. 354; *Saville v. Ins. Co.*, 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542; *New v. Ins. Co.*, 5 Ind. App. 82, 31 N. E. 475; *Ins. Co. v. Jones*, 48 Ind. App. 186, 92 N. E. 879; *Weinberger v. Ins. Co.*, 170 Mo. App. 266, 156 S. W. 79; *McIntyre v. Ins. Co.*, 131 Mo. App. 93, 110 S. W. 604; *Ins. Co. v. Johnston*, 143 Ill. 106, 32 N. E. 429; *Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. 464, 102 Am. St. Rep. 846; *Rissler v. Ins. Co.*, 150 Mo. 368, 51 S. W. 755.

After the fire occurred the agents of the company demanded the balance of the unpaid premiums from the assured, which it paid; and the law is that the acceptance of the premium after fire is a waiver of any violation of policy after the agent of the insurance company knew of it. *Flannigan v. Ins. Co.*, 20 Misc. Rep. 539, 46 N. Y. Supp. 687; *Ins. Co. v. Raddin*, 120 U. S. 195, 7 Sup. Ct. 500, 30 L. Ed. 644; *Baker v. Ins. Co. (C. C.)*, 77 Fed. 550; *Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Ins. Co. v. Freeman*, 19 Tex. Civ. App. 632, 47 S. W. 1025.

We are therefore of the opinion that under the great weight of authority, under the facts of this case, the appellant has waived the forfeiting conditions of the policy, and is estopped from interposing them as a defense to this case.

VII. What is said regarding the vacancy clause of the policy is applicable to and controlling as to the incumbrance clause of the policy. The agents of the appellant not only knew of the mortgages being upon the property, but canceled two other policies they had issued on it because of those incumbrances, and issued two others in their stead. This company should not be permitted to thus blow hot and cold. If it wished to rely upon these forfeiting clauses of the policy, it should have returned the unearned premiums and declared the policy void before the fire occurred; but, having failed to do either, it will not, at this late date, be heard to say that the policy was void because of the violations of said forfeiting clauses.

VIII. It is next insisted by counsel for appellant that its agents, Kilpatrick & Hanley, were acting in collusion with the respondent and against the interest of the appellant. Counsel do not make it clear as to when or how this conspiracy was formed, or the purpose they intended to accomplish by it. Certainly they did not enter into a conspiracy to burn the smelter by a stroke of lightning from heaven; nor did the vacancy of the smelter or the incumbrances thereon contribute or operate as conductors of the lightning from the clouds to the smelter, nor were inducing causes of the lightning striking the same. Moreover, the undisputed evidence is that the mortgages were paid and satisfied long before the fire occurred. So I am unable to see in what possible way the vacancy of the smelter and the satisfied incumbrances thereon had to do with the fire, or how the alleged conspirators could have co-operated with the lightning in destroying the smelter. Such a thing is preposterous. The agents of the company did nothing but tell the true facts of the case as disclosed by the physical facts and the undisputed evidence in the case. If an agent may not do that, even though it may be detrimental to the interest of his principal, then the time has come when such agencies should be abolished. There is not a scintilla of evidence in this case that tends

to show that Kilpatrick & Hanley were acting collusively against the appellant.

[6] IX. Counsel for appellant complain of the action of the trial court in refusing to give their instructions numbered 3, 4 and 5, as asked, and in modifying them and giving them in the modified form. Counsel say that:

"By its modification of these instructions, the court told the jury that they could not find for the defendant on the question of waiver unless they believed from the evidence that 'Doepke for the plaintiff company agreed and consented that said agents Kilpatrick & Hanley should conceal from the defendant company' the facts constituting the breaches of the conditions of the policy."

These instructions should not have been given at all, either as asked by counsel or as modified by the court, for the reason that there was no evidence upon which to base them. We disposed of this question in paragraphs 6 and 7 of the opinion, and no good purpose would be served by discussing it further at this place.

[7] It is finally insisted by counsel for appellant that:

"The court erred in giving plaintiff's instruction 6, and thereby instructing the jury in effect that if they found from the evidence that, prior to the institution of this suit, plaintiff paid all necessary corporation fees to the state of Colorado and obtained from the secretary of state of Colorado a certificate of authority to do business in the said state, the fact that plaintiff had not paid said fees and obtained said certificate of authority prior to its alleged acquisition of title to the property in question, or prior to the issuance of the policy in suit, or prior to the fire, was immaterial."

The evidence discloses the fact that at the time the policy in suit was issued, the respondent had not taken out a license to do business in the state of Colorado, and had not done so at the time it purchased the property upon which the buildings insured stood, for which it paid about \$175,000, and received a general warranty deed thereto; but subsequently thereto it took out a license to do business in the state, and paid all fees and taxes due on the property long before the fire occurred. That instruction correctly declared the law. This question has been passed upon by the Supreme Court of Colorado and by the Supreme Court of the United States in a case which went up from Colorado. In the case of *Ins. Co. v. Allis*, 11 Colo. App. 264, 53 Pac. 242, the court said:

"There is no provision that the contracts of a corporation which has failed of compliance with the law, shall be avoided; on the contrary, their validity is recognized, and they are enforceable not only against it, but against its officers, agents, and stockholders; nor does the statute assume to deprive it of any remedy which it would otherwise have, upon its contracts, or for the protection of its property rights. No consequence is attached to the failure, except the subjecting of its officers, agents, and stockholders to a personal liability on its contracts; and the courts cannot very well go further than the Legislature has gone. We feel entirely safe in saying that there is nothing in the statute by which the plaintiff's capacity to sue, or its right to maintain its action to enforce its demand, is in any way affected."

The following cases are cited: *Utley v. Mining Co.*, 4 Colo. 369; *Tabor v. Mining Co.*, 11 Colo. 419, 18 Pac. 537; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311. In the case of *Kindel v. Beck Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311, the Supreme Court of Colorado expressly holds:

"Failure of a foreign corporation, doing business in Colorado, to file a certificate, as required by the Constitution (article 15, § 10), * * * subjects its officers, agents, and stockholders to certain personal liabilities, but does not affect its right of action against a resident of the state for goods sold and delivered."

This same question came before the Supreme Court of the United States in the case of *Fritts v. Palmer*, 182 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317. This case arose under the laws of Colorado. In that case, the court said:

"The Constitution of Colorado provided that no foreign corporation should do business in the state without having a known place of business [in the state] and an agent upon whom process might be served."

Said act further provided that no corporation, foreign or domestic, should purchase or hold real estate except as provided in the act. The act did not indicate a mode by which a foreign corporation might acquire real estate in Colorado. A foreign noncomplying corporation took a deed to property, and its title was attacked on the ground—

"that the company violated the laws of the state [Colorado] when it purchased the property without having previously designated its place of business and an agent."

The United States Supreme Court held that the grantee held a good title to the property, inasmuch "as the Constitution and laws of Colorado did not prohibit foreign corporations from purchasing and holding real estate within its limits," and that no one could question the title but the sovereignty. In *Seymour v. Mines*, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807, it is held:

"The state only can challenge the right of a foreign corporation to * * * hold real estate within its limits."

In *Smith v. Sheeley*, 12 Wall. 358, 20 L. Ed. 430, it is held a deed to land is not a nullity by the grantor who has received a consideration for the grant; there being no ouster of grant at the instance of the government. In *Summet v. Realty Co.*, 208 Mo. 512, 106 S. W. 617, this court said:

"This court is next asked to reverse the judgment in this cause because the record discloses that the insurance company held the land in question for a period of more than six years, which is in violation of section 7, art. 12, of the Constitution of 1875. This question can be raised by the state alone. It is a matter that does not concern the individual, as held by the following cases."

See cases there cited.

In *Bank v. Matthews*, 98 U. S. 628, 25 L. Ed. 188, the court said:

"A private person cannot, directly or indirectly, usurp this function of the government" and question such title. *Bank v. Whitney*, 106 U.

S. 101, 26 L. Ed. 443; *Ina. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27.

It is expressly held by the Supreme Court of Colorado in *International Trust Co. v. Leschen & Sons Rope Co.*, 92 Pac. 727:

"Where a foreign corporation actually complies with the act of April 6, 1901 (Laws 1901, p. 116, c. 52), prescribing the terms on which a foreign corporation may do business within the state and prohibiting the exercise of corporate powers or the prosecution or the defense of actions until the required fee shall have been paid and the prescribed certificate obtained subsequent to the commencement of an action on a contract made with a domestic corporation, it may maintain the action and enforce the contract, the prohibition being only provisional, subject to removal at any time."

The statute in question, and the contract of purchase of the land mentioned, being products of the state of Colorado, and her courts holding that under that statute said contract was valid, it would be presumption on the part of this court to hold otherwise, especially when this court has repeatedly ruled the same way in cases arising under similar statutes of this state.

There are some other minor points discussed, but they, in no manner, affect the merits of the case, and I will therefore pass them by.

Finding no error in the record, the judgment is affirmed.

FARIS, J., concurs in result. BLAIR and REVELLE, JJ., concur.

GRAVES, J. (dissenting). I cannot concur in the majority opinion. The facts of the case and the questions raised are as follows: Plaintiff is alleged to be an Arizona corporation, and defendant is alleged to be a Pennsylvania corporation, doing a general fire insurance business. The petition is an ordinary petition upon a fire insurance policy, issued by defendant to plaintiff in the state of Colorado. The property is alleged to have been destroyed by fire during the life of the policy. This suit was brought in Audrain county, Mo., and there tried, resulting in a judgment for the plaintiff in the sum of \$2,689.57, the amount of the policy for \$2,500 and interest thereon. Service of summons in the case was had by the sheriff of Cole county, Mo., delivering a copy of the petition and summons to Frank Blake, the then superintendent of the insurance department of Missouri. Preserved in the bill of exceptions by the plaintiff, we have the motion to quash the service in this cause, which motion reads:

"Now comes the defendant herein, and, appearing for the purposes of this motion and for the purposes of this motion only, moves to quash the writ herein issued and the return thereon by the sheriff of Cole county, and dismissed the cause for the following reasons, to wit: The circuit court of Audrain county and no other court of the state of Missouri has jurisdiction over the person of the defendant herein nor over the subject-matter of said action. The plaintiff is a corporation existing under the laws of the territory of Arizona but attempting to engage in business in the state of Colorado, and

also attempting, according to the allegations of the petition herein filed, to exercise its corporate powers in the state of Colorado, and, according to the allegations of plaintiff's petition, was the owner of the property in said petition described in the state of Colorado; and the defendant is a foreign corporation of the state of Pennsylvania, doing business as an insurance company in the state of Missouri, and also in the state of Colorado. That the alleged contract sued upon by plaintiff was made in the state of Colorado, and the insurance against fire by said alleged policy was against loss of property located in the state of Colorado; and said fire by which said property is alleged to have been destroyed took place in the state of Colorado. Hence the alleged contract sued upon and the alleged cause of action in plaintiff's petition, if any, is a contract under the laws of Colorado, and the cause of action arose in the state of Colorado and is located in the state of Colorado. That the defendant corporation is an insurance company of the state of Pennsylvania, and hence is a resident and a citizen of the state of Pennsylvania. That the said contract and said cause of action is located in the state of Colorado, and is not a contract nor a cause of action in the state of Missouri. That under and by virtue of section 7042 of the Revised Statutes of Missouri, 1909, a foreign insurance company is required, upon condition of doing business in the state of Missouri, to make the superintendent of the insurance department of the state of Missouri its agent upon whom service of process issuing out of the courts of the state of Missouri might be had; but said superintendent of insurance is and can be an agent for the purpose of service of process upon only for the benefit of the state of Missouri and a cause of action arising in the state of Missouri out of contracts made in the state of Missouri; and said section is solely for the benefit of actions located in the courts of the state of Missouri; and said superintendent of insurance is not an agent for the purpose of having process served upon him for a cause of action arising outside of the state of Missouri and in behalf of nonresidents of the state of Missouri; and the said Frank Blake, the said superintendent of the insurance department of the state of Missouri, upon whom service was had in said action, is not an agent for this defendant upon whom process could be served in the alleged cause of action set forth in plaintiff's petition. Wherefore this defendant says that this court has no jurisdiction over the subject of this action, nor over the person of this defendant.

"II. The bringing of this action in the state of Missouri and outside of the state of Colorado is an attempt on the part of the plaintiff to make use of the courts of the state of Missouri to deprive the defendant of judicial process by which it may procure the attendance of witnesses on its behalf in a defense of the merits of said cause of action. That this defendant is entitled to a defense on the merits of said cause of action, and has a defense thereto consisting as follows: First, said policy is void; second, said policy became void by reason of acts of the defendant after the issue of said policy; third, it is void in fact and in law; fourth, the defendant was not the sole and unconditional owner of said property described in said petition at the time of the issuing of said policy, neither was it the sole and unconditional owner thereof at the time of the alleged fire; and, further, the plaintiff has avoided said policy and caused the same to become null and void by its violation of the terms of said policy, and said plaintiff did not have destroyed by fire a portion of the property, as alleged in its said petition. That said petition presents many issues which the defendant, acting on its own behalf, will be compelled to defend against, and there is a large amount of testimony in the way of witnesses

and in the way of documentary evidence, all located in the state of Colorado, which this defendant cannot produce in any court of the state of Missouri by judicial process, and for that reason this court should not take jurisdiction of said cause, and cannot have jurisdiction of said cause; and to be allowed to maintain said action in the state of Missouri would be to deprive the defendant of that due process of law which the Constitution of the state of Missouri guarantees to every foreign insurance company entering the state for the purpose of doing business therein; and to allow said action to be prosecuted in the state of Missouri is to deny to the defendant the equal protection of the laws, and is therefore, in disobedience of section 1, Amend. 14, of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This motion the court nisi overruled, and the defendant answered. In this answer the jurisdiction is thus challenged:

"The defendant herein admits that at all dates herein the plaintiff was and now is a corporation duly organized and existing under and pursuant to the laws of Arizona, and that at all of said times, such defendant was and now is a foreign corporation duly existing under the laws of the state of Pennsylvania and at all of said times said defendant, as such company and corporation, has been and now is engaged in a general fire insurance business in the state of Colorado, and also in the state of Missouri, and was and now is licensed and authorized to do business in both of said states. Defendant says that the policy or contract of insurance issued was made and executed in the state of Colorado upon property located in the state of Colorado, and further says that therefore said contract of insurance is a contract under the laws of the state of Colorado, and not a contract under the laws of the state of Missouri; that the said Frank Blake, superintendent of the insurance department of the state of Missouri, upon whom service was had in said cause, was not authorized by the laws of the state of Missouri to acknowledge or receive service of process issued from any court of record in the state of Missouri for this defendant in said cause of action; hence this court has no jurisdiction over this defendant nor the subject-matter of this action, and section 7042, Rev. St. Mo. 1909, does not apply to this action, for the reason that said contract of insurance is a contract of the state of Colorado, and not of the state of Missouri, and the cause of action can only be maintained in the state of Colorado, and said section 7042 of the Revised Statutes of Missouri is unconstitutional and void because it denies to this defendant due process of law and is an effort to take the property of this defendant without due process of law, and is therefore in conflict with section 30, art. 2, of the Constitution of the state of Missouri, which provides that no person shall be deprived of property without due process of law, and is in conflict with section 1, Amend. 14, of the Constitution of the United States, which provides that no state shall make or enforce any law which shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"Defendant further says that said section 7042 was enacted by the General Assembly of the state of Missouri in the year 1885, as shown by Laws of Missouri of 1885, page 183, and that the title to said act is as follows: 'An act to amend section 6013, art. 4, of the Revised Statutes of Missouri of 1879, entitled, "General Provisions Relating to Insurance and Service of Legal Process Therein"'—whereas in truth and

in fact said act of the Legislature did not amend said section 6013, but repealed said section, and enacted a new section in lieu thereof, and is therefore in conflict with section 28, art. 4, of the Constitution of Missouri, which provides that no bill shall contain more than one subject, which shall be clearly expressed in said title, is contrary to the body of said act, and that the subject of the body of the act is not expressed in the title, either clearly or otherwise.

"And defendant further says that said act is contrary to the terms of section 34, art. 4, of the Constitution of Missouri, which provides that: 'No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.'

"Wherefore defendant says that said section 7042, Rev. St. Mo. 1909, is unconstitutional and void, and that the service herein is void, and this court has no jurisdiction over the defendant or over the subject-matter of this action, and to entertain further jurisdiction in this cause would be to deprive the defendant of its property without due process of law."

Further parts of the answer set out various defenses to the suit upon the policy, which matters can be best stated, if necessary, with the points made. Reply placed in issue matters in the answer.

I. In this dissent I am not unmindful of the ruling of this court in *State ex rel. v. Grimm*, 239 Mo. 135, 143 S. W. 483, and cases following it. I take it that the United States Supreme Court has fully sustained the dissent in the *Grimm* Case, and no specious argument can change the force and effect of the very recent holding of such court. This, however, we discuss later.

It is clear in this case that the defendant did nothing more to give the circuit court of Audrain county jurisdiction over its person than the filing of the two documents we have set out in the statement. One is called a motion to quash the service, and the other is the answer. It is clear that jurisdiction over the person was challenged from start to finish. Jurisdiction over the person is the proper subject-matter of a plea in the answer. Section 1804, R. S. 1909 reads:

"When any of the matters enumerated in section 1800 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action."

Section 1800, R. S. 1909, referred to in section 1804, supra, reads:

"The defendant may demur to the petition, when it shall appear upon the face thereof, either: First, that the court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties, for the same cause, in this state; or, fourth, that there is a defect of parties plain-

tiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the petition does not state facts sufficient to constitute a cause of action; or, seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

From this it appears that jurisdiction over the person is a subject-matter of demurrer, if it appears from the face of the petition, but if it does not so appear, then it is a subject-matter of answer, and is only waived in the event it is not challenged by one or the other methods. The challenge in this case was not only timely, but continuous. Jurisdiction over the person can only be acquired by service of the person had according to law, or by consent, expressed or implied. Implied consent consists in doing such things as would indicate a willingness for the court to try the case, i. e., as filing answer or doing some similar thing, without questioning the jurisdiction of the court. Implied consent is more frequently denominated waiver of jurisdiction. In the case at bar the defendant has waived nothing as to jurisdiction. Dragged into court by the ears, as it were, it has persistently protected want of jurisdiction. It has lodged the plea where the statutes of this state say it may be lodged, i. e., in its answer. The reply of the plaintiff filed herein admits all the facts necessary to show want of jurisdiction, if our views of the law are correct. In other words, the reply admits that plaintiff is an Arizona corporation, and the defendant is a Pennsylvania corporation, and that "the contract of insurance was made and executed in Colorado, upon property in Colorado." This admission shows that it was not the result of business done in Missouri. The full effect of this omission is not in the petition, and therefore demurrer was not necessarily the pleading for defendant. Under the plea to the jurisdiction found in the answer, and the admission found in the reply, the circuit court of Audrain county should have found for defendant upon the issue of jurisdiction.

Our statute (section 7042, R. S.) requires a foreign insurance company to designate the state superintendent of insurance as its agent to receive service of process in suits filed against such foreign insurance company in the courts of this state. This designation is a prerequisite to a license to do business in this state. A close reading of our statute, however, will disclose no legislative intent to make service of process in this manner effective in any case except one arising through contracts made and acts done in this state, whilst the corporation was licensed to transact business therein. In the Grimm Case, supra, 239 Mo. loc. cit. 187, 143 S. W. 499, I then took occasion to say:

"Neither do I believe section 7042, Revised Statutes 1909, charges our courts with the duty of hearing a case such as is now pending in the court of the respondent Grimm in the city of St. Louis. That section compels foreign insurance companies doing business in this state to

make our state superintendent of insurance an agent to accept service of process. I believe that this section only confers jurisdiction upon our courts to hear and determine controversies growing out of insurance contracts made in this state, whilst a foreign insurance company is doing business in this state under a license from the state. It is said in the opinion by my learned Brother that there is no limitation in this statute, and hence cases from other jurisdictions where there is a limitation in the statute are not in point. I think the statute, when considered as a whole, has a limitation. I think from its language there can be gathered a clear legislative intent to limit the jurisdiction of courts to actions upon contracts made in this state. Note the language: 'Service of process as aforesaid, issued by any such court, as aforesaid upon the superintendent, shall be valid and binding, and be deemed personal service upon such company, so long as it shall have policies or liabilities outstanding in this state.' This follows the language emphasized by my Brother, and to my mind characterizes the kind of litigation to which foreign insurance companies can be called upon to respond in our courts. In other words, it fixes a limitation of the kind of causes over which our courts can assume jurisdiction. The statute specifically refers to policies 'outstanding in this state.' It is true that this clause refers to a time when such company has withdrawn from the state or is no longer doing business in the state, but it also refers to contracts made when in the state. The policies above mentioned in the statute are policies issued when the company was in the state. The question then arises, Why preserve this method of service after the company has left the state and limit it to cases upon policies outstanding in this state only, if the previous portion of the statute referred to all kinds of actions, whether upon contract in this state or contracts made out of this state? To my mind, the substituted method of service provided for in this statute only applies to actions arising upon contracts made in this state, and not to actions upon contracts made out of this state. In other words, the statute limits the class of cases in which this kind of service can be effectively had, and the case pending in respondent's court is not one of the class, if the averments in the complex motion are true. How the relator may now avail itself of the situation, with jurisdiction over its person having been decided by the majority, may be a question, but not one for discussion at this time. To do so would be but to suggest to counsel how to try their cases. To hold that such statute covers service in a case of this kind would make it violate the due process claim of both state and federal Constitution."

"For these reasons, somewhat hurriedly drawn, I dissent in this case, as well as in those which follow it upon the questions discussed.

"Valliant, C. J., concurs in these views."

The exact question, since the writer expressed the foregoing views, has come up in the United States Supreme Court in construing a similar statute in the state of Louisiana. By section 1 of the Louisiana act (Act No. 54 of 1904), a foreign corporation was required to file a written declaration, setting forth the places in the state where it was doing business and the name of its "agents in the state upon whom process may be served." Section 2 of the act reads:

"Whenever any such corporation shall do any business of any nature * * * in this state without having complied with the requirements of section 1 of this act, it may be sued for any legal cause of action in any parish of the state where it may do business, and service of process

in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served."

In *Simon v. Southern R. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, Mr. Justice Lamar, in discussing these statutes says:

"Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein, to require such companies to name agents upon whom service may be made, and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 608, 19 Sup. Ct. 308, 42 L. Ed. 569. *But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law.* Otherwise, claims on contracts wherever made and suits for torts, wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any state in which the foreign corporation might, at any time, be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. *But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Assn. v. McDonough*, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 351, *that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states.* In that case the Pennsylvania statute, as a condition of their doing business in the state, required foreign corporations to file a written stipulation, agreeing 'that any legal process affecting the company served on the insurance commissioners * * * shall have the same effect as if served personally on the company within this state.' Page 18. The Old Wayne Life Association, having executed and delivered, in Indiana, a policy of insurance on the life of a citizen of Pennsylvania (page 20), was sued thereon in Pennsylvania. 'The declaration averred that the company has been doing business in the state of Pennsylvania, issuing policies of life insurance to numerous and diverse residents of said county and state,' and service was made on the commissioner of insurance. The association made no appearance and a judgment by default was entered against it. Thereafter suit on the judgment was brought in Indiana. The plaintiff there introduced the record of the Pennsylvania proceedings and claimed that, under the full faith and credit clause of the Constitution, he was entitled to recover thereon in the Indiana court. There was no proof as to whether the company having done any business in the state of Pennsylvania, except the legal presumption arising from the statements in the declaration as to soliciting insurance in that state. This court said: 'But even if it be assumed that the Company was engaged in some business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania. Page 21. * * * Conceding, then, that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have consented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that com-

monwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. * * * As the suit in the Pennsylvania court was upon a contract executed in Indiana, as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney, or by agent in the suit, and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the state within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the * * * judicial proceedings of the several states, and was void as wanting in due process of law.' *From the principle announced in that case it follows that service, under the Louisiana statute, would not be effective to give the district court of Orleans jurisdiction over defendant as to a cause of action arising in the state of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 64, was not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama.*"

The italics are ours.

To my mind this ruling of our highest tribunal will stand the test of reason. There is no doubt that a state can require a foreign corporation to come into the state upon terms. Among those terms may be the designation of an agent to receive service of process in suits brought in the courts of the state, but the reasonable construction of all such statutes is that they refer to suits arising out of business done in the state, and not elsewhere. The laws of a state are presumably for the benefit of its own citizens, and not for outsiders. The state, when it imposes conditions upon foreign corporations, is imposing conditions with reference to the business which the corporations expect to do in the state when they apply for licenses. These conditions are imposed for the purpose of protecting the state and its citizens. So that we maintain that this condition imposed by section 7042, supra, should be read in that light. This state has no special interest in making its courts the rendezvous of all alleged causes of action arising in other states, whose laws and procedure may render the procurement of a judgment in such states. Section 7042 was never passed with the legislative intent to authorize such process to be served in cases arising in other jurisdictions. It should be construed (as we think it clearly reads) to have reference only to causes of action growing out of the contracts made and the acts done within this state. When thus construed, the trial court was without jurisdiction in the case, and it should have so adjudged under the pleadings and admissions made in the pleadings.

II. It was said in the Grimm Case that the form of the motion to quash the execution was such as to make a general appearance. To this I did not then agree, and do not now. In the case at bar a similar contention is made. The suggestion in the Grimm Case is

that there are matters which go to the merits. In this case, when the motion is read, whilst it is voluminous, it must, in fairness, be said that all that is said therein goes to the question of want of jurisdiction, and reasons why jurisdiction should not be assumed. The first paragraph of this motion, in a rather lengthy way, challenged the jurisdiction. It goes to nothing else. The second paragraph, at most, simply sets up reasons why the court should not assume jurisdiction over the person. Taken as a whole, it is but a challenge to the jurisdiction, and the appearance was special and not general.

It is further suggested that because the first line or so of the answer uses the words:

"Now comes the defendant herein, and, after leave of court had and obtained, for its answer herein says."

The record proper shows no application for leave to answer. The whole record proper, so far as relates to the matter here involved, reads:

"During the regular September term, 1911, on September 4, 1911, the defendant filed a motion to quash writ and return. Further, during said September term, 1911, on September 6, 1911, the court overruled defendant's motion to quash writ and return. Further, during said September term, 1911, on September 14, 1911, awaiting the action of the Supreme Court and its decision, this cause was ordered passed without action by this court. In vacation, on December 16, 1911, this cause was by the court continued, awaiting the action of the Supreme Court. During the regular March term, 1912, on March 4, 1912, the defendant filed its answer, and deposited with the clerk of this court the sum of \$30.05 as tender of premiums and interest paid by the plaintiff to the defendant on said policy, which answer, omitting caption and signatures, is as follows."

It will be noted that after the ruling upon the motion to quash the service every other act was done by the court itself, until this answer was filed. Nothing in this record shows that defendant ever waived the matter of jurisdiction prior to filing its answer. If so, then by the very terms of section 1804, R. S. 1909, the defendant did not waive the question, when it made such a question a part of its answer. It had the right to plead want of jurisdiction over its person, along with other matters of defense. So that under the statutes of the state sections 1800 and 1804, R. S. 1909, this question of jurisdiction (although it be jurisdiction of the person) is well preserved and is here for our review.

Under the law there can be no question that by filing an answer which only goes to the merits of the case, jurisdiction of the person is waived. It may also be waived by a general appearance for any other purpose in the case, and it is useless to review the cases cited by counsel. Those cases are not this case. Here, like *Houston v. Publishing Co.*, 249 Mo. 332, 155 S. W. 1068, we have a case where the question of jurisdiction over

the person has been kept a live issue from start to finish. Under the law the trial court should have found for defendant upon this plea in the answer. Other questions in the record need not be discussed. Nor should our previous ruling in the *Grimm* and the school of cases here with the *Grimm* Case be taken as stare decisis and preclude a further review of the question. In my humble judgment the question is of such grave concern that it should never be considered settled until it is settled right. *Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650, and cases cited therein.

The judgment appealed from should be reversed, and I so vote.

BOND and WALKER, JJ., concur in these views.

BOBB v. TAYLOR. (No. 17885.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

1. LIMITATION OF ACTIONS \S 73(3)—DISABILITY OF COVERTURE—STATUTE.

Under Rev. St. 1909, \S 1894, providing that if any person entitled to bring a personal action at the time the cause of action accrued was a married woman such person shall be at liberty to bring the action within the period of limitation after the disability is removed, where plaintiff became the owner of a debt secured by deed of trust by the indorsement and delivery to her by her husband, the payee, of the note evidencing the debt, and her coverture lasted until 1910, when her husband died, suit to foreclose the deed of trust being brought in 1912, the debt was not barred by the statute of limitation of 10 years, which was arrested by her disability.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 401; Dec. Dig. \S 73(3).]

2. CONSTITUTIONAL LAW \S 107 — VESTED RIGHTS—STATUTE OF LIMITATION.

Rev. St. 1909, \S 1892, providing that no suit under power to foreclose any deed of trust executed hereafter to secure any obligation to pay money or property shall be maintained after such obligation has been barred by limitation, does not impair the vested rights of parties to mortgages or deeds of trust executed before the act was passed, provided the obligations secured by them were not barred at the time of its enactment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. $\S\S$ 246-251; Dec. Dig. \S 107.]

3. PAYMENT \S 66(5)—BILLS AND NOTES—REBUTTABLE PRESUMPTION.

The presumption of payment arising from the fact that a mortgage note matured more than 20 years before suit to foreclose is not conclusive, but rebuttable.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 188; Dec. Dig. \S 66(5).]

4. MORTGAGES \S 476 — FORECLOSURE — PARTIAL PAYMENT—DUTY OF COURT.

In suit to foreclose a mortgage, where releases of part of the land recited a partial payment and satisfaction of the note by the purchaser, it was the duty of the trial court to as-

certain the amounts paid for such releases and to decree a credit therefor on the indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1390-1393, 1417; Dec. Dig. § 476.]

5. ALTERATION OF INSTRUMENTS § 23—**ALTERATION OF MORTGAGE NOTE—EFFECT ON MORTGAGE OBLIGATION.**

Where a deed of trust recited that \$30,000 was the purchase money of the lands conveyed in trust, indorsement of payment upon the note evidencing such indebtedness, so as to void the instrument for material alteration, did not extinguish the original indebtedness for which the note was given, which existed until paid or discharged in law.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 192-207; Dec. Dig. § 23.]

6. MORTGAGES § 486—**FORECLOSURE—UNENFORCEABILITY OF NOTE—GENERAL PRAYER FOR RELIEF.**

In suit to foreclose a deed of trust, where plaintiff alleged the original indebtedness for the purchase price of land, she was entitled, under her prayer for general relief, to full equitable redress, regardless of the unenforceability of the note representing the debt, since any relief within the scope of all the allegations of the petition may be granted under the prayer for general relief.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1404-1411, 1470; Dec. Dig. § 486.]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Suit by Clara P. Bobb against Lucy G. Taylor. From a judgment dismissing the petition, plaintiff appeals. Judgment reversed, and cause remanded.

T. J. Rowe, of St. Louis, for appellant. S. T. G. Smith and Henry A. Baker, both of St. Louis, for respondent.

BOND, J. I. This suit to foreclose a deed of trust was begun January, 1912. The petition alleges: That plaintiff was the widow of John H. Bobb. That from the 17th of September, 1884, until the 10th of March, 1910, when her husband died, she was a married woman. That on the 12th of June, 1884, defendant gave her note due one year thereafter for \$30,000, payable to the husband of plaintiff, who, on October 1, 1884, indorsed and delivered the same to plaintiff, who is now the owner of said note and which is secured by a deed of trust executed by defendant when the note was given, which deed of trust recites that the said note was for the purchase money due from defendant to John H. Bobb for the conveyance by him of the land described in the deed of trust to the defendant. The deed of trust was executed to Wm. C. Jamison, who has since died, and contained the usual covenants. That nothing has been paid on said note except \$5 as appears from an indorsement thereon on the 2d of May, 1895, signed by defendant. The petition then prays for a strict foreclosure barring the equity of redemption to satisfy the debt and interest secured by the deed of trust and for general relief. The answer

is a general denial and a plea of the statute of limitations as to the note, and that the indorsement thereon of the payment of \$5 was not made or authorized by the defendant; wherefore it is averred the note is avoided and that no consideration was given for the note and deed of trust and nothing paid thereon. The answer further averred that plaintiff as the holder of said note, in consideration of the receipt of enough money to pay the same, executed releases of the lien of the deed of trust to the purchasers of a portion of the lands conveyed therein. The reply was a general denial. The evidence shows that John H. Bobb executed a quitclaim deed on the 12th of June, 1884, to the defendant, wherein he conveyed certain lands to her which were described separately in four clauses of the deed; that the portions included in the third and fourth descriptions are still subject to the deed of trust which was executed by the defendant to secure her note given for the purchase money; that said portions are known as the Burd place and contained about 30 acres of land; that defendant quitclaimed this tract of land to Miss M. Degroot, who, in turn, quitclaimed it to the plaintiff; but that defendant has been in the actual possession thereof over 20 years and claims to hold said lands adversely, but has never paid any taxes during that period and never paid anything on the note; and that she never wrote nor certified the indorsement thereon purporting to show a payment of \$5. The evidence shows the plaintiff has paid the taxes on the property in question. Upon consideration of the evidence, the trial court dismissed plaintiff's petition, from which she has duly appealed.

[1] II. Appellant became the owner of the debt secured by the deed herein sought to be foreclosed, by the indorsement and delivery of the note evidencing that debt by the payee (her husband), in 1884. Her coverture lasted until 1910, when her husband died. This suit was brought in 1912. It necessarily follows that the debt was not barred by the statute of limitation of ten years, for that was arrested by her disability until two years before this action was begun. Revised Statute 1909, § 1894; Lindell Co. v. Lindell, 142 Mo. 61, 43 S. W. 368.

[2] Neither was the deed of trust affected by the act of 1891 (Laws 1891, p. 184), now section 1892 of the revision of 1909, for that act does not impair the vested rights of parties to mortgages or deed of trust which were executed, as in this case, before the act was passed, provided the obligations secured by them were not barred at the time of the enactment of 1891. Morrison v. Roehl, 215 Mo. loc. cit. 554, 114 S. W. 981, and cases cited; Bumgardner v. Wealand, 197 Mo. loc. cit. 436, 95 S. W. 211, and cases cited; Martin v. Teasdale, 212 Mo. 611, 111 S. W. 511, and cases cited. It follows that neither the debt nor the deed of trust securing it were

open to the defense of the statute of limitations made in the answer of defendant in this case.

III. It is, however, insisted by the defendant that, independently of the defense of the statute of limitations, a presumption of payment arises from the fact that the note matured more than 20 years before the suit, during which time plaintiff took no steps to foreclose the deed of trust. *Williams v. Mitchell*, 112 Mo. loc. cit. 311, 20 S. W. 647; *Cape Girardeau Co. v. Harbison, Adm'r*, 58 Mo. loc. cit. 96; *Carr v. Dings*, 54 Mo. loc. cit. 101.

[3] Waiving for the argument, whether such presumption exists where the person, as here, was under the disability of coverture (*Lindell v. Lindell*, supra, 142 Mo. loc. cit. 81, 43 S. W. 368), it is enough to say that such presumption is not conclusive, but is rebuttable (*Smith's Ex'r v. Benton*, 15 Mo. loc. cit. 374), and may be overcome by evidence showing that the debt has not been paid. In the case at bar, the defendant admitted on the witness stand that she never, at any time, paid anything on the debt secured by the deed of trust. This necessarily removed any support for a presumption of payment arising from lapse of time.

[4] But there is evidence of a partial payment of that indebtedness by the purchasers of the two smaller tracts of land as to which plaintiff released the deed of trust, for in the releases it is expressly recited that:

"Lucy G. Taylor has partially paid and satisfied said note, and is justly and legally entitled to a partial release of the said deed of trust."

In view of these recitals, it was the duty of the trial court to ascertain by proper proceedings the amounts paid for obtention of such releases, and to have decreed a credit therefor on the indebtedness secured by the trust deed.

[5] IV. It is further insisted by defendant that the note evidencing the indebtedness was altered by the indorsement of payment thereon, as to its identity and integrity, and therefor became a void instrument. It is wholly unnecessary to go into that inquiry in this case. The deed of trust given by the defendant recites that \$30,000 was the purchase money of the lands conveyed in trust. The note was simply evidentiary of that indebtedness, and, if it became void by such indorsement, that fact could not extinguish the original indebtedness for which it was given. That indebtedness exists until paid or discharged in law.

Suppose the note had been given to a person not under any disability and had been barred, as it might, by the statute of limitations, that would not prevent the foreclosure of a deed of trust executed before the statute of 1891, for the amount of the original indebtedness secured by it. *Bumgardner, v. Wealand*, supra. Neither in the pres-

ent case can the invalidity of that note arising from the material alteration of its term (if that be conceded) affect the right of the beneficiary under a deed of trust to foreclose for the unpaid portion of the original indebtedness for the purchase of the lands which is secured therein.

[6] The allegations of the petition set forth recitals of the conditions of the deed of trust wherein it is stated that defendant "is indebted in the sum of \$30,000 for the purchase money of the property" conveyed therein. The petition also contains a prayer for general relief, and the rule is settled in such cases that any relief within the scope of all the allegations of the petition may be granted. *Phillips v. Jackson*, 240 Mo. loc. cit. 336, 144 S. W. 112; *Gibson v. Shull*, 251 Mo. loc. cit. 492, 158 S. W. 322; *Story's Equity Pleadings*, § 40; *McLure v. Bank*, 252 Mo. loc. cit. 519, 160 S. W. 1005.

In the instant case, having alleged in the petition the original indebtedness and its nature, plaintiff was entitled, under the prayer for general relief, to full equitable redress based on that allegation, regardless of the unenforceability of the note given for that debt.

The contract and obligations of the defendant in this case are expressed in the deed of trust executed by her, whereof the plaintiff has become the beneficiary. That deed of trust, under the facts shown in this record, is enforceable according to its terms, in so far as the indebtedness for the purchase money secured thereby has not been paid.

To the end that that shall be done, after a proper accounting between the parties, the judgment in this case is reversed, and the cause remanded. All concur.

SOUTHERN REAL ESTATE & FINANCIAL CO. v. BANKERS' SURETY CO.

(No. 17855.)

(Supreme Court of Missouri, Division No. 1, March 30, 1916.)

1. APPEAL AND ERROR ⇐171(1)—THEORY OF CASE BELOW.

In an action by the owner against the surety on the bond of a contractor for a building, where the case was contested by the surety upon the sole issue of the sufficiency of the architect's certificates to justify payment to the contractor, such surety could not on appeal question the sufficiency of the allegations of the petition to cover the entire ground of the cause of action stated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1066; Dec. Dig. ⇐171(1)]

2. APPEAL AND ERROR ⇐1170(3)—UNSUBSTANTIAL ERROR—DISREGARD—STATUTE.

Under Rev. St. 1909, § 1850, requiring disregard of error or defect in pleadings not affecting substantial rights of the adverse party, and providing that no judgment shall be reversed or affected by reason thereof, the Supreme Court, in an action by a realty company

against the surety on the bond of its contractor for a building, must disregard error in the petition for failing to state that the consideration named in the contract was to be paid in installments, etc., the case having been contested on the sole issue of the sufficiency of the architect's certificates to justify payment to the contractor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4075, 4098, 4101, 4542; Dec. Dig. ¶1170(3).]

3. APPEAL AND ERROR ¶193(1)—DEFECT IN PLEADING—DEMURRER—STATUTE.

Under Rev. St. 1909, § 2119, providing that no judgment shall be reversed for want of any allegation in a pleading on account of which a demurrer could have been maintained, in an action by a realty company against the surety on the bond of its contractor for a building, where the petition did not sufficiently state that payments to the contractor were made upon architect's certificates in conformity with the contract, the point should have been raised by the surety by demurrer, and was not open on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226, 1230, 1231, 1237, 1240; Dec. Dig. ¶193(1); Pleading, Cent. Dig. § 1355.]

4. PLEADING ¶245(4)—AMENDMENT—STATUTE.

Under Rev. St. 1909, § 1848, touching amendment of pleadings, in an action by a realty company against the surety on the bond of its contractor for a building, the action of the court in permitting the surety, which had stood by its general denial, to file an amended answer, after the evidence was all in, pleading specifically overpayments by the realty company to the contractor and the want of certificates of the architect showing the existence of the facts justifying the payments, and asking the discharge of the surety on that ground, was proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 660, 664-666; Dec. Dig. ¶245(4).]

5. PRINCIPAL AND SURETY ¶59—CONTRACTS OF SURETSHIP—CONSTRUCTION.

The contracts of sureties will be construed most strongly in their favor, they being favorites of the law.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. ¶59.]

3. PRINCIPAL AND SURETY ¶59—BOND—CONSTRUCTION.

The surety of a building contractor, whose bond contained nothing on its face to indicate that its terms originated with the surety rather than the owner or his architect, all special stipulations being directed against the surety, had the legal right to stand equally before the law with the owner in the construction of the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. ¶59.]

6. CONTRACTS ¶287(2) — BUILDING CONTRACTS — ARCHITECT'S CERTIFICATES — CONCLUSIVENESS.

Architect's certificates, upon which the owner of a building under construction paid the contractor as the work progressed, in the absence of fraud or mistake are conclusive upon all parties, owner, contractor, and contractor's surety, whether right or wrong.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. ¶287(2).]

8. PRINCIPAL AND SURETY ¶117—BUILDING CONTRACT—ARCHITECT'S CERTIFICATES.

Where a building contract required that the owner should make payments in current funds, and only upon certificates of the architect, on or before the 15th day of each month, in amounts equal to 90 per cent. of the value of the work in place during the preceding month according to the architect's certificates, and the certificates on which payments were made by the owner contained no statement of the work in place, only two of them implying that an estimate had been made or that value had been considered, three of them requesting payment on account of labor and material furnished "as per contract and other extra work," and three of them requesting payment to parties other than the contractor for material furnished, without any suggestion that it had gone into the building, all certificates in effect stating only the desire of the architect that the money be paid to the contractor, such certificates were not a compliance with the contract, which required the value of the work in place during each month to appear in the certificates, and that the estimates be founded on the contract price and state the value of the work and material in place relative to the entire amount of the contract, and payment on such certificates constituted a breach of the building contract, so that the surety on the contractor's bond would not be liable for payments made on such certificate.

[Ed. Note.—For other cases, Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. ¶117.]

9. PRINCIPAL AND SURETY ¶117 — DISCHARGE—BREACH OF CONDITION OF CONTRACT.

Where the provision of a building contract regulating the contents of certificates of the architect on which payments should be made was an independent provision, relating only to the evidence on which it might be found that the payments had become due in the amount stated, the loss, if any, occasioned by nonobservance being capable of computation and compensation in damages, the surety on the contractor's bond, the owner having overpaid in good faith on insufficient certificates, was not liable for the amount of the overpayments, but was not discharged in toto on the bond, since where a stipulation does not go to the root of a contract, so that a failure to perform it would not render the performance of the rest of the contract a thing different in substance from what was contracted for, its breach will not authorize an abandonment, nor is abandonment authorized where nonperformance of a condition does not materially impair the benefit from the performance of the others, the loss being capable of compensation in damages.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. ¶117.]

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Suit by the Southern Real Estate & Financial Company against the Bankers' Surety Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Reynolds & Harlan and Thomas Bond, all of St. Louis, for appellant. Jeffries & Corum, of St. Louis, for respondent.

BROWN, C. This suit was instituted to recover the sum of \$9,670.56 against the defendant, an Ohio corporation authorized to transact a general surety business in Mis-

ouri, upon its bond as surety for the E. H. Abadie Company, a Delaware corporation, as contractor for the erection of a steam heating, ventilating, and power plant for a hotel and theater building in St. Louis, for the contract price of \$60,000 with the right in the owner to make additions and alterations up to the amount of \$5,000, which was afterward changed, with the consent of the defendant, to \$15,000, and extra work was actually done under this provision to the amount of \$8,963.98, making the gross contract price \$68,963.98. The contract contains the following provisions:

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be sixty thousand dollars (\$60,000.00), subject to additions and deductions as herein provided, and that such sum shall be paid by the owner to the contractor in current funds, and only upon certificates of the architect, as follows:

"On or before the 15th day of each month payments shall be made equal in amount to ninety (90) per cent. of the value of the work in place during the preceding month, according to the certificate of the architect."

The bond was in the usual form. The work proceeded under the contract, the plaintiff making payments from month to month to the aggregate amount of \$65,056.52, and the contractor failed to complete the work as provided by the contract. The plaintiff, in pursuance of its provisions, entered upon and completed the work at an additional cost of \$13,578.03, being \$9,670.57 in excess of the contract price.

It may be seen from this statement that the payments made by the plaintiff before it took over the contract amounted to \$2,988.94 over the entire contract price. The payments made by the plaintiff were upon orders of the architect, which are properly described by the trial judge in a memorandum at the time of entering judgment below as follows:

"Please pay to the E. H. Abadie Company the sum of \$6,000, being the second payment to apply on account for work done during the month of September, as per contract, and oblige." Other certificates, in substance the same as above, were issued for \$5,000, \$7,000, and \$3,000. Two other certificates are the same in substance, except that they add, 'to apply on account of estimate for work' done during preceding month. Three request payment on account of labor and material furnished 'as per contract and other extra work.' One requests the payment of \$6,600, 'being the balance due on statement filed for work done at Seventh and Market streets, during the month of October.' And three do not request the payment to E. H. Abadie & Co. at all, but request the payment to third parties for 'material furnished the American Theater and Hotel Building, and charge to the account of the E. H. Abadie Company.' None of the purported certificates contain any statement of 'the work in place during the preceding month' or any statement that the architect has in fact made any estimate of such work in place, unless it can be said that the two certificates containing the words, 'to apply on account of estimate for work done,' etc., do so. And none of the certificates contain any statement that the payment requested is in fact

90 per cent. of any estimate of the work in place. On the other hand, some of the payments requested show on their face that they are not on account of 'work in place,' but a far different thing, 'materials furnished'; and the last three do not call for a payment to the E. H. Abadie Company, but for payment to third parties on account of 'material furnished.' And as to these last three, it can only be fairly inferred that they were not payments of 90 per cent. even of such materials furnished, but were payments to such third parties in full of their bills against the Abadie Company for 'materials furnished.'

There is no charge of fraud.

The case turned upon the effect of these architect's certificates. The trial court held that they did not constitute such authority for the payment of the sums named in them as was required by the contract, and that the payment upon them of more than ninety (90) per cent. of the value of the entire work done was such a violation of the rights of the surety as discharged it from the obligation of the bond, and gave the defendant judgment.

The petition did not state that the plaintiff had performed all the provisions of the building contract to be performed by it. The respondent says in its brief that on this account it failed to state a cause of action, and is for that reason not sufficient to support the judgment.

The appellant complains that after the evidence was all in and before judgment the defendant was permitted, against plaintiff's objection, to file an amended answer setting up the facts relied on for his discharge. To this the plaintiff excepted.

[1-3] 1. Although the respondent said in the oral argument that the vital and only question he desired to present pertained to the sufficiency of the papers in evidence relied upon as architect's certificates justifying the payment made to the contractor, it urges in its brief that the petition fails to state a cause of action because it does not state "either specifically or generally, that the plaintiff complied with all the conditions required to be performed on his part," contained in the building contract, to secure the performance of which the bond sued on was given. This point was raised upon the trial by objection to the introduction of any evidence, and not otherwise. The petition does not state that the consideration named in the contract was "to be paid in installments on the 15th day of each month of ninety per cent. of the work in progress during the preceding month, according to the certificate of the architect, the final payment to be made thirty days after the completion of the work included in the contract," and that "all payments shall be due when certificates of the same are issued." It also states that prior to the abandonment of work by the contractor it paid him on the certificates of the architect the sum of \$65,056.52. We think, the case having been contested by defendant upon the sole issue of the sufficiency of the

certificates, it is now too late for the defendant to question the sufficiency of these allegations to cover the entire ground of the cause of action stated. The error, if there was an error, comes directly within the provisions of section 1850 of the Revised Statutes of 1909, which requires us, in every stage of the action, to "disregard any error or defect in the pleadings * * * which shall not affect the substantial rights of the adverse party," and that "no judgment shall be reversed or affected by reason of such error or defect"; and also within the terms of section 2119, which provides that no judgment shall be reversed "for the want of any allegation or averment on account of which omission a demurrer could have been maintained." The objection to the evidence was, at the trial, placed upon the ground that the petition should have stated that the payments were made upon the certificates of the architect in conformity to the terms of the contract. If the statement to which we have called attention was not a sufficient averment of that fact the point should have been raised and saved by demurrer as provided by the section last cited.

[4] 2. A similar question is made by the appellant upon the action of the court in permitting the defendant to file an amended answer after the evidence was all in. The only evidence given at the trial was on the part of the plaintiff, which presented for the first time the architect's certificates upon which payments were made to the contractor. Up to that time the defendant had stood on its general denial, but after the evidence was in showing the facts with reference to these payments and certificates, and before judgment, the court permitted it to amend by pleading specifically the overpayments which had been made, the want of certificates of the architect showing the existence of the facts justifying the payments, and asking the discharge of the defendant on that ground. We think the amendment was fully authorized by section 1848 of the Revised Statutes of 1909 and did not change the character of the claim or defense implied by the general denial and insisted upon at every stage of the trial.

[5] 3. If the architect's certificates introduced by the plaintiff substantially complied with the terms of the contract they were, in the absence of fraud or mistake, conclusive of the fact that such payments had become due, and were binding alike upon the principals and surety. Before construing them in this respect it is necessary to refer to the principles of law applicable to their construction as between the parties to this suit. It has been said from time immemorial that sureties are the favorites of the law, and that their contracts should be construed most strongly in their favor. This rule was sometimes justified upon the ground that their contract is a favor to the parties in the sense that it is founded upon a consider-

ation moving not to themselves, but to the principals in the contract for which they become sponsors. Although, in many cases, this was a violent deduction from the facts, the rule remained that however greatly the surety may have profited, as he did often profit, by the transaction, he might, by the form of his contract alone, place himself in the cherishing arms of the law. When the practice of forming corporations for the purpose of becoming sureties became general, the courts began to harden their rules with reference to the contracts of such agencies, but did not remove their protection from personal sureties nor even inquire whether their reasons for assuming such responsibility were sentimental or pecuniary. They simply relaxed the rule strictissimi juris as against these corporations, but did not deny them the aid of the courts in the enforcement of their fair and reasonable contracts, nor refuse to interpret them, as all other contracts are interpreted, in accordance with the reasonable intent of the parties plainly expressed upon their face.

[6] In this case the bond contains no annoying stipulations. Its condition is that if the obligors shall pay to the plaintiff "all damages it may sustain, and all forfeitures to which it may be entitled by reason of the nonperformance on the part of the said E. H. Abadie Company of any of the covenants, conditions, stipulations and agreements of said contract, including such alterations and additions, then this obligation shall be void, otherwise the same shall remain in full force and virtue." While it contains some special stipulations they are all directed against the surety in the bond, and none of them are calculated or intended to furnish it a loophole through which to escape. In short, there is nothing upon its face indicating that its terms originated with the surety rather than with the owner or his architect; and the obligors, by its terms, acknowledge themselves to be bound "unconditionally" for the faithful performance of said contract. Respondent has the moral as well as the legal right to stand equally before the law in its construction.

[7] Assuming then that this surety is not "a favorite of the law," we must determine what his contract is. It undertakes to indemnify the plaintiff against loss on account of failure of the contractor to fully perform his undertaking in the building contract, which, by this reference, becomes a part of the undertaking of the surety as perfectly as if its words were set out in the bond. The bond thus becomes a tripartite undertaking, each of the parties to which is plainly and necessarily obligated to perform everything in the respective contracts which he has undertaken to do, and which necessarily and substantially tends to the benefit of each of the others. The provisions of the building contract that payments be made

only to the extent of 90 per cent. of the value of the work and materials in place is evidently for the benefit of the surety, who is now called upon to repay to the plaintiff about \$3,000 which has been paid to the contractor, and which he admittedly never earned; and how much more of this kind of liability is called for in this suit can only be ascertained by ascertaining the value of the work in place at the time the owner took over the job. The fact that at that time the entire contract price had been paid except about \$4,000, while \$13,578.03 of work and materials remained to be furnished, strongly suggests that the contractor abandoned his work with considerable profit which the plaintiff is now seeking to recover from the surety. Whether or not this can be done depends upon the effect to be given to the certificates of the architect, for it is conceded that if they fill the requirements of the contract, they are, in the absence of fraud or mistake, conclusive upon all the parties, whether right or wrong.

[8] 4. The contract requires that payments shall be made "by the owner to the contractor, in current funds, and only upon certificates of the architect, as follows:

"On or before the 15th day of each month payments shall be made equal in amount to ninety (90) per cent. of the value of the work in place during the preceding month, according to the certificate of the architect."

This not only requires that the money be paid *only* upon the certificates of the architect, but that it should amount to only ninety (90) per cent. of the value of the work in place during the preceding month *according to the certificate of the architect*. That these words required the value of the work in place during each month to appear in the certificate of the architect before the payment could be made, is too plainly expressed to admit of discussion. It will be noted that this does not refer to the value of the work and material placed in the structure during the month, but the value of the work and material in the entire structure during each monthly period; and that it was designed to confine the monthly payments to such amounts as would leave a safety margin of ten (10) per cent. of the contract price at the end of the work is equally clear. This necessarily required the estimate to be founded upon the contract price and to state the relative value of the work and material in place to the entire amount of the contract. *Fidelity & Deposit Co. v. Agnew*, 152 Fed. 955, 959, 82 C. O. A. 103; *O'Neill v. Title Guaranty & Trust Co.*, 191 Fed. 570, 113 C. O. A. 211; *Hawkins v. Burrell*, 69 App. Div. 462, 74 N. Y. Supp. 1008, 1004; *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745. Otherwise, the entire contract price might be payable long before the completion of the work, and the same construction would require the payments to continue, notwithstanding the price fixed in the contract.

The surety in these cases is between the upper and nether millstones. He is not in position to take care of himself. The contractor and owner have him in their power. If the job should prove an unprofitable one they have it in their power to make it profitable to themselves at the expense of the surety, as is demonstrated by the facts in this case. The only protection he has lies in the carrying out of the terms of the contract which give him protection. He cannot interfere in the work, but is entitled to the reasonable performance of the duties of the architect, designed for his protection. That this contract requires him to ascertain *and certify* the entire value of the work and materials in place during each month there can be no doubt. Nor is there any doubt that the careful performance of this duty is the surety's chief protection. While the owner may waive this provision of the contract so far as his own interest is affected by making the payments without a certificate, or upon a defective one, or by not making a timely objection when an objection is called for by the circumstances, it is equally evident that he cannot waive it for the surety, an adverse party to the same contract. The most of these certificates certify nothing, nor do they state anything other than the desire of the architect that the money be paid to the contractor. None of them contain any statement of the work in place, and only two of them *imply* that an estimate has been made or that value has been considered. Three of them request payment on account of labor and material furnished "as per contract and other extra work." Three of them request payment to other parties than the contractor for material furnished, without any suggestion that it had gone into the building. To say that these are certificates which constitute conclusive evidence of facts which they do not state or imply is an absurdity. To say that they are substitutes for sworn evidence differs only in degree. We are not holding that the parties to such a contract might not appoint an arbitrator to ascertain and determine the ultimate question whether or not each payment had become due under its terms, and provide that his determination upon all the questions of law and fact, fairly made, should be conclusive. That question is not now before us. We do hold, however, that when the parties have taken the reasonable precaution, as we hold they have done in this case, to require the certificate of the architect to state the facts upon which the payments shall become due, we will not, by construction, nullify their prudence.

The authorities are not in perfect unison on the question of the form of the certificate, but not one of them denies the fundamental doctrine that a substantial breach of the principal contract, in any provision inuring to the benefit of the surety, entitles him to be discharged from his liability either wholly or to the extent of his injury by such

breach. This rule has been applied to those cases in which there was a substantial failure in the certificate to comply with the terms of the contract. *Harris v. Taylor*, 150 Mo. App. 291, 129 S. W. 995; *Roy v. Boteler*, 40 Mo. App. 213; *Fidelity & Deposit Co. v. Agnew*, 152 Fed. 955, 82 C. C. A. 103.

[9] 5. As to the effect of the payments on these defective certificates. We have already said that this surety is not a favorite of the law, so that a stricter rule of performance must be applied in its favor than is applicable to the construction of other contracts. The general rule in that respect is correctly stated by Mr. Elliott in his exhaustive work on Contracts (section 2046) as follows:

"Where the stipulation does not go to the root of the contract so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from what was contracted for, there is ordinarily not such a breach as will authorize an abandonment of the contract by the other party. Neither is there a fatal breach in cases where the nonperformance of one of the conditions does not materially impair the benefit from the performance of the others and the loss occasioned by the breach of the particular condition is capable of compensation in damages."

Applying this same principle to the bond before us, we note that the provision requiring the certificates of the architect is an independent provision, relating only to the evidence upon which it might be found that the payments had become due in the amounts stated, and the loss, if any, occasioned by its nonobservance, is capable of computation and compensation in damages. As to such payments as were made in advance of the performance of the work authorizing them, the same rule is applicable. It is a subordinate detail of the principal obligation, of the contractor to do the work, and of the owner to pay the contract price. If the owner should refuse to pay, such refusal might be a defense to the surety to the same extent as it would be a defense to the contractor if sued for the abandonment of his contract on that ground; if he overpays he cannot recover the excess from the surety, because it does not come within the terms of the contract, which is the essence of the bond, and he only has to stand upon the terms of his bond as the defendant is doing in this case. Every difference growing out of such payment is susceptible of adjustment between the owner and surety without resort to any other feature of the contract, and constitutes a defense only to the extent of the amount involved in the overpayment, so long as it is made in good faith, as it is admitted to have been made in this case. This principle has been asserted in this state in *Casey v. Gunn*, 29 Mo. App. 14, and *Bank v. Kilpatric*, 204 Mo. 119, 102 S. W. 499, 120 Am. St. Rep. 689, and applied to the class of sureties to which this defendant belongs in *Southwestern Surety Insurance Company v. Minnetonka Lumber Company (Okla.)* 148 Pac. 1038, *Chicago v. Agnew*, 284 Ill. 288, 106 N. E. 252, *Man-*

hattan Company v. United States Fidelity & Guaranty Company, 77 Wash. 405, 137 Pac. 1003, *Fergus Falls v. Illinois Surety Company*, 112 Minn. 462, 128 N. W. 820, *Monro v. National Surety Company*, 47 Wash. 488, 92 Pac. 280, *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833, *Welk v. Pugh*, 92 Ind. 382, *Brewing Company v. Bonding Company*, 127 Minn. 330, 149 N. W. 539, and *Lackland v. Renshaw*, 256 Mo. 133, 165 S. W. 314.

We are referred by the appellant to the case last cited as determining that these certificates are sufficient in form and substance to comply with the provisions of the contract. The clause in that contract requiring the certificate of the architect as a prerequisite to payment was as follows:

"That a final payment shall be made within ten days after this contract is completely finished; provided, that in such of the said cases the architects shall certify in writing that all the work upon the performance of which the payment is to become due has been done to their satisfaction."

The certificate was as follows:

"Office of J. B. Legg, Architect.

"St. Louis, December 29, 1902.

"Missouri Botanical Garden:

"Pay to the order of Renshaw & Son one thousand and five hundred (\$1,500) dollars, on account of their contract for building your Eddy factory building, S. W. Corner Market and Main streets. \$1,500.00.

"J. B. Legg, Architect."

The contractors abandoned the work before the completion, and the building was finished by the owner. It was found by the trial court that the surety had not been injured by the advanced payments, and this court adopted the finding and decided the cause upon that ground with the following cautious statement:

"No particular form of certificate is required in a case like this; and no fraud on the part of the architects having been so much as suggested, and the money paid having all gone into the building, as the referee finds, we hold certificates in this case were sufficient in the circumstances, and their informality did not warrant judgment for the surety."

It was therefore unnecessary to decide upon the sufficiency of the certificate as evidence or otherwise.

The trial court erred in holding that the defective form of the certificates in this case discharged the surety from all liability, and the defendant is liable upon the bond for an amount equal to any excess of amounts paid to the contractor up to and not exceeding ninety (90) per cent. of the value of the work and materials in place in the structure at the time of its abandonment by the contractors, to be ascertained in the manner hereinbefore indicated, augmented by such amount as was afterward necessarily expended by plaintiff in completing the building and in discharging valid claims against it created by the contractor, if any, over and above the price stipulated in the contract, including such extras as were provided for in the original

contract and amendment thereto. This rule is not to exclude any new matters of claim or defense that may be properly presented hereafter.

The cause is therefore reversed, and remanded for trial in accordance with the principles herein stated.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur, except BOND, J., not sitting.

WREN et al. v. STURGEON et al.
(No. 17724.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

1. WITNESSES \S 144(6) — COMPETENCY — TRANSACTIONS WITH DECEASED PERSON.

Under Rev. St. 1909, \S 6354, declaring that no person shall be disqualified as a witness, but that in suits where one of the original parties to the contract or cause of action is dead, the other shall not be admitted to testify either in his own favor or in favor of any party claiming under him, defendant who claimed to be entitled to land by virtue of a deed executed by her uncle and through whom all parties traced their title is incompetent to testify that before his death the uncle delivered the deed to her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 633; Dec. Dig. \S 144(6).]

2. DEEDS \S 208(2)—DELIVERY—EVIDENCE.

Evidence held insufficient to show delivery of a deed in favor of defendant, which at the time of his death was found in a stamped envelope amongst the private papers of the deceased grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 626; Dec. Dig. \S 208(2).]

3. DEEDS \S 56(6)—DELIVERY—TIME OF DELIVERY.

To effectuate a deed there must be delivery with the design of parting with title to the property, which must take place during the life of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 123; Dec. Dig. \S 56(6).]

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Action by Elizabeth F. Wren and others against Estelle G. Sturgeon and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The plaintiffs, who are sisters of Lycurgus Gillispie, deceased, brought suit in the circuit court aforesaid, on October 3, 1912, against defendants C. C. Gillispie, David H. Gillispie, Mollie Fetroe, and Estelle Gillispie Sturgeon to cancel a warranty deed dated September 23, 1911, from said Lycurgus Gillispie, a bachelor, to defendant Estelle Gillispie Sturgeon, purporting to convey to the latter lot 21 in block 1, Kelley's addition to the town of Columbia, county of Boone and state of Missouri, to divest said defendant Sturgeon of the title thereto, and to vest the same

in said plaintiffs and the defendants, other than said Sturgeon.

The defendants C. C. Gillispie and David H. Gillispie are brothers of said Lycurgus Gillispie; Mollie Fetroe is a niece of said Lycurgus Gillispie and one of his heirs at law. Defendant Sturgeon is a niece of said Lycurgus Gillispie, and a daughter of defendant C. C. Gillispie.

It is charged in the petition—and the trial court in its decree found—that said deed was never delivered to defendant Sturgeon, in the lifetime of said Lycurgus Gillispie. The latter died in the state of Texas, on August 29, 1912. The warranty deed aforesaid was found in a trunk of deceased, where he died in the state of Texas. The deed was in a large sealed envelope, and on the latter was written: "Mr. C. C. Gillispie, Columbia, Missouri, Boone County, Paris Rd. 1301." In the lower left-hand corner was written: "If not called for in ten days, return to Pueblo, Colorado, East 8th St., No. 1210, Estelle Sturgeon." On the upper right-hand corner of the envelope were two two-cent stamps, uncanceled. The above envelope contained another sealed envelope, with said deed therein, addressed as follows: "Estelle Gillispie Sturgeon, Pueblo, Colorado, East 8th St., No. 1210." The address on each envelope was in the handwriting of deceased. Said trunk containing the above envelopes was brought to Columbia, Mo., and said envelopes were opened by J. H. Reed, a witness appointed by the probate court of said county.

It appears from the testimony that deceased had been suffering for several years before his death with asthma and chronic nephritis, or Bright's disease. On the 29th of August, 1912, while in a tent in the state of Texas, he was undergoing great pain, and in consequence thereof committed suicide. The coroner found in said tent, in the handwriting of deceased, the following:

"August 29, 1912.

"I have two sisters, Wilmoth Wright, in Columbia, Mo., sister Elisabeth Wren, Callaway County, Mo., Stephens Store, Brother D. H. Gillispie, who lives in Rockvale, Colo., niece who I make my home. I own a house and lot in Columbia, but live in Colorado, Stella Sturgeon in Colorado, I want her deed sent to her. I want Stella Gillispie Sturgeon as her own I owe it her.

"A brother C. C. Gillispie who lives in Columbia and attends to my business. If it takes more money than I have here he will pay it. I have fifty dollars at Karsville at Shriner Bank. I have some money in my pocket in my purse, give me a decent burial in Comfort Burying grounds, I prefer it here myself, my suffering is severe. [Signed] L. Gillispie.

"I think God will forgive me for this rash act only shortening my time a few days or a year or so. My suffering has been bad the last few nights, and tonight it takes two and one-half hours to get to my bed, it looks like I would faint and could not get my breath, so I think it will be over with me by morning, at least I hope so, and as for the future I know but little, hoping that God will accept my spirit in the

judgment day, only shortening my days by taking chloroform, so I hope my time on earth is done. May God forgive my many sins, and receive me in my petition."

The above deed was signed and acknowledged by Lycurgus Gillispie, in September, 1911, in the state of Colorado, and was filed for record October 2, 1912, by defendant C. C. Gillispie, in behalf of Mrs. Sturgeon, and the recording fee paid by him. Mrs. Sturgeon was not in Columbia on above date. The evidence shows that deceased was all right mentally when the above deed was executed.

Deceased owned two houses and lots in Columbia. The one in controversy was worth \$1,400 to \$1,500. It appears from the evidence that defendant C. C. Gillispie was appointed administrator of the estate of said Lycurgus Gillispie; that he inventoried the lot in controversy and paid the taxes thereon as administrator aforesaid. There was never any transfer of the insurance on the property in controversy to defendant Sturgeon. Deceased had stayed 2 years with his sister, Mrs. Wright, in Columbia, Mo., and in 1910 went to Pueblo, Colo., and stayed with Mrs. Sturgeon about 18 months.

Mrs. Wren testified that she received a letter from deceased, which was destroyed, in which he stated that he had built himself a room at Estelle Sturgeon's; that he had furnished it with everything he needed; that he had electric lights put in all the house; that he paid Estelle \$20 a month, and his money was going mighty fast.

Mr. Harris, of Pueblo, was an acquaintance of deceased and Mrs. Sturgeon. He testified that deceased said Mrs. Sturgeon "had treated him with the greatest care and kindness, and he was much more satisfied at their house than with any of his other relations."

Mr. Holloran, the notary public who took the acknowledgment of deceased to said deed, testified that deceased told him he had a spell of sickness, that Mrs. Sturgeon had taken care of him, and that while he was feeling all right he wanted to deed her the lot in controversy, so in case he passed away she would have it.

The deposition of defendant Sturgeon was offered in evidence, and excluded by the court. The deed in controversy was found in said trunk with the private papers of deceased.

The court found that said deed was not delivered by Lycurgus Gillispie in his lifetime, but was recorded by defendant C. C. Gillispie after his death. The trial court entered a decree setting aside said deed, divesting said Sturgeon of the title obtained thereby, and vested the same in the plaintiffs and other heirs of said deceased. Appellant filed a motion for new trial, which was overruled, and the cause duly appealed to this court.

Sebastian & Sebastian, of Columbia, for appellants. Curtis B. Rollins, Jr., and N. T. Gentry, both of Columbia, for respondents.

RAILEY, C. (after stating the facts as above). [1] I. Appellant assigns as reversible error the action of the trial court in excluding her deposition when offered in evidence. Section 6354, R. S. 1906, among other things, provides that:

"No person shall be disqualified as a witness in any civil suit: * * * Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him. * * *"

Appellant in her deposition testified, among other things, to the following:

"Q. I will get you to state whether your Uncle Lycurgus Gillispie, while he was staying at your house, made you a deed to lot 21 in block 1 of Kelley's addition to the town of Columbia, Mo. A. Yes, sir; he did. Q. Did you know anything of his intention of making this deed until after he had made it? A. Yes, sir. Q. Were you with him at the time it was made? A. No, sir. Q. Had you done or said anything to get him to make the deed? A. I had not. Q. How long was it after the deed was made before you knew that he made it? A. It was a few days afterwards. Q. I will get you to state what, if anything, he gave you a short time before he left you and went to Texas? A. He drew a deed and gave it to me. I read it and it was a deed to a piece of property, lot No. 21, block 1, of Kelley's addition to the town of Columbia, Boone county, state of Missouri. Q. What then did you do with the deed? A. I gave it to him and told him to mail it to my father, to have it recorded. Q. Was your father then living in Columbia, Mo.? A. Yes, sir."

It is manifest that the above testimony was offered for the purpose of showing that deceased executed and *delivered* to her the warranty deed sought to be canceled in this proceeding.

Eliminating from appellant's proffered testimony that part of same relating to the alleged *delivery* to her of said deed by Lycurgus Gillispie, the remainder of her testimony is not controverted, and practically stands admitted in the statement of facts heretofore set out.

The real question in this case hinges upon the proposition as to whether the deed in controversy was ever *delivered* to appellant in the lifetime of deceased. Under the statute, *supra*, she is an incompetent witness to testify as to the alleged delivery of said deed to her by deceased in his lifetime. *Leaves v. Southern Ry. Co.*, 181 S. W. loc. cit. 8, and cases cited; *Eaton v. Cates*, 175 S. W. loc. cit. 953; *Goodale v. Evans*, 263 Mo. loc. cit. 228, 229, 172 S. W. 370, and cases cited; *Lieber v. Lieber*, 239 Mo. loc. cit. 13, 143 S. W. 458; *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Chandler v. Hedrick*, 187 Mo. App. loc. cit. 670, 173 S. W. 93; *Diggs v. Henson*, 181 Mo. App. 34, 163 S. W. 535; *Bone v.*

Friday, 180 Mo. App. 577-581, 167 S. W. 509; Taylor v. George, 176 Mo. App. 222, 223, 161 S. W. 1187; Leavea v. Railroad, 171 Mo. App. 27, 153 S. W. 500.

The testimony of appellant relating to the *delivery* of said deed was properly excluded by the trial court. The *remainder* of her testimony, whether admitted or excluded, cannot change the result, and is not in conflict with the facts heretofore stated.

[2, 3] II. With appellant's deposition relating to the alleged delivery of the deed in controversy excluded, it leaves the case in this attitude: Deceased was found dead in his tent, in the state of Texas, on August 29, 1912. The deed in controversy was in a sealed envelope, addressed as heretofore stated, stamped and placed with his private papers in his trunk. The written statement heretofore set out, explaining the reason for his suicide, was found by the coroner in his tent, but not with his private papers. The trunk containing said deed was brought to Columbia, Mo., and the deed placed of record by defendant C. C. Gillispie, the father of appellant. The latter was never in possession of said lot in the lifetime of deceased; never paid any taxes thereon prior to his death, nor did she ever attempt to have the insurance transferred to her, during the lifetime of deceased. There is nothing in the record to indicate that appellant did not receive from deceased, in his lifetime, reasonable compensation for her care and trouble in looking after and boarding deceased while he remained at her house from June 3, 1910, to February, 1912. According to the testimony, deceased paid appellant \$20 per month for his board. He built a room at appellant's home, furnished it with everything needed, and had electric lights put in all the house. He wrote Mrs. Wren, his sister, that his money was going mighty fast. It does not appear from the record that appellant paid any bills of deceased for nurse hire, medicine, or doctors.

Taking into consideration all the foregoing matters, was the trial court justified in holding that there was no legal delivery of the deed in controversy to appellant, during the lifetime of deceased? Leaving out of consideration her own testimony heretofore excluded, appellant has signally failed to show that the foregoing deed was ever *delivered* or passed beyond the control of deceased during his lifetime.

In the recent case of *Burkey v. Burkey*, 175 S. W. loc. cit. 624, Judge Bond, in behalf of this division, in which all the judges concurred, very clearly, forcefully, and tersely stated the law of this state as follows:

"To validate a deed there must be a delivery with the design of parting with title to the property, which delivery, in fact or by relation, must take effect in the lifetime of the grantor."

The above citation is sustained by an array of authorities in this state and elsewhere,

among which are the following: *Schooler v. Schooler*, 258 Mo. loc. cit. 95, 167 S. W. 444; *Terry v. Glover*, 235 Mo. loc. cit. 550, 139 S. W. 337; *Chambers v. Chambers*, 227 Mo. loc. cit. 282, 127 S. W. 86, 137 Am. St. Rep. 567; *Cook v. Newby*, 213 Mo. loc. cit. 459, 490, 112 S. W. 272; *McCune v. Goodwillie*, 204 Mo. loc. cit. 338, 102 S. W. 997; *Rausch v. Michel*, 192 Mo. loc. cit. 310, 311, 91 S. W. 99; *Peters v. Berkemeier*, 184 Mo. loc. cit. 402, 403, 83 S. W. 747; *Bunn v. Stuart*, 183 Mo. loc. cit. 383, 81 S. W. 1091; *Dohmen v. Schlieff*, 179 Mo. loc. cit. 600, 78 S. W. 799; *Griffin v. McIntosh*, 176 Mo. loc. cit. 400, 75 S. W. 677; *McNear v. Williamson*, 166 Mo. loc. cit. 367, 66 S. W. 160; *Mudd v. Dillon*, 166 Mo. loc. cit. 118, 119, 65 S. W. 973; *McVey v. Carr*, 159 Mo. loc. cit. 652, 60 S. W. 1034; *Powell v. Banks*, 146 Mo. loc. cit. 632, 633, 48 S. W. 664; *Hall v. Bank*, 145 Mo. loc. cit. 426, 46 S. W. 1000; *Sneathen v. Sneathen*, 104 Mo. loc. cit. 209, 16 S. W. 497, 24 Am. St. Rep. 326; *Crowder v. Searcy*, 103 Mo. loc. cit. 118, 15 S. W. 346; *Standiford v. Standiford*, 97 Mo. loc. cit. 238, 239, 10 S. W. 836, 3 L. R. A. 299; *Tobin v. Bass*, 85 Mo. loc. cit. 658, 659, 55 Am. Rep. 392; *Miller v. Lullman*, 81 Mo. loc. cit. 316, 317; *Huey v. Huey*, 65 Mo. loc. cit. 692 et seq. To the same effect are the following authorities outside the state: *Cook v. Brown*, 34 N. H. 460-474; *Johnson v. Farley*, 45 N. H. 509; *Stevens v. Stevens*, 256 Ill. loc. cit. 143, 144, 99 N. E. 917; *Noble v. Tipton*, 219 Ill. loc. cit. 196, 187, 76 N. E. 151, 3 L. R. A. (N. S.) 645; *Hawes v. Hawes*, 177 Ill. loc. cit. 413, 414, 53 N. E. 78; *Latimer v. Latimer*, 174 Ill. loc. cit. 428, 51 N. E. 548; *Rountree v. Smith*, 152 Ill. loc. cit. 503, 38 N. E. 630; *Dunbar et al. v. Meadows et al.*, 165 Ky. 275, 176 S. W. loc. cit. 1170; *Sutton, etc., v. Gibson, etc.*, 119 Ky. loc. cit. 425, 84 S. W. 835; *Clark v. Creswell*, 112 Md. loc. cit. 342, 76 Atl. 579, 21 Ann. Cas. 338; *Hearn v. Purnell*, 110 Md. loc. cit. 465, 72 Atl. 906; *Russell v. May*, 77 Ark. loc. cit. 92, 93, 90 S. W. 617; *Young v. McWilliams*, 75 Kan. loc. cit. 245, 89 Pac. 12; *Joslin v. Goddard*, 187 Mass. loc. cit. 167, 72 N. E. 948; *Gould v. Day*, 94 U. S. loc. cit. 412, 24 L. Ed. 232; *Rowley v. Bowyer*, 75 N. J. Eq. loc. cit. 81, 82, 71 Atl. 396; *Schlicher v. Keeler*, 67 N. J. Eq. loc. cit. 639, 61 Atl. 494; *Franklin Ins. Co. v. Feist*, 31 Ind. App. loc. cit. 395, 396, 68 N. E. 188; *Corr v. Martin*, 87 Ind. App. loc. cit. 659, 77 N. E. 870; *Vaughan v. Godman et al.*, 91 Ind. 191; *Aber v. Twichell*, 17 N. D. 229, 116 N. W. 95; *In re Bell's Estate*, 150 Iowa, loc. cit. 728, 729, 130 N. W. 798; *Albrecht v. Albrecht*, 121 Iowa, loc. cit. 524, 96 N. W. 1087; *Logsdon v. Newton*, 54 Iowa, 448, 449, 6 N. W. 715; *Kittoe v. Willey*, 121 Wis. loc. cit. 552, 553, 90 N. W. 337; *Sappingfield v. King*, 49 Or. 102, 89 Pac. loc. cit. 143, 90 Pac. 150, 8 L. R. A. (N. S.) 1066; *Pierson v. Fisher*, 48 Or. loc. cit. 233, 85 Pac. 621; *Cassidy et al. v. Holland*, 27 S. D. loc. cit.

292, 130 N. W. 771; *Kenney v. Parks*, 125 Cal. loc. cit. 150, 57 Pac. 772; *Bury v. Young*, 98 Cal. 446, 83 Pac. 338, 35 Am. St. Rep. 186; *Melvin v. Melvin*, 8 Cal. App. loc. cit. 687, 97 Pac. 696; *Burk v. Sproat*, 96 Mich. loc. cit. 407, 55 N. W. 985; *Walker v. Green*, 23 Colo. App. loc. cit. 159, 160, 128 Pac. 855; 2 *Greenleaf on Ev.* (16th Ed.) § 297; 3 *Washburn on Real Prop.* (6th Ed.) p. 255 and following; 9 *Am. & Eng. Ency. of Law* (2d Ed.) 153 et seq.; 1 *Devlin on Real Estate* (3d Ed.) § 260 and following. In our opinion, the foregoing authorities are conclusive against appellant.

Having reached the conclusion, as did the trial court, that there was no legal delivery of the deed in controversy to defendant Sturgeon, it is unnecessary to consider any other questions discussed in the case. The judgment below was for the right parties, and is accordingly affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur.

CARSON v. MISSOURI, K. & T. RY. CO. (No. 17901.)

(Supreme Court of Missouri, Division No. 1.
March 30, 1916.)

1. CONSTITUTIONAL LAW — 278(1)—EMINENT DOMAIN — 2(1)—DUE PROCESS OF LAW—TAKING PROPERTY FOR PRIVATE USE—POLICE POWER.

A statute based on the valid exercise of the police power does not deprive a person of his property without due process of law, contrary to Const. art. 2, § 30, or Const. U. S. Amend. 14, § 1, or take private property for private use contrary to Const. art. 2, § 20.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 924; Dec. Dig. — 278(1); Eminent Domain, Cent. Dig. § 4; Dec. Dig. — 2(1).]

2. COURTS — 231(6)—JURISDICTION—SUPREME COURT—FRIVOLOUS OBJECTION.

The objection that Rev. St. 1909, § 3150, requiring railroads to construct and maintain ditches to drain the surface water wherever necessary and giving the landowner the right to construct such ditches after notice and recover the cost from the railroad, is class legislation, contrary to Const. art. 4, § 53, raises no substantial constitutional question sufficient to give the Supreme Court jurisdiction of an appeal from a judgment against the railroad company for damages caused by its failure to construct the ditch.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 653; Dec. Dig. — 231(6).]

Appeal from Circuit Court, Cooper County; J. G. Slate, Judge.

Action by Hinton V. Carson against the Missouri, Kansas & Texas Railway Company. Judgment for the plaintiff, and de-

fendant appeals. Case transferred to the Court of Appeals.

Plaintiff sues in two counts to recover damages to his crops in the years 1910 and 1912, alleged to have been occasioned by overflow water upon his farm, which it is charged was caused to remain upon his farm in Howard county, because defendant failed to construct ditches along its railroad bed to the north of plaintiff's farm.

The railroad track and right of way is to the north of plaintiff's farm, and the farm abuts on said right of way. The railroad runs east and west, or practically so, at the point where the farm abuts the right of way. The negligence charged is that stated in the first count of the petition:

"That the construction of defendant's said railroad along and adjacent to plaintiff's said land obstructed the drainage of water therefrom and prevented it from passing off from said land through its natural outlets, and that ditches along the side of said roadbed connected with drains and water courses then existing were rendered necessary by the construction of said railroad so as to afford sufficient outlet to drain and carry off the water that accumulated on plaintiff's land alongside railroad, and was confined thereon by reason of the construction of said roadbed, and to afford an outlet for said water into such drains and water courses, with which ditches along the side of said railroad could and should have been connected. That at all the times hereinafter mentioned, there was east of plaintiff's land a water course known as "Salt creek"; that said Salt creek emptied into the Missouri river; that a ditch on each side of defendant's railroad near plaintiff's land could and should have been constructed connecting with Salt creek; and that such ditches were rendered necessary by the construction of said railroad. That defendant wholly failed and neglected to cause to be constructed and maintained ditches along the sides of its said railroad near the plaintiff's said land to connect with drains and water courses then existing as aforesaid so as to afford a sufficient outlet to drain and carry off the surface and overflow water that accumulated on plaintiff's said land south of defendant's said railroad. That, upon the contrary, the defendant, by its roadbed, impeded the flow of the water and caused it to be gathered together in great quantities on plaintiff's land on the south side of said railroad, and wholly neglected and failed to provide ditches upon the sides of its railroad to carry the same off to the natural water courses. That in consequence of defendant's failure to construct such ditches along the sides of said railroad as required by the statutes in such cases, plaintiff's said land on or about the 13th of June, 1912, was overflowed, and the water—by reason of the defendant's embankment and its roadbed—was retained upon plaintiff's said land for a long space of time, to wit, forty-five (45) days, and in consequence thereof the corn growing upon twenty-eight (28) acres of said land of the value of five hundred and four dollars (\$504) was thereby totally destroyed, and the corn upon another twenty (20) acre tract upon plaintiff's land was damaged to the extent of two hundred forty dollars (\$240.00), and the wheat growing upon thirty (30) acres of land was damaged to the extent of three hundred and fifty dollars (\$350.00); all of said crops being then and there the property of this plaintiff and the damage and injury to the same was caused by defendant's neglect and failure to con-

struct ditches upon the sides of its said railroad as aforesaid.

"Wherefore plaintiff says that he has sustained damages in the sum of one thousand ninety-four dollars (\$1,094.00), and for which amount, with costs, he asks judgment."

The negligent charge in the second count for the year 1910 is the same. The answer of the defendant (1) denies the necessity of ditches, and denies that its roadbed occasioned the accumulation of water upon plaintiff's lands; (2) denies that ditches could have or should have been constructed to Salt creek, and denies that plaintiff suffered any damages in consequence of a failure to construct such ditches; (3) general denial; (4) defendant also pleads an unusual and extraordinary rainfall at the time stated in the petition; (5) that section 3150, R. S. 1909, upon which plaintiff relies, is violative of both the state and federal Constitutions, pointing to the exact provisions of each instrument claimed to have been violated by the act. The answer to the two counts are in point of facts practically the same. Reply, general denial.

Upon a trial before a jury plaintiff recovered by verdict \$637.50 on first count, and \$212.50 on second count. From the judgment entered upon such verdict, the defendant has appealed. The constitutional questions bring the case here.

J. W. Jamison, of St. Louis, for appellant. Sam C. Major, of Fayette, and Williams & Williams, of Boonville, for respondent.

GRAVES, P. J. (after stating the facts as above). It will be noted that our jurisdiction is wholly dependent upon constitutional questions. These constitutional mandates, of which section 3150, R. S. 1909, is charged as being violative of, are section 20, article 2, of Missouri Constitution; section 30, article 2, of Missouri Constitution; section 53 of article 4 of Missouri Constitution; and the Fourteenth Amendment of the Constitution of the United States.

Section 20 of article 2 prohibits the taking of private property for private use without compensation, section 30 of article 2 is the due process of law clause. Section 53 of article 4 is the section relating to local or special laws. So much for the state Constitution.

The Fourteenth Amendment of the federal, Constitution (section 1 the portion invoked here), so far as applicable, reads:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

[1] The instant case was not appealed until May 24, 1913. Fourteen days prior to this appeal this court in banc handed down an opinion in the case of *Tranbarger v. Railroad*, 250 Mo. 46, 156 S. W. 694, in which

the constitutionality of the act of 1907 (Laws of 1907, p. 169) was involved. That act is now section 3150, R. S. 1909. In *Tranbarger's Case* the constitutional matters were thus alleged by this same defendant:

"Further answering, defendant says that section 1110 of the Revised Statutes of Missouri, 1899, as amended, is unconstitutional and void in this:

"First. That it deprives and denies to this defendant the equal protection of the law, as guaranteed to it under the Fourteenth Amendment of the Constitution of the United States, and it is also in contravention of the cause of the state Constitution, which provides that private property shall not be taken for private use.

"Second. Because the said statute imposes a penalty which is excessive and exorbitant for the infringement of a private right not published by indictment or information, and does not provide to whom the penalty shall go or the person or party entitled thereto, all in violation of section 25 of article 2 of the Constitution of Missouri.

"Third. Because said action is in violation of the first section of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and without just compensation or any compensation whatever.

"Fourth. Because said statute is *ex post facto* and retrospective in its effects or operation, and takes from this defendant, vested rights and impairs its contract obligations, all contrary to section 15, article 2, of the Constitution of Missouri.

"Fifth. Because the act in question contains more than one distinct subject-matter, contrary to section 28 of article 4 of the Constitution of Missouri.

"Wherefore defendant, having fully answered, prays to be discharged with its costs in this behalf expended."

In the *Tranbarger Case*, *supra*, Judge Bond summarized the defendant's answer thus:

"The answer of defendant was (1) a general denial; (2) a plea of inevitable accident caused by an alleged extraordinary overflow of the Missouri river; (3) the existence of its railroad and embankment in its present condition for a period of 35 years, as creating a prescriptive right against any recovery by plaintiff; (4) the unconstitutionality of the act upon which the suit was brought."

He then holds that the law is a constitutional and valid exercise of the police power of the state, and an exercise of such in no way violative of the due process and equal privilege clause of the federal Fourteenth Amendment. The pleadings in the *Tranbarger Case* forced the construction of every constitutional question involved in this case, save and except the alleged violation of section 53 of article 4 of the Missouri Constitution. Judge Bond held that the law was the due exercise of the police power of the state under our Constitution. He said:

"All powers of government which regulates the public health, welfare and the property rights of its people—these, no state can strip itself of, for that would render it incapable of carrying out the prime purposes of its creation. The sanctity and import of this attribute of sovereignty are recognized in the Constitution of this state, to wit, 'The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to con-

duct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state.' Article 12, section 5, Constitution of Missouri. The only restrictions upon the exercise of this faculty are that its use shall be reasonably adapted to the ends for which it is given, and that it shall not infringe any right or privilege guaranteed by the federal Constitution. The authorities and cases demonstrating these principles are uniform."

In holding the law a valid and constitutional exercise of the police power of the state, he necessarily held that it was not violative of either the state or federal due process clause. A valid exercise of the police power is due process of law. Nor could such constitutional exercise of the police power violate the clause of the Constitution relative to taking private property for private use.

[2] It is clear therefore that all constitutional questions lodged here in this case were disposed of prior to the appeal herein, except the one thus pleaded in the answer:

"And, further, that said act is class legislation within the purview and meaning of section 53 of article 4 of the Constitution of the state of Missouri."

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As to this question we can only say that there is no such substance in the contention as to make it such constitutional question as to confer jurisdiction upon this court. If the answer had averred that the law violated section 3 of article 11 of the Missouri Constitution, it would have come just as near raising a constitutional question as it does now. Said section 3 reads:

"Separate free public schools shall be established for the education of children of African descent."

There must at least be some substance to the constitutional question before it possesses the vitality to force jurisdiction here. This last clause of the answer, quoted supra, raises no substantial constitutional question, such as to confer jurisdiction, and the other constitutional questions having been passed upon in the Tranbarger Case, supra, prior to the appeal in this case, they are not open questions in this case. The case should be transferred to the Kansas City Court of Appeals for disposition on the merits.

It is so ordered. All concur.

WEST v. GLISSON et al. (No. 5596.)

(Court of Civil Appeals of Texas, Austin.
March 8, 1916. On Motions for Rehear-
ing, April 12, 1916.)

1. WILLS §1—TESTAMENTARY POWER—EX-
TENT.

A testator can dispose of his property by will in any manner he sees fit, provided he does not contravene the law of the state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. §1.]

2. WILLS §439—CONSTRUCTION—INTENT OF
TESTATOR.

It is the duty of courts to construe a will so as to carry into effect the will of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. §439.]

3. WILLS §456—CONSTRUCTION—MEANING
OF WORDS.

Words in a will are to be construed in their ordinary meaning, unless the context shows that a different meaning should be given.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. §456.]

4. WILLS §470 — CONSTRUCTION AS A
WHOLE.

The entire will must be looked into to ascertain the testator's intention, and, if possible, each clause must be construed so as to harmonize with all other clauses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. §470.]

5. WILLS §441—CONSTRUCTION—SITUATION
OF TESTATOR.

In case of ambiguity, the situation of the testator at the time of executing the will should be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 953; Dec. Dig. §441.]

6. WILLS §602(3)—CONSTRUCTION—ESTATES
CREATED—LIMITATION OF FEE.

Where one clause of a will gave all the property to the daughter of testatrix in fee, while the following clause provided that, if the daughter should die without heirs of her own, the property or the residue thereof should go to another, the two clauses should be construed together, and the absolute estate granted by the first clause is limited by the second.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. §602(3).]

7. WILLS §506(4) — CONSTRUCTION —
"HEIRS."

In a will giving the property to the daughter of testatrix in fee, but, if she should die without heirs of her own, then to another, the word "heirs" means children. Citing 4 Words and Phrases, Heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1093-1095; Dec. Dig. §506(4).]

8. WILLS §616(4)—CONSTRUCTION—ESTATES
CREATED—LIMITATION OF FEE.

A will which gave the property to the daughter of testatrix in fee, with the provision that, if the daughter should die without children of her own, the property or the residue of the same should go to another, gives the daughter the absolute power to dispose of the property during her lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1421; Dec. Dig. §616(4).]

On Motions for Rehearing.

9. WILLS §545(6)—CONSTRUCTION — COND-
TION—SURVIVING HEIR.

Where a will gave the property to the daughter of testatrix in fee, with a provision

that, if the daughter should die without children of her own, the property should go to another, it was intended to bequeath the residue to the other in case there should be no children surviving the daughter, not merely in case she should never have any children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1176; Dec. Dig. §545(6).]

10. WILLS §602(3) — CONSTRUCTION — ES-
TATES CREATED—QUALIFIED FEE.

The estate created by a will giving the property to a daughter and her heirs in fee, with a provision that, if she die without children, it or the residue shall go to another, is a qualified fee, not a life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. §602(3).]

Appeal from District Court, McLennan County; E. J. Clark, Judge.

Action by Lula West, by her guardian ad litem, against Annie Calvert Glisson and another, to construe a will. From a judgment construing the will in accordance with defendants' contention, plaintiff appeals. Reversed and remanded.

James P. Alexander, of Waco, for appellant. Oltorf & Oltorf, of Marlin, for appellees.

JENKINS, J. This case involves the construction of the will of Mrs. Fannie Calvert, deceased, who was the mother of Mrs. Annie Calvert Glisson, the appellee herein, and the grandmother of Lula West, the appellant herein, which will is as follows:

"The State of Texas, County of McLennan.

"Know all men by these presents: That I, Fannie Calvert, of the county and state aforesaid, being in sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will and testament, revoking all others heretofore made by me:

"(1) I desire and direct that all of my just debts be paid out of my estate without delay, by my executrix hereinafter appointed.

"(2) It is my will and desire, that all the property, both real and personal, I may die seized and possessed of, after the payment of my just debts, together with all the expenses incident to the probating of this will, shall pass to and vest in fee simple in my beloved daughter, Annie Calvert, and her heirs.

"(3) It is my desire and will that if said Annie Calvert die without heirs of her own, then the property or residue of same herein bequeathed shall pass to and vest in fee simple in my granddaughter, Lula West.

"(4) I hereby appoint and constitute my daughter, Annie Calvert, executrix of this my last will and testament, and direct that no bond or security be required of her as executrix.

"(5) It is my will that no other action shall be had in the county court in the administration of my estate than to prove and record this will and to return an inventory and appraisalment of my estate and list of claims.

"In witness whereof, I have hereunto set my hand this — day of —, A. D. 1912.

"Mrs. Fannie Calvert.

"Signed, declared, and published by Mrs. Fannie Calvert as her last will and testament in the presence of us, the attesting witnesses, who have hereto subscribed our names in the presence of said Mrs. Fannie Calvert at her special instance and request, this 23d day of January, A. D. 1912.

W. A. Hamilton.
"J. W. Lauterback."

This will was duly admitted to probate in McLennan county.

[1, 2] A testator is entitled to dispose of his property by will, in any manner that such testator may see fit, provided the same does not contravene the law of this state. *Hancock v. Butler*, 21 Tex. 806. It is the duty of courts to so construe a will as to carry into effect the will of the testator.

[3-5] In determining the intention of the testator the usual rules of construction of all written instruments are applicable, that is to say (a) words are to be construed in their ordinary meaning, unless it appears from the context that a different meaning should be given; (b) the entire instrument must be looked to, and, if possible, each clause thereof must be so construed as to harmonize with all other clauses; (c) in case of ambiguity, the situation of the testator at the time of executing the will should be taken into consideration. *McMurry v. Stanley*, 69 Tex. 230, 6 S. W. 412; *Haring v. Shelton*, 103 Tex. 10, 122 S. W. 14; *Cottrell v. Moreman*, 136 S. W. 126; *Hancock v. Butler*, supra.

In *McMurry v. Stanley*, supra, the court said:

"In construing the will all of its provisions should be looked to for the purpose of ascertaining what the real intention of the testatrix was; and, if this can be ascertained from the language of the instrument, then any particular paragraph of the will which, considered alone, would indicate a contrary intent must yield to the intention manifested by the whole instrument."

[6] At the time of the execution of the will Mrs. Fannie Calvert, deceased, was the owner in her own separate right of certain real estate. She had a husband and a daughter, Miss Annie Calvert, who has since married H. S. Glisson, who is joined herein pro forma. She also had a granddaughter, Lula West, who was then and still is a minor. These were her only heirs. The second clause of the will, as above set out, if it be construed independently of the third clause, vests the appellee with full fee simple title to the property owned by the executrix at the time of her death; and it is the contention of appellee that this clause of the will should be so construed, without reference to the third clause. But it is evident that the testatrix meant something by the third clause of the will, otherwise it would not have been inserted therein, and we think the two clauses should be construed the same as if they had both been inserted in one clause. Giving it this construction, the will, in effect, reads that her daughter shall have all of her property in fee simple, unless she dies without heirs of her own, in which event the property or residue of the same shall belong to the granddaughter.

[7] We think the words "without heirs of her own" should be construed to mean "without children of her own." "Heirs" may

mean children. *Simonton v. White*, 93 Tex. 56, 53 S. W. 339, 77 Am. St. Rep. 824; *Dolan v. Meehan*, 80 S. W. 99; *Hancock v. Butler*, 21 Tex. 809; *Brooks v. Evetts*, 33 Tex. 732; *Words & Phrases*, vol. 4, pages 3246, 3249, 3250, 3251, 3252. It is very unusual for any one to die without "heirs," if this word be construed in its ordinary sense—that is to say, kindred who are capable of inheriting—and it evidently was not contemplated that this would be the condition of the daughter of the testatrix, inasmuch as she then had living a father and a niece, who, if they had died prior to the decease of the daughter, would perhaps themselves have left heirs, who would probably, in such event, have been the heirs of the daughter Annie. Had the daughter Annie died unmarried and without issue, the granddaughter would have been one of her heirs, but not her only heir had her father survived her, and not her only heir had she married and her husband survived her. But, in such case, it is evident that the testatrix did not mean that her granddaughter Lula West should inherit a portion of the property as the heir of her daughter Annie, nor, indeed, that she should inherit any part of it as such heir, but that she should take the same, or the residue thereof, under the will.

It is the contention of appellee that, inasmuch as the second clause of the will is clear and explicit, it should not be modified by the third clause because of ambiguities in the same; but if, after giving appellee the benefit of all doubt that may arise from such ambiguities, there still remains any beneficial interest in appellant under the third clause of the will, the same should be recognized. The ambiguities referred to are "without heirs of her own" and "residue of same." For the reasons stated, we think that it is clear, looking to the whole will, that the words "without heirs of her own" meant "without children of her own."

[8] As to the words "residue of same," we think the doctrine announced in *McMurry v. Stanley* and *Cottrell v. Moreman*, supra, should control. The clauses of the will under consideration in *McMurry v. Stanley* were as follows:

"Third. It is my will and desire that my beloved husband shall have all of my property, both real, personal and mixed, whatever the interest may be, whether separate or community interest, and that he shall have full power and control over same, to use and dispose of as he may desire.

"Fourth. It is my will and desire that at his death should he have any of said property still remaining in his possession not disposed of, or used by him, that the same shall be given by him to my nieces Jessie McMurry and Flora Brown, daughters of Vina and Taylor Brown."

It will be seen that the third clause of the will, as above set out in that case, if taken by itself, vests full title in the husband; but the court said:

"The third paragraph cannot be construed and held to pass to her husband an absolute estate in fee for his sole benefit, without nullifying the

succeeding paragraph; and, under well-settled rules for the construction of such instruments, we do not feel authorized to do this, or to hold that she so intended."

The court held that the husband took under the will an estate in fee in the entire property, but that this was in trust for the beneficiaries named in the fourth paragraph of the will, except as their right was limited by the right given to him to use and dispose of the property during his lifetime, which was given by the express terms of the will.

In *Cottrell v. Moreman*, supra, the third clause of the will was as follows:

"I will and bequeath to my beloved husband, M. L. Gee, all my real and personal property that I may be seised and possessed of at my death, in fee simple, to have, control, use and enjoy as he sees fit as long as he lives, but if at his death there remains any of said estate then the remainder, whatever it be or whatever be the amount is to revert from him to my nearest kin then living and divided equally among them."

The court said:

"The trial court, in effect, held that the devise to M. L. Gee in the will did not vest the title to the property in M. L. Gee in fee simple, but only vested in him an estate, subject to his disposition during life, with remainder to vest in the two married daughters of Mrs. Gee, who are now living. We are of the opinion that the trial court properly construed the will. * * * This clause does not come within the rule in *Shelley's Case*, which is a rule of property in this state, but we think it clear from the language used Mrs. Alice Gee intended to bequeath to her husband her property to use and enjoy as he saw fit during his life, and, if at his death he had not disposed of any or all of it, what remained was to become the property of her nearest of kin."

The will in the instant case, as in the case last above referred to, first devised the property of the testatrix to her daughter in "fee simple," but the third clause devised the residue thereof to her granddaughter. By the third clause of the will in the case of *Cottrell v. Moreman*, supra, it was held that the husband took only a life estate with power to dispose of the same, which is equivalent to the expression used in *McMurry v. Stanley*, supra, that the legatee took the estate in trust as to the undisposed portion thereof, for the benefit of the other legatees therein named. The will in the instant case did not, in express terms, give the legatee power to dispose of the property; but we think the expression in the third clause "residue of same," when taken in connection with the expression in the second clause, "fee simple" should be construed to give the appellee a life estate in the property of the testatrix, with power to dispose of the same or any part thereof; and that, if any of said property should remain undisposed of at the death of appellee, the same will become the property of Lula West as the residuary legatee under said will. This decision is based upon the fact, as shown by the statement of facts, that appellee has no children and it is not contemplated that she will ever have.

The court below construed the will herein

as vesting an absolute fee simple title in appellee. For the reasons stated, the judgment of the trial court is reversed, and this case is remanded, with instructions to enter judgment as herein indicated.

Reversed and remanded, with instructions.

On Motions for Rehearing.

[9] Both appellant and appellees have filed motions for rehearing herein, with lengthy arguments and citations of numerous authorities. After carefully examining same, the conclusion at which we have arrived does not differ in its practical effect from that announced in our original opinion herein. We adhere to the view that the words "heirs of her own," used in the will, meant "children," and that the will meant to bequeath the residue of the estate to Lula West in the event Annie Calvert should die without leaving children surviving her. It is true that, in many cases seemingly similar to this, courts have construed the words "without issue" to mean without having issue born to the party. Courts have been influenced to some extent in this regard, as appears from the opinions, by the fact that it is advisable that the estate in lands should not remain uncertain. But that consideration should have no influence in this case for the reason that we hold that the appellee is empowered under the will to sell the land and make good title thereto. If she does not sell the same she derives all the benefit intended by the testatrix, and if she does sell the same the grantee acquires a perfect title. In many of the cases in which it has been held that issue means issue born, and not surviving, the language used would bear this construction. Thus, in *Clough v. Clough*, 64 N. H. 509, 15 Atl. 127, the language used was "if she should have living issue." In *Isbell v. MacLin*, 24 Ala. 315, the language was "should she marry and have lawful issue." In *McCullough v. Coal Co.*, 210 Pa. 222, 59 Atl. 984, the language was "should my son have heirs or issue." In each of these cases it was held that the birth of a child vested the estate in fee simple; but in the instant case we think it clear that the testatrix intended the rights of her granddaughter Lula West to depend upon her daughter Annie Calvert leaving children at the time of her death.

In cases relied upon by appellees as vesting an estate in fee simple, the language used was "heirs of body," which has been construed to mean heirs generally within the rule of *Shelley's Case*. *Peters v. Rice*, 157 S. W. 1181; *McGennis v. McGennis* (Ky.) 29 S. W. 833. In *Lacey v. Floyd*, 99 Tex. 112, 87 S. W. 666, the language used was "to his lawful heirs." In that case the court pointed out the distinction between heirs and children. In *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399, the language used was "heirs." In *Pearce v. Pearce*, 104 Tex. 73, 184 S. W. 210, the language used by Judge

Ramsey was, "the estate became absolute upon the birth of a child"; but in that case the child survived her mother, to which the court evidently had reference, instead of simply to the birth of a child. In *Chase v. Gregg*, 88 Tex. 552, 32 S. W. 520, the devise was to the wife of the testator (his second wife), with remainder to his son by a former marriage in case she should die "without leaving a child or children born to her." No child was born to her.

We adhere to our ruling that the word "residue," used in the third clause of the will, taken in connection with the second clause, empowered appellee to sell the property and make good title thereto. Appellant says that in so holding she reaps a barren victory, inasmuch as appellee will doubtless sell the property, and thereby deprive her of any benefit therein. We are not responsible for this consequence, if such it be, nor do we think that we would be justified in supposing that the appellee will sell the property bequeathed to her, except upon what she may deem good reason for so doing and not merely to defeat the purpose expressed by her mother in her will.

[10] We think we were technically in error in describing the estate, which the will vests in the appellee, as a life estate. In *Chase v. Gregg*, supra, Mr. Justice Brown, speaking for the court, said:

"Under the will of Darius Gregg, Mrs. Gregg took an estate in fee, determinable upon the condition expressed."

We think this is a proper description of the estate vested in appellee by the will. Lord Coke says:

"Of fee simple, it is commonly holden that there be three kinds, viz.: Fee simple absolute, fee simple conditional, and fee simple qualified or base."

And Chancellor Kent says:

"Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever. It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold." *Pipe Line Co. v. Ry. Co.*, 62 N. J. Law, 254, 41 Atl. 759, 42 L. R. A. 572.

A very learned discussion with reference to the construction of wills will be found in the late case of *Middleton v. Dudding* (Mo. Sup.) 183 S. W. 443-458.

In our original opinion herein we said:

"This decision is based upon the fact, as shown by the statement of facts, that appellee has no children, and it is not contemplated that she will ever have."

The statement of facts shows that appellee is married and has no children, and there was no intimation in the briefs of either party that the possibility of issue was not extinct. However, the statement of facts does not show that she will never have children, and therefore this finding of fact is withdrawn.

For the reasons stated, the motions for rehearing upon the part of both appellant and appellee are overruled.

Motion overruled.

KAUFMAN et ux. v. CHRISTIAN-WATHEN LUMBER CO. et al. (No. 5594.)

(Court of Civil Appeals of Texas. San Antonio. March 1, 1916. On Motion for Rehearing, March 22, 1916.)

1. CONTRACTS \S 350(1)—BUILDING CONTRACT—ALTERATIONS—SUFFICIENCY OF EVIDENCE.

In an action by a contractor against the owners for a balance due, in which the defendant interposed a counterclaim for the expense of completing the building after breach by plaintiff, evidence held sufficient to support finding that it was impossible to tell what portion of the material covered by the architect's certificate and used in completing the building was used in making changes not authorized by the contract in the work done by the contractor, and what portion was expended in completion of the building according to the terms of the contract, so that defendant could not recover.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 1819, 1822, 1823; Dec. Dig. \S 350(1).]

2. CONTRACTS \S 350(1)—BUILDING CONTRACT—COST OF COMPLETING HOUSE—SUFFICIENCY OF EVIDENCE.

In an action by a contractor for a house against the owners for a balance, evidence held sufficient to show that the amount of labor necessary to complete the house in accordance with the contract and specifications was the difference between the total amount paid by defendant for labor and that paid for labor in making unauthorized changes in the work done by plaintiff.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 1819, 1822, 1823; Dec. Dig. \S 350(1).]

3. DAMAGES \S 189—BUILDING CONTRACT—POSSIBILITY OF RENTING—SUFFICIENCY OF EVIDENCE.

In an action by a contractor for a house against the owners for a balance, evidence held sufficient to support finding that there was no proof that the building could have been rented, if ready, from the time it was contracted to be finished until it was actually finished.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 288, 512; Dec. Dig. \S 189.]

4. DAMAGES \S 85—BUILDING CONTRACT—DELAY IN COMPLETION—LIQUIDATED DAMAGES.

Where the owner of a house under construction on June 16th wrote the contractor, who had abandoned, that, if he did not go to work by June 19th, the owner would take possession of the premises and complete the house, which notice had no effect, the owner waiting till September, such owner could not recover stipulated damages caused by such delay in completion after the date set for going to work.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 179-181, 183-187; Dec. Dig. \S 85.]

5. DAMAGES \S 85—LIQUIDATED DAMAGES.

Where a building contractor abandoned work and caused delay in completion, the owner was entitled to recover the stipulated damages in absence of a showing that the same amounted to a penalty or was disproportionate to the actual damage sustained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 179-181, 183-187; Dec. Dig. \S 85.]

6. PRINCIPAL AND SURETY \S 7—SURETY FOR CORPORATION—ULTRA VIRES ACT.

The bond given by a surety for a corporation is binding upon it, even though the contract, performance of which the bond was made to secure, was ultra vires as to the corporation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 8-12, 14, 16, 18; Dec. Dig. \S 7.]

Error from District Court, Bexar County; W. F. Ezell, Judge.

Suit by the Christian-Wathen Lumber Company against L. Kaufman and wife, in which defendants pleaded Lee Garcia and another. From a judgment that plaintiffs take nothing by their suit and defendants nothing by reason of their cross-action, defendants bring error. Judgment reversed in part and rendered for defendants, and affirmed in part.

W. H. Russell and T. M. West, both of San Antonio, for plaintiffs in error. Hertzberg, Barrett & Kercheville, of San Antonio, for defendants in error.

MOURSUND, J. The Christian-Wathen Lumber Company sued L. Kaufman and wife for \$2,096.72, alleged to be the balance due by Kaufman and wife to plaintiff on a contract by plaintiff and Lee Garcia to erect for Kaufman and wife a house on San Pedro avenue, in San Antonio. Kaufman and wife denied the plaintiffs' allegations, and by cross-action impleaded Lee Garcia and the Southwestern Surety Insurance Company of Oklahoma, the surety on the bond of Christian-Wathen Lumber Company and Lee Garcia, and asked for judgment against all of said parties, alleging that Kaufman and wife had paid out the sum of \$2,046.92 in completing the house, which sum was \$1,554.88 more than the original contract price. They further pleaded that the house was to be completed within 60 working days, or by May 17, 1913, and that they were entitled to recover penalties at the rate of \$6 per day for every day the house remained uncompleted after May 17, 1913, that the building was not completed until 238 days after said date, and that Kaufman and wife were damaged in the sum of \$1,428 by reason of such delay. They also alleged that they were damaged in the sum of \$714, the rental value of the house for the time intervening between the 60 working days and the date the house was completed.

The Christian-Wathen Lumber Company, Lee Garcia, and the surety company answered this cross-action by general demurrer, special exceptions, and denials of the material allegations, and pleaded that said Kaufman breached the contract in various particulars. The surety company also pleaded that the contract of suretyship was not binding upon it, for the reason that the Christian-Wathen Lumber Company was a corporation incorporated under subdivision 24 of article 642, Re-

vised Statutes 1895, for the purchase and sale of goods, wares, merchandise, etc., and its contract, jointly with Lee Garcia, to erect a house, was an ultra vires act, for which it could not be held liable, and therefore the surety company could not be held liable. It pleaded further that the said lumber company entered into a partnership agreement with Garcia to erect the building, and that said partnership was an ultra vires act and void, and therefore the surety company was not liable.

Judgment was rendered to the effect that plaintiffs take nothing by their suit, and that Kaufman and wife take nothing by reason of their cross-action. Kaufman and wife appealed. The trial court at the request of the surety company filed the following conclusions of fact:

"(1) I find that the Christian-Wathen Lumber Company, a corporation, plaintiff, and Lee Garcia, defendant, on March 5, 1913, contracted to erect and build for defendant L. Kaufman a two-story frame two-flat apartment house and shed in San Antonio, Tex., and that they contracted to erect and finish said building in 60 working days after date, for the sum of \$3,989, subject to additions and deductions, and that said Christian-Wathen Lumber Company, a corporation, and Lee Garcia thereupon executed a bond on the same date, signed by Lee Garcia, principal, and the Christian-Wathen Lumber Company, by Ed A. Christian, president, principal, and by the Southwestern Surety Insurance Company of Oklahoma as surety, in the sum of \$1,333, payable to L. Kaufman, to secure the faithful performance of the contract above referred to.

"(2) I further find that on said date the Christian-Wathen Lumber Company was a corporation organized under the laws of Texas, and does business in Texas, and was formed for the purpose of the purchase and sale of goods, wares, and merchandise and agricultural and farm products, including lumber, shingles, doors, sash, blinds, moldings, cement and brick, builder's hardware, nails and all other species and character of what is commonly known as goods, wares, and merchandise, and especially everything manufactured from timber and all articles used in building and erecting structures of all sorts.

"(3) I further find that the Christian-Wathen Lumber Company, a corporation, executed said contract for the erection of said building jointly with Lee Garcia, both acting as principals, and that both of them signed the bond jointly and as principals, for the purpose of profiting out of said transaction, and that they were acting jointly and as partners in the erection of said house for L. Kaufman.

"(4) That the Christian-Wathen Lumber Company entered into a partnership agreement with Lee Garcia to erect said building for the benefit of L. Kaufman and for the mutual benefit of each other.

"(5) That the Southwestern Surety Insurance Company refused to execute a bond for Lee Garcia to L. Kaufman for the erection of said building, but did agree to execute the bond for Lee Garcia and the Christian-Wathen Lumber Company jointly and as partners.

"(6) I further find that payments were made by L. Kaufman to the contractors on the dates stated in defendant Kaufman's first amended original answer, being paragraph 6, page 2.

"(7) I further find that the money claimed to have been expended by L. Kaufman for the completion of said building and contract was also

expended for alterations and changes made in said building after the first contractors had abandoned the work, and that no proof was offered as to what portion of said money was expended for changes and alterations and what portion of said money was absolutely necessary for the completion of said building according to the original plans and specifications, and that, proof in this respect not being definite and such as the court could render intelligent judgment upon, the court therefore finds that defendant Kaufman has failed to prove what amount of money was actually expended and absolutely necessary to complete said building according to the original plans and specifications.

"(8) I further find that the architect of said job did not give written notice to the contractors to proceed to remove from the grounds or buildings any materials condemned by him, or to take down any portion of the work which the architect shall, by written notice condemn as unsound or improper or as in any way failing to conform to the drawings and specifications, except certain flooring in the servant's room and some other flooring material, which was removed by the contractors, and that all other changes and alterations on said job made by L. Kaufman after he undertook to complete the contract were unauthorized by the architect, and that the architect did not give written notice as provided in the contract, and that the said L. Kaufman was therefore unauthorized to expend money for these purposes and include said expenses in the amount necessary to complete the job, and because of his failure to show how much money was so expended and how much money was necessary to complete the building strictly according to plans and specifications the court is unable to determine the exact amount necessary to complete the building.

"(9) I further find that there is no proof to the effect that said building could have been rented from the time it was contracted to be finished until the time it actually was finished.

"(10) I further find that the defendant Kaufman paid on said contract \$3,202.30, which was 80 per cent. of the work done and material furnished at time of payment.

"(11) I further find that defendant Kaufman paid to various persons for material furnished and labor performed on said building after he took charge of the same the sum of \$2,046.92, which included cost of completing the building, and also included cost of making alterations and changes in the building, which alterations and changes were not directed to be made by the architect in charge."

The conclusions of law, in so far as they relate to the cross-action, are as follows:

"I find that L. Kaufman and wife are not entitled to recover any judgment against the Christian-Wathen Lumber Company, Lee Garcia, and the Southwestern Surety Insurance Company, for the reason that no proof has been introduced showing the exact amount expended for completing said building strictly according to plans and specifications, and I conclude that said Kaufman is not entitled to recover anything for loss in rent because of his failure to show that said building could have been rented during said time.

"I further conclude that the certificate issued by the architect after the completion of said building was not such as to authorize defendant Kaufman to recover the amount paid for changes and alterations in said building made after defendant Kaufman took charge of same for completing it; said certificate simply showing the gross amount paid for completing the building and for making the alterations and changes."

The seventh, eighth, and eleventh findings of fact are attacked by appellants as unsupported by the evidence. These findings are very important, in view of the fact that

the contract provided: That the work was to be done under the direction of the architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final; that no alterations were to be made in the work except upon written order of the architect, the amount to be paid by the owner or allowed by the contractor by virtue of such alterations to be stated in such order; that, if the architect shall certify that the refusal or neglect of the contractor to supply workmen or materials is sufficient ground for such action, the owner may terminate the employment of the contractor and enter upon the work included in the contract and employ any other person or persons to finish the work and to provide the materials therefor, and in such case the contractors would receive no further payment until the work was wholly completed, at which time, if the unpaid balance of the amount to be paid under the contract shall exceed the expense incurred by the owner in finishing the work, such difference shall be paid by the owner to the contractor, but, if the expense exceeds the unpaid balance the contractors shall pay the difference to the owner, and the expense incurred through such default shall be audited by the architect whose certificates thereof shall be conclusive upon the parties.

Mr. Behles, the architect, testified that the house was completed according to the original plans and specifications up to the date when the owner took charge of it. However, his testimony at another place shows that he had condemned the flooring in the servants' room, and that the work which had been done was in pretty bad condition. He also testified that a great many partitions had to be taken out, also some flooring.

D. T. Shepherd, who had charge of the construction work after the owner took charge, testified that it did not take \$1,335.85 worth of labor to complete the house, but that it did take that amount, including the cost of tearing out what had to be torn out and replaced; that he did not know how much of the material was used in replacing material torn out. A statement by him to Kaufman was introduced in evidence which shows that very many changes were made by him in the portion of the work already done. This statement shows that the total amount paid for labor in tearing out and replacing portions of the house was \$329.85. Shepherd testified he made these changes without instructions from anybody. It is clear that he took the plans and specifications, placed his own interpretation thereon, instead of applying to the architect, and proceeded to make numerous changes. After the building was completed the architect gave Kaufman a certificate as follows:

"This is to certify that in completing your apartment house, corner Myrtle and San Pedro streets, which was taken over from the Chris-

tian-Wathen Lumber Company and Lee Garcia, contractors, amounts as follows:

For lumber from P. J. Owens Lumber Co.....	\$ 610 07
Millwork for H. Wagner.....	101 00
Labor complete.....	1,330 80."

This certificate included the material and labor for changes made, as well as for the completion of the house.

[1] In view of the above testimony, we conclude that the court was correct in finding that it was impossible to tell what portion of the material covered by the architect's certificate was used in making changes in the work already done, which changes were not made in accordance with the terms of the contract, as the architect had not directed that they be made, and in fact had approved the work found defective by Shepherd. It is clear, therefore, that no recovery could be had by Kaufman for any material covered by such certificate, and it is impossible to tell how much thereof was necessary for the completion of the building in accordance with the terms of the contract.

[2] We think, however, the court erred in not finding that the amount of labor necessary to complete the house in accordance with the terms of the contract and the specifications was the difference between \$1,330.80, the total amount paid out for labor, and \$329.85, the amount paid for labor in making changes, namely, the sum of \$1,000.95.

It follows that, as the remaining 20 per cent. of the contract price was only \$786.70, and the Kaufmans paid out for labor in completing the building the sum of \$1,000.95, they were entitled to recover the sum of \$214.25 upon their count for damages by reason of having to complete the building.

[3] Appellants contend they should have recovered \$600 as the reasonable rental value of the building for six months. The court found that there was no proof that the building could have been rented from the time it was contracted to be finished until the time it was actually finished. This finding is supported by the evidence, for the only evidence on the subject was that of Kaufman to the effect that after the building was completed it had a rental value of \$100 per month.

[4, 5] Appellants also contend that the court erred in failing to render judgment in their favor for \$6 per day as liquidated damages for each day from June 1, 1913, to November 26, 1913. Garcia testified he quit the job about the last of May. It appears that it was evident to Behles and Kaufman that the contractors had abandoned the work, for on June 16th Kaufman wrote Garcia that, if he did not go to work by Thursday, June 19th, Kaufman would take possession of the premises and complete the house. A carbon copy of this letter was sent to the surety company. There is no testimony that these notices had any effect, and yet Kaufman waited until September 5, 1913, and

then wrote another letter to the surety company, stating that he had on that day dismissed the contractors, and allowing said company until August 6, 1913, in which to decide whether to complete the house or let him proceed to complete it. No explanation is made of the discrepancy in dates, nor of the long delay in proceeding to carry out the threat of taking possession on June 19th. No recovery should be had for the time covered by such delay, nor does the evidence furnish any basis for damages for the time intervening between September 5th and November 26th, but we fail to see upon what theory a recovery could be refused for the time intervening between June 1st and June 19th. There being no contention made in the pleadings that the provision for payment of \$6 per day was intended as a penalty, or that it was so disproportionate to the actual loss that it would be unconscionable to permit the recovery thereof, and there being no evidence of the amount of actual damages, it seems that appellants should have been allowed to recover at the rate of \$6 per day for each day intervening between June 1st and June 19th. *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467; *Dilley & Son v. Wise and Hervey*, 160 S. W. 985.

[6] The surety company by cross-assignments contends that the bond is not binding upon it, because the Christian-Wathen Lumber Company, a corporation, exceeded its powers in contracting to erect a building, and makes the further contention that the corporation, by said contract, entered into a partnership with Garcia, and therefore the contract was void. If it be conceded that the business of erecting buildings was not authorized by the articles of incorporation, and that the contract had the effect of surrendering to Garcia to a certain extent the control of the affairs of the corporation required by law to be exercised through its authorized officials and agents, and was therefore ultra vires, still it has been decided in this state, and we think correctly, that the bond is binding upon a surety, even though the contract which it was made to secure performance of was ultra vires. *Mitchell v. Hydraulic Stone Co.*, 129 S. W. 148. The cross-assignments are therefore overruled.

The judgment of the trial court is reversed, and the cause remanded.

On Motion for Rehearing.

The Southwestern Surety Insurance Company contends that we were in error in finding that the sum of \$1,000.95 was proven to have been the amount paid out for labor to complete the house according to specifications. It is asserted that the statement only referred to by us as having been made by Shepherd relates only to labor utilized in tearing out and replacing defective material, and we concede the correctness of that assertion. It is further asserted that the evidence shows that changes were thereafter

made in completing the building and the sum of \$1,000.95 includes the sums paid for labor necessary to make such changes. Both Shepherd and Behles testified the building was completed in accordance with the specifications, and we are unable to find any evidence which sustains the contention that changes were made. As was pointed out, the evidence fails to show the cost of the material used in replacing portions found by Shepherd to be defective and torn out and replaced, so it is impossible to make any finding with regard to the sum expended for material necessary to complete the building according to specifications. The motion for rehearing is overruled.

We are, however, of the opinion that, instead of remanding the cause for another trial, we should render judgment for the Kaufmans for the sum of \$328.25.

Our former judgment is therefore set aside, and judgment rendered that L. Kaufman and wife recover of the Christian-Walthen Lumber Company, Lee Garcia, and the Southwestern Insurance Company said sum of \$328.25. That portion of the judgment of the trial court to the effect that the Christian-Walthen Lumber Company take nothing by its suit against L. Kaufman and wife will not be disturbed.

TEXAS GRAIN & ELEVATOR CO. et al. v. DYER. (No. 8313.)

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 29, 1916. On Motion for Rehearing, Feb. 26, 1916.)

1. APPEAL AND ERROR \S 743(1) — ASSIGNMENTS OF ERROR — REFERENCE TO TRANSCRIPT—NECESSITY.

Where the statements under assignments of error made no reference to the portion of the transcript containing a record of the alleged error complained of, such assignments could not be considered, not being briefed as required by the rules of the Courts of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2999; Dec. Dig. \S 743(1).]

On Motion for Rehearing.

2. APPEAL AND ERROR \S 743(1) — ASSIGNMENTS OF ERROR—REFERENCE TO RECORD—STATUTE.

Where the statement of appellants' assignment of error based upon the trial court's failure to submit the case upon special issues made no reference to the record, except the expression "(See defendants' bill of exception, No. 3)," neither the assignment, the proposition, or the statement showing that any issues of fact were presented by the pleadings and evidence which were not submitted to the jury by special issues, such assignment was insufficient and could not be considered, under rules 30, 31, for the Courts of Civil Appeals (142 S. W. xiii), providing that each point of each assignment shall be stated as a proposition, unless the assignment itself sufficiently discloses the point, in which event it shall be sufficient to copy the assignment, and that to each proposition there shall be subjoined a brief statement of the proceedings, with a reference to the pages of the record, etc. (Acts 33d Leg. c. 136, § 1 [Vernon's Sayles' Ann. Civ. St. 1914,

art. 1612]), providing that an assignment of error shall be sufficient which directs the attention of the court to the error complained of not having abrogated the rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2999; Dec. Dig. \S 743(1).]

3. TRIAL \S 352(1)—SUBMISSION ON SPECIAL ISSUE—GENERAL CHARGE.

Where, under the pleadings, the only issue of fact to be submitted to the jury was upon defendant's verified plea of privilege, the charge, though general in form, which involved only such single issue of fact, whether the defendants when they made the contract in suit intended to take the hay contracted for and pay for the same so that they were not guilty of fraud, was in effect a submission upon special issues, the finding of the jury under it being determined by the one issue of fact, and decided adversely to defendants by their verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 840; Dec. Dig. \S 352(1).]

Appeal from Erath County Court; A. P. Young, Judge.

Suit by H. L. Dyer against the Texas Grain & Elevator Company and others in the alternative. From a judgment for plaintiff, defendants appeal. Affirmed.

Hickman & Bateman, of Dublin, for appellants. E. E. Solomon, of Dublin, for appellee.

BUCK, J. Suit was filed in the justice court of Erath county by H. L. Dyer against the Texas Grain & Elevator Company of Ft. Worth, alleged to be a corporation, and, in the alternative, against E. M. and G. H. Rogers, alleged to be a partnership and doing business under the name of said Grain & Elevator Company. The plaintiff alleged the cause of action to be by reason of the breach of two contracts in writing entered into by and between plaintiff and defendants, (1) for the delivery at Mangum, Tex., on October 1, 1914, of 50 tons of Johnson grass hay, and (2) for the delivery at Dublin, Tex., on November 3, 1914, of 30 tons of hay, all at \$8 a ton, said hay to be shipped in accordance with instructions from defendants. That plaintiff was at all times ready and willing to deliver said hay, and so advised defendants, but that defendants failed and refused to give any instructions for shipping, or to receive or pay for said hay. That because of said breach by defendants, and by reason of the decline of the market price of hay, plaintiff was forced to sell said 80 tons of hay on November 12, 1914, at \$6 a ton. Plaintiff's suit for damages included \$2 a ton loss, or \$160, \$10 for storage, and \$10 attorney's fees.

Defendants, both in the justice court and in the county court, to which an appeal was taken by them, after alleging that the Texas Grain & Elevator Company was not a corporation, but a partnership, composed of said E. M. and G. H. Rogers, submitted their verified plea of privilege to be sued in Tarrant county where it was alleged both resided.

In answer to the plea of privilege, plain-

tiff pleaded, (1) that the contract was in writing and to be performed in Erath county, and (2) that the defendants were guilty of fraud and deceit, committed in Erath county, in that they never intended, even at the time of making the contract, to comply therewith and pay for said hay, in case the market should decline. This latter ground only of said plea was submitted to the jury, which found in favor of plaintiff "on the issue of defendant's right to be sued in Tarrant county"; and the jury also found, under peremptory instructions, subject to the plea of privilege, for plaintiff, on the issue of damages, for \$160. Defendants appeal.

[1] Appellee objects to the consideration of any one of the 17 assignments contained in appellants' brief because they are not briefed as required by the rules, in that in the statements thereunder no reference is made to the portion of the transcript containing the record of the alleged error of which complaint is made. For instance, in their first assignment, complaining of the action of the court in overruling defendants' application for a change of venue, and their plea of privilege to be sued in Tarrant county, appellee calls our attention to the fact that "neither the assignment nor the statement refers to that part of the record containing such plea, if there was any, or to the court's judgment thereon, if there was a judgment against the plea." In the second assignment, urging that the verdict of the jury is contrary to the evidence on the issue of fraud, which is one of the grounds pleaded by plaintiff to sustain the venue in Erath county, there is no reference to that portion of the motion for new trial complaining of the alleged error.

We believe that the objections by appellee to the consideration of the assignments in this form and condition should be sustained. *Farthing Lumber Co. v. Illig*, 179 S. W. 1092; *Norris Lumber Co. v. Harris*, 177 S. W. 515; *Anderson et al. v. Jackson*, 168 S. W. 54; *Taylor v. Butler*, 168 S. W. 1004; *Heath v. Huffhines*, 168 S. W. 974; *Ford Motor Co. v. Freeman*, 168 S. W. 80.

There being no fundamental error manifest of record, the judgment of the trial court is affirmed.

On Motion for Rehearing.

[2] In their motion appellants insist strenuously that we erred in refusing to consider the assignments because of defective briefing, and specially do they urge that as to the sixteenth assignment the statement thereunder is sufficient. This assignment is based upon the court's failure to submit the case upon special issues. In the statement thereunder no reference is made to the record at all, except the expression "(See defendants' bill of exception No. 3)." It is not shown either in the assignment, the proposition, or the statement that any issues of fact were presented by the pleadings and evidence which were not submitted to the jury as

separate issues. This character of statement has been held insufficient to require consideration in *Childress v. Robinson*, 161 S. W. 78, and *Mitchell et al. v. Robinson*, 162 S. W. 443. In both of these cases it was stated that the act of the Thirty-Third Legislature (chapter 136, p. 276; article 1612, Vernon's Sayles' Ann. Civ. St. 1914), which provides that an assignment of error "shall be sufficient which directs the attention of the court to the error complained of," does not, and was never intended to, abrogate rule 30 (142 S. W. xiii), which, in part, is as follows:

"Each point under each assignment shall be stated as a proposition, unless the assignment itself may sufficiently disclose the point, in which event it shall be sufficient to copy the assignment"

—and rule 81 (142 S. W. xiii), which, in part, provides:

"To each * * * proposition there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. This statement must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it, and without intermixing with it arguments, reasons, conclusions, or inferences."

See *Douthitt v. Farrar*, 159 S. W. 182.

[3] But even if the question of defective statement should be waived and we should give this assignment consideration, we think it should be overruled on its merits. Defendants filed no pleadings in the case except their plea of privilege to be sued in Tarrant county. They introduced no evidence as to the merits of plaintiff's claim. Hence, the only issue of fact to be submitted to the jury was upon defendants' verified plea of privilege, as supported by the testimony of J. B. Rogers, father of the defendants. Upon this plea the court charged the jury as follows:

"The law provides that no person who is an inhabitant of this state shall be sued out of the county or precinct in which he has his domicile, except, among other cases, in all cases of fraud, in which case suit may be brought in the county in which the fraud was committed."

"If you believe from the evidence in this case that the defendants, under the name of the Fort Worth Mill and Elevator Company, made written agreements with plaintiff as alleged by him, and agreed to purchase from plaintiff 80 tons of Johnson grass hay at the price of \$8 per ton, to be delivered by plaintiff free on board the cars at Mangum and Dublin, Texas, and that on account of said contracts, plaintiff prepared said hay and was ready to deliver same to defendants in accordance with the terms of said contracts, and if you further believe that at the time said contracts were made by defendants with plaintiff that the defendants did not intend to take said hay and pay for the same, then you will find for the plaintiff on the issue of the privilege of said defendants to be sued in precinct No. 1 of Tarrant county, and so state by your verdict. If you do not so find, your verdict will be for the defendants on the issue of the privilege of the defendants to be sued in precinct No. 1 of Tarrant county, and so state by your verdict."

"The burden of proof is on the plaintiff on the issue of the right of defendants to be sued in precinct No. 1, Tarrant county, Tex.

"In the event you find for the defendants on the issue of their right to be sued in precinct No. 1 of Tarrant county, Tex., then you need not make any further finding on the issue hereinafter submitted to you."

So, it will be seen that only one issue of fact was involved in the charge submitted to the jury upon defendants' plea of privilege, to wit, Did defendants, at the time they contracted for said hay, intend to take said hay and pay for the same? Hence, it would appear that though said instructions were given in the form of a general charge, yet the finding of the jury was determined by this one issue of fact, and that when they found in favor of plaintiff on the issue of defendants' right to be sued in Tarrant county, which they did, separately and apart from the further verdict as to plaintiff's damages, which they found under a practically instructed verdict, they decided the one issue involved.

Even if reference should be had to said bill of exception No. 3, the said bill fails to show that any issues of fact were raised by the pleadings and evidence, and fails to show, by reference or otherwise, what issues of fact, if any, were tendered by the defendants and refused by the court. Hence, we conclude that no reversible error is shown in the action of the court in refusing and failing to submit the cause on issues further than those that were submitted.

We believe what we have said above is entirely in harmony with the holding by the Supreme Court in the case of C. R. I. & G. Ry. Co. v. Pemberton, 161 S. W. 2, cited by appellants, in which it is said:

"It is further urged by the defendant in error that the statements as made, subjoined to the propositions submitted under the second, third, and fourth assignments, are not in compliance with rule 31, and that the court properly refused to consider those assignments, because of the want of reference to the pages of the record. The statements under the assignments just named are defective in this particular. The second assignment is based upon the refusal to give a special charge. The statement gives the number of the charge and copies it literally, but omits to give the page of the transcript where it may be found. It further purports to give the substance of certain testimony upon the issues submitted in the charge, and with respect thereto to give the transcript pages. The third and fourth assignments both relate to matters made the subject of bills of exception. In the statements the bills are referred to by number, and copied in full, but reference to the pages of the transcript where found is omitted. While the statements under these three assignments are defective in the particular stated, their accuracy was not questioned in the Court of Civil Appeals by the defendant in error, and for this reason we believe the court would have been warranted in considering the assignments, but we do not consider it within our province to revise the exercise of discretion by the Court of Civil Appeals, where the statement wholly fails to refer to the pages of the record, and the assignment is not considered for that reason.

"The judgment of the Court of Civil Appeals

is reversed, and the cause is remanded to that court for the consideration of the first assignment of error in the brief filed in that court by the plaintiff in error, and for the consideration of the remaining three assignments, unless the court is of the opinion it should refuse to do so because of the statements thereunder being defective in the respect stated, under rule 31."

We note in reply by appellee's counsel to appellants' motion for rehearing, that reference is made to appellee's death, alleged to have occurred since the rendition of the judgment in the trial court, and pathetic appeals are attempted to be made to this court on behalf of the widow and orphans, and arguments used to the effect that a reversal of this case would work a great injustice to such widow and orphans, because of the death of the appellee. The injection of such matters, being de hors the record, is not proper, and of the impropriety of its use the counsel must have been well aware, and this court has not considered the same, except, as herein, to discountenance the departure from the record.

The motion for rehearing is overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS v. PACE. (No. 8308.)

(Court of Civil Appeals of Texas. Ft. Worth. Feb. 19, 1916. Rehearing Denied March 18, 1916.)

1. COMMERCE \Leftrightarrow 33 — RAILROADS — "INTERSTATE COMMERCE" — INJURIES IN INTERSTATE COMMERCE.

A shipment of coal billed to a point in another state, from which, although without reloading or unloading, it was then billed to a point within such state, was not interstate as to the second shipment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. \Leftrightarrow 33.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE \Leftrightarrow 27 — RAILROADS — INJURIES TO SERVANT — "INTERSTATE COMMERCE."

The mere fact that it does not appear whether cars were unloaded and reloaded within the state, or that the goods were in the same cars at a point without the state, is not determinative of whether the shipment was interstate, and where at the time of shipment a destination within the state only was contemplated the state statutes control the railroad's liability for injury to a servant engaged in such shipment.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. \Leftrightarrow 27.]

3. MASTER AND SERVANT \Leftrightarrow 204(1) — INJURIES TO SERVANT — DEFENSES — ASSUMPTION OF RISK — COMMON-LAW RULE.

The common-law defense of assumed risk still obtains, except as limited by Vernon's Sayles' Ann. Civ. St. 1914, art. 6645.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. \Leftrightarrow 204(1).]

4. MASTER AND SERVANT \Leftrightarrow 295(1) — INJURIES TO SERVANT — DEFENSES — ASSUMPTION OF RISK.

Where the defense of assumption of risk is expressly limited under certain conditions by Vernon's Sayles' Ann. Civ. St. 1914, art. 6645,

an instruction requested by defendant on the issue of assumption of risk, which failed to negate those conditions, is properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1163, 1169, 1179; Dec. Dig. ¶ 295(1).]

5. NEGLIGENCE ¶ 141(6) — REDUCTION OF COMPENSATION.

In a servant's action for injuries arising out of and in the course of his employment, defended on the ground of contributory negligence, the issue of the amount to which his compensation should be reduced by reason of such contributory negligence, must be submitted, no standard for determining whether the compensation allowed is excessive being otherwise possible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 387; Dec. Dig. ¶ 141(6).]

6. APPEAL AND ERROR ¶ 934(2) — SCOPE OF REVIEW—PRESUMPTIONS.

Every reasonable presumption must be indulged in favor of the judgment rendered, and a special verdict should be liberally construed in order to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶ 934(2).]

7. TRIAL ¶ 352(1) — SPECIAL VERDICT—SUFFICIENCY.

A special verdict must directly, fairly, and fully submit to the jury material issues and be sufficiently certain to stand as a final decision of the special matters with which it deals.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 840; Dec. Dig. ¶ 352(1).]

8. NEGLIGENCE ¶ 142—INJURIES TO SERVANT—AMOUNT OF AWARD.

A special verdict in a servant's action for injuries, defended on the ground of contributory negligence, awarding him \$17,500 where the demand was \$50,000, was too indefinite to stand, since it could not be determined in what amount his contributory negligence reduced the verdict if at all.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400-403; Dec. Dig. ¶ 142.]

9. MASTER AND SERVANT ¶ 291(3)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—PLEADINGS—SUFFICIENCY.

An allegation that the master negligently furnished the servant with an engine out of repair as to its sand pipe, will support an instruction that it was the master's duty to exercise ordinary care to furnish an ordinarily safe engine and to have it inspected and repaired, especially where the specific duty was by later instruction specifically defined.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. ¶ 291(3).]

10. MASTER AND SERVANT ¶ 270(15)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an engineer's action for injuries received when he attempted to replace a sand pipe with his foot while the engine was in motion, it is not error to permit him to testify that such was the custom since it might reasonably be presumed that the general custom was acquiesced in by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 925; Dec. Dig. ¶ 270(15).]

11. MASTER AND SERVANT ¶ 135—INJURIES TO SERVANT—ACTIONS—DEFENSES—CUSTOM.

The master, in order to avoid the charge of negligence, cannot rely upon failure of others in

similar circumstances to perform a duty, the violation of which is the subject of complaint.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 271, 281, 293; Dec. Dig. ¶ 135.]

12. MASTER AND SERVANT ¶ 127—INJURIES TO SERVANT—LIABILITY—NEGLECT.

A railway company is not guilty of negligence per se for failure to take precautions which other railways observed in keeping their engines in repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 252; Dec. Dig. ¶ 127.]

13. EVIDENCE ¶ 539 — EXPERT WITNESS — WHO ARE EXPERT WITNESSES.

Where an injured engineer testified to an experience with engines covering more than 35 years, it is not error to permit him to testify that he did not believe a sand pipe could be displaced with a blow of the foot, since in so testifying he might be regarded as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. ¶ 539.]

Appeal from District Court, Tarrant County; J. W. Swayne, Judge.

Action by C. L. Pace against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Thompson & Barwise, A. C. Wood, and G. W. Wharton, all of Ft. Worth, for appellant. D. W. Odell, T. J. Powell, and Gaines B. Turner, all of Ft. Worth, for appellee.

BUCK, J. Suit was instituted in the Seventeenth district court of Tarrant county, Tex., by C. L. Pace against the Missouri, Kansas & Texas Railway Company of Texas for damages for personal injuries sustained. Plaintiff alleged that on the 24th day of February, 1913, he was an employé of defendant railway company in the capacity of locomotive engineer, and as such was operating one of appellant's engines attached to a string of cars which were to be carried south from Ft. Worth on appellant's line. It was further alleged that as part of the equipment of said engine there was attached a box of sand with an iron pipe extending from said sand box to a point immediately above the rail, so that the operator of such engine, by opening a valve in said pipe, could scatter sand along said rail and thereby assist in the movement of the engine. It was alleged that the sand pipe was out of order, in that it was loose and carelessly adjusted, and did not deposit the sand on the rail, but on the ground some 4 or 5 inches outside the rail; that when the plaintiff had taken his position on the engine in question and turned on the sand, he discovered the defect, and that while the engine was slowly starting, he dismounted from the engine to examine the sand pipe in order to determine whether or not it would be necessary to stop the engine and send it to the shop for repairs; that while said engine was in very slow motion, plaintiff, for the purpose of determining the condition of said sand pipe, placed his foot gen-

tly against the pipe, assuming that it was reasonably securely adjusted, as same should have been, and as was usual and customary for it to be, and that in so doing his leg was caught under the wheels and across the rail in front of said moving engine, thereby crushing his leg and making it necessary to amputate it about 9 inches below the knee.

Plaintiff alleged that it was negligence on the part of defendant to have the sand pipe in the condition it was, and that same contributed directly and proximately to the accident and injuries complained of; and further alleged that it was no part of plaintiff's duty to inspect said engine or its appliances, and that he did not know that said sand pipe was defective and out of repair at the time he took charge of the engine, but that he supposed that it was reasonably tight, and, at the time of placing his foot against it, supposed that it had been forced out of its proper position by some external force, as frequently occurs in the operation of the engine, and that said sand pipe would oppose considerable resistance to the pressure of his foot thereon, and that while testing it, as above set out, he was acting in a careful and prudent manner, and in the usual and customary manner used by engineers in such matters.

Plaintiff further alleged that he was an experienced and competent engineer and was then earning, and capable of earning, from \$200 to \$250 per month at his said occupation; and that by reason of the injuries received, he had become wholly incapacitated from following his said occupation; that his capacity to labor and earn money had been very greatly diminished and almost destroyed; that he had been thereby rendered a hopeless cripple for life and had suffered, and would continue to suffer, much physical pain and mental anguish. He sued for \$50,000 damages.

Defendant answered, denying negligence in any of the respects alleged; pleaded contributory negligence on the part of plaintiff, and, further, that at the time of the injury it was engaged in handling and moving interstate commerce, and invoking the federal statutes pertaining thereto; and further pleaded assumed risk.

Plaintiff denied that the defendant and plaintiff at the time of the injury were engaged in interstate commerce, and denied that plaintiff was guilty of contributory negligence or that he assumed the risk incident to the use of the engine with the defective sand pipe aforesaid.

The cause was submitted to the jury on eight special issues upon which the jury found:

(1) That the sand pipe, at the time of the accident, was loose and unadjusted, and unfastened in or near the socket where it should be attached to the sand box.

(2) That the defendant was guilty of negligence in turning the engine over to the plaintiff, for his use as an engineer, in the

condition in which it was at the time of the injury.

(3) That the negligence of the defendant was the proximate cause of the injury suffered by plaintiff.

(4) That the plaintiff was guilty of contributory negligence in placing his foot upon or against, or kicking, the sand pipe at the time and under the circumstances related.

(5) That the plaintiff was injured, substantially, as pleaded.

(6) That the plaintiff will continue to suffer pain and mental anguish as a result of the injury.

(7) That plaintiff's capacity to labor and earn money has been diminished as a result of his injury.

(8) That \$17,500 was a reasonable, fair, and just compensation to him for suffering, loss of time up to the time of the trial, and for diminished capacity to labor and earn money in the future.

Upon this verdict the court entered judgment for plaintiff in the sum of \$17,500, and defendant appeals.

Further pleadings and instructions given and refused by the court will be noted as may be necessary in the course of this opinion.

[1] The first question which we will consider, as raised in appellant's first assignment of error, is: Was the defendant at the time of the injury engaged in interstate commerce? The evidence shows that at the time of the injury the engine was pulling a train composed mostly of coal cars, with some loaded box cars next to the caboose. It is as to these coal cars that the insistence is made that the interstate character of the service was determined. The coal had been mined and purchased by the defendant at points near McAlester, Okl., and had been billed to Denison, Tex., and from Denison had been routed to the Bellemead Yards, some 3 miles north of Waco, Tex. W. E. Florentine, witness for defendant, testified:

That he was car distributor for the defendant railway company, working under the superintendent of transportation, O. O. Smith; that the coal was brought in from Oklahoma to Denison for the use of the company at Smithville, Waco, Ft. Worth, and other points; that the greater part of it was used for engines on its freight and passenger trains, a little being used for stationary engines and some at passenger stations for heating, and some at water tanks for pumping; that coal for engine purposes is placed in coal chutes and the engines are loaded from the chutes; that during February, 1913, the defendant railway company handled through passenger trains through Denison going north, containing passenger coaches, baggage cars, and sleepers, originating at points like Houston and San Antonio; that the division point between the Missouri, Kansas & Texas Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas is Red river, the first-named road operating through Oklahoma and north, and the second lying entirely within Texas; that freight cars coming from the south and going north of Denison were received and some of them were unloaded and reloaded at Denison and some went right

through; that in February, 1913, it was a practice to handle interstate business through Denison, both into and out of the state of Texas; that one of the cars in question was billed from McAlester, account of Adamson, to Denison, February 21, 1913, loaded with mine run coal, and consigned to the Missouri, Kansas & Texas Railway Company of Texas; that this waybill brings it to Denison; that another car was billed "Denison, account Ray Yards, to Smithville, February 23d; that is, Smithville, Texas. Ray Yards is $3\frac{1}{2}$ or 4 miles out of Denison. It is the place freight trains are made up. It shows Denison made this bill for Ray Yards because there is no agent there. No. 3 is B & O 38862 billed North McAlester, account of Adamson, Okl., February 22, 1913, a car of coal for the Katy. This means that North McAlester made the bill because there is no agent at Adamson. The coal, however, was loaded at Adamson, Okl. Adamson is about 13 miles from McAlester on a branch line. No. 4 covers the same car. * * * billed out of Denison, account of Ray Yards, February 23, to Bellemead. * * * I should judge neither of these cars were unloaded at Denison, from the billing, but can't swear they were not."

Further examination of this witness and of other witnesses disclosed that the cars of coal out of Oklahoma were billed to Denison; that some of it was used at Denison in supplying trains and for other purposes, and other cars were from there forwarded under new bills of lading to various points on defendant's lines of railway in the state; that in some instances the coal was forwarded to Texas points in the same cars in which it had been shipped from Oklahoma points, and in other cases the coal was unloaded at Denison, put in chutes, and from the chutes loaded into other cars to be shipped to Texas points.

We think the evidence fully sustained the conclusion that at the time of the shipment from the Oklahoma point of origin there was no other definite point of destination in the mind of the shipper except Denison, and that the further disposition of such shipments was left to be determined after the shipments reached Denison, and depended upon the demand for coal, either at Denison, or at other points in Texas. We are of the opinion that, under this state of facts, the shipment of the cars of coal in the train pulled by the engine of which the appellee was in charge at the time of the injury was not impressed with an interstate character, but constituted an intrastate shipment.

The case of *G., C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, seems to be directly in point. In that case, suit was brought by the state in the district court of Tarrant county, Tex., to recover a penalty for alleged extortion in a charge for the transportation of a carload of corn from Texarkana to Goldthwaite, Tex. It appeared from the findings of the trial court, Associate Justice Dunklin being then the presiding judge of the trial court, that the Texas & Pacific Railway Company executed a bill of lading, by which it acknowledged the receipt from the Samuel Hardin Grain Company at Texarkana,

Tex., of one car of sacked corn, consigned to shippers, with orders to deliver to Saylor & Burnett, at Goldthwaite, Tex. This car of corn was transported by the Texas & Pacific Railway Company to Ft. Worth, there delivered to the Gulf, Colorado & Santa Fé Railway Company, and by it transported to Goldthwaite. Upon its arrival at Goldthwaite, Saylor & Burnett tendered the charges prescribed by the state railroad commission, which the agent declined to accept, and demanded and collected a larger sum. Upon this action by the agent of the railway company, the state brought the suit, alleging extortion as aforesaid. It appeared that the Samuel Hardin Grain Company at Kansas City, Mo., offered to sell to Saylor & Burnett at Goldthwaite, Tex., the corn at an agreed price; that the Hardin Grain Company contracted with the Harroun Commission Company of Kansas City, for the delivery at Texarkana to the Hardin Grain Company of two cars of corn of the prescribed kind; that previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered at Texarkana, and with these two cars it expected to fill, and did fill, the order of the Hardin Grain Company. These cars originated at Hudson, S. D. The contention was made by the state of Texas that the shipment from Texarkana to Goldthwaite was an intrastate shipment, and the claim made by the railway company was that, because of the fact that the shipment had originated in South Dakota, it was an interstate shipment. From a judgment in favor of the state, the cause was appealed to this court, and, in an opinion by Chief Justice Conner (32 Tex. Civ. App. 1, 73 S. W. 429), the judgment was affirmed. A writ of error having been granted by the Supreme Court of Texas, later, in an opinion by Chief Justice Gaines (97 Tex. 274, 78 S. W. 495), this court was sustained. The cause having been carried to the United States Supreme Court, the judgment of the Texas courts was upheld, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. Justice Brewer, in delivering the opinion of the court, says:

"The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment. If so, the regulations of the state railroad commission do not control, and the court erred in enforcing the penalty. If, however, it was a purely local shipment, the judgment below was right and should be sustained. * * *

"The corn was carried from Texarkana, Tex., to Goldthwaite, Tex., upon a bill of lading which, upon its face, showed only a local transportation. It is, however, contended by the railway company that this local transportation was a continuation of a shipment from Hudson, S. D., to Texarkana, Tex.; that the place from which the corn started was Hudson, S. D., and the place at which the transportation ended was Goldthwaite, Tex.; that such transportation was interstate commerce, and that its interstate character was not affected by the various chang-

es of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite.

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana; that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing, the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment, or the place of delivery. The Hardin Company accepted the contract of shipment theretofore made and purchased the corn to be delivered at Texarkana; that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting, not as carrier, but simply as a forwarder. * * * Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn, was a matter immaterial so far as the completed transportation was concerned.

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite."

The above decision was cited with approval by our state Supreme Court in the case of *Texas & Pacific Ry. Co. v. Taylor*, 103 Tex. 367, 126 S. W. 1117, 1200, in which it was held that where property was shipped by rail from one Texas station to another on the Mexican border, and there delivered to the shipper, the contract was intrastate, not international, and was governed by the Texas statute, although the shipper intended to, and did on receiving it, at this destination, re-ship over another line to a point in Mexico.

In *Coley v. K. C. So. Ry.*, 43 Tex. Civ. App. 488, 95 S. W. 96, it was held that where a railroad engaged in putting down new rails on its road shipped rails from one state to another, and the cars in the shipments when they reached the latter point were held until the rails were needed as the work progressed, and then forwarded at different times

and to different points along the road, said cars, after they left the first point of destination within the state, were not used in interstate traffic. In many respects the last-cited case is very similar to the one under consideration, and notably, in that the railway company was the consignor and the consignee both, making the shipment to its own order. It had the rails shipped from Colorado and consigned to it at Mena, Ark. When they reached the latter point, the cars were not unloaded, but were put in the yards and held there until the rails were needed as the work progressed, when, as before stated, the cars were forwarded at different times and to different points along the road.

In *G., H. & S. A. Ry. v. Wood-Hagenbarth Cattle Co.*, 105 Tex. 178, 146 S. W. 538, the Supreme Court, in an opinion by present Chief Justice Phillips, illuminates this question by the use of the following language:

"As to whether the movement of the cattle from Valentine to El Paso was an interstate or intrastate shipment must be determined by the following questions: What was the ultimate destination of the shipment at the time it was made? Though the ultimate destination may have been without the state, was there any break or interruption in the journey by any delivery of the cattle by the carrier to the consignee at El Paso?"

"If at the time the shipment originated its final destination was without the state, and it moved to such destination in a continuous and uninterrupted journey, unaccompanied by any delivery by the carrier to the consignee within the state, it was clearly an interstate shipment under the well-established rules of this court upon this subject. On the other hand, if there was a delivery of the cattle by the carrier to the consignee within the state, it was an intrastate shipment, notwithstanding it may have been the intention of the shipper at the time the shipment was made that it should be transported to a point without the state as its ultimate destination."

By the test hereinabove given by the Supreme Court, we think that the shipment in the instant case is easily distinguishable from those in a number of cases cited by appellant, in which it was held that the shipments were interstate or international in character. For instance, in *T. & N. O. Ry. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442, the United States Supreme Court held, in an opinion by Justice McKenna, that a shipment of lumber destined by the purchaser for export, made by the seller under a local bill of lading from an interior point in Texas to a Texas Gulf port, at which the lumber was unloaded without delay by the purchaser's order into slips or docks, in reach of ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports—such shipment not being an isolated one, but typical of many others—constitutes foreign commerce. In this last-cited case, Justice McKenna cites *G., O. & S. F. Ry. v. State of Texas*, supra, and without in any way disturbing the holding in that case, distinguishes the *Sabine Tram Co.* Case from it, and further says:

"The facts in the case at bar are different. The lumber was ordered, manufactured and shipped for export. And we say 'shipped,' for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one and did not change the relation of the Powell Company to it, and make the lumber other than lumber purchased at Ruliff, and started from there in transportation to a foreign destination. The findings are explicit and circumstantial as to this. And the shipment was not an isolated one but typical of many others, which constituted a commerce amounting in the year 1906 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine."

[2] We do not think that because in the instant case the evidence does not disclose positively whether the coal was in the same cars at Ft. Worth as those in which it was shipped from Oklahoma points, or whether the cars had been unloaded and reloaded at Denison, can be in any way determinative of the issue involved. It is evident that there was no fixed destination in the mind of the shipper at the time of the shipment for these cars except Denison, but that the subsequent disposition and movement of the coal was to be determined after its arrival at Denison. Therefore we conclude that at the time of the injury plaintiff and defendant were not engaged in interstate commerce; and that in this respect the federal statutes have no controlling effect upon the plaintiff's cause of action, but that the same will be governed by the state statutes. Hence we overrule appellant's first, second, third, and fourth assignments, which, in various forms, present this contention.

[3] The special issue contained in defendant's requested charge No. 22, which was refused by the court and the refusal of which is assigned as error, reads:

"Did the plaintiff know, or must necessarily have known in the ordinary discharge of his duties, that said sand pipe was out of adjustment and in a defective condition, and of the danger incident to attempting to move said pipe with his foot, with such knowledge, while said engine was in motion?"

In its answer the defendant specially pleaded that:

"Defendant knew of the condition of said sand pipe, or by the exercise of ordinary care could have known it, and also knew of the damages incident to attempting to move the same, and yet with such knowledge he continued in the employment, and he attempted to move said sand pipe with his foot which he knew to be dangerous, and for that reason he assumed all the risks incident to such defective condition and of the manner in which he attempted to handle and move the same, and by reason of his said knowledge and assumption of the risk he is not entitled to recover against this defendant."

By article 6645, 4 Vernon's Sayles' Texas Civil Statutes, it is provided that the defense of assumed risk in a suit against a railway company for the death or personal injury of

one of its employes, shall not be available in the following cases:

"First. Where such employe had an opportunity before being injured or killed to inform the employer, or a superior intrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify, or cause to be notified, the employer, or superior thereof, within a reasonable time: Provided, it shall not be necessary to give such information where the employer, or such superior thereof, already knows of the defect.

"Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or employe give notice of the defect as provided in subdivision 1 of this article."

Except as so limited by said statute, the common-law defense of assumed risk still obtains. It will be noted that in defendant's plea of assumed risk the exception contained in the second subdivision of the statute was expressly negated. It thus appears that defendant not only tendered the issue whether or not the case came within the exception, but assumed the burden of showing that it did not. And in the special issue requested that question was omitted; neither has appellant cited any evidence to show that the case did not come within the statutory exceptions noted. In view of this condition of the record and as the judgment is to be reversed on another assignment, we deem it unnecessary to discuss the question of whether or not, in the absence of evidence showing that the case came within one or the other of the statutory exceptions noted, the assignment now under discussion should be sustained.

[4] In the opinion of the majority, what has been said with reference to the failure to submit special issue No. 22, is applicable to the objection urged to the refusal to give special charge No. 4, involving the question of assumed risk on the part of plaintiff in attempting to push the sand pipe back in line with his foot while the engine was in motion, and instructing the jury that if they found that plaintiff could easily have stopped his engine, and that if he had stopped it and had then attempted to adjust said sand pipe with his foot, the accident would not have occurred, they would find for the defendant. This charge, not including the special exceptions contained in article 6645 supra, did not give the plaintiff the benefit thereof.

The writer does not concur fully with the disposition of these two assignments, and were not the judgment of this court to be determined by other questions hereinafter to be discussed, he would feel impelled to embody in a dissenting opinion his views with reference thereto; but, as it is, he will content himself with this expression of his dissent from the views of the majority above expressed.

[5, 6] In the seventh assignment, complaint is made of the submission of special issue No. 8a, as follows:

"What sum of money, which if paid now, would be a reasonable, fair, and just compensation to him for mental and physical pain, if any, resulting and such as may result from the injuries received by him, if any, and also the reasonable value of his services for the time lost, by reason of his injury, up to this time, if any, and also for his diminished capacity to labor and earn money in the future, if any.

"In answering this question, should you, in response to the issue of contributory negligence, have found the plaintiff was guilty of contributory negligence, then you will take such contributory negligence into consideration in estimating said sum, and diminish the amount of the damages found by you in proportion to the amount of negligence which you attribute to the plaintiff, as compared to the combined negligence of both the plaintiff and the defendant. If you have found him not to have been guilty of contributory negligence, you will not diminish his damages in the amount you find as indicated above."

Defendant presented a special charge, which included the submission of the following issue:

"How much should plaintiff's damages be diminished as a result of his own contributory negligence?"

To the failure of the court to submit this charge and issue error is assigned under the eighth specification. We are of the opinion that the court should have submitted the issues so that the jury would have been instructed, either to find separately the amount of damages the plaintiff had sustained, and the amount to which they should be reduced because of plaintiff's contributory negligence, if they should find contributory negligence, or the proportion or relation which plaintiff's contributory negligence bore to the combined negligence of defendant and plaintiff. By this means only could the trial court, or can this court, determine the amount of damages that the jury believed the plaintiff had suffered, independent of the question of contributory negligence, and the proportionate relation that plaintiff's contributory negligence bore to the combined negligence of plaintiff and defendant.

Under the particular facts of this case, this court is entitled to know, as was the trial court, what was the basis of the finding of the jury as to the sum allowed plaintiff as damages, so that the question of the sufficiency or excessiveness thereof may be intelligently determined. From the verdict no one can tell what sum the jury found plaintiff would have been entitled to if no question of contributory negligence had been involved, nor how much such sum was reduced, if at all, by reason of the contributory negligence found. Neither can it be told what proportion of the combined negligence involved was held by the jury chargeable to the plaintiff. It is true every reasonable presumption should be entertained in support of the judgment rendered, and that a special verdict should be liberally construed so that it will stand, rather than fall. *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618. But in this case, both by objection to the form of

the issue as submitted, and by two special charges and issues requested, was the matter brought to the attention of the court.

[7] A special verdict must directly, fairly, and fully submit to the jury the material issues in the case, and should be sufficiently certain to stand as a final decision of the special matters with which it deals. *Kirby v. P. & G. R. Co.*, 39 Tex. Civ. App. 252, 88 S. W. 281; *Dunlap v. Canal & Mill Co.*, 43 Tex. Civ. App. 269, 95 S. W. 43; *State v. Hanner*, 143 N. C. 632, 57 S. E. 154, 24 L. R. A. (N. S.) 46.

[8] The difficulty that may be presented to a court, whether trial or appellate, in determining whether the verdict and the judgment thereon is excessive, confronts us here, because in one of its assignments the appellant charges the verdict and judgment is excessive. We are unable from the record to say whether the jury found large damages to plaintiff, say in the sum sued for, to wit, \$50,000, and reduced it to the sum recited, \$17,500, because of the great contributory negligence of plaintiff; or whether they found the sum to which plaintiff would have been entitled, irrespective of contributory negligence, was only slightly in excess of the special verdict rendered, say \$18,000, but further found that plaintiff's negligence was slight as compared with defendant's, and therefore plaintiff's damages should be reduced only in a negligible manner.

We are of the opinion that the contention of appellant, as presented in the seventh, eighth, and ninth assignments, should be sustained. *Darden v. Mathews*, 22 Tex. 320; *Mussina v. Shepherd*, 44 Tex. 623; *G., H. & S. A. Ry. v. Botts*, 22 Tex. Civ. App. 609, 55 S. W. 514; *Waco Cement Stone Works v. Smith*, 162 S. W. 1158; *Railway v. McClellan*, 173 S. W. 258; *Du Bose v. Battle*, 34 S. W. 148.

Article 6649, Vernon's Sayles' Texas Civil Statutes, provides that in the event of contributory negligence in this kind of a case, "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." We have no way of determining whether this statutory requirement was complied with or not. The proportion that this contributory negligence bore to the combined negligence was one of the vital issues in the case, and in our opinion should have been submitted, when properly requested, in some succinct and definite form for a finding by the jury, and the failure to so submit it constitutes, as we think, reversible error.

[9] The questions presented in assignments 10 to 15, inclusive, attacking the findings of the jury (1) because the same, as claimed, are vague, obscure, etc., and (2) because the verdict is excessive, are disposed of by what we have said with reference to assignments 7 to 9 above. Nor do we find any error in the charge of the court, as urged in the sixteenth specification, to the effect that

it was the duty of defendant to exercise ordinary care to furnish plaintiff an ordinarily safe machine or engine with which to perform the services required of him, etc., as well as to exercise ordinary care to have the same inspected and repaired when out of repair. The contention is made that this charge authorized the jury to find acts of negligence on the part of the defendant not pleaded. Plaintiff's petition alleged that the engine was out of repair in respect to the condition of the sand pipe, and that defendant was guilty of negligence in permitting such condition to occur and continue, and in not having the engine inspected. This charge only purported to define the general duty of the defendant with reference to furnishing equipment and appliances. Later in the charge, the court restricted, by the submission of the special issues 1a and 2a, the right of recovery to the specific act of negligence charged. We do not think the holding in *S. A. & A. P. Ry. v. Weigers*, 22 Tex. Civ. App. 344, 54 S. W. 910, cited by appellant, is applicable to the question herein involved. In the cited case plaintiff relied on the alleged negligent act of defendant's foreman in attempting to bolt certain timbers overhead at the time plaintiff was engaged underneath in repairing a bridge; said foreman's acts being alleged to have caused the embankment to cave. It was evident from the pleadings that defendant's alleged negligence was not predicated upon a want of care in failing to furnish plaintiff a reasonably safe place in which to work. Hence the holding.

[10-12] We do not find any error in permitting plaintiff to testify that "from his experience and observation and knowledge of machinery, locomotive engines, etc., it was the custom and practice, when a sand pipe was out of line so as to throw the sand away from the rail, for an engineer to put his foot against it and push it around," as complained of in the seventeenth assignment. It is true that a defendant railroad, in order to avoid the charge of negligence, may not rely upon the fact that certain other railroads do not perform the duty, the violation of which is the subject of the complaint in plaintiff's petition, as held in *Railway v. Evansich*, 61 Tex. 3. Nor can a railway company be held guilty of negligence per se for failure to take certain precautions which certain other railways may observe, as announced in *Railway v. Nelson*, 20 Tex. Civ. App. 536, 49 S. W. 710. Yet in order to affect the degree of plaintiff's contributory negligence, if any, we think it was admissible to show that in performing the act of pushing the sand pipe with his foot, plaintiff was following the custom and practice of engineers generally. *Railway v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362 (writ denied); *Railway v. Hays*, 40 Tex. Civ. App. 162, 89 S. W. 29; *Railway v. Schilling*, 32

Tex. Civ. App. 417, 75 S. W. 64. In *Railway v. Puente*, supra, Justice Neill says:

"Generally, the question of negligence is of such a character that it may be presumed that jurors are competent to decide the question, upon ascertaining the immediate facts, upon being informed as to the law by the court. But in cases where the question involved is of such a character that the jury will be aided by being advised of the practice of others under like circumstances, such evidence is competent, at least where the custom is a general or universal one"—citing *Gillette Ind. & Col. Ry. § 128*; *Railway v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Railway v. Nelson*, 20 Tex. Civ. App. 536, 49 S. W. 710.

If the manner of remedying, or attempting to remedy, the defect followed by plaintiff was in accord with the usual custom of engineers under similar circumstances, as pleaded and testified to by plaintiff, such a custom might reasonably be presumed to have been acquiesced in, if not adopted, by railroads generally, including defendant, as held in the *Hays Case*, supra.

[13] Without further enlarging this opinion, already too long, we will content ourselves with stating that we do not find any error in permitting plaintiff to testify that he did not believe it was possible for a man to have loosened with his foot the sand pipe at the point where it was joined onto the cylinder. In so stating, he was testifying as an expert, with an experience with engines covering a period of more than 35 years.

For the errors mentioned above, it is the order and judgment of this court that the judgment of the trial court be reversed, and the cause remanded.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. KERR. (No. 831.)

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 29, 1916. Rehearing Denied March 4, 1916.)

1. APPEAL AND ERROR ⇐1064(1)—TRIAL ⇐229—CARRIAGE OF LIVE STOCK—INSTRUCTIONS—REPETITION.

In a suit for damages to a shipment of cattle, an instruction repeating all the issues of negligence which had already been submitted in the instructions gave undue emphasis to those issues, harmful to the defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4219; Dec. Dig. ⇐1064(1); Trial, Cent. Dig. §§ 475, 513, 525, 553; Dec. Dig. ⇐229.]

2. EVIDENCE ⇐474(19)—OPINION EVIDENCE—VALUE OF LIVE STOCK—KNOWLEDGE OF WITNESS.

In a suit for damages to a shipment of live stock, where a witness for plaintiff had testified that he did not know the market value of such cattle at destination, his estimate that, if the cattle had reached destination in good condition, they would have been worth on the market from \$1.50 to \$2.50 a head more than in the condition when they arrived, was a mere guess, and inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2218; Dec. Dig. ⇐474(19).]

3. TRIAL \Leftrightarrow 251(3)—INSTRUCTIONS—APPLICABILITY TO PLEADING AND ISSUES.

In a suit for damages to a shipment of cattle, where defendant made a general denial of its negligence, it was entitled to an instruction that if any of the alleged injuries to the cattle were due to the inherent nature or proper vice of the animals, and not caused by any alleged negligence on its part, no damages could be allowed for such injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 590; Dec. Dig. \Leftrightarrow 251(3).]

4. CARRIERS \Leftrightarrow 227(3) — INJURY TO LIVE STOCK—PLEADING.

In such suit, it was not necessary for defendant to specially plead the defense of injury from the inherent propensities of the animals, but proof thereof would be admissible under its general denial of the negligence charged against it, unless it could be said that the evidence showed some inherent vice in the particular cattle not common to cattle generally.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 956; Dec. Dig. \Leftrightarrow 227(3).]

5. TRIAL \Leftrightarrow 253(1)—INJURY TO LIVE STOCK—INSTRUCTIONS—IGNORING ISSUES.

In a suit for damages to a shipment of cattle based on allegations of negligence in several respects, an instruction submitting the converse of the theories on which plaintiff was to recover, omitting one of the issues of negligence, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 614; Dec. Dig. \Leftrightarrow 253(1).]

6. APPEAL AND ERROR \Leftrightarrow 216(1) — ASSIGNMENT OF ERROR—REQUESTS FOR INSTRUCTIONS.

In such case, defendant could not be heard to complain of the omission in the appellate court, in the absence of a requested instruction thereon.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \Leftrightarrow 216(1); Trial, Cent. Dig. § 637.]

7. TRIAL \Leftrightarrow 252(7) — INSTRUCTIONS — CONFORMITY TO EVIDENCE.

In a suit for damages to a shipment of cattle, where there was no evidence of a want of care in loading the cattle, an instruction that a want of care would be negligence was without support in the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 602; Dec. Dig. \Leftrightarrow 252(7).]

8. APPEAL AND ERROR \Leftrightarrow 1058(1)—HARMLESS ERROR—CUMULATIVE EVIDENCE.

In a suit for damages to a shipment of cattle, the refusal to admit a record made by a witness who was live stock inspector at the market and who inspected the cattle on arrival, purporting to show the condition of the cattle and of the car, was not error, where the witness testified to the same facts from actual memory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. \Leftrightarrow 1058(1).]

Buck, J., dissenting in part.

Appeal from Tarrant County Court; Chas. F. Prewitt, Judge.

Suit by Edgar Kerr against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Thompson & Barwise and George Thompson, Jr., all of Ft. Worth, for appellant. Templeton & Milam and C. A. Wright, all of Ft. Worth, for appellee.

DUNKLIN, J. Edgar Kerr instituted this suit against the St. Louis Southwestern Railway Company of Texas to recover damages for alleged injuries to a shipment of cattle over the defendant's railway from the town of Commerce, to the city of Ft. Worth, and from a judgment in plaintiff's favor the defendant has appealed.

The suit was based upon allegations of negligence in the following respects: (1) In failing to provide suitable pens at Commerce for holding the stock until they could be shipped; (2) that the cattle were held in such pens awaiting shipment for an unreasonable length of time; (3) that the cars in which the cattle were shipped were overloaded; and that, after starting them from Commerce to Ft. Worth, they were roughly handled and unreasonably delayed. By reason of all of which alleged negligence plaintiff claimed that the cattle were crippled and bruised, suffered a shrinkage in flesh, and became stale in appearance, and thereby their market value was greatly depreciated.

The first four paragraphs of the court's charge were as follows:

"(1) 'Ordinary care,' as that term is used in this charge, means such care as a person of ordinary caution or prudence would use under the same or similar circumstances. A failure to use such care constitutes negligence.

"(2) It was the duty of the defendant to exercise ordinary care to keep and maintain its stock pens at Commerce in reasonably good condition for the handling of such stock as were tendered to it for shipment at such station, and a failure so to do would constitute negligence.

"(3) It was also the duty of the defendant to exercise ordinary care to run and operate its freight trains for the transportation of freight over its lines of railway at regular times, and to operate same for the transportation of such freight as was tendered to it for shipment with ordinary care and dispatch, and a failure so to do would constitute negligence.

"(4) It was also the duty of the defendant, upon receiving plaintiff's cattle in its shipping pens at Commerce, to exercise ordinary care to load and transport said cattle at and from said station to their destination at Ft. Worth within a reasonable time; and it was further the duty of said defendant to so transport said cattle, and to handle them while in its possession with ordinary care and dispatch, and to avoid injuring them unnecessarily. A failure to exercise such care in loading handling and transporting said cattle would be negligence."

[1] In the fifth paragraph of the charge, the same issues of negligence already submitted in the second, third, and fourth paragraphs were again submitted, in connection with an instruction that if any one or more of such allegations of negligence was or were sustained by proof, and if the jury should find that the same was the proximate cause of the alleged injuries to the cattle, if any, and their market value was thereby depreciated, then a verdict should be returned in favor of the plaintiff for the amount of such depreciation. We are of the opinion that, in thus repeating in the fifth paragraph all of the issues of negligence which had already

been submitted in the preceding paragraphs, undue emphasis was given to those issues which was probably harmful to the appellant, as insisted in one of its assignments of error.

[2] Marvin Thompson, a witness for the plaintiff, over the defendant's objection was permitted to testify that, if the cattle had reached Ft. Worth in good condition they would have been worth on the market from \$1.50 to \$2.50 per head more than they were worth in the condition they were in when they reached their destination. This witness had already testified that he did not know the market values of such cattle in Ft. Worth, and, based upon that testimony, the defendant objected to the estimate already mentioned, for the reason that he had not properly qualified to give such estimate. Under the circumstances, the estimate of damages so given by the witness necessarily involved a mere guess, and the objection urged to it should have been sustained. A different question would have been presented if the witness had estimated the depreciation on a percentage basis, rather than in specified sums. *H. B. & T. Ry. v. Vogel*, 156 S. W. 261.

[3, 4] We are of the opinion, further, that the court should have given an instruction to the jury, in effect, that if they should find that any of the alleged injuries to the cattle were due to the inherent nature or proper vice of the animals, and not caused by any alleged negligence on the part of the defendant, then for such injuries no damages could be allowed. Nor do we think that it was necessary for the defendant to specially plead that defense, unless it could be said that the evidence showed some inherent vice in these particular cattle which was not common to cattle generally. Certainly, proof upon that issue would be admissible under the general denial of the negligence that was charged against the defendant, and, such being true, the defendant would be entitled to an instruction presenting such facts affirmatively in the court's charge. *Wells Fargo Express Co. v. Benjamin* (Sup.) 179 S. W. 513; *F. W. & D. C. Ry. v. Berry*, 170 S. W. 128.

It may be, as insisted by the appellee, that the requested instruction upon that issue was argumentative in form, and therefore properly refused; but even if that be true, the court should have given a proper instruction in the main charge presenting that defense, in view of the exception taken to the action of the court at the time in failing so to do, and which refusal is made the basis of another assignment of error. *Olds Motor Works v. Churchill*, 175 S. W. 785.

We are of the opinion that by reason of the three errors noted above, considered as a whole, the judgment should be reversed, and the cause remanded, even though it could be said that any one of those errors considered alone would not be sufficient to require such reversal.

[5-7] We deem it proper to notice two other criticisms made by appellant of the court's charge, neither nor both of which would constitute reversible error, but which should be avoided upon another trial; one of which is that, in submitting the converse of the theories upon which plaintiff sought a recovery, one of the issues of negligence was omitted. Of course, defendant could not be heard to complain in this court of that omission, in the absence of a requested instruction thereon. The other criticism is to that part of the fourth paragraph of the charge wherein the jury were told, among other things, that a failure to exercise care in loading the cattle would be negligence. The complaint made of that instruction is that there was no pleading or evidence raising that issue, which contention is borne out by the record. It is not probable that, reading paragraph 4 of the charge as a whole, the jury interpreted it in the manner suggested by the criticism mentioned. But we suggest that it would be advisable to so frame the charge on another trial as to avoid that criticism.

[8] We are of the opinion that there was no error in the court's refusal to admit in evidence a certain record made by the witness A. J. Ankerson, live stock inspector at Ft. Worth, who inspected the plaintiff's cattle at the time they were unloaded in Ft. Worth, such record purporting to show the condition of the cattle and of the car at that time, especially as the witness testified to the same facts from actual memory.

For the reasons noted, the judgment is reversed, and the cause remanded.

BUCK, J., dissenting to action of majority on fifth assignment, but concurring in the reversal of judgment on other assignments.

MUTUAL FILM CORP. v. MORRIS & DANIEL. (No. 8303).*

(Court of Civil Appeals of Texas. Ft. Worth. Jan. 15, 1916. On Motion for Rehearing, Feb. 26, 1916.)

1. CONTRACTS \S 10(4) — UNILATERAL CONTRACT.

The contract is unilateral, and so terminable at the will of either party, where, though defendant agreed to furnish films so long as plaintiffs continued in business, plaintiffs did not agree to take them for such, or any, definite period.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 37; Dec. Dig. \S 10(4).]

On Motion for Rehearing.

2. STATUTES \S 276(1)—REPEAL—EFFECT.

Act March 3, 1913 (Acts 33d. Leg. c. 127) \S 4, amending Rev. St. 1911, art. 1902 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 1902), to provide that a fact alleged in the petition, not being denied by the answer, shall be taken as confessed, being remedial, is not available on appeal, where repealed after the trial.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 371; Dec. Dig. \S 276(1).]

3. PLEADING \Leftrightarrow 412—MATTERS OF COMPLAINT NOT DENIED—REQUEST TO COURT.

That plaintiffs may avail of Act March 3, 1913, § 4, amending Rev. St. 1911, art. 1902, to provide that a fact alleged in the petition, not being denied by the answer, shall be taken as confessed, the court's attention must be called to the fact, and request be made that the allegation be taken as confessed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. \Leftrightarrow 412.]

4. CONTRACTS \Leftrightarrow 28(3)—UNILATERAL CONTRACT—EVIDENCE.

Evidence, in an action for breach of defendant's agreement to furnish films to plaintiffs so long as they remained in business, held to fail to show that plaintiffs agreed to take and pay for them for such period, so as to prevent the contract being unilateral.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1820, 1821; Dec. Dig. \Leftrightarrow 28(3).]

5. APPEAL AND ERROR \Leftrightarrow 1175(5)—REVERSAL—RENDERING OR REMANDING.

Where though the necessity of proof by plaintiffs of the material allegation of the complaint, of agreement on their part, could not well have escaped their attention, and they offered the testimony of the only persons by whom it seems the necessary proof could be made, and they testified, apparently, fully, without making the proof, and plaintiffs in their motion for rehearing set forth no fact or circumstance tending to show that full opportunity was not afforded for a full development of the case, the provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1626, that, when judgment is reversed, the court shall render such judgment as the court below should have rendered, and not the exception, that when it is necessary that some matter of fact be ascertained, the cause shall be remanded for a new trial, is applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4579; Dec. Dig. \Leftrightarrow 1175(5).]

6. APPEAL AND ERROR \Leftrightarrow 768—BRIEFS—STATEMENT—FAILURE TO CONTEST.

By express provision of Court of Civil Appeals rule 41 (142 S. W. xiv), whatever of the statements in appellant's brief is not contested will be considered as acquiesced in.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8103; Dec. Dig. \Leftrightarrow 768.]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by Morris & Daniel against the Mutual Film Corporation. Judgment for plaintiffs, and defendant appeals. Reversed and rendered.

Smith, Robertson & Robertson, of Dallas, for appellant. Eugene De Bogory, of Abilene and W. L. Morris, of Albany, for appellees.

CONNER, C. J. This appeal is from a judgment for \$1,750 in appellees' favor as damages for breach of an alleged contract made with the appellant corporation.

[1] Premitting as immaterial a discussion of a number of assignments presented, we go at once to the vital question in the case. The appellees alleged that they were engaged in exhibiting moving picture films in the city of Abilene; that upon the date stated the appellant corporation agreed to furnish appellees with moving picture films delivered in Abilene weekly at a rental of \$28-

50 per week, "so long as the plaintiffs continued in the picture show business in Abilene." It was alleged that the appellees agreed to take and use the films at the price and upon the terms stated "as long as the plaintiffs continued in the picture show business in Abilene." The evidence possibly supports the finding of the jury to the effect that the appellant corporation agreed to furnish films as alleged, but, as presented, we find the evidence wholly wanting to support the allegation of an agreement on appellees' part to take the films at the price and for the period specified. The contract, therefore, is so plainly unilateral, and terminable at the will of either party that it seems only necessary to cite some of the authorities. See *H. & T. C. Ry. Co. v. Mitchell*, 38 Tex. 86; *Kraft Holmes & Co. v. Sims*, 1 White & W. Civ. Cas. Ct. App. § 404; *Richardson v. Hardwicke*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; *Dorsey v. Packwood*, 12 How (U. S.) 126, 13 L. Ed. 921; *Oil & Pipe Line Co. v. Teel*, 95 Tex. 591, 68 S. W. 979; *Tyler Ice Co. v. Coupland*, 44 Tex. Civ. App. 383, 99 S. W. 133; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *E. L. & R. R. R. Co. v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; *A. Santaella & Co. v. Otto F. Lange Co.*, 155 Fed. 719, 84 C. C. A. 145; *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *Fowler Utilities Co. v. Gray*, 167 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344; *Bradshaw v. Terrell Foundry & Mach. Co.*, 104 S. W. 509.

The contract, under the circumstances proven being terminable at the will of either party, was unenforceable, and appellant's failure to continue furnishing films, as charged in the appellees' petition, furnishes no legal ground for redress. We, accordingly, sustain appellant's assignments attacking the action of the court in submitting the issue, the verdict of the jury thereon, and the judgment in appellees' favor.

The conclusions so announced require of us a reversal of the judgment and a rendition of the judgment in appellant's favor, and it is accordingly so ordered.

On Motion for Rehearing.

[2, 3] Appellees urgently insist that we erred in reversing the judgment herein because of a want of evidence, for the reason that in appellant's answer there was no special denial of plaintiffs' allegation that appellees "agreed" to take and use the films, which were the subject-matter of the controversy, "at the price and upon the terms stated as long as the plaintiffs continue in the picture show business in Abilene." And they cite section 4 of the act of the Thirty-Third Legislature, approved March 3, 1913, amending article 1902 of the Revised Statutes. (Vernon's Sayles' Ann. Civ. St. 1914, art. 1902). The amended article reads, in part:

"The defendant in his answer shall plead to each fact alleged in the plaintiff's petition, and either admit or deny the same, or deny that he has any knowledge or information thereof sufficient to form a belief. And any fact not denied by the defendant or which he does not deny that he has any knowledge or information thereof sufficient to form a belief shall be taken as confessed," etc.

It is true that in the defendant's answer there was no specific denial of the allegation quoted. But since the trial below the act quoted has been repealed by act approved March 22, 1915. See General Laws 1915, p. 155. The statute above quoted, being remedial in its nature, is, in consequence of the repeal; therefore no longer available even in this court. See *Etter v. Missouri Pac. Ry. Co.*, 2 Willson, Civ. Cas. Ct. App. § 60, and authorities therein cited. See, also, 36 Cyc. p. 1228, § G. Moreover, it has been the holding of this court, as well as of other courts, that in order to entitle a party to avail himself of the right conferred by section 4 of the act of 1913, because of a want of a verified denial of a material allegation, it is necessary that the court's attention be called to the fact, and request be made that the allegation be taken as "confessed," as provided in the section quoted. *Ashcroft v. Stephens*, 16 Tex. Civ. App. 341, 40 S. W. 1036; *Railroad Co. v. Dye*, 70 Fed. 24, 16 C. C. A. 604; *T. & P. Ry. Co. v. Tomlinson*, 169 S. W. 217. The record fails to show that appellees excepted to any part of appellant's answer for a want of verification, or that request was made of the trial court that any part of the appellees' petition be taken as confessed. We are of the opinion, therefore, that appellees' first ground of error in the motion for rehearing must be overruled.

[4-8] It is further insisted that we erred in rendering the judgment rather than in reversing the cause for another trial. Appellees, in support of this ground of the motion, invoke article 1626 of Vernon's Sayles' Texas Civil Statutes, which reads that:

"When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained, or the damages to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below."

We were not unmindful of this provision of our statutes in announcing our original conclusion. But the record shows that the trial proceeded upon the appellees' fourth amended original petition, their first supplemental petition, and a trial amendment, and upon defendant's first amended original answer and its first and second supplemental answers. And the necessity on appellees' part to, among other things, prove the very material allegation that they had agreed to take and pay for the films promised by the appellant corporation could not very well have escaped the attention of the parties and of the court, as it seems to us. Upon

this point it further appears that the appellees offered the following testimony, and none other that materially affects the issue, viz.:

Charlie Morris, one of the appellees, after having testified that the appellees had leased the film business in Abilene in October, 1913, and after having testified that he had communicated with Charles Touchon of the appellant film company, requesting a continuance of the service by shipping films to the appellees, to which Touchon consented, and after having further testified that there was "not anything said over the telephone then about how long we were to get the service; there was no agreement over the telephone about how long we were to get the service," further testified:

"I did not talk with the Mutual people any more until in January, 1914, in regard to a contract. I then talked with Touchon, at the Mutual Film Exchange in Dallas. When I was in Dallas in January, I told Touchon that I had heard that there was a party in Abilene trying to get our service, and that is what I came to Dallas for, and to see about service for a new theater we had opened here. 'Well,' he says, 'there is nobody trying to get your service, Morris,' and he says, 'They could not get it if they wanted it.' He says: 'Our business relations have been very pleasant, and we don't do that kind of business. We don't take service away from a man as long as he pays for it.' I asked him about service for the Gem Theater, and he did not know where I could get service. I asked him about the Universal service. He said it was no good. We then had a conversation in the back part or the center part of the building in regard to some features we were looking over—some new advertising matter; big post cards and big photographs—and I booked some features with him. By 'booking' I mean contracting for it. A feature film is a special film on any special feature that is not in the regular service. It is called a feature, that might be from one to ten reels. That is a special, booking a feature is contracting for it; that is, contracting to run a feature separate from the regular program on a certain day or a certain price. We were going to run this at the Jewel Theater in Abilene. Touchon patted me on the back, and says, 'You go back to Abilene and boost your business and rest easy.' He says, 'There is nobody going to get your service.' Nothing else specially was said. He said he would continue shipping to Abilene just like he always had at the same price, and wanted to know if I wanted any new machine or anything for the new theater. He tried to sell me a motograph picture machine for the Gem Theater. At that time, the Gem Theater was located in Abilene. The theater that we were running at that time was located at Abilene in the Jewel Theater building. We had the Airdome then. * * * I don't know how long I was in the office, 30 or 40 minutes. I was back there that day, and back there the next day. We were talking most of the time. That is all that I can recall that was said. We were not using any other films, at that time, than the Mutual Film. I don't recall anything else that was said specially, except that Mr. Touchon told me there was nobody trying to get the service, and could not get it if they wanted it; that we could have it just as long as we paid for it, and as long as we was in the show business in Abilene. * * * There had not been any interruption in the service of the Mutual Film Company from the beginning, and after the conversation with Mr. Touchon that I have testified about up to May 15, 1914, the time asked about. We got films

every day except Sunday. We didn't get films on Sunday. We got a regular program of three films a day. I received the telegram which you now show me. This telegram is directed to 'Morris and Daniel, Abilene, Texas, Jewel Theater.' And reads as follows: 'Please make other arrangements for service after Saturday May sixteenth. Mutual Film Corp. of Texas. 9:27 P. M.' * * * There is another part of the conversation that I did not recall this morning, in regard to keeping the service in the Jewel Theater. Mr. Touchon said that there could not anybody get our program, and that we were to have it exclusively; that no other show in town could get it, and that we could have it as long as we paid for it, and as long as we was in the show business in Abilene, and that he would continue to deliver films to Abilene just like he had been in the past. * * *

L. E. Keys testified:

"My name is L. E. Keys. I live in Abilene. At one time, I lived in Dallas. While I lived in Dallas, I met Charlie Morris there at one time. I met Charlie at the Interurban Station, and we went over to some film exchange. At the film exchange, I saw this gentleman that was sitting right over there a while ago, with the light hair. I heard a conversation between he and Charlie. I don't know that I can explain just every word that was said between them, but it was something in reference to the films that they were using. Charlie says, 'I heard that you was going to take them away from me,' or something that way. He says, 'Oh, well, there is nothing to it that I know of, as long as you pay for them; everything has been satisfactory so far.' He said there was nothing to what Charlie had heard. Well, they went on and talked about something else—I don't know what all they did say—and then they got up and went in the back end of the building—of the office."

On cross-examination he testified:

"As to how it happened that I went over to the film place with Charlie Morris, I was going down the street and met Charlie there. * * * I could not say what the name of that Film Exchange was. * * * I saw Touchon there. He is the man that was sitting there. * * * No one else was with Morris at that time. I went inside of the place; that is, on the inside of the exchange. When I first saw Touchon, he was at his desk there inside of a railing. I did not have any conversation with Touchon. Morris just introduced me to him, and he asked me if I was in the moving picture business, and I told him no, and I think that is all the words we said. As to how long a time Morris was talking to Touchon, I suppose we stayed there maybe 20 or 30 minutes; something like that. We were inside the railing, both of us. * * * I might have heard all of the conversation, but I was not interested in it, and I don't know anything about it. I did not pay any particular attention to it; nothing more than I would, just being in conversation anywhere with any one else. * * * They talked there where I was something like 20 minutes, and then they got up and went in the back end of the building. I never went back there with them at all, I stayed there until he came back, and when he came back, I got up and went on off with him. * * * The portion of the conversation that I remember when we went in there was that Morris introduced me to this man, and Morris says, 'I heard something about you going to let somebody else have my business' or something in regard to that. * * * He told Morris that he had not heard anything about it, and he asked Morris if that is what he came to Dallas for, or something that way. Morris had put up another show, and Morris asked him about getting films for the other show. Morris asked him

where to get them, and he told Morris he did not know where Morris could get service. Morris asked him something about features. Now, I don't know what there is about that. I don't know what the features are, and when they went in the back end of the house, I never heard any more of the conversation. He told Morris that as long as he paid for them, and paid him what he owed him, he did not see why he should change, or something in regard to that. That is what Mr. Touchon said."

Touchon, while testifying, denied that any agreement was made, but, regardless of this denial, we think the conclusion is inevitable that the evidence quoted fails to show that appellees "agreed" to take and pay for the films as they alleged. In addition to this, the want of this proof was specifically pointed out on the original hearing under appellant's second assignment of error, excepting to the refusal of the court to give a peremptory instruction as requested, where, among other things, it was stated in appellant's brief that:

"There was no evidence that the plaintiffs agreed to use defendant's films in their picture show at Abilene as long as they remained in the picture show business in Abilene."

Appellees made no answer to this assignment, and made no denial of the statement so made in appellant's brief. And rule 41 (142 S. W. xiv), promulgated for the government of this court, expressly declares that:

"Whatever of the statements of the appellant or plaintiff in error in his brief is not contested will be considered as acquiesced in."

In the foregoing condition of the record before us, we fail to see any necessity for remanding the cause in order "that some matter of fact be ascertained." Appellees offered the testimony of the only persons by whom it seems the necessary proof could be made. These parties testified, apparently, fully, upon the trial, and appellees in their motion for rehearing set forth no fact or circumstance which tends to show that full opportunity was not afforded by the trial court for a full development of the case. It is apparent that other contingencies mentioned in article 1626 have no application to the present case.

We, accordingly, adhere to our original conclusions and overrule the motion for rehearing.

GERMO MFG. CO. v. COLEMAN COUNTY.
(No. 5593.)

(Court of Civil Appeals of Texas. Austin.
March 1, 1916. Rehearing Denied
April 5, 1916.)

1. COUNTIES \S 113(1) — COMMISSIONERS' COURT—POWERS—CONTRACTS.

The commissioners' court has charge of the business affairs of the county, and it alone has authority to make contracts binding upon the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 176; Dec. Dig. \S 113(1).]

2. COUNTIES \S 113(6) — COMMISSIONERS' COURT—AGENT—SHERIFF.

The commissioners' court may act through an agent appointed by them, and a sheriff not appointed by them to purchase for the county was not their agent by virtue of his office.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 174, 180; Dec. Dig. \S 113(6).]

3. COUNTIES \S 124(2) — UNAUTHORIZED ACT OF AGENT—COMMISSIONERS' COURT—RATIFICATION.

A county, through the only agency by which it can act, that is, its commissioners' court, may ratify the act of one assuming without authority to be its agent, but the sheriff's use of disinfectants purchased by him without authority, over the protest of the court, was not a ratification; as one cannot constitute himself the agent of another against the other's protest and then ratify his unauthorized act so as to bind such other.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 185; Dec. Dig. \S 124(2).]

Appeal from Coleman County Court; W. Marcus Weathered, Judge.

Suit by the Geromo Manufacturing Company against Coleman County. Judgment for defendant, and plaintiff appeals. Affirmed.

J. P. Ledbetter and Woodward & Baker, all of Coleman, for appellant. Snodgrass, Dibreil & Snodgrass and Critz & Woodward, all of Coleman, for appellee.

Findings of Fact.

JENKINS, J. On February 25, 1912, and for some time prior and subsequent thereto, W. L. Futch was sheriff of Coleman county. On that date he gave an order to appellants to ship certain disinfectants to appellee, signing said order "W. L. Futch, Sheriff." Disinfectants were necessary to maintain the Coleman county jail in a sanitary condition, and the disinfectants so ordered were received by the sheriff and used by him and his jailer in disinfecting the jail. The account for such disinfectants was presented to the commissioners' court of Coleman county and disallowed, whereupon this suit was brought.

On June 13, 1911, the commissioners' court of Coleman county passed an order that no one except said court would be permitted to purchase disinfectants for the courthouse or jail. This order was on that date entered of record in the minutes of the court, and the sheriff was informed thereof. Upon the trial hereof Futch testified that no one instructed him to buy the disinfectants, that he did so "on his own hook," and that he did not consider it any of the commissioners' court's business.

Prior to February 25, 1912, the commissioners' court contracted with local druggists to furnish disinfectants for the courthouse and jail, but the sheriff refused to use the same or to allow any portion thereof to be brought in the jail. Subsequent to the receipt of the disinfectants the county judge and commissioners went to the jail and told the party that they there found in charge not to use the disinfectants bought by the sher-

iff, but to use those bought by the county. The sheriff refused to allow the jailer to comply with this request.

Upon the trial of this cause the county judge instructed the jury to return a verdict for the defendant. They did so, and judgment was entered accordingly, from which judgment this appeal is prosecuted.

Opinion.

[1] The court did not err in peremptorily instructing the jury to return a verdict for appellee. The commissioners' court have charge of the business affairs of the county, and they alone have authority to make contracts binding upon the county. *Ferrier v. Knox County*, 33 S. W. 896; *Lumber Co. v. Van Zandt County*, 77 S. W. 960; *Fears v. Nacogdoches County*, 71 Tex. 337, 9 S. W. 265; *Brown v. Reese*, 67 Tex. 318, 33 S. W. 292; *Presidio County v. Clarke*, 38 Tex. Civ. App. 320, 85 S. W. 475; *Fayette County v. Krause*, 31 Tex. Civ. App. 569, 73 S. W. 51.

In *Ferrier v. Knox County*, supra, the court said:

"In dealing with a county it is necessary to have an express contract with the commissioners' court, and that court can speak only by and through its minutes and records. No action can be maintained upon any implied promise upon its part to pay for anything." Page 898, col. 1, of 33 S. W.

In *Presidio County v. Clarke*, supra, speaking in reference to the contract there involved, the court said:

"To be binding upon the county, it must, on its part, be made through the proper agency—the commissioners' court." 38 Tex. Civ. App. 320, page 476, col. 2, of 85 S. W.

[2] The commissioners' court may act through an agent appointed by them. Futch was not appointed by the commissioners' court to purchase disinfectants. He was not such agent by virtue of his office.

[3] A county, as an individual, may ratify the act of one who assumes, without authority, to be its agent. *Brazoria County v. Padgett*, 160 S. W. 1170; *Brazoria County v. Rothe*, 168 S. W. 70; *Harris County v. Campbell*, 68 Tex. 22, 8 S. W. 243, 2 Am. St. Rep. 467; *Gallup v. Liberty County*, 57 Tex. Civ. App. 175, 122 S. W. 291; *Boydston v. Rockwall County*, 86 Tex. 234, 24 S. W. 272. But such ratification must be through the only agency by which the county can act, viz., its commissioners' court. The only claim of ratification in this case was the use of the disinfectants over the protest of the commissioners' court. One cannot constitute himself the agent of another over the protest of the alleged principal, and then ratify his unauthorized act so as to bind such principal, by doing something over his protest, even though it may be beneficial to such alleged principal.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

DIFFIE v. WHITE et al. (No. 1558).*

(Court of Civil Appeals of Texas. Texarkana.
Feb. 17, 1916. On Motion to Reform
Judgment, March 9, 1916.)

1. EVIDENCE \S 460(7) — PAROL EVIDENCE — DESCRIPTION IN DEED.

In a deed of land described as "420 acres out of the northeast portion of the Robert Hill survey," the uncertainty of description, if any appeared upon the face of the deed, and extraneous evidence was inadmissible to supply what was lacking.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2121; Dec. Dig. \S 460(7).]

2. DEEDS \S 38(1) — INSUFFICIENCY OF DESCRIPTION — VALIDITY.

Such deed would not be treated as void for want of a sufficient description of the land conveyed, unless the description was so defective that the land could not be located by an inspection of the deed and a resort to those muniments or evidences to which it expressly or impliedly refers.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 70; Dec. Dig. \S 38(1).]

3. DEEDS \S 41 — SUFFICIENCY OF DESCRIPTION — EVIDENCE.

Such deed, expressly referring to the land as a part of the Robert Hill survey, made it proper to resort to the field notes of that survey to ascertain its location, form and area.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 84; Dec. Dig. \S 41.]

4. DEEDS \S 38(2) — PATENTED LAND — SUFFICIENCY OF DESCRIPTION — "PORTION."

A deed, conveying "420 acres out of the northeast portion of the Robert Hill survey," was sufficient, where it appeared that the survey contained 836 acres and was in the shape of a square, with all of its boundaries running toward the four cardinal points of the compass, and that the grantor had previously conveyed 231 acres in the northwest corner of the survey and 202 acres in the southwest corner connecting with the tract first conveyed, as the word "portion" might be treated as synonymous with "part," so that the northeast part of the survey was that part lying between the north and east boundary lines, and where the number of acres to be taken from that part of the survey was equal to or exceeded the area contained in the northeast quarter when subdivided into four equal parts, there was an intent to include at least all of the land in that quarter, and to fix the northeast corner of the survey as the northeast corner of the land conveyed, and from that point the law would construct a survey in the form of a square sufficiently large to embrace the number of acres called for.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 66, 71; Dec. Dig. \S 38(2).]

For other definitions, see Words and Phrases, First and Second Series, Portion.]

5. DEEDS \S 38(1) — "DESCRIPTION" — OFFICE.

The office of the "description" in a deed is not to identify the land, but to furnish means of identification.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 65-67, 70, 73-75, 79; Dec. Dig. \S 38(1).]

For other definitions, see Words and Phrases, First and Second Series, Description.]

6. EVIDENCE \S 452 — EXTRINSIC EVIDENCE — DESCRIPTION — "LATENT AMBIGUITY."

A "latent ambiguity" arises when a deed expresses more than one method for identifying the lines or corners of a grant, and which do not harmonize when applied to the ground, or

when the description is such that it may, without contradicting or ignoring its terms, be applied to more than one tract of land; but no latent ambiguity arises from the mere fact that the calls in the description conflict with some prior conveyance not referred to or made a part of the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2093-2101; Dec. Dig. \S 452.]

For other definitions, see Words and Phrases, First and Second Series, Latent Ambiguity.]

7. DEEDS \S 93 — CONSTRUCTION — INTENT OF GRANTOR.

The intention of the grantor must be gathered from the language used.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 231, 232; Dec. Dig. \S 93.]

8. EVIDENCE \S 450(3) — EXTRINSIC EVIDENCE — "LATENT AMBIGUITY."

Where there is no conflict in the terms of the description of a deed, and it fits one tract of land and no other, there is no "latent ambiguity," and no occasion for the admission of extrinsic evidence to explain the intention of the grantor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 2068, 2069; Dec. Dig. \S 450(3).]

9. DEEDS \S 114(5) — DESCRIPTION — CONSTRUCTION.

Where the assignee of a survey of 836 acres in the form of a square, with all its boundaries running toward the four cardinal points of the compass, conveyed 231 acres from the northwest corner and 202 acres from the southwest corner, connecting with the first tract, his deed conveying "420 acres out of the northeast portion or part, fixing only the northeast corner," evidenced an intention that the land conveyed was to be regarded as forming a square, with all sides running toward the four points of the compass, conforming to the north and east boundary lines of the survey, and leaving the distances south and west to which the call should be extended a mere matter of mathematical calculation, whereby the block would be bounded by four sides 1,539.8 varas long.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 329, 388; Dec. Dig. \S 114(5).]

10. ADVERSE POSSESSION \S 71(3) — CONVEYANCE BY ONE WITHOUT TITLE.

The three-year statute of limitations was not available where the portion claimed had been disposed of by the assignees of a survey prior to the execution of the bond for title to the one under whom the adverse party claimed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 422, 423; Dec. Dig. \S 71(3).]

On Motion to Reform Judgment.**11. TRESPASS TO TRY TITLE \S 32 — PLEADING — ADMISSION — FAILURE OF TITLE.**

In trespass to try title, allegations that plaintiffs purchased the land described from one N. in consideration of a cash payment and certain vendor's lien notes, and that N. had executed to them a deed with general warranty of title; that after the purchase they found that it was clouded by reason of the adverse claims of the unknown heirs of a certain person, and other parties defendant; that their title was threatened by the adverse claims set out in the answers of the defendants; that they believed that the titles set up by defendants were paramount to their own title; and that they would be dispossessed, asking a judgment against their warrantor and a cancellation of the vendor's lien notes—was in effect an admission that plaintiffs

had no title to that part of the land described in their petition.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 39-41; Dec. Dig. ¶ 32.]

12. APPEAL AND ERROR ¶1178(6)—DISPOSITION OF APPEAL—REMAND FOR TRIAL OF DAMAGES.

In trespass to try title, where the warranty of plaintiffs' grantor failed to the extent of the land lost to plaintiffs by the reformation of the judgment, but where the warrantor was a party to the suit, not denying his warranty, and there was no proof of the exact amount of the land which would be lost, the case, as between the plaintiffs and their warrantor, would be remanded, to enable them to try the issue of damages resulting from a breach of the warranty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4614, 4615; Dec. Dig. ¶ 1178(6).]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

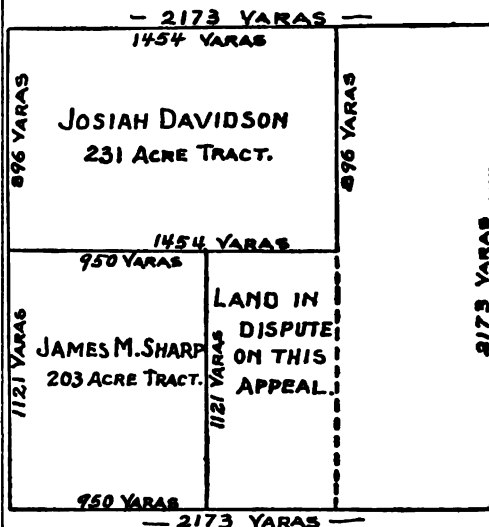
Trespass to try title by J. A. White and another, in which, after White's death, his nephew and children were substituted as parties plaintiff, against unknown heirs of Anderson King, in which W. O. Diffie filed a plea of intervention, asking affirmative relief against plaintiffs, and making P. D. Wilson a party defendant, and in which Wilson filed an answer and cross-bill. Judgment for defendants, and for the cross-complainant, and the intervener appeals. Reformed and affirmed.

Chambers & Black, of Clarksville, for appellant. S. W. Harmon, Kennedy & Robbins, and Lennox & Lennox, all of Clarksville, and Wright & Patrick, of Paris, for appellees.

HODGES, J. In September, 1913, J. A. White and Dero Austin instituted this suit in the district court of Red River county, against the unknown heirs of Anderson King, Jr., and William Gregg, in the form of an action of trespass to try title and to about 400 acres of land described as a part of the Robert Hill survey situated in Red River county. Before a trial White died, and his widow and children were substituted as parties plaintiff. Some of the heirs of Anderson King answered. In November, 1913, the appellant, W. O. Diffie, filed a plea of intervention, setting up a claim of title to about 200 acres of the land described in the plaintiffs' petition, and asked for affirmative relief. P. D. Wilson, one of the appellees, who was made a party defendant, thereafter filed an answer and a cross-bill, in which he set up title in himself to that portion claimed by Diffie. The controversy was finally narrowed to one between Diffie and Wilson, as to which had the title to the 200 acres they both claimed.

The Robert Hill survey was patented to Benjamin Gooch, assignee of Robert Hill, September 24, 1853. The patent recited that the original certificate was transferred to

Gooch February 7, 1840. According to the field notes, the Hill survey contained 836 acres, and was in the shape of a square whose sides were 2,173 varas long. On May 28, 1841, Gooch conveyed by bond for title 231 acres lying in the northwest corner of the Hill survey to Josiah Davidson. On February 3, 1842, he conveyed to James M. Sharp, in the same manner, 202 acres lying in the southwest corner, and connecting with the Davidson tract. The following diagram will show the Hill survey and the subdivisions existing after the sales made to Davidson and Sharp, and also the land involved in this suit:



[1-3] The appellee Wilson claims title under a deed from Benjamin Gooch to the heirs of Anderson King, assignee of William Gregg, dated December 3, 1854. This deed appears to have been executed in compliance with a bond for title given by Gooch to William Gregg on November 10, 1843, which recited a cash consideration. The appellant, Diffie, claims under a grant from Gooch to Wm. C. Young. The record shows that on January 29, 1846, Gooch executed a bond for title to Young for 200 acres of land in the Hill survey, lying south of the Davidson tract and east of the Sharp land. On December 5, 1854, Gooch executed a deed to Wm. C. Young, in which the number of acres was omitted, but which in other respects contained the same description embraced in the bond for title. When the appellee Wilson offered in evidence the deed from Gooch to the heirs of Anderson King, it was objected to by the appellant, Diffie, on the ground that it was void because of a defective description. The objection was overruled, and the deed was read in evidence. The following is the description objected to: "Five hundred and eighty acres of land situated in the county of Red River, State of Texas, on Pecan bayou on the waters of Red river,

being a portion of the Robert Hill survey of land and a part of the James Basham survey, to wit: Four hundred and twenty acres out of the northeast portion of the Robert Hill survey, and one hundred and sixty acres out of the east half of the James Basham survey of three hundred and twenty acres adjoining on the southeast the Robert Hill survey, and more particularly described by the records of the register's office in Clarksville."

That part of the above description which refers to the 160 acres out of the Basham survey is not material in this controversy. It is contended that the language "four hundred and twenty acres out of the northeast portion of the Robert Hill survey" is too indefinite and uncertain to enable a surveyor to locate land. The uncertainty of this description, if there is any, appears upon the face of the grant itself, and extraneous evidence is not admissible to supply what is lacking. The general rule is that a deed conveying real estate will not be treated as void for want of a sufficient description of the land conveyed unless the description is so defective that the land cannot be located by an inspection of the deed and a resort to those monuments or evidences to which it refers expressly or by implication. 2 Devlin on Deeds, p. 1917. Here the deed expressly refers to the land as a part of the Robert Hill survey, and thus makes it proper to resort to the field notes of that survey for the purpose of ascertaining its location, its form and the number of acres it contains. Brown v. Chambers, 63 Tex. 131.

[4] Upon examination of the patent we find that the Hill survey contained 836 acres, and is in the form of a square, with all of its boundary lines 2,173 varas long and running toward the four cardinal points of the compass. The deed under consideration conveys 420 acres to be taken out of the northeast portion of that survey. We think the word "portion," as there used, may be treated as synonymous with "part," without making any material variation in the meaning intended to be conveyed by the grantor. The description would then read: "Four hundred and twenty acres out of the northeast part of the Robert Hill survey." The northeast part of a survey which has the form of a square is that portion lying between the north and the east boundary lines. Where the number of acres to be taken from that part of the original survey is equal to or exceeds the quantity of land contained in its northeast quarter when subdivided into four equal parts, there is no difficulty in saying that the parties to the conveyance intended to include at least all of the land in the northeast quarter. This would fix the northeast corner of the original survey as the northeast corner of the land conveyed, and thus definitely establish a starting point from which to construct the new survey.

Descriptions similar to that here under consideration have been held sufficient by the courts in other states. Smith v. Nelson, 110

Mo. 552, 19 S. W. 734; Goodbar v. Dunn, 61 Miss. 618; Enochs v. Miller, 60 Miss. 19; Bowers v. Chambers, 53 Miss. 259. In the last case cited the following description was held to be good: "Fourteen acres off N. E. corner E. half S. E. quarter section 20," etc., and "thirteen acres off N. end W. half S. W. quarter N. of road, section 21," etc. In discussing the sufficiency of the description the court said:

"It is easy to lay 13 acres off of the end of an eighth of a section, and 14 acres off of the northeast quarter of an eighth."

In Goodbar v. Dunn this description was held to be good: "Two hundred and twenty-two and a half acres off the south and west part of the south half of section 24." The court, in discussing its sufficiency, said:

"By this description is conveyed 222½ acres to be laid off in a strip of equal depth on the southern and western boundaries of the half section, which lines are by the description made the base lines for the survey."

In Enochs v. Miller this description was held sufficient:

"One hundred and seven acres in the south part of southeast quarter of section 22, township 3, range 2 west."

In support of its holding the court referred to Bowers v. Chambers, supra, and McCready v. Lansdale, 58 Miss. 879. In Smith v. Nelson this description was held sufficient:

"One acre, being the southeast corner of the northeast fourth of the southeast quarter of section 2, township 43, range 24, Henry county, Missouri."

In passing upon the question the Supreme Court of Missouri quoted approvingly the following language from an Ohio decision:

"That corner is a base point, from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed. From this point the section lines extend north and east so as to fix the boundary west and south. The east and north boundaries only are to be established by construction, and the rule referred to gives them with sufficient certainty."

Applying the rule referred to in the above quotation, we have the northeast corner as a definitely fixed point where a survey might begin, with the north and the east boundary lines definitely determined. It remains, then, to locate the other two lines. With a starting point of this character the law will construct a survey in the form of a square sufficiently large to embrace the number of acres called for; there being no natural or artificial objects mentioned which would limit the size of the square to a smaller figure. Hence we conclude that the deed was not subject to the objections urged.

The next question then is, Did the court err in holding that this deed conveyed all of the unsold portion of the Hill survey; that is, all of the land which had not been previously conveyed to Davidson and Sharp? The court filed the following as a part of his conclusions of law:

"The deed from Benjamin Gooch to the heirs of Anderson King conveyed the remainder of

the Robert Hill survey, deducting the Josiah Davidson and J. M. Sharp tracts; and under said deed the land was located and generally recognized as covering and including all of the land in the Robert Hill survey south and east of the J. M. Sharp tract."

[5] While there are no specific expressions in the court's finding to that effect, he must have concluded that the deed from Gooch, under which Wilson claimed, when applied to the land, presented a situation which made it proper to hear and consider extrinsic evidence in order to determine just where the parties intended the south and west boundary lines to run. Extrinsic evidence was admitted, over the appellant's objection, and formed the basis of the court's conclusion above quoted. That evidence consisted of facts tending to show that at the time Gooch made the conveyance to the heirs of Anderson King, he had previously conveyed to Davidson and Sharp all of the Hill survey except 403 acres which lay principally in the southeastern portion of the survey. There was also evidence tending to show that subsequent purchasers holding under this conveyance from Gooch paid the taxes on and cut timber from all that part of the land. The action of the court in admitting and considering this evidence is defended by the appellees with the proposition that, while the deed was free from any patent ambiguity which would destroy its efficacy, a latent ambiguity was disclosed when the description it contained was applied to the ground.

"The office of description in a deed or other writing is not to identify the land, but to furnish means of identification." *Holley v. Curry*, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. Rep. 944, and cases there cited.

[6] A latent ambiguity arises when the deed expresses more than one method for identifying the lines or corners of the grant, and which do not harmonize when applied to the ground, or when the description is of such a character that it may, without contradicting or ignoring its terms, be applied to more than one tract of land. No latent ambiguity arises from the mere fact that the calls in the description conflict with some prior conveyance not referred to or in any manner made a part of the instrument to be construed.

[7, 8] We must gather the intention of the grantor from the language used; and, where there is no conflict in the terms of the description, and that description fits one tract of land and no other, there is no latent ambiguity and no occasion for the admission of extrinsic evidence to explain the intentions of the grantor. *Jamison v. N. Y. & T. L. Co.*, 77 S. W. 969; *Thompson v. Langdon*, 87 Tex. 254, 28 S. W. 934; *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27; *Converse v. Langshaw*, 81 Tex. 277, 16 S. W. 1031. In *Thompson v. Langdon*, referred to above, Justice Gaines, of our Supreme Court, said:

"The lines of a grant must be established by the calls in its field notes. If those calls are

inconsistent, then certain rules of construction and mere parol evidence may be resorted to in order to resolve the doubt and to establish the line which was actually run by the surveyor. It is but a case of a latent ambiguity in a written instrument. A writing unambiguous upon its face may become doubtful when applied to the subject-matter of the description. On the other hand, if there be no conflict in the calls found in the field notes of a survey, there is no room for construction, and the calls must speak for themselves. To permit the introduction of parol evidence to vary the calls would be to violate the familiar rule that extraneous evidence is not permissible to vary a written instrument."

In *Johnson v. Archibald*, *supra*, the same judge said:

"If the calls in a grant when applied to the land correspond with each other, parol evidence is not admissible to vary them by showing that in point of fact they are not the calls of the survey as actually made. But if when so applied they disclose a latent ambiguity—that is to say, if they conflict with each other—then extrinsic evidence may be resorted to in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey."

[9] There is in the description before us, but one fixed point from which to begin a survey—the northeast corner of the Hill survey. If the description contained in the deed had expressly provided this as a beginning point and had called for lines running west, south, east, and north, of equal length, that description, when applied to the ground, could have disclosed no latent ambiguity. The only means given for locating the south and west lines are course and distance. With such a description as that, extrinsic evidence would not have been admissible to show that the lines intended to be established were at a different place from that where course and distance would locate them. Such evidence would violate the rule announced in the cases last cited. The only ground upon which the sufficiency of a description like that here under consideration can be sustained is the conclusive inference that the parties intended that the land described should be bound on all sides by lines of equal length and parallel with those referred to in the deed. If this inference is not to be treated as conclusive, we should have different deeds with precisely the same field notes, except as to the particular corner where the start was to be made, describing lands lying in wholly different forms. What the law supplies in a written instrument is to be treated with as much sanctity as that which the parties have themselves put there. The description in this instance, to be held sufficient, must be regarded as forming a square, with all sides running toward the four cardinal points of the compass and conforming to the north and east boundary lines of the Hill survey. The distance south and west to which the calls should be extended is a mere matter of mathematical calculation. A square block containing 420 acres would be bounded by four sides 1,539.8 varas long.

[10] With that construction of the deed, it

appears that Gooch conveyed to the heirs of Anderson King only a part of the land involved in this controversy between Diffie and Wilson. It follows that Diffie has no title to the land claimed by him, and which lies within the limits above referred to. The three-year statute of limitation is not available, because the evidence conclusively shows that this portion had been disposed of by Gooch prior to the execution of the bond for title to Young, under whom Diffie claims. *Dixon v. Cruse*, 127 S. W. 591; *Saxton v. Corbett*, 122 S. W. 75; *Eliot v. Whitaker*, 30 Tex. 411; *Allen v. Root*, 39 Tex. 589. There is no evidence in the record of any lack of notice on the part of those under whom Diffie claims that would change the rule announced in the cases above cited.

We therefore conclude that the court erred in rendering judgment in Wilson's favor for all of the land in controversy, and in refusing to enter judgment in favor of the appellant, Diffie, for that portion of the Hill survey claimed by him and which lies outside of that included in the Gooch deed to King. The judgment of the trial court will therefore be reformed and here rendered in accordance with these conclusions; that is, that Diffie recover that portion of the land in controversy included within the limits of a square sufficiently large to contain 420 acres, constructed with the northeast corner of the Hill survey as the starting point, and that Diffie recover all that portion of the land in controversy lying south of the land herein awarded to Wilson, together with costs of this appeal.

On Motion to Reform Judgment.

The appellant, Diffie, has filed a motion to reform the judgment rendered in this case, so as to award him a recovery of all the land lying south of the south boundary line of the square containing 420 acres as outlined in the original opinion, and extending east to the east boundary line of the Hill survey.

[11] In view of the peculiar character of some of the pleadings in this case, we have had some difficulty in determining just what the form of the judgment to be rendered here should be. The amended original petition of White and Austin, the original plaintiffs, was in part in the form of an action of trespass to try title. A part of the land which they described as theirs is included in that claimed by Diffie under his deed. After pleading in the form of an action of trespass to try title, the plaintiffs White and Austin set out other facts at considerable length. They allege that they purchased the land described by them from W. T. Norris in consideration of a stated cash payment and the execution of certain vendor's lien notes, and that Norris had executed to them a deed containing a general warranty of the title. They further allege that after their purchase, and upon in-

quiry into the true status of the title, they found that it was clouded by reason of the adverse claims of the unknown heirs of Anderson King, and unknown heirs of William Gregg, and other parties defendant. After referring to the various answers theretofore filed to former amendments of their original petition, they continue as follows:

"That plaintiffs' title to the entire premises is threatened by adverse claims set out in answers of all the defendants herein named, and plaintiffs believe and allege that the titles set up and claimed by said defendants are paramount to the title of the plaintiffs, and that plaintiffs will be dispossessed and evicted from said premises."

Under further averments in the petition a judgment is sought against Norris on his warranty, and a cancellation of the notes executed by White and Austin in consideration of the purchase of the land.

It appears from the language quoted above that these plaintiffs have conceded that their title, to the extent of the conflicts presented in the answers of the parties named as defendants, which includes both Wilson and Diffie, has failed. This, in effect, appears to be an admission that they have not title to that part of the land described in their petition. Whether they intended this to have all the legal effect of an admission of no title may be doubted, in view of the averments first appearing in their amended original petition. But in any event, when we go to the proof we find that the plaintiffs White and Austin have failed to establish a title to that part of the land described as theirs which lies south of the south boundary line of the square block containing 420 acres and constructed in accordance with the rule announced in the original opinion. The appellant, Diffie, in his pleadings asked no affirmative relief, but merely resists the claim of Wilson and of White and Austin to the extent of the conflicts in their respective claims. We have therefore concluded that, as between White and Austin and Wilson and Diffie, the proper judgment to be rendered is that White and Austin and Wilson take nothing by their suits against Diffie as to that portion of the Hill survey described in their pleadings which lies south of the following described line: Beginning at a point on the east boundary line of the Hill survey 1,539.8 varas south of its northeast corner and running thence west parallel with the north boundary line of the Hill survey 1,539.8 varas. That is the effect of the judgment heretofore rendered by this court against Wilson, and of which he has made no complaint. The judgment will therefore be reformed so as to deny any recovery to White and Austin of the lands lying south of the line above referred to.

[12] To the extent of the land lost to White and Austin by this reformation of the judgment the warranty of Norris has failed, and under proper pleadings and proof he might be made to respond for breach to that extent. Norris is a party to this suit, and has

filed an answer which does not deny the existence of his warranty and the payment of the consideration set out in the plaintiffs' petition. But there is before us no proof of the exact amount of the land that will be lost, and we are therefore unable to accurately determine the amount of recovery that should be awarded for the breach of the warranty. As between Norris and the original plaintiffs, White and Austin, the case will be remanded to enable these parties to try the issue of damages resulting from a breach of the warranty. While the testimony shows the consideration paid, it does not show the exact number of acres which the plaintiffs will lose to Duffie, and we deem this the best method of disposing of that controversy, which is a separable one. In all other respects not inconsistent with the judgment as reformed, the judgment of the trial court is affirmed.

**CLEBURNE PEANUT & PRODUCTS CO. v.
MISSOURI, K. & T. RY. CO. OF TEXAS.***
(No. 8294.)

(Court of Civil Appeals of Texas. Ft. Worth.
Jan. 22, 1916. Rehearing Denied,
March 18, 1916.)

1. TRIAL — 85 — EVIDENCE — OBJECTIONS.

An assignment, complaining of the overruling of an objection to the evidence, presents nothing for review, where the evidence was in part admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225; Dec. Dig. — 85.]

2. CARRIERS — 133 — CARRIAGE OF GOODS — ACTIONS — EVIDENCE.

In an action for injuries to a shipment of peanuts, which plaintiff claimed was caused by want of ventilation, evidence that green peanuts, if confined before sufficiently dry, would necessarily be damaged is admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583-587, 606; Dec. Dig. — 133.]

3. EVIDENCE — 481(3) — OPINION — CARRIAGE OF GOODS — ACTIONS — EVIDENCE.

Where plaintiff claimed that a shipment of peanuts was injured because of delay in shipment and confinement in an unventilated car, testimony as to the time for transportation of such freight, not based on the operation of defendant's trains or the witness' personal knowledge is incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2251, 2254; Dec. Dig. — 481(3).]

4. EVIDENCE — 542 — OPINION — CARRIAGE OF GOODS — ACTIONS — EVIDENCE.

In an action for injuries to a shipment of peanuts, testimony that the peanuts, if in proper condition when shipped, would keep for a longer time than that of the shipment, given by experienced dealers, though not of the locality, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2355; Dec. Dig. — 542.]

5. APPEAL AND ERROR — 728(1) — ASSIGNMENT OF ERROR — SUFFICIENCY.

An assignment of error to the exclusion of testimony too vague to show what testimony was excluded cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3010; Dec. Dig. — 728(1).]

6. APPEAL AND ERROR — 1058(2) — REVIEW — HARMLESS ERROR.

The exclusion of testimony already given by the witnesses is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. — 1058(2).]

7. EVIDENCE — 538 — OPINION — EVIDENCE — ADMISSIBILITY.

In an action for injuries to a shipment of peanuts, which it was claimed were confined too long in an unventilated car, testimony that the shipment could be made in a given length of time, if diligently handled, is inadmissible as an expression of opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2348; Dec. Dig. — 538.]

8. CARRIERS — 132 — CARRIAGE OF GOODS — ACTIONS — BURDEN OF PROOF.

Where a shipper expressly alleged that the goods were in good condition when delivered to the carrier, it has the burden of proving that fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605; Dec. Dig. — 132.]

9. CARRIERS — 137 — CARRIAGE OF GOODS — ACTIONS — INSTRUCTIONS.

A charge in an action for injuries to a shipment of goods, that the burden of proof was on plaintiff to make out a case is not objectionable, on the theory that when a shipment is delivered in good condition, but arrives damaged, the burden is on the carrier to excuse the injury, the proof not showing without contradiction that the shipment was in good condition when received, and plaintiff having alleged that it was delivered in good condition, for if the burden on that issue had shifted, such contention should have been presented by an appropriate request.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 594, 595; Dec. Dig. — 137.]

10. PLEADING — 127(2) — ADMISSIONS — CARRIAGE OF GOODS.

Where a shipper of peanuts contended they were damaged because the car furnished could not be ventilated, allegations, in the answer that the shipper was negligent in loading green peanuts into an unventilated car, do not admit that the car was not suitable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 267; Dec. Dig. — 127(2).]

11. APPEAL AND ERROR — 1033(5) — HARMLESS ERROR — INSTRUCTIONS.

In an action by a shipper for injuries to a shipment, the giving of numerous charges, declaring that under enumerated circumstances verdict should be for the shipper, but not declaring that a failure of proof would require verdict for the carrier, was not error to plaintiff's injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. — 1033(5); Trial, Cent. Dig. § 587.]

12. TRIAL — 260(1) — INSTRUCTIONS — REFUSAL.

The refusal of requests covered by the charges given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. — 260(1).]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by the Cleburne Peanut & Products Company against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Affirmed.

S. C. Padelford, of Cleburne, for appellant.
J. M. Chambers, of Dallas, and Brown & Lockett, of Cleburne, for appellee.

DUNKLIN, J. On November 6, 1913, the Cleburne Peanut & Products Company delivered to the Missouri, Kansas & Texas Railway Company of Texas, at Cleburne, Tex., a carload of peanuts for shipment to St. Jo, Mo. The shipment was made in a closed car, consigned to brokers, and reached its destination November 12th, and was tendered to the consignee on November 13th. Prior to the shipment, dealers in St. Jo had contracted to buy the peanuts at certain fixed prices, but, after inspecting them, refused to accept them, claiming as a reason for such refusal that the peanuts were not in a salable condition. Plaintiff then reshipped the peanuts to Kansas City, where they were sold at prices lower than those for which the owner bargained to sell them in St. Jo. The Cleburne Peanut & Products Company instituted this suit for damages alleged to be the difference between the price realized for the peanuts when sold and the price for which they had contracted to sell them at destination. Briefly stated, the grounds of negligence alleged in plaintiff's petition as the proximate cause of the damages claimed were that the car in which the shipment was made was not a proper car for that purpose, in that, being a closed car, the peanuts were not properly ventilated, and thereby became damp and in a moldy condition; that such car was saturated with coal oil, which was absorbed by the peanuts, and that the shipment was unreasonably delayed in reaching its destination. It was further alleged in plaintiff's petition that the peanuts were in good condition when they were delivered to the railway company in Cleburne, and that by reason of the character of shipment it was the duty of the defendant to handle the same as a preferred or "red ball" freight, to the end that it be more speedily transported than ordinary freight. A trial of the case before a jury resulted in a verdict and judgment in favor of the defendant, from which plaintiff has appealed.

Appellant's brief contains 95 pages, presenting 44 assignments of error, and is supplemented by an argument 74 pages in length, while appellee's brief shows 70 pages.

Many objections are urged to the consideration of appellant's assignments, on the ground that they are violative of the rules prescribed for briefing, several of which, at least, appear to be valid objections. However, as we have examined the assignments and have decided to overrule them on their merits, we shall not undertake to discuss those objections, a discussion of which would necessarily be quite voluminous.

[1, 2] The peanuts in controversy were of the crop of 1913, and one of the defenses urged by the railway company was that they were green, wet, and immature when shipped,

and any damages sustained during the shipment were due to that condition, and not due to any negligence on the part of the carrier. It was proven by uncontroverted testimony that if green or wet peanuts are confined in bulk without ventilation for any substantial length of time, they will necessarily heat and mold, and also that if the ground and weather are wet when the peanuts are gathered, it is necessary to dry them before shipment. According to the testimony of plaintiff's witnesses, these peanuts were purchased from farmers in the fall of 1913, and were in proper condition for shipment when they were loaded into the car. Complaint is made of the introduction of the testimony of several witnesses that they made sales of peanuts to the plaintiff, in the fall of 1913, which were not in good condition for shipment, and of the testimony of other witnesses that certain crops of peanuts, growing in the same vicinity from which plaintiff purchased the shipment in question, were affected by the rains which prevailed during that season, and that if peanuts were confined in bulk while green and before they were sufficiently dried, they will necessarily become damaged thereby. The assignment is presented to the admission of the testimony of all of the witnesses last referred to as a whole. A part of the testimony was clearly admissible, and this would be a sufficient answer to the assignment, even though a part was subject to the objections urged; the principal objection being that the witness did not profess to know anything of the particular peanuts in controversy.

[3] The shipment was by "red ball," or preferred freight. Plaintiff offered the testimony of C. T. Jackson, to the effect that a preferred, or red ball, shipment of peanuts could be transported from Cleburne to St. Jo in three days. The objection sustained to that testimony was that the witness had not shown sufficient knowledge to qualify him to give such an opinion. The witness testified that he had shipped peanuts from Cleburne to St. Jo and other points for two years, that he had gone with one shipment of cattle, but did not testify that he had gone with any shipment of peanuts made by him, although he knew the time consumed by the shipments from reports made to him by consignees. Nor did he claim that any of the shipments made by him was over the defendant's line of railway; nor that the conditions under which such shipments were made were similar to the conditions of the shipment in controversy. Furthermore, while not presented by the objection, the proper inquiry would have been the usual and customary time consumed by such shipments. Under such circumstances, we are unable to say that the court erred in excluding the testimony.

Testimony of a like character from the witness Jackson was excluded on a similar ob-

jection, the only qualification given by that witness being that he had had a wide experience in shipping peanuts, and we overrule the assignment to that ruling for the same reason.

[4] Nor was there error in admitting the testimony of the witness named in the fourth and fifth assignments, in effect that, if peanuts are in proper condition when sacked and shipped, they will keep uninjured for a much longer period of time than that consumed by the shipment in controversy. The witnesses were experienced dealers in peanuts, and the fact that they had never handled peanuts until after they had been shipped north of the Mason & Dixon line might possibly bear upon the weight of such testimony, but would be no reason for rejecting it.

[5, 6] Appellant's bill of exception No. 7, to the exclusion of testimony, and upon which the sixth assignment is presented, is too confused and vague to show what the testimony was which was offered and excluded, and mentions only one witness, while in the assignment complaint is made of the exclusion of the testimony of three other witnesses also. Furthermore, it appears that the witness named had already testified substantially to the same facts which, according to this assignment, were excluded.

[7] Plaintiff offered in evidence an answer of a witness shown by deposition, in effect that a shipment of peanuts could be made from Cleburne to St. Jo in from three to five days "if diligently handled." There was no error in excluding the answer, since it was but an opinion of the witness on a mixed question of law and fact; furthermore, neither in the bill of exception, nor in the statement under the assignment, does it appear that the witness had sufficiently qualified to give such opinion; that being the specific objection urged to its introduction. *H. & T. C. Ry. v. Roberts*, 101 Tex. 418, 108 S. W. 808.

[8, 9] The court submitted plaintiff's cause of action substantially as alleged in the petition, coupled with the usual charge, in general terms, that the burden was on plaintiff to make out its case by a preponderance of the evidence. Appellant invokes the rule that when it is shown that property of this character is delivered to a carrier in good condition and is transported and delivered to the consignee in a damaged condition, the burden is upon the carrier to show that such damage was caused by the act of God or the public enemy, or by the inherent vice of the goods; and it is insisted that the charge violated that rule. The vice of the contention is in assuming as an uncontroverted fact that the peanuts were in good condition when delivered to the carrier at Cleburne, while that issue was sharply controverted by evidence introduced by the defendant. Plaintiff's entire case, as pleaded, was based on the alleged negligence of appellant, and it was expressly alleged that the peanuts were in good

condition when delivered to the defendant for shipment. The general rule which places the burden on plaintiff to make out his case by a preponderance of the evidence was applicable. *Boswell v. Pannell* (Sup.) 180 S. W. 593. And if the burden of proof did shift under any view of the evidence, appellant cannot complain, in the absence of a request for a proper instruction to that effect.

[10] Another assignment is presented to the refusal of a requested instruction that, as the defendant, as well as plaintiff, had pleaded that an unventilated car was unsuitable for the shipment, then the burden was upon defendant to show that damages to the peanuts from heating and molding was due to their inherent nature. The pleading of defendant referred to merely presented the defense of contributory negligence on the part of plaintiff in loading the peanuts, which were green, and hence not in a proper condition for shipment, into a closed car without sufficient ventilation for peanuts in that condition. The effect of the requested instruction was to tell the jury that defendant had, by its pleadings, admitted that the car was unsuitable for the shipment, even though the peanuts were dry and in a proper condition for shipment, which, clearly would have been improper.

[11] Many other assignments of error are urged to the different paragraphs of the court's charge, in which the different theories upon which plaintiff would be entitled to a verdict were submitted. In none of these instructions were the jury told that a failure of proof of the affirmative of any one or more of those issues would entitle defendant to a verdict. In other words, all those instructions were favorable to plaintiff, and present no affirmative error to plaintiff's injury, even though it could be said that they did not present every theory upon which a verdict for plaintiff should be returned; and that fact, of itself, is a sufficient answer to all the assignments last referred to. *Yellow Pine Lumber Co. v. Noble*, 100 Tex. 358, 99 S. W. 1024; *Abilene Light & Water Co. v. Robinson*, 146 S. W. 1052, and authorities there cited.

[12] The record contains numerous other special instructions requested by plaintiff, and assignments are presented to the refusal of those also. After a careful consideration of all those instructions and the assignments based thereon, we think it sufficient to say that all material issues contained in such instructions were sufficiently and properly covered by the main charge, and that no reversible error is shown in the court's refusal to give them.

By other assignments it is insisted that the effect of instructions given in certain paragraphs of the court's charge was to exclude any right of recovery upon some of the issues of negligence relied on by plaintiff and supported by proof. We are of the opinion

that all the material issues of negligence relied on by plaintiff were presented in the court's charge, which, when read and considered as a whole, we do not think is subject to the criticism last mentioned.

We are of the opinion, further, that the verdict is not contrary to the law and evidence, as insisted by another assignment.

For the reasons noted, all assignments of error are overruled, and the judgment is affirmed.

SEALEY et al. v. MUTUAL LAND CO. et al.*
(No. 8305.)

(Court of Civil Appeals of Texas. Ft. Worth.
Jan. 22, 1918. Rehearing Denied
March 4, 1918.)

1. HUSBAND AND WIFE \S 276(6) — COMMUNITY PROPERTY — AUTHORITY TO CONVEY.

Under Act Aug. 26, 1856, $\S\S$ 2, 3, 7 (see 4 Gammel's Laws, p. 469), making it unnecessary for a surviving wife to administer on the community property of herself and her deceased husband, and authorizing her to manage, control, and dispose of the property as may seem best for the interest of the estate after filing in the county court an inventory and appraisal of all the community property, where an inventory and appraisal of community property were filed with the knowledge and authority of a surviving wife and in her behalf, though it was not signed nor verified by her, but by third parties, it was sufficient to authorize her to convey full title to land constituting part of the community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. $\S\S$ 1038, 1039; Dec. Dig. \S 276(6).]

2. RECORDS \S 17(7) — PRESUMPTIONS — CONVEYANCES.

Where the records of a county court have been destroyed, it will be presumed, in support of a conveyance by a surviving wife of community property where there has been filed an inventory of the community property not signed by her but by third parties, that the wife made application to the court for the appointment of appraisers and that their appraisal was duly approved by the court.

[Ed. Note.—For other cases, see Records, Cent. Dig. $\S\S$ 33, 43; Dec. Dig. \S 17(7).]

Error from District Court, Tarrant County; R. H. Buck, Judge.

Action by Joella Sealey and others against the Mutual Land Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

M. D. Gano and H. C. Jarrel, both of Dallas, and Lattimore, Cummings, Doyle & Bouldin, of Ft. Worth, for appellants. McLean, Scott & McLean and J. C. Terrell, all of Ft. Worth, for appellees.

CONNER, C. J. Joella Sealey and others, claiming as heirs of Samuel Sealey, deceased, instituted this suit to recover an undivided one-half interest in a tract of land situated in Tarrant county, described as a portion of the Daniel Dulaney survey patented by the state of Texas to E. M. Daggett as assignee.

The plaintiffs suffered an adverse judgment in the court below and have prosecuted this writ of error.

The defendants claimed by virtue of a regular chain of conveyances emanating from and under a deed from Jane C. Sealey, surviving wife of Samuel Sealey, to R. E. Maddox in 1883. The defendants also claimed under the five and ten years' statute of limitations. Omitting facts unrelated to the question upon which we have based our conclusion, it appears that the survey of which the land in controversy is a part was patented by the state of Texas to E. M. Daggett in May, 1856; that thereafter, on the 23d day of January, 1863, E. M. Daggett by deed duly executed conveyed said land to David Wiggins; that thereafter, on the 12th day of April, 1867, David Wiggins and wife, Marry Wiggins, by deed duly executed, conveyed said land to Samuel Sealey. Samuel Sealey died intestate in Tarrant county on March 11, 1869, leaving as his sole heirs and survivors the plaintiffs in this case and his wife, Jane C. Sealey. The following inventory and appraisal was offered in behalf of the defendants, and it is admitted that the land therein referred to includes the land in controversy, viz:

"Inventory and appraisal of the community property of Sam Sealey, deceased, and Jane C. Sealey, his surviving wife, there being no individual property belonging to either of them.

540 acres of land at \$2.75 per acre..	\$1,485.00
14 yoke of work oxen, yokes and chains, \$40.00.....	560.00
1 iron axle wagon.....	100.00
2 wooden axle wagons, \$75 each....	150.00
1 buggy and harness.....	100.00
18 head stock cattle, \$5 each.....	90.00
1 mule.....	65.00
1 mare and yearling colt.....	65.00
1 gray mare, old.....	20.00
Household and kitchen furniture....	200.00

"State of Texas, County of Tarrant.

"Personally appeared before me, the undersigned authority, W. F. Adams and F. L. Hartman, who, being duly sworn by me, says that the foregoing is a true and correct appraisal of all the property exhibited to us by Jane Sealey, surviving wife of Sam Sealey, deceased.

"W. F. Adams.

"F. L. Hartman.

"Sworn and subscribed to before me this the 29th day of May, 1869.

"A. G. Walker, Co. Clk.,

"By H. A. Powell, Deputy."

This instrument was indorsed:

"Sam Sealey, deceased. Estate of Inventory and Appraisal. Filed June 2nd, 1869. Examined and approved, B. F. Barkley, JCCTCT."

The deed from Jane C. Sealey to R. E. Maddox, under whom the defendants claim, purported to convey the entire interest in the land therein described, including that in controversy, and the foregoing inventory and appraisal was offered by the defendants in error to show the qualification of Jane C. Sealey, as the community survivor, to convey full title as she purported to do in the deed to Maddox. It is admitted that:

"If Mrs. Sealey was duly qualified as survivor of the community estate of herself and deceased husband, this deed (the deed to Maddox) conveyed the title to the land in controversy, and defendants, who deraigned title through R. E. Maddox, are entitled to judgment."

The court admitted the inventory over objection of plaintiffs in error to be herein-after indicated, and, among other special issues, submitted to the jury the following:

"Did Mrs. Jane Sealey, surviving widow of Samuel Sealey, file the instrument purporting to be an inventory and appraisal of the community estate of herself and deceased husband, Samuel Sealey, and purporting to be signed by W. F. Adams and F. L. Hartman, as appraisers?"

To which the jury answered:

"Mrs. Jane Sealey did not personally file, but authorized to be filed, the inventory."

It is thus seen that the question of whether Jane C. Sealey was qualified to act as the community survivor in the disposition of the community property of herself and Samuel Sealey, deceased, is a vital one, irrespective of questions relating to the issues of five and ten years' limitation under which the defendants in error also claim, and we will now address ourselves to the solution of the vital question so presented.

It was shown that the courthouse in Tarrant county and the records were destroyed by fire on March 29, 1876, with the single exception of "Book G" of the probate minutes, from which the inventory and appraisal in question was copied. It was also shown that W. F. Adams and F. L. Hartman, who subscribed to the inventory and appraisal, were, at the time of Samuel Sealey's death, near neighbors and confidential friends of the family; that on the 19th day of August, 1873, Jane C. Sealey conveyed to Wiley Harris a portion of the Daniel Dulaney survey, which conveyance recites:

"That I, Jane C. Sealey, surviving widow of Samuel Sealey, deceased, having filed an inventory in accordance to law, for and in consideration of eleven hundred and eighty dollars gold paid to me by Wiley Harris," etc.

This deed was duly acknowledged before the proper clerk of Tarrant county, who certified that Jane C. Sealey was well known to him and that she appeared before him and acknowledged that she "signed, executed and delivered said deed for the purposes and consideration therein stated." Plaintiffs in error objected to the inventory, and here contend that it was void and unavailing for the purposes for which it was offered, because:

"(1) That said inventory and appraisal was not prepared and filed by the said Jane Sealey. (2) That said inventory and appraisal was in fact prepared and filed by W. F. Adams and F. L. Hartman, parties unknown so far as the records disclose. (3) That said Jane Sealey was not a party to said record, or to the preparation and filing of said inventory and appraisal. (4) That the court has had no supervision over the person of said Jane Sealey by virtue of which the preparation and filing of said inventory could have vested in her any authority to dispose of the property of the community estate of herself and deceased husband."

[1] We are of opinion, however, that the evidence supports the jury's conclusion that the inventory and appraisal were filed with her knowledge and authority and in her behalf, and that it was recognized by the proper probate officer as the inventory of Jane C. Sealey, and that as such the inventory was properly admitted in evidence, and is sufficient to support the contention of the defendants in error that thereby Jane C. Sealey was authorized to convey to R. E. Maddox full title to the land in controversy as she purported to do in 1883. The controlling statutes in force at the time relating to the subject are to be found in an act of the Legislature of Texas approved August 26, 1856, entitled, "An act supplementary to the act of March 13, 1848, entitled, 'An act better defining the marital rights of parties.'" See Gammel's Laws of Texas, vol. 4, p. 469. So far as here necessary to quote, sections 2 and 3 of the act referred to read:

"Sec. 2 That it shall not be necessary for any surviving husband to administer upon the community property of himself and his deceased wife, but he shall have the exclusive management, control and disposition of the same after her death in the same manner as during her life subject to the provisions of this act.

"Sec. 3. That it shall be the duty of the surviving husband at the death of his wife, if she have a surviving child, or children, to file in the county court a full, fair and complete inventory and appraisal of all the community property of himself and deceased wife, to be taken and recorded as in cases of administration, and to have the same force and effect in all suits between parties claiming under it. After which, without any administration or further action whatever in the probate court, he shall have the right to manage, control and dispose of said community property both real and personal, in such manner as to him may seem best for the interest of said estate, and of suing and being sued with regard to the same, in the same manner as during the life of his wife. * * *

Section 7 of the act, so far as necessary to quote, provides:

"That the surviving wife may retain the exclusive management and control of the community property of herself and her deceased husband, in the same manner, and subject to the same rights, rules and regulations, as provided in the foregoing provisions of this act. * * *

The act further provides that the survivor so filing an inventory shall keep fair and full accounts of all exchanges, sales, and other disposition of the community property, and upon final partition shall account to the legal heirs for their interest in the community property and in the increase and proceeds of the same. It also provides that, if the survivor should fail or refuse to file an inventory as required by the provisions of this act, the county court, upon complaint made, might require it done, or otherwise grant administration upon the estate. The act further provides that if it should appear to the court as in any way necessary for the protection of the property belonging to the state, or should any of the heirs make proper complaint of mismanagement or waste, that the court might require bond and se-

curity of the survivor for the proper management of the property, etc.

Of this act it was said by our Supreme Court in *Cordier v. Cage*, 44 Tex. 532:

"The act of 1856 was intended and designed by the Legislature to afford an easy and speedy mode of managing and controlling community estates, and to allow a survivor to manage, sell, or dispose of it, relieved of the trammels thrown around such estates prior to that time, and that it was entitled to a liberal construction."

It will be noted that there is nothing in the statute as quoted which specifically requires the inventory and appraisal to be signed or sworn to by the survivor in person, and an inventory and appraisal wanting in these particulars was expressly upheld in the case of *Green v. Grissom*, 53 Tex. 432. The inventory and appraisal in that case was made by E. M. Brock and J. N. George, who had been appointed by the court as appraisers and who made a verified statement that it was a true and correct inventory of the property belonging to the estate so far as the same had come to their knowledge. So, in the case of *Long v. Walker*, 47 Tex. 173, an inventory not including certain lots there in controversy was in effect upheld; the failure mentioned being referred to as an irregularity that might have been corrected upon complaint of those interested. And in the case of *Withrow v. Adams*, reported in 4 Tex. Civ. App. 438, 23 S. W. 437, in which a writ of error was refused by our Supreme Court (29 S. W. 221), our Court of Appeals for the Third District held that the facts that an inventory of community property filed in the probate court by the surviving wife did not in terms purport to be an inventory of all of the community property, and that it was not filed and sworn to by her, were not sufficient to invalidate the sale of community property by her.

[2] Plaintiffs in error insist, however, that it appeared in the case of *Green v. Grissom*, supra, that Mrs. Grissom made application in open court to file an inventory and have the property appraised under the provisions of the statute, and that the court appointed appraisers who returned an inventory that was accepted by the court. The contention is, in substance, that the court was thus given jurisdiction over the person of the survivor, and that hence the omission of the survivor to in person sign the inventory was not fatal. It is true that in the case before us it was not made to appear that Mrs. Jane Sealey made an application to the court, but it is to be remembered that the probate records of Tarrant county, with the exception stated, were burned, and, if necessary to our final conclusion, we do not think it an unreasonable presumption that in this case Mrs. Sealey made the proper application, which has been destroyed, for the appointment of appraisers; for it cannot be disputed that an inventory and appraisal of

the community property Samuel Sealey, deceased, was duly presented and sworn to before a clerk of the county court by persons who purported to so act in a most formal manner, and whose action in so presenting the inventory seems to have been formally approved by the presiding judge of the proper court. The evidence fails to present a suggestion that either Adams or Harman could personally profit in this transaction, or that there was fraud or collusion of any character to indicate the action on their part. Moreover, as already mentioned, soon thereafter Jane C. Sealey executed a deed to Wiley Harris, in which she solemnly declared, in substance, that she had filed an inventory of the community estate of herself and deceased husband, and nothing in the record suggests that this declaration could have referred to any other inventory than the one now under consideration. It also appears that from the time of the execution of the deed by Jane C. Sealey to R. E. Maddox, until about the time of the institution of this suit in 1911, neither Jane C. Sealey, nor any of the plaintiffs in error, paid taxes upon, or otherwise claimed, the land in controversy. So that, on the whole, we conclude that under the circumstances of this case, after the lapse of 40 years from the date of Jane C. Sealey's deed to R. E. Maddox, we must uphold the judgment of the court below in behalf of the defendants in error, on the ground that, before making the deed to R. E. Maddox conveying the entire interest in the land in controversy, Jane C. Sealey had duly qualified herself to so do under the act of 1856.

Affirmed.

BUCK, J., not sitting.

FT. WORTH & D. C. RY. CO. v. HAPGOOD.
(No. 8331.)

(Court of Civil Appeals of Texas. Ft. Worth.
Feb. 19, 1916. On Rehearing,
March 25, 1916.)

1. RAILROADS — §461 — FIRES — CONTRIBUTORY NEGLIGENCE.

Plaintiff's refusal of permission to a railroad to burn necessary fireguards on his land, except on condition that the railroad pay in advance for the grass consumed, is, if such condition is unreasonable under the circumstances, contributory negligence barring recovery against the railroad for burning his land.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1682; Dec. Dig. §461.]

2. EVIDENCE — §142(4) — SIMILAR FACTS — VALUE.

It is improper, in a suit for damages to grass, to allow a witness to testify that the grass "was above an average for Clay county," over the objection that it is improper to describe the grass by comparison with other grass the quality of which is foreign to any issue in the suit.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 420; Dec. Dig. §142(4).]

3. APPEAL AND ERROR \S 1050(1)—HARMLESS ERROR—QUALIFICATION OF WITNESS.

The admission of testimony that land has depreciated \$2 per acre by being burned, over the objection that the witness had answered that he had never known of the sale of land after being burned over, but based his opinion upon the estimated value of the grass, where the witness qualified sufficiently to give an opinion of the value of the grass destroyed, which he estimated at \$2 per acre, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. \S 1050(1).]

4. EVIDENCE \S 142(4)—RELEVANCY—VALUE OF OTHER PROPERTY.

In an action for damages to land, it is not error to exclude evidence of the leasing value of adjoining land, where it is not proved that the grass on such land is of as good quality as the grass on plaintiff's land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 420; Dec. Dig. \S 142(4).]

5. TRIAL \S 350(2) — SPECIAL INTERROGATORIES—EVIDENTIARY FACTS.

Requested special issues, embodying inquiries as to mere matters of evidence bearing upon the issues to be determined, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828, 832; Dec. Dig. \S 350(2).]

Appeal from District Court, Clay County; J. W. Akin, Judge.

Action by K. N. Hapgood against the Ft. Worth & Denver City Railway Company. From judgment for the plaintiff, defendant appeals. Reversed and remanded.

Thompson & Barwise, of Ft. Worth, and Arnold & Taylor, of Henrietta, for appellant. W. T. Allen and Wantland & Parrish, all of Henrietta, for appellee.

DUNKLIN, J. K. N. Hapgood and wife owned a tract of land adjacent to the right of way of the Ft. Worth & Denver City Railway Company. The land was covered with a growth of grass suitable for hay and for grazing. During the months of June and July of the year 1914, seven fires occurred which consumed the grass on different portions of the tract at different times, the land so burned over aggregating 623½ acres.

The owners of the land instituted this suit against the railway company to recover damages for the destruction of the grass and injury to the turf, it being alleged in plaintiffs' petition that the fires which destroyed the grass originated through the negligence of the railway company in using faulty appliances and spark arresters upon its locomotives, on account of which cinders escaped and ignited the grass and other combustible matter which the defendant had negligently permitted to accumulate on its right of way, and from there spread to and burned over plaintiffs' land.

It was further alleged in the petition that the railway company was guilty of negligence in failing to burn fireguards for a width of about 200 feet on each side of its right of way, as for a number of years it had been in

the habit of doing, so that fires starting in weeds and dry grass upon defendant's right of way would not spread to plaintiffs' land.

From a judgment rendered in plaintiffs' favor for the sum of \$1,876.50, the defendant has appealed.

One of the special defenses pleaded by the defendant consisted in allegations that, before any of the fires occurred, the defendant applied to plaintiffs for permission to burn fireguards on plaintiffs' land adjacent to defendant's right of way and adjacent to the land that was afterwards burned, informing plaintiffs at the time of the danger of fire spreading upon said land, and offering to pay them for the grass so burned as a fireguard as soon as the area of the same could be measured and the number of acres burned ascertained; but that plaintiffs refused said request, unless defendant would pay them for the grass on said fireguard in advance and before the same was burned. It was further alleged in said plea that plaintiffs well knew the danger incident to the destruction of their grass if fireguards were not so burned, and well knew that the burning of the fireguards would protect their premises from fire, and that the absence of such fireguards greatly endangered their property, which was afterward burned. It was further alleged that by reason of such failure on the part of the plaintiffs to permit the defendant to burn said fireguards, as it requested permission to do and would have done but for such refusal, the plaintiffs were guilty of negligence proximately contributing to the damages sustained by them, and for which they sued, and hence they were not entitled to recover.

The plaintiffs addressed a general demurrer to the plea of contributory negligence in the following language:

"The plaintiff demurs to the defendant's plea of contributory negligence as set out in the thirteenth paragraph of its answer herein, and says the same is insufficient in law, and shows no defense to the plaintiff's cause of action herein, and prays that said paragraph be stricken from said answer."

That demurrer was sustained, and to the action of the court in striking out the plea the defendant has assigned error.

[1] We are of the opinion that the assignment should be sustained upon the authority of the recent decision of our Supreme Court in *St. L. S. W. Ry. Co. of Texas v. Arey*, 179 S. W. 800, and other decisions therein cited, chiefly the decisions of *Martin, Wise & Fitzhugh v. T. & P. Ry. Co.*, 87 Tex. 117, 26 S. W. 1052, and *T. & P. Ry. Co. v. Levi*, 50 Tex. 674.

The case of *Railway Co. v. Arey*, supra, was a suit by Arey, the plaintiff, for the destruction by fire of his barn. The fire was caused by sparks from a passing engine which were blown through a window facing the right of way and which plaintiff had

left open. The railway company pleaded contributory negligence on the part of the plaintiff, in thus leaving the window of the barn open with an accumulation of combustible matter exposed to sparks that might emanate from the railway company's locomotives in passing and through which the fire which destroyed the barn originated. Our Supreme Court held that the submission of the defense of contributory negligence so pleaded was proper, and in that opinion used the following language:

"It is not a question of the lawful use by an owner of his premises. It is a question of his negligent use of them, and the legal consequence of such use when it is directly responsible, in whole or in part, for injury to the owner's property. If others, in the lawful use of their property, are required to exercise ordinary care to prevent its negligent injury or destruction, what is there in the situation of an owner or lessee of premises like these that creates for him a different rule? It clearly does not lie in the fact that his use of the premises is lawful. Nor does it rest in the maxim that no one is bound to anticipate another's negligence; for that is a principle of general application. No other ground for the distinction is advanced in the authorities which affirm the proposition. It is not believed that any other can be urged; and neither ground in our opinion is sound."

The cases of *Railway Co. v. Levi* and *Martin, Wise & Fitzhugh v. Railway Co.*, supra, were suits for the loss of cotton stored in close proximity to the railway tracks, and burned by sparks which escaped from locomotives, and in each of those cases it was held that the defense of contributory negligence on the part of the owner in thus exposing his cotton to fire from that source was available.

In the *Arey Case* our Supreme Court expressly refused to follow the decision of our United States Supreme Court in *Le Roy Fibre Co. v. Railway Co.*, 232 U. S. 340, 34 Sup. Ct. 415, 58 L. Ed. 631, cited by the appellee, and in effect overrules all other Texas decisions relied on by the appellee.

In each of the three cases by our Supreme Court cited above, it was held, in effect, that if a person of ordinary prudence could and should have anticipated that the railway company probably would, through its negligence or otherwise, permit sparks to escape from its locomotives and set fire to property of the character and located as was plaintiff's property, then the plaintiff owed the duty to exercise ordinary care in advance of such negligence to avoid injury therefrom. And why not? It is a well-settled rule of common law that a person of ordinary prudence owes the duty to exercise ordinary care to avoid injury from an act or omission of another amounting to negligence, when he is apprised of such act or omission. Upon reason and principle, why should he be excused from the exercise in advance of like precautions to avoid injury from negligence which a person of ordinary prudence would foresee as probable and the consequences of which he would endeavor to avoid? A different rule would encourage a wilful exposure to danger which

even the slightest prudence would avoid and would be contrary to sound public policy. Tested by the common experience of men, no one of ordinary prudence, when confronted with an impending danger to his person or property, will do less to avoid its probable consequences because of the fact that such danger is brought about by the negligence of some one else.

As alleged by plaintiffs in their pleadings and shown by the evidence, seven fires occurred within two months, thus tending to show perhaps unusual dangers to their property, and furnishing cogent reasons for the application of the doctrine announced in the decisions of our Supreme Court cited above.

While it is true, as appellees insist, the facts of the present case were different from those of the other cases discussed above, yet we do not believe that such difference in the facts avoids the controlling effect of those decisions upon the question now under discussion. Appellees insist that plaintiffs had the legal right to demand payment for the grass proposed to be burned as a fireguard in advance of such burning, and that it would be unreasonable to require them to wait for such compensation until after the fireguard was burned. Even though it should be said that under ordinary circumstances a person has the legal right to exact payment for his property in advance before the same is appropriated by some other person, we do not think that such a conclusion would preclude the defendant's right to the defense pleaded. According to the defendant's plea, which must be accepted as stating the facts truly, the railway company offered to pay for the grass as soon as it was burned, and the number of acres burned could be ascertained. As a matter of law, this offer included the implied obligation to pay the reasonable value of such grass, and it was a proper question for the jury to determine whether or not a person of ordinary prudence would, under all the circumstances, have accepted that offer rather than incur the risk of losses which might reasonably be expected to occur if such fireguard was not burned off.

A number of other assignments are presented to the admission of testimony of various witnesses tending to show the value of the grass burned and depreciation in the value of the land by reason of injury to the turf or roots of the grass, over defendant's objection that the witnesses had not shown themselves sufficiently qualified to give their opinions on such issues. Except as hereinafter noticed, we shall not undertake to discuss each one of the assignments in detail, as we think it is a sufficient answer to say that we have carefully examined the assignments, and are of the opinion that such objections were properly overruled, as we find in the testimony of the respective witnesses a sufficient qualification, prima facie at least, to make such opinion admissible.

[2] We are of the opinion, however, that

it was improper to allow the witness L. R. Hamm to testify that the grass burned "was above an average for Clay county," over the objection that it was improper to describe the grass by comparison with other grass, the quality of which was foreign to any issue in the present suit.

[3] And in this connection we deem it proper to notice also the objection made to the testimony of R. J. Brown for the plaintiffs that the land was depreciated in value \$2 per acre by reason of the fire. The objection to this testimony was that the witness had answered that he had never known of the sale of land after it was burned over, but based his opinion with respect to the depreciation testified to by him upon what the witness estimated the grass to be worth. The witness did, however, sufficiently qualify to give an opinion of the value of the grass that was destroyed, which he estimated to be \$2 per acre; and while perhaps the objection addressed to the question as to how much the land was depreciated in value was, strictly speaking, a valid one, yet we are of the opinion that, in view of the further testimony of the witness that he based the opinion given in answer to that question upon his knowledge of the value of grass which he placed at \$2 per acre, the error was, at all events, harmless.

[4] The defendant proposed to prove by plaintiffs' witness R. J. Brown, upon cross-examination, that Sid Webb was leasing other land adjoining plaintiffs' land for 50 cents per acre per year. The plaintiffs objected to the question and answer upon the ground that it was irrelevant, and the court sustained the objection. It does not appear in the bill of exception that the defendant could have proved that the grass on the land so leased by Webb was of a quality as good as the grass in controversy. Hence no reversible error is shown by the ruling, even though it should be held that this one transaction would be admissible on the issue of the market value of plaintiffs' grass.

[5] Appellant also complains of the refusal of the court to submit to the jury three special issues requested by it, two of which consisted of an inquiry as to what per cent. of the land burned over had been reset with grass at the time of the trial, and the other how long were the plaintiffs deprived of the use of the grass by reason of the fires. All of those inquiries related to mere matters of evidence bearing upon the controlling issues to be determined by the jury, and were therefore properly refused.

For the reasons noted the judgment is reversed and the cause remanded.

On Rehearing.

In their motion for rehearing appellees insist with much earnestness that we erred in our opinion upon original hearing that the

appellant's special plea of contributory negligence presented a valid defense to the suit. In our former opinion it was stated that one of the grounds of negligence relied upon by the plaintiffs was the failure of the defendant company "to burn fireguards for a width of about 200 feet on each side of its right of way, as for a number of years it had been in the habit of doing, so that fire starting in weeds and dry grass upon defendant's right of way would not spread to plaintiffs' land." That allegation of negligence was contained in plaintiffs' original petition, but was not embodied in the amended petition upon which the case was tried, and hence was not relied upon by the plaintiffs upon the trial of the suit. The original petition, as well as the amended petition, were contained in the record, and through inadvertence we referred to the original petition rather than the amended one, and the reference to that issue in the original opinion is now withdrawn.

Appellees have cited a great array of authorities from numerous states, as well as from our own state, announcing the general rule that it is not incumbent upon any one to anticipate the negligence of another which may probably result in his injury, and specifically that an owner of land adjoining a railroad right of way has the right to subject it to any lawful use he may see proper, and cannot be held guilty of contributory negligence in permitting combustible material to accumulate on his premises which is ignited through the negligence of the railway company in the operation of its trains. Appellant insists that many of those decisions, when properly understood, are not in conflict with the decision in the Arey Case. We shall not undertake to discuss them, for however that may be, the decision in the Arey Case is unquestionably binding upon us, and we think of controlling effect in the present suit.

Appellees insist, further, that the facts of the present suit differ materially from those in the Arey Case, and that hence the decision in the Arey Case should not be given controlling effect here. It is true that the facts are different, but we are of the opinion that the underlying principle is the same in the two cases.

The motion for rehearing is overruled.

NEWMAN et al. v. DAVIS. (No. 514.)

(Court of Civil Appeals of Texas. El Paso.
March 10, 1916. Rehearing Denied
April 6, 1916.)

1. PUBLIC LANDS §175(5)—LANDS OF STATES —PRIORITY OF LOCATION.

Where a location of public lands is fixed by actual survey upon the ground, being the first or eldest in location, the lines so fixed upon the ground control.

[Ed. Note.—For other cases, see Public Lands. Cent. Dig. §§ 565, 566; Dec. Dig. §175(5).]

2. APPEAL AND ERROR 1002—REVIEW— VERDICT ON CONFLICTING EVIDENCE.

A verdict on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. 1002.]

Walthall, J., dissenting.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Suit by Lamar Davis against O. M. Newman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A. G. Foster, Jno. L. Dyer, and T. A. Falvey, all of El Paso, for appellants. Winter, McBroom & Scott, of El Paso, for appellee.

HARPER, C. J. Appellee filed this suit against appellants in trespass to try title to survey No. 7, Texas & Pacific Railway Company, describing same by metes and bounds. Appellants disclaimed as to all that part of No. 7 lying north or northerly of the south or southerly line of said survey by the survey and map of Hardaway; and under a description by metes and bounds of surveys 72 to 78 and 82, by cross-action, asked judgment for all of said last-named surveys. Appellees, by supplemental petition, disclaimed as to all sections named, except 77. The case was submitted to a jury upon special issues. A verdict was returned upon which judgment was entered for appellees, plaintiffs below, from which this appeal is perfected.

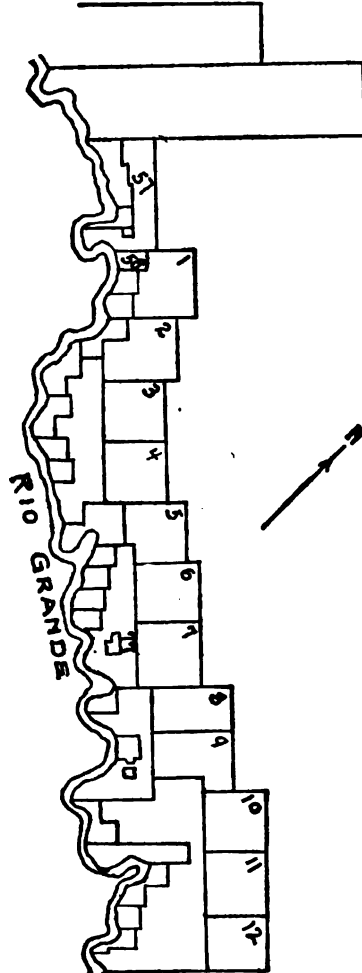
The parties filed an agreement in writing which contained, among other things, the following stipulation:

"It is agreed that the controversy in reference to the lands and premises herein involved is one of boundary, and the true boundary lines between the lands of plaintiffs and the defendants and the location thereof is in controversy, and that wherever the boundary line may be located that the plaintiffs will be entitled respectively to all the lands claimed by them lying northeast of such boundary lines, and that the defendants, as to the lands claimed by them, shall be entitled to the lands lying southwest of such boundary line; * * * the only issue being the location of the true boundary line and dividing line between the lands of plaintiffs and defendants."

In 1858, J. A. Tivey located by actual survey upon the ground surveys numbered 53 to 114, inclusive. Beginning at a point upon the Rio Grande, No. 53 was located upon the ground by definite corners, and then survey No. 54 was located and tied onto 53 on the southeast, and each, in turn, in their numerical order, were located in the same manner, running southeast along the Rio Grande for the southern boundary line of at least a portion of each survey. A plat of said surveys was made and filed in the General Land Office of Texas and the same were patented from time to time up to the last, about 1873.

[1] In 1870, Jacob Keuchler, deputy surveyor for the Texas & Pacific Railway Company, located surveys 1 to 11, block A, inclusive, upon the north of said Tivey surveys

beginning with east line of survey No. 57, west corner of No. 58, and then so located the south line of each as to join onto and make the north lines of the Tivey surveys the south lines of the said Texas & Pacific surveys down to and including Tivey survey No. 77, as shown by the following plat:



As will appear from the above statement, the Tivey surveys being the first or eldest in location, their north line as fixed upon the ground would control. Several resurveys have been made of said lands with a view of tracing the footsteps of Tivey in the original survey. Some of said surveyors by their maps and plats and testimony place the Tivey line, as run by him, between survey 7, Texas & Pacific, and 77; Tivey, where plaintiffs claim it to be; and others, where defendants claim it to be. Appellants contend for the line as found by and delineated upon the map of one Hardaway, surveyor appointed by the court, and appellees contend for the line of surveyor Harris' map, etc. The verdict and judgment is based upon question No. 1, which is as follows:

"Do you find from a preponderance of the evidence that the northern boundary line of said survey No. 77, as surveyed on the ground by J. A. Tivey, is coincident with or south of the northern boundary of said survey as located and marked by Murray Harris, and delineated on the map of the said Harris introduced in evidence? Answer: Yes."

Appellants urge by assignments 1 and 2 that the verdict and judgment for plaintiff, appellee here, is against the great weight and preponderance of the evidence and for that reason should be reversed and remanded for a new trial.

Appellants submit many propositions under these assignments which are in line with the rules of law, but the sole question for this court to determine is: From the evidence in this record favorable to appellees, could the jury, in an honest and impartial effort to arrive at the truth, have reached the conclusion expressed by their verdict? If so, then we cannot set it aside.

There are more than 300 pages of typewritten matter in the statement of facts, and appellants, under the two first assignments, urge 30 propositions. To answer them in detail by reference to the evidence in the record would extend this opinion to an unreasonable length, and, in fact, take our time to no good purpose. We have carefully read the record in respect to all of appellant's contentions, and have reached the conclusion that there is no such lack of preponderance of the evidence in favor of the appellee as to justify us in reversing this case.

To illustrate how the questions of fact raised by appellants, upon which they rely to reverse this case, are met, or offset by the evidence in favor of appellees, let us discuss what we consider the strongest or most forceful proposition urged here by them, viz.:

"That the artificial objects called for in the field notes of surveys 53 and 85 and 86 and 110½, lying in proper position, according to the field notes of all the surveys in their order, correctly show the location of all said surveys from 53 to 110½, inclusive, without dispute."

The first object relied upon is the old stage road called for in the Tivey field notes to No. 53 and survey No. 110½, as made in 1858. The contention is that the line running north and south between 52 and 53 is agreed upon, that the call for this line fixed this old road at 520 varas from the river, and that this point is practically agreed upon. Now, if this be so, and we can here hold that as a matter of fact the northwest or northeast corner of 53 is fixed by natural objects or by agreement, and that, by running the north line of the Tivey surveys on the ground from this point to points about which there is no question as to their location, the Hardaway line is established beyond question, then this case should be reversed and rendered; but what do we find in relation to the road in question and the other points claimed to be established unquestionably? We find that witnesses for both parties testify that the original stage road of 1858 has

been washed away, in 1875, or at some other date fixed by witnesses. Harris, upon whose testimony and map the verdict must have been based, testified that there were several old roads in and about the same place; that the designated "old road" upon his map was not fixed. The testimony of some of the witnesses shows that they had not been upon the ground for many years, and there are other facts in evidence which justify the jury in their refusal to accept the evidence as to the exact starting point of the surveys of Tivey, as being as contended for by appellants.

[2] And the same conflict of testimony appears as to each and every one of the points in the evidence relied upon by appellants to substantiate their claim that the preponderance of the evidence is not in favor of the verdict. So we could continue on and show the conflict of evidence upon the points urged by appellants to be uncontradicted; but, in each case, we find the evidence to be equally conflicting, so we conclude that the verdict of the jury has sufficient evidence to support it.

The third assignment is:

"The court erred in rendering judgment in favor of plaintiff herein for the land sued for by plaintiff herein, because in the pleadings of plaintiff herein no reference is had or made to the map made by Murray Harris, and the findings of the jury in this case did not identify the line found by them in relation to the land sued for by the plaintiff herein, and it is impossible for the court to determine or say that the line as established by Harris covers, coincides with, or is coincident with any line of the land described in plaintiff's petition, and, in entering judgment on the findings of the jury, the court erred and assumed that the Harris land was coincident with the south line or any other line of the land called for by the plaintiff herein, and described by plaintiff in his petition, and for that reason and for such reason the judgment entered herein should be set aside and a new trial be ordered herein and the findings of the jury be disregarded."

The answer is that plaintiff sued for survey No. 7, Texas & Pacific survey, by metes and bounds, and there is sufficient evidence in the record to show that the land described by plaintiffs in their petition is the same as that incorporated within the lines between the Hardaway and Harris surveys; in other words, to prove that the lands in controversy were the lands belonging to survey No. 7, Texas & Pacific, as pleaded by appellees.

Finding no error in the record, the cause is affirmed.

WALTHALL, J. (dissenting). I do not concur in the opinion expressed by the majority members of this court in this case.

There appears to be no dispute as to the correctness of the Hardaway survey and map filed by him in his location of Tivey surveys from No. 53, down to and including survey No. 58. The conflict in the surveys involved in this suit, it seems to me, can be traced to the beginning point fixed for Texas & Pacific survey No. 1. Surveys 57 and

58 were located on the ground and patents issued for them long before any of the Texas & Pacific surveys were made. No. 58 was located according to the calls made by Tivey in his original survey of No. 57. Tays, in his resurvey of 57, began his survey of 57 at the same common river corner of 56 and 57, and called for the same natural objects. From that common point, both Tivey and Tays have the same calls for course, distance, and calls for other surveys up to where they both reached the east or northeast corner of survey No. 57. Tivey, in running his line from the northeast corner of 57 to the river for a corner, calls for a distance of 697 varas. From that river corner Tivey meandered the river to the common river corner for 56 and 57 as used by both Tivey and Tays. Survey 58 was patented on the field notes made by Tivey which tied onto 57. These two surveys were made by Tivey at the same time. In making survey 58, Tivey began at the lower river corner of 57, and ran his line for 58 on the same course (45° E.) 833 varas, thus placing the northwest corner of 58, 136 varas farther to the north than 57 was fixed by both Tivey and Tays. Tays, in making his resurvey of 57, coincides with all of the calls, courses, and distances and ties onto all of the Tivey surveys on their northern boundaries back to survey 52. There is only one difference between the resurvey of 57 made by Tays and the original survey made by Tivey. Tays makes the northeasterly stem of 57 from its northeast corner to the river 1,337 varas as against Tivey's distance of 697 varas; that is, gave that stump of 57 a greater length by 640 varas. Tays' resurvey was made 15 years after Tivey had located 57 on the ground. In other words, in running the northeast line of 57 fifteen years after the original survey was made, he ran that distance to reach the river as it then was. There was no resurvey made by Tays of 58. The relative positions of 57 and 58 are shown by the records both in the county surveyor's office and by the map of said surveys made by Tivey and filed in the land office at Austin, and by Tays' map in his resurvey of 57, both in the surveyor's office and in the land office. These surveys and maps show the northerly boundary of survey 58 to be north of north boundary of 57.

In locating Texas & Pacific survey No. 1, it calls to begin "at a stake and mound set on the east line of survey No. 57, for the west corner of 58." The field notes do not show how far below the northeast corner of survey 57 the beginning corner of Texas & Pacific survey No. 1 starts; but Mr. Harris' evidence shows it to be 640 varas. That is, the surveyor, in locating Texas & Pacific survey No. 1, pulls survey 58 down on easterly line of 57, a distance of 776 varas, and calls that point

the "west corner of survey 58." With that point as a beginning corner for Texas & Pacific survey No. 1, it would necessarily carry a conflict and cause a lapping over onto the subsequent Tivey surveys by the subsequent Texas & Pacific surveys until Texas & Pacific survey No. 7 and Tivey survey No. 77 are reached. If that view is sustained by the undisputed evidence, the Harris south line for Texas & Pacific survey 7 is too far south by 776 varas. To make the south line of Texas & Pacific survey No. 7 and the north line of Tivey survey 77 coincident, the Harris line should be further north the width of the conflict; that is, 776 varas.

I have found no authority in the evidence for the beginning corner of Texas & Pacific survey No. 1, and I am of the opinion that none can be found. The Tays resurvey of 57 in no wise changes the north boundary line of 57. It cannot be claimed that the resurvey of 57 by Tays could in any way change the original location of 58. The original locations of these surveys were accepted by the General Land Office, and the lands covered by the field notes and patents were removed from subsequent locations. The evidence does not show a cancellation of any of the Tivey surveys, nor any change of location on the ground. I am of the opinion that as a matter of law the original location of the Tivey survey 77 would control as against the subsequent location of Texas & Pacific survey No. 1, so far as they conflict.

For reasons stated, I enter my dissent.

FERRELL-MICHAEL ABSTRACT & TITLE CO. et al. v. McCORMAC et al. (No. 8272.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 27, 1915. On Appellees' Motion for Rehearing, Feb. 5, 1916. Appellants' Motion for Rehearing Denied Feb. 5, 1916.)

1. PRINCIPAL AND SURETY — 147(1)—SECURITY GIVEN TO SURETY—RIGHT OF CREDITOR.

Where the maker of a note gave the surety a chattel mortgage, the payee is entitled to benefit of the mortgage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402, 405½, 407, 408½; Dec. Dig. § 147(1).]

2. CHATTEL MORTGAGES — 274 — ENFORCEMENT—LIMITATIONS.

Where the maker of a note mortgaged his personal property to protect a surety, and then transferred the property to a corporation organized to take over his business, limitations did not run in favor of the corporation by reason of its holding the property against the right of the payee to enforce the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 561; Dec. Dig. § 274.]

3. CHATTEL MORTGAGES — 47—DESCRIPTION—SUFFICIENCY.

A chattel mortgage on property used in abstract business which described it as consisting of abstract books and appurtenances all on described premises is sufficiently definite to warrant foreclosure; for parol evidence is admis-

sible to show what articles are included within the general description.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 87, 88, 96-103; Dec. Dig. § 47.]

4. CONTINUANCE § 22—RIGHT TO.

Where defendant against whom intervener had set up claim of a laborer's lien answered that intervener had drawn checks and created liabilities against defendant in excess of the amount of his claim, and asked for a continuance to procure testimony to sustain the defense, and intervener on trial clearly explained the nature of the claims, etc., while defendant made no showing of ability to sustain its charges or to subsequently obtain evidence sought, it was not an abuse of the trial court's discretion to deny continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 58-67; Dec. Dig. § 22.]

5. MASTER AND SERVANT § 82(2)—LABORER'S LIENS—RIGHT TO.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5644, declaring that, whenever any clerk, accountant, bookkeeper, factory operator, servant, mechanic, or common laborer shall perform labor, he shall have a lien on all products, machinery, or appliances of the master, etc., intervener, who was engaged to manage an abstract business, but performed much clerical work himself writing up the books and preparing abstracts, was entitled to a laborer's lien, although, as manager or superintendent, he could obtain no such lien.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 129, 130; Dec. Dig. § 82(2).]

6. COURTS § 121(1)—TEXAS DISTRICT COURT—JURISDICTION.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1848, declaring that before a case is called for trial additional parties may, when they are necessary or proper parties, be brought in, the district court, which had jurisdiction of an action on notes and to foreclose a mortgage, may allow one asserting a laborer's lien against the property of defendant to intervene, although the amount of his claim was less than the jurisdictional amount of the district court; such intervener being a proper, if not a necessary, party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 413, 416, 426; Dec. Dig. § 121(1).]

7. JUSTICES OF THE PEACE § 129(3)—JUDGMENT—COLLATERAL ATTACK—PARTIES ENTITLED TO MAKE.

A judgment of a justice of the peace foreclosing a laborer's lien cannot be collaterally attacked by parties or privies on the ground that the property on which the lien was claimed exceeded the jurisdictional amount of justice court, where the amount of the claim was within the jurisdiction of the justice, and the record did not show the value of the property on which the lien was sought to be imposed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 410; Dec. Dig. § 129(3); Judgment, Cent. Dig. § 912.]

8. APPEAL AND ERROR § 880(3)—NECESSITY OF APPEAL.

A decree against a defendant who did not appeal will not be disturbed on the appeal of the other defendants not interested in that particular.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3588; Dec. Dig. § 880(3).]

On Appellees' Motion for Rehearing.

9. JUDGMENT § 495(1) — COLLATERAL ATTACKS—PRESUMPTION.

Upon collateral attack on a judgment of a domestic court it will, where the action was within the court's general jurisdiction be presumed that the necessary jurisdictional facts existed, though they do not appear of record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933; Dec. Dig. § 495(1).]

10. JUDGMENT § 818(1) — COLLATERAL ATTACK—FOREIGN JUDGMENTS.

Judgment of a court of foreign jurisdiction can be collaterally attacked by parties or privies, even by evidence dehors the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1453, 1459; Dec. Dig. § 818(1).]

11. JUDGMENT § 494—COLLATERAL ATTACK—"PARTY"—"PRIVY."

The term "parties" in the sense of one who is concluded by a judgment includes all those directly interested in the subject-matter and who had the right to control or defend the proceedings and appeal, while "privies" are those who succeeded to the rights or property of parties to the judgment; hence a chattel mortgage was not a "party" nor "privy" to an action against the mortgagor to enforce a laborer's lien on his property, and might collaterally attack the judgment by evidence dehors the record on the ground that the court was without jurisdiction (citing Words and Phrases, Second Series, Party; see, also, Words and Phrases, First and Second Series, Privy).

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 932; Dec. Dig. § 494.]

12. JUSTICES OF THE PEACE § 44(2)—JURISDICTION—LABORER'S LIENS—ENFORCEMENT.

In a proceeding to enforce a laborer's lien, unlike one to enforce a landlord's lien, the rule applicable to contract liens that the value of the property, and not the demand, determines the jurisdiction of the court, obtains; hence justice court is without jurisdiction of a proceeding to enforce a laborer's lien on property of a value exceeding \$200.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 158, 162, 164, 167; Dec. Dig. § 44(2).]

13. APPEAL AND ERROR § 1234(5) — SUPERSEDES BOND—LIABILITY.

Where a supersedeas bond for appeal from a judgment foreclosing a chattel mortgage was conditioned to perform any judgment of the Court of Civil Appeals, and the judgment was affirmed, sureties are liable only for the costs, and no personal judgment can be rendered against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4773, 4775; Dec. Dig. § 1234(5).]

Appeal from District Court, Eastland County.

Action by Mrs. C. B. McCormac and others against the Ferrell-Michael Abstract & Title Company and others, in which R. L. Davenport intervened, and to which George Vaught and another were made parties defendant. From a judgment for plaintiffs and intervener, the named defendant and the impleaded defendants appeal. Affirmed in part and reversed and rendered in part.

Earl Conner and M. J. Smith, both of Eastland, for appellants. J. R. Stubblefield, of Eastland, for appellees.

CONNER, C. J. Mrs. C. B. McCormac, C. A. Gray, and J. W. Ward joined in the institution of this suit in the district court of Eastland county, seeking to recover a judgment upon certain promissory notes severally made to these parties. It was alleged that the note to Mrs. C. B. McCormac, which, principal, interest, and attorney's fees, amounted to \$512.60, had been executed by J. M. Ferrell, as principal, and J. R. Stubblefield, as surety, that the note payable to C. A. Gray amounting at the date of the judgment, as found by the court, to \$606.68, had been executed by J. M. Ferrell, J. R. Stubblefield, and W. B. Ferrell, and that the note payable to J. W. Ward, at the date of the judgment amounting in all to \$583.15, had been executed by J. M. Ferrell, W. S. Michael, and J. R. Stubblefield. It was alleged that at the date of the execution of the McCormac note J. M. Ferrell was the owner of a certain abstract business in the town of Eastland, and that, as such owner, he had executed and delivered to the said J. R. Stubblefield a certain mortgage on certain property described in the petition to secure the payment, among others, of the said note to said C. B. McCormac, and that said mortgage had been duly recorded in the proper records of Eastland county; that at a later date not named the Ferrell-Michael Abstract & Title Company was incorporated for the purpose of doing an abstract business in Eastland county, and that all the books, papers, records, and office fixtures and appurtenances theretofore belonging to J. M. Ferrell, and which had been mortgaged as alleged by J. M. Ferrell to secure the McCormac indebtedness, "became the property of the Ferrell-Michael Abstract & Title Company, subject to the mortgage above described," and that the abstract company was in possession of all of the property and asserting some right or title to the same. It was further alleged that 33 shares of the capital stock of said corporation owned by W. S. Michael had been duly mortgaged to J. W. Ward, C. A. Gray, and C. B. McCormac, for the purpose of securing the respective plaintiffs in the several notes owned by them.

Later, by an amended petition, the plaintiffs made George and Nora Vaught parties defendant, alleging, in substance, among other things, that subsequent to the happenings hereinbefore recited, and prior to the institution of the suit, a judgment had been rendered in the justice's court of precinct No. 1 of Eastland county, in the case of M. J. Smith v. the Ferrell-Michael Abstract Company, for the sum of \$117.50, with interest and costs, purporting to foreclose a "laborer's lien on the books, papers, records, a Remington typewriter, an Underwood typewriter, and all other fixtures and appurtenances belonging to the Ferrell-Michael Abstract & Title Company, including the record pertaining to the titles to land in Eastland and Stephens counties, Tex.," which said judgment had

been transferred to Nora Vaught, and under and by virtue of which she was asserting some right, title, or interest to the judgment. It was alleged:

"That the said judgment was void because it attempted to foreclose a laborer's lien on personal property in excess of the sum of \$200; that it attempted to foreclose a laborer's lien on property of the value of more than \$1,000."

The plaintiffs sought to foreclose the mortgage made to J. R. Stubblefield upon the property therein described as against all parties to the suit. They also sought to foreclose the mortgage upon the 32 shares of capital stock that had been issued to W. S. Michael.

All those against whom complaint was made as above stated were made parties defendant, after which R. L. Davenport filed a petition of intervention seeking to foreclose a laborer's lien set up by him upon the property described in the Stubblefield mortgage, and in the plaintiff's petition. A trial was had before the court without a jury, and resulted in a judgment in Mrs. C. B. McCormac's favor against J. M. Ferrell, as principal, and J. R. Stubblefield, as surety, on the note made to her, with a foreclosure of the mortgage lien evidenced by the Stubblefield mortgage upon the property of the abstract company. C. A. Gray and J. W. Ward also recovered judgment for the amounts by them as severally sought, with a foreclosure in their favor upon the 32 shares of the Michael capital stock of the abstract company. The court denied the prayer of these parties that the Stubblefield mortgage be foreclosed in their favor. The court further found and adjudged in favor of R. L. Davenport as against the abstract company for the sum of \$130, to secure \$60 of which a lien was declared and foreclosed upon the property in controversy as against all parties save the lien foreclosed in favor of Mrs. C. B. McCormac, which was made first in the judgment. It was further found and adjudged that the said judgment of the justice's court in favor of M. J. Smith against the Ferrell-Michael Abstract & Title Company, under which George and Nora Vaught claimed, was "void, because the plaintiff sought in said judgment to foreclose a laborer's lien on property of value in excess of \$200." The Ferrell-Michael Abstract & Title Company and George and Nora Vaught severally filed motions for new trial, which were overruled, and they alone have prosecuted appeals.

[1, 2] By exceptions to the petition the judgment, and in other ways, it is contended that Mrs. C. B. McCormac was not entitled to the benefit of the mortgage made by J. M. Ferrell to his surety, J. R. Stubblefield. But in so adjudging we think the court was correct as against the original title of the abstract company. While made direct to J. R. Stubblefield, the surety, one of its specific purposes, as therein recited, was to secure the payment of the note declared upon by Mrs. C. B. McCormac. The note was unpaid,

the mortgage had been duly recorded prior to the abstract company's acquisition of the property, the mortgagee, Stubblefield, was consenting thereto, and no repudiation of the mortgage of which it is shown Mrs. McCormac had notice has been pointed out. Under such circumstances we think the mortgage inured to the benefit of Mrs. C. B. McCormac, that the statute of limitations did not run against her right, and that the title of the abstract company to the books and other property acquired from J. M. Ferrell was in all respects subordinate to the claim of C. B. McCormac. As said in a recent work on Chattel Mortgages (see Jones on Chattel Mortgages [5th Ed.] § 512):

"The mortgage given to a surety inures to the benefit of the creditor to whom the surety is bound; and upon the bankruptcy of the mortgagor a court of bankruptcy will enforce the trust. If the mortgage upon its face be conditioned to indemnify the mortgagee against a liability upon certain debts, it expresses a trust; and one who purchases the mortgage, or takes an assignment of it, takes it with notice of such trust and subject to it. The sale and assignment are then void in equity, and the assignee will be regarded as merely holding the legal title to the property as trustee in place of the original trustee."

See, also, *Nat. Shoe & Leather Bank of Auburn et al. v. Small et al.* (D. C.) 7 Fed. 837; *Hanlon v. Hanlon*, 73 Kan. 25, 84 Pac. 381, 117 Am. St. Rep. 453.

That the plaintiffs' action was not barred by limitation, as urged, is apparent in view of the fact that the action was not one for conversion of the property described in the petition, as suggested, but merely one for the foreclosure of a mortgage lien that had been duly recorded before the incorporation of the abstract company, and before, of course, its acquisition of the mortgaged property from J. M. Ferrell. Such record effected the abstract company with notice of the mortgage and of C. B. McCormac's equitable right therein, notwithstanding there may have been a want of actual notice thereof on the part of some of the stockholders of incorporators, as was testified. It is not pretended that the note of C. B. McCormac was barred by limitation, or that she at any time was given notice that the abstract company had or would repudiate the mortgage and hold the mortgaged property in hostility thereto. The mere possession and use of the property under a claim of ownership was not necessarily inconsistent with the terms and legal effect of the mortgage, and certainly not sufficient to establish that character of adverse possession which would be necessary to bar C. B. McCormac's action to foreclose the mortgage declared upon. All assignments of error involving these questions are accordingly overruled.

By other assignments the sufficiency of the description of the property as described in the mortgage, in the plea of intervener, and in the judgment is attacked. Substantially, the description in the mortgage is as follows:

"Two league books, four section books, two lot books, probate index, general index, maps, supplies and machine now on hand and in use, and that are hereafter acquired and used by me, the said J. M. Ferrell, in conducting and continuing in the abstract business, this day purchased by me from the firm of Ferrell & McCormac, said firm being composed of the J. M. Ferrell and C. B. McCormac, said above-described property being in the office and vault at the rear of the building situated on lot No. 6, Blk. —/B1. in the town of Eastland, Eastland county, Texas, and all appurtenances thereto belonging or which may hereafter be acquired."

[3] The description of the property in the judgment is yet, if anything, more complete, and is, we think, on the whole, sufficient. Again quoting from Mr. Jones on Chattel Mortgages, §§ 53, 54, and 54a, it is said:

"It is not necessary that the property should be so described as to be capable of being identified by the written recital or by the name used to designate it in the mortgage. Parol evidence is admissible to show that the particular article is included within the general words of a description, though not to supply an essential word which has been omitted. Thus, under a mortgage of all of the stock, tools, and property belonging to the mortgagor in and about a wheelwright's shop occupied by him, parol evidence is admissible to show what articles were in and about the shop when the mortgage was made. It is obviously impossible in most cases to set forth on the face of the mortgage all the articles embraced in it with such precision that any one, by a mere inspection of the mortgage, without reference to any other source of information, can identify them. Resort must generally be had to parol evidence to identify the property mortgaged, although it be enumerated and described with the utmost minuteness. Such evidence is no more required to identify property described as all one's household furniture than it is when the number of chairs, tables, and other articles is given. * * * A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify property, is sufficient. * * * Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect—the parties and their privies. A subsequent purchaser or mortgagee is supposed to acquire a knowledge of all the facts so far as may be needful to his protection, and he purchases in view of that knowledge. * * * A mortgage which describes the property as 'one bay horse, aged six years,' in the mortgagor's possession in a certain city, is not void by reason of the insufficiency of description, though the description would not enable a third person, without the aid of facts not contained in the mortgage, to identify the horse. But the description would enable a third person, aided by inquiries which the instrument itself suggests, to identify the property, and is therefore sufficient. A mortgage of '50 head of steers about 20 months old, now owned by me and in my possession on my farm' in a certain township, is sufficient against subsequent purchasers, though some of the cattle were bought in an adjoining township into which the farm extended."

It is to be noted that the property under consideration is described in the mortgage as general index maps, supplies, and machines "now on hand and in use by the said J. M. Ferrell in conducting and continuing his abstract business," purchased by him from the firm of Ferrell-Michael Abstract & Title Company on the day the mortgage was executed. The property is further described

as "being in the office and vault at the rear of the building situated on lot No. 6, Block —/B1, in the town of Eastland, Eastland county, Texas." In the light of these references and of the authority from which we have quoted, it is not to be doubted, we think, that an identification of the property may easily be made by resort to competent parol proof, and we accordingly overrule all objections to the plaintiffs' petition, to the judgment, and other proceedings made upon the ground of insufficient description of the property upon which the court foreclosed C. B. McCormac's lien.

[4] A number of assignments of error relating to the claim of intervener, R. L. Davenport, are presented. R. L. Davenport filed his plea of intervention on the 20th day of January, 1915, alleging, among other things, a contract of employment between him and the abstract company at a salary of \$60 per month. He further alleged that upon such contract of employment there was a balance due of \$150; that his employment required certain work in making abstracts from appellant's books, and in transcribing from the county records certain matters pertaining to land titles, and placing the same upon appellant's books. The particulars of the work which he alleged he did were set out, and intervener declared that to secure the unpaid balance due him he was entitled to the laborer's lien provided for by statute; that he had secured said lien in the manner provided for, and he sought its foreclosure. Later, on the same day, the abstract company filed its first supplemental answer to such plea, denying that it was due the intervener any sum whatever, and alleging that during the time the intervener was in its employment he had charge of the books and accounts until he ceased said employment on the 29th day of December, 1914; that during said time the intervener had made all charges and collected the amounts due the abstract company, which collections he retained; that there appeared on the books of the abstract company outstanding accounts kept by intervener in a sum much greater than sufficient to pay off and discharge all claims asserted by him; that through inadvertence or mistake he (the intervener) had made many collections of accounts, and failed to make the proper credit on the books of appellant, and failed to charge himself with such collections; that the intervener had also issued corporation checks to various parties at the time unknown to the abstract company in payment of his individual indebtedness; and that thereby there were outstanding legal liabilities against the abstract company in a greater amount than would be sufficient to offset the intervener's claim. It was further alleged that the appellant company did not know the true state of the accounts; that the books were then in the hands of an accountant for examination and for the purpose of ascertaining the true condition; but

that time sufficient had not as yet elapsed to enable the abstract company to learn from such persons whose names were on the books whether the accounts had been paid, just how much had been collected, the exact amount that had been appropriated by intervener, etc. And appellant, in close connection with its said answer, made a written application for a continuance of the cause to enable it to obtain the information indicated by its answer, and which, it was alleged, would be sufficient to establish a perfect defense to any alleged indebtedness of the intervener.

The application for a continuance was overruled, to which action the appellant company duly excepted, and the court required the trial to proceed upon the next day, to wit, on January 21, 1915. We have carefully examined the motion and considered the action of the court complained of, but have finally concluded that we would not be justified in reversing the judgment on this account. The motion for continuance, we think, was addressed to the discretion of the court. The intervener, Davenport, testified fully as to his method of bookkeeping, explained a number of the failures to make proper entries, etc., and the court made a corresponding deduction in his claim. There seems to be no evidence by persons named in the motion for continuance, or whose names appear upon the books, of the payment of any sums due the abstract company for which credit was not given, nor does it appear that there were any checks issued by the intervener not accounted for, and no suggestion was made by appellant in its motion for new trial, which was filed on January 29th, that during or since the trial any witness had been discovered who could or would be able, by his testimony, to sustain the suppositional facts in the abstract company's answer. We think, therefore, the assignments and propositions relating to this matter must be overruled.

[5] It is also urged that the court should have stricken out the plea of intervention on the ground that the intervener did not show himself to be within that class of persons entitled to a laborer's lien. The statute invoked by the intervener (4 Vernon's Sayles' Texas Civ. Statutes, art. 5644), so far as necessary to quote, reads:

"That whenever any clerk, accountant, bookkeeper, artisan, craftsman, factory operator, mill operator, servant, mechanic, quarry man, or common laborer, farm hand, male or female, may labor or perform any service in any office, store, * * * by virtue of any contract or agreement, written or verbal, with any person, employer, firm, corporation, or his, her, or their agent or agents, receiver or receivers, trustee or trustees, in order to secure the payment of the amount due or owing under such contract or agreement, written or verbal, the hereinbefore mentioned employee shall have a first lien upon all products, machinery, tools, fixtures, appurtenances, goods, wares, merchandise, chattels, * * * or thing or things of value of whatsoever character that may be created in whole or

in part by the labor of, or that may be used by such person or persons, or necessarily connected with the performance with such labor or service, which may be owned by or in the possession or under the control of the aforesaid employer, person, firm, corporation, or his, or their agent or agents, receiver or receivers, trustee or trustees," etc.

The intervenor alleged, in substance, that the defendant corporation was engaged in making abstracts to land, perfecting land titles, and in transcribing the various instruments of record in the office of the county clerk of Eastland county, Tex., which affected titles to lands, and recording and indexing such instruments on the books of the corporation kept for that purpose, and that the "intervener was employed to manage, supervise, and control said abstract business of defendant corporation, and labored daily and continually from May 14, 1914, to December 29, 1914, making abstracts, and, when not so employed, taking off from the deed records of Eastland county and recording and indexing on the books of defendant corporation instruments affecting land titles; that the labor so done and performed by this intervenor is now contained on the different books of the defendant corporation and the indexes thereto; that the intervenor also kept books of accounts for said defendant corporation in which all debts and credits are shown," etc. The evidence of the character of the intervenor's employment and labor corresponds very closely to his allegations as above set out, and the appellant company insists that its case comes within the ruling in the cases of *Lindale Brick Co. v. Smith*, 54 Tex. Civ. App. 297, 118 S. W. 568; *Bush Bros. Lumber & Milling Co. v. Eastwood*, 132 S. W. 389; *Hatton v. Bodan Lumber Co.*, 57 Tex. Civ. App. 478, 123 S. W. 163. In the case first cited it was held that one employed as a superintendent of a brick company was not entitled to a lien for his services, although he at times performed the labor of an ordinary hand, inasmuch as a lien was not given in favor of persons not enumerated, although they may occasionally perform the duties of one of the enumerated classes. The other cases cited are of like effect. We have no disposition to controvert the holdings in these cases, and, while the intervenor's case is not without difficulty, we have finally concluded that we cannot disturb the trial court's determination that the intervenor brought himself within the statute conferring the lien. It is true he alleged and testified that he was employed to manage and control the appellant company's abstract business, but on the whole, as alleged and proved, it seems that his employment and service comprehended the service also of a clerk, one of the classes of persons specifically named in the article of the statute that we have quoted. In the case of *Lindale Brick Co. v. Smith*, supra, it appears that the manager, Smith, in addition to the duties of management and superintendence, also per-

formed at times labor of the character ordinarily performed by a common servant. This, it was held, did not bring Smith within the designated class, but emphasis is given to the fact there shown that it did not appear that such ordinary labor was required of Smith by the terms of his contract of employment. The court said:

"There is nothing, however, to negative the inference that those services [the ordinary services referred to] were performed from choice, rather than in compliance with the exactions of a contract. For aught that appears to the contrary, he was empowered to employ others to do all the manual labor which he performed about the plant."

In the case before us, however, the intervenor's allegations and testimony as a whole indicated that his contract of employment contemplated, not only the supervision and management of the business, but also the performance of the necessary clerical work upon the books of the company. Indeed, it appears that during his employment he alone did all the work necessary in the prosecution of the business, and nothing in the allegation or testimony indicates that it was contemplated, or that he was authorized to employ others to do the clerical work, and at the same time draw the stipulated salary as manager. We think, therefore, that it should be held that in cases like this, where the contract of employment contemplates the performance of services to secure the payment of which the statute was evidently enacted, that the statute should be given effect, even though the clerk, servant, or other person named in the statute was also required to perform services more properly perhaps relating to the functions of a superintendent or manager, who, it appears, is not included within the protected classes of the statute. We feel, therefore, that we must overrule the contention noted. *Lindale Brick Co. v. Smith*, 54 Tex. Civ. App. 297, 118 S. W. 568.

[8] It is further insisted in various forms that, inasmuch as the intervenor's claim amounted to but \$150, the court was without jurisdiction to entertain it. But this contention likewise, we think, must be overruled. Our statutes provide that:

"Before a case is called for trial, additional parties may, when they are necessary or proper parties to the suit, be brought in by proper process, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but such parties shall not be brought in at such a time or in such a manner as unreasonably to delay the trial of the case." 2 *Vernon's Sayles' Tex. Civ. Statutes*, art. 1848.

It is doubtless true that the intervenor was not a necessary party, and that the court, in the exercise of its discretion, might have refused to entertain his plea, but we think he was not an improper party. The action as instituted by the original plaintiffs was to foreclose a mortgage upon specified property upon which the intervenor, by his plea in intervention, also asserted a lien, and it is a favorite doctrine of equity, in order to avoid

a multiplicity of suits, that parties having a common interest in the subject-matter may join, or at least are proper parties, even though their asserted rights may not have a common origin. See 16 Cyc. 65, and numerous authorities cited in note 79. See, also, 11 N. Y. Anno. Dig. §§ 74207, 74208, and authorities cited in notes. See, also, section 783, Jones on Chattel Mortgages, and cases cited in notes 108 and 109; *Polk v. King*, 19 Tex. Civ. App. 666, 48 S. W. 601, and cases therein cited. It is to be noted that the intervenor was not the original actor—not the one who first sought an exercise of the court's jurisdiction. The plaintiffs in the suit were the original movants, and presented a case over which the court had undoubted jurisdiction, both as to the parties and as to the subject-matter, and intervenor's attitude was that of one who merely interposes a claim to the subject-matter over which the court already had jurisdiction, and the case was not as if the intervenor whose demand was below the jurisdiction of the court, had first sought to maintain the suit.

It appearing that the court already had acquired jurisdiction of the subject-matter, and having already exercised his discretion in entertaining the plea, we think the action of the court in this respect must be sustained, regardless of the amount of the intervenor's demand.

In the form of exceptions to the plaintiff's petition, objections to evidence, and to the court's final decree, complaint is made of the action of the court relating to the judgment of the justice court in favor of M. J. Smith against the appellant abstract company, by virtue of which the plaintiffs alleged George and Nora Vaught were claiming some right. Besides costs, the judgment was for the sum of \$117.50, and purports to foreclose a laborer's lien on part or all of the property upon which the plaintiff sought to foreclose the mortgage. The plaintiffs alleged, among other things, that:

"The said judgment was void because it attempted to foreclose a laborer's lien on personal property in excess of the sum of \$200; that it attempted to foreclose a laborer's lien on property of the value of more than \$1,000," etc.

There were other points of attack upon the judgment, but none, it seems, which plaintiffs attempted to support by evidence. R. L. Davenport, however, was permitted to testify over the objection of defendants that the books, etc., upon which the laborer's lien had been foreclosed in the justice court exceeded the sum of \$200 in value, and the court adjudged:

"That the judgment rendered by the justice court of precinct No. 1 of Eastland county, Tex., in the case of M. J. Smith v. Ferrell-Michael Abstract & Title Company, in cause No. 3129, be, and the same is hereby, declared null and void, and of no force or effect whatever as against all parties to this suit, and that the claim of George Vaught and Nora Vaught be hereby declared to be null and void, and the

said George Vaught and Nora Vaught are hereby perpetually enjoined from claiming or asserting any rights, title, or interest on account of the said judgment having been transferred to them or either of them, and the plaintiff Mrs. O. B. McCormac, C. A. Gray, and J. W. Ward are hereby given a judgment for any and all costs which have accrued in this case on account of the said George Vaught and Nora Vaught being made parties to this suit, and for which let execution issue as against the said George Vaught and Nora Vaught, or either of them."

We are of opinion that the court erred in his ruling and decree on this branch of the case. Contrary to what has been frequently declared in cases of contract liens, it has been held in a number of cases that, where a foreclosure of a statutory lien is sought, the amount and character of plaintiff's debt or demand determines the jurisdiction of the court, and not the value of the property upon which the foreclosure is sought. See *Lawson v. Lynch*, 9 Tex. Civ. App. 582, 29 S. W. 1129; *Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312; *Allen v. Glover*, 27 Tex. Civ. App. 483, 65 S. W. 379; *Manire v. Wilkinson et al.*, 136 S. W. 1152. The principle of these cases evidently is that, where the plaintiff establishes a debt within the jurisdiction of the court, and such debt is of the character within the statute giving the lien, the foreclosure upon so much of the property as is necessary to satisfy the judgment follows as a matter of course. In such cases the real controversy is over the amount of the debt, and its character and the lien is but an incident. In all cases where this is true, and where the validity of the lien is in reality not questioned (except as otherwise controlled by statute as in cases of foreclosure of liens upon lands), it seems to the writer, at least, that the principle of the cases just cited is sound, whether the lien asserted arises by contract or statute; for in neither case does the law contemplate an appropriation of more of the property upon which the lien rests than is necessary to satisfy the debt. But, however this may be, we all concur in the distinction made by the above cases between contract and statutory liens, and in accordance therewith are of opinion that the judgment of the justice court in favor of M. J. Smith against the abstract company foreclosing the laborer's lien was not open to attack upon the only ground upon which it seems the judgment of its invalidity rests.

[7] We think the judgment below in this respect was wrong for yet another and perhaps a better reason. The judgment is entirely regular upon its face. The amount for which recovery was sought was \$117.50, an amount clearly within the jurisdiction of the justice court. The property upon which the lien was foreclosed was personal property, the value of which, if it could make any difference, does not appear on the face of the judgment to be beyond amounts over which the justice court by statute has been given jurisdiction. It reads as follows:

"M. J. Smith v. Ferrell-Michael Abstract & Title Company.

"In the Justice Court of Precinct No. 1, Eastland County, Texas.

"On this the 8th day of July, A. D. 1914, came on to be heard the cause of M. J. Smith v. Ferrell-Michael Abstract & Title Company, and the plaintiff, M. J. Smith, appearing by his attorney and announced ready for trial, and the defendant having waived process and having entered its appearance herein, but filed no pleadings in this court or made any defense against the claim of said plaintiff, and jury being waived, and matters of fact as well as of law being submitted to the court, and the court, after hearing the evidence adduced and the argument of counsel is of the opinion that the plaintiff, M. J. Smith, should recover of and from the defendant, Ferrell-Michael Abstract & Title Company, a corporation, the sum of \$117.50, and all costs in this behalf expended, and, it further appearing to the court that the plaintiff has a valid and subsisting laborer's lien upon the following described property of the defendants: 3 league books of Eastland county, Tex.; 4 section books of Eastland county, Tex.; 1 order book for Eastland county, Tex.; 3 lot books for Eastland county, Tex.; 2 typewriters, one Remington, one Underwood No. 5; 3 section books of Stephens county, Tex.; 1 league book of Stephens county, Tex., marker; section book of Eastland county, Tex.; 1 probate index of Eastland county, Tex.; 1 general index of Eastland county, Tex.; 1 bookcase; 1 table; about 511 duplicate carbon copies of abstracts of title of Eastland county; about 100 copies of deed records of Eastland county, Tex., and about 36 copies of deed records of Stephens county; 1 Stephens county index—it is therefore ordered, adjudged, and decreed that the laborer's lien as it existed on the 27th day of March, 1914, be and the same is hereby foreclosed upon the property described belonging to the defendant, Ferrell-Michael Abstract & Title Company; and it is hereby further ordered and decreed that said property be sold in accordance with law as provided for the sale of personal property under execution, and that the proceeds realized from such sale be applied in liquidation of this judgment, and, if the same be insufficient to satisfy the same, that the balance be made out of any other property of the defendants subject to execution."

There is evidence in the record tending to show that by virtue of the judgment quoted an order of sale was issued out of the justice court in obedience to which the property described in the judgment was sold to Virgil Love on December 29, 1914, and by him sold to H. C. Pope on December 31, 1914, and neither Love nor Pope has been made a party to this suit. But, regardless of considerations that these facts may suggest, we are of opinion that the court was without power to declare the judgment void.

The attack upon the judgment was collateral, and not direct, as evidently was the view of the plaintiffs and of the court below. As said by our Supreme Court in the case of Crawford v. McDonald, 88 Tex. 626, loc. cit. 630, 33 S. W. 325.

"A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of same, in a proceeding instituted for that purpose, such as a motion for rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc. A collateral attack on a judgment is an attempt to avoid its binding force in a proceed-

ing not instituted for one of the purposes aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effect."

In O'Neill v. Potvin, 18 Idaho, 721, 93 Pac. 20, 21, 257, citing 1 Black on Judgments, § 252, it is said that the attack upon the judgment is a "collateral attack" if the action or proceeding has an independent purpose and contemplates some other relief or result than the mere setting aside of the judgment, although the setting aside of the judgment may be necessary to secure such independent purpose. Where an action was instituted to quiet title to land, and in order to so quiet the title a judgment must be held to be void, the action is clearly a collateral attack on that judgment. Tested by these principles and numerous other authorities that might be cited of like effect, it seems clear that the attack upon the justice's judgment is collateral, as contradistinguished from direct. The plaintiffs' suit was instituted for the purpose of foreclosing a lien upon the property described in their petition, and as incidental merely to this, and for the evident purpose of establishing the priority of their mortgage lien the attack was made upon the judgment of the justice's court. Not only the authorities cited, but numerous others that might be cited (see Scudder v. Cox, 35 Tex. Civ. App. 416, 80 S. W. 872; Newman v. Mackey, 37 Tex. Civ. App. 85, 33 S. W. 31; Brooks v. Powell, 29 S. W. 809, and Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325, and cases cited), establish the doctrine that a judgment of a court of competent jurisdiction regular on its face cannot be declared invalid on a collateral attack, and in this respect there can be no difference between the judgment of the justice court and that of any other court of general jurisdiction. Within the limits assigned to them by the statute such courts are treated as courts of general jurisdiction. See Williams v. Ball, 52 Tex. 603, 36 Am. Rep. 730; Long v. Brennehan, 59 Tex. 210; Clayton v. Hurt, 88 Tex. 595, 32 S. W. 876.

It follows, we think, that no right or interest, if any, of appellants George and Nora Vaught, or of other persons, whether parties to this proceeding or not, can be abridged or effected by a decree in the present suit, and the judgment of the court below of contrary effect must be set aside and so determined.

[8] Appellants also urged objection to the foreclosure of the plaintiffs' mortgage upon the shares of stock issued to the defendant Michael, but, inasmuch as Michael has not complained of the decree in this respect, we fail to see in what way either of the appellants have cause of complaint. Nor has any complaint of which we can take notice been made of the failure of the court to foreclose the mortgage declared upon in the plaintiffs' petition in favor of the plaintiffs Gray and

Ward. This branch of the subject, therefore, will not be further noticed. On the whole, however, the judgment will be affirmed in part, and reversed and rendered in part, in accordance with the foregoing opinion.

Affirmed in part; reversed and rendered in part.

On Appellee's Motion for Rehearing.

All parties herein urge motions for rehearing, and we will briefly dispose of the questions presented in a general way.

[9, 10] On original hearing we held, in effect, that the judgment in favor of M. J. Smith against the appellant abstract company was not in this action subject to attack on the ground of a want of jurisdiction in the justice court which rendered it. It is clear, we think, that, as originally announced, the attack herein is a collateral one, and, said court being a domestic court with general jurisdiction within prescribed limits, and a want of jurisdiction not appearing on the face of the record, the judgment mentioned is conclusive as between all parties and privies thereto. Under such circumstances the necessary jurisdictional facts, when not recited, as in the case of the judgment under consideration, will be conclusively presumed to have existed. See, in addition to the authorities cited in our original opinion, 1 Black on Judgments, §§ 270, 271; Murchison v. White, 54 Tex. 78. In this connection, however, we think it should be noted that the authorities make a distinction between judgments of domestic courts and judgments rendered by courts of other states, or personal judgments against a nonresident, or judgments by courts deriving their authority from another sovereign power. Judgments of the latter classes may be attacked in a collateral proceeding on the ground of a want of jurisdiction over either person or subject-matter, even by evidence dehors the record, and by persons who are parties or privies on the face of the proceeding. Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 806; 1 Black on Judgments, § 270; Bender v. Damon, 72 Tex. 92, 9 S. W. 747.

[11] Thus far we find no fault in our original opinion, but on reconsideration we have concluded that appellees were neither parties nor privies to the judgment of the justice court, and that hence they are not concluded from showing its invalidity in this action.

"The term 'party,' in the sense of one who is concluded by a judgment, includes all those directly interested in the subject-matter, and who had the right to control or defend the proceedings, examine and cross-examine witnesses, and appeal from the judgment." See Words and Phrases, Second Series, vol. 3, p. 894, citing Allen v. McMannes (D. C.) 156 Fed. 615.

Again, the same author, on the same page, citing Perkins v. Goodin, 111 Mo. App. 429, 85 S. W. 996, says:

"The term 'parties,' as used in connection with the doctrine of res judicata, includes all who are directly interested in the subject-matter of the suit and have a right and are given an oppor-

tunity to make a defense, control the proceedings, examine and cross-examine the witnesses, and appeal from the judgment or decree in case an appeal lies. Persons not having these rights substantially are regarded as strangers to the cause. A mere nominal party, having no control of or interest in the suit, is not bound by the judgment."

Says the same author on page 1219 of the same volume:

"Privy is defined to be a mutual or successive relationship to the same rights of property, and within the rules relating to the conclusiveness of judgments all persons are 'privies' to a judgment whose succession to the rights of property thereby adjudicated was derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that action." Lamar County v. Talley, 127 S. W. 272.

Again in the same connection it is said:

"Privies, in such sense that they are bound by a judgment, are those who acquired interest in the subject-matter after the rendition of the judgment"—citing cases.

The same author gives numerous other definitions of like import of the terms "parties" and "privies," and therefrom we think it clear that appellee Mrs. McCormac was neither a party nor privy to the judgment of the justice court we have under consideration. Her right as mortgagee in the property involved in the judgment accrued not only prior to the rendition of the judgment, but prior even to the acquisition of the property by the abstract company against which the judgment was rendered. She was not made a party in the proceeding in which the judgment was rendered, had no right of control over the proceedings, had no right of appeal, and claims no right emanating from or under that judgment. On the contrary, her claim is in hostility thereto. As to persons in such relation to a judgment, it is said in 1 Black on Judgments, § 260:

"The rule that a judgment of a court of competent jurisdiction is conclusive, until reversed or in some manner set aside and annulled, and that it cannot be attacked collaterally by evidence tending to show that it was irregular or improperly obtained only applies to parties and privies to the judgment who may take proceedings for its reversal, and in no sense extends to strangers."

See, also, Freeman on Judgments, § 334; Murchison v. White, 54 Tex. 78.

[12] If then, the appellee's plea and proof that the value of the property upon which the laborer's lien in the justice court was foreclosed was in excess of \$200, the limit of the jurisdiction of the justice court, must be sustained, as appellee urges, the judgment of the trial court in this case must, as between the parties herein, be approved to the extent necessary to free the property upon which the plaintiffs sought to foreclose their mortgage from the incumbrance, or apparent incumbrance, created by the judgment of the justice court. The sufficiency of the plaintiff's plea to a want of jurisdiction in the respect pointed out cannot be successfully assailed, nor can the finding of the court in favor of appellees upon the issue be disturbed

because of the want of evidence. For the witness R. L. Davenport distinctly testified that the property specified in the judgment and upon which Smith's laborer's lien was foreclosed was of a value far in excess of \$200. On original hearing we said:

"Contrary to what has been frequently declared in cases of contract liens, it has been held in a number of cases that, where a foreclosure of a statutory lien is sought, the amount and character of plaintiff's debt or demand determines the jurisdiction of the court, and not the value of the property upon which the foreclosure is sought"—citing a number of authorities, including the leading one of *Lawson v. Lynch*, 9 Tex. Civ. App. 582, 29 S. W. 1129, which was a case of the landlord's lien.

Appellee, however, now presses upon us a distinction between the landlord's lien and a laborer's lien that was made in the case of *Railway v. Rucker*, 38 Tex. Civ. App. 591, 88 S. W. 815. In that case it was held that the test of jurisdiction in contract cases applied as well in cases where a foreclosure of a statutory lien is sought, except where the statutory lien sought to be foreclosed was that of a landlord, under title 80 of the Revised Statutes. The case of *Railway v. Rucker* was distinctly approved by our Supreme Court in 99 Tex. 125, 87 S. W. 818, and, while the distinction is not entirely satisfactory to us, we nevertheless feel bound to apply the distinction here in the case before us.

It follows that appellee Mrs. McCormac and intervenor R. L. Davenport are entitled as against George and Nora Vaught, and as against all other parties to this suit, to a foreclosure of the liens in the order and as adjudged below. That this may be done, appellee's motion for rehearing will be granted, with an affirmance of the judgment below in all other respects; no error in other respects having been found.

[13] Appellees further insist that the judgment of this court should have been given against appellants and the sureties upon their supersedeas bond. This contention must be overruled, save as to costs, which will be adjudged against appellants and their sureties as in other cases. No personal or money judgment whatever against appellants or either of them was rendered in favor of appellees Mrs. McCormac or Gray, and the intervenor, Davenport, is not complaining. As against appellants the decree simply was that the mortgage lien declared upon should be foreclosed upon the property described in the mortgage and in the judgment, and the terms of the supersedeas bond, which is in compliance with the statute, bind appellants only to prosecute their appeal with effect, "and in case the judgment of the Supreme Court or of the Court of Civil Appeals shall be against them, they shall perform its judgment, sentence, or decree and pay all such damages as said court may award against it." In the absence of a claim of damages for the delay occasioned by the operation of the

supersedeas bond, we do not understand that the principal and sureties thereon can be held liable for a debt not adjudged against the principals in the judgment below. *Adoue v. Wettermark*, 28 Tex. Civ. App. 593, 68 S. W. 553.

We conclude that appellants' motion for rehearing must be overruled, and the judgment below affirmed as hereinbefore stated, and as in other respects in our original opinion provided, with all costs taxed against appellants and the sureties on their supersedeas bond.

LANE et al. v. KEMPNER et al. (No. 8323.)
(Court of Civil Appeals of Texas. Ft. Worth.
Feb. 5, 1916.)

1. EXECUTION \S 268—SALE—TITLE OF PURCHASER—INCUMBRANCE.

A purchaser of property under execution sale took title subject to the incumbrance of vendor's lien notes secured by a valid vendor's lien on record against the property.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 762-767; Dec. Dig. \S 268.]

2. INJUNCTION \S 27 — EXECUTION AND ENFORCEMENT OF JUDGMENT—STATUTE.

Under Vernon's Sayles' Ann. Civ. St. 1914, \S 4643, providing when injunctions may be granted, owner of realty held entitled to writ of injunction enjoining the purchaser of the property under execution sale and the sheriff from seizing it under writ of sequestration issued in a suit in trespass to try title in which the purchaser at execution sale was plaintiff and the owner's tenant defendant.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 50, 51, 53; Dec. Dig. \S 27.]

3. INJUNCTION \S 16—RIGHT TO RELIEF—LEGAL REMEDY—STATUTE.

Vernon's Sayles' Ann. Civ. St. 1914, \S 4643, providing when injunctions may be granted, gives an applicant within its terms a right to the relief irrespective of the existence of a legal remedy at law.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 15; Dec. Dig. \S 16.]

4. SEQUESTRATION \S 15—RESTRAINING SEQUESTRATION—LEGAL REMEDY—RIGHT TO REPLEVY PROPERTY.

Plaintiffs in an injunction suit, who were not parties to a suit in trespass to try title against a tenant of one of them, were not authorized to replevy the property when seized under writ of sequestration, the defendant alone having the right under Vernon's Sayles' Ann. Civ. St. 1914, \S 7103, providing that, when property has been sequestered, the defendant may replevy by giving bond.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. \S 25-32; Dec. Dig. \S 15.]

5. INJUNCTION \S 17 — ENFORCEMENT OF JUDGMENT — SEIZURE UNDER WRIT OF SEQUESTRATION—ADEQUACY OF LEGAL REMEDY.

The remedy of plaintiffs, in suit to enjoin seizure of property under writ of sequestration issued in a suit in trespass to try title against the tenant of one of them, to permit the sequestration to have been completed, and then, had they prevailed in their suit to set aside the execution sale, to have brought an action in damages for loss sustained by reason of the seques-

tration, was not as efficient as the remedy by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 16; Dec. Dig. ¶ 17.]

6. EXECUTION — 258 — SALE — COLLATERAL ATTACK.

A collateral attack on the validity of an execution sale by intervening in trespass to try title could not effect its avoidance for irregularities and defects not appearing on the face of the proceedings, and therefore such right of intervention does not defeat a suit for injunction to restrain seizure of the property on such writ of sequestration.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 736-739, 789; Dec. Dig. ¶ 258.]

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Suit by R. L. Lane and another against I. H. Kempner and another. From an order dissolving a temporary injunction, plaintiffs appeal. Judgment reversed and cause remanded, and order of the trial court dissolving the injunction ordered set aside, such injunction being continued in force until lawfully altered.

Roy & Rowland and Wm. J. Berne, all of Ft. Worth, for appellants. Hunter & Hunter, of Ft. Worth, for appellees.

BUCK, J. This suit was brought by appellants, R. L. Lane and T. B. Freeman, against I. H. Kempner, alleged to reside in Galveston county, Tex., and N. C. Mann, sheriff of Tarrant county, Tex., to enjoin the defendants from seizing certain improved residence property in the city of Ft. Worth under a writ of sequestration issued in a suit in trespass to try title in which I. H. Kempner was plaintiff and Percy Webb defendant. A temporary injunction issued, which, upon motion of appellees, Kempner and Mann, was dissolved. From the order of dissolution, plaintiffs have appealed.

No oral evidence was heard, and the order of dissolution was based upon the petition, the answer, the motion to dissolve, the first supplemental petition, and plaintiffs' reply to defendants' motion to dissolve. The practically uncontroverted facts seem to be as follows:

[1] On December 18, 1914, Percy Webb, a married man, occupied and owned the premises in controversy, and on said date Webb and his wife executed and delivered to plaintiff Lane a warranty deed conveying said property; Lane taking the title in his own name, but the consideration having been paid by himself and his coplaintiff, Freeman. Said deed was duly filed for record in Tarrant county, January 15, 1915, and duly recorded. Upon the execution of said deed, on December 18, 1914, Webb rented said premises from plaintiff and occupied the same as plaintiff's tenant continuously from that time to the institution of this suit. On November 14, 1912, Turner & Dingee obtained a judg-

ment in the justice court of Tarrant county against R. L. Lane in the sum of \$183.65 and costs, said judgment bearing interest at the rate of 6 per cent. per annum from date, execution having been issued on said judgment in due time and having been returned by the constable of Tarrant county with the indorsement of nulla bona. On December 14, 1912, an abstract of the above judgment was recorded in the judgment record of Tarrant county. On April 14, 1915, an alias execution issued on said judgment, and having been placed in the hands of the constable of precinct No. 1, Tarrant county, said constable levied upon the property in controversy as the property of appellant Lane, and duly advertised said property for sale, for 20 days prior to the sale, in the Union Banner, a weekly newspaper published in Tarrant county, and deposited an envelope addressed to appellant Lane, duly stamped and containing a notice of sale, in the United States post office, addressed to appellant's home in Ft. Worth. Said property was sold by the constable under the execution sale to Kempner for \$225.

There was a valid vendor's lien on record against said property to secure vendor's lien notes in the sum of \$5,000, due December 18, 1916, and, of course, Kempner took such title as he received, as purchaser under the execution sale, subject to this incumbrance secured by the vendor's lien. Kempner filed his deed for record with the county clerk of Tarrant county on June 1, 1915, and the same was duly recorded. On April 23, 1915, Kempner caused to be levied on the premises in controversy in the instant suit a writ of execution issued on a moneyed judgment that Kempner had obtained against Webb, said writ being levied on said premises as the property of said Webb, and thereupon, before said sale, a writ of injunction issued out of the Forty-Eighth district court of Tarrant county, Tex., in cause No. 39,225, upon application of R. L. Lane, enjoining and restraining said sheriff from making said sale; and said writ remains in full force and effect. On May 31, 1915, the aforesaid premises having been duly levied upon and advertised for sale on June 1, 1915, under the Turner & Dingee judgment against Lane, and as the property of Lane, said Lane, acting through his friend Blanton, agreed with the attorneys of Turner & Dingee (the conversation being had with W. C. Blalock of the firm of Bryan, Stone & Blalock, attorneys for Turner & Dingee) that the sale of said premises should not be made on June 1st, and that Lane should pay said judgment not later than June 3, 1915. On June 2d, Lane tendered to said attorney the money due on the Turner & Dingee judgment, but the money was refused, the attorney stating that the judgment sale had already taken place. The firm of Hunter, West & Hunter, in fact, seem to have

represented Turner & Dingee in having the alias execution issued, and the subsequent sale made, on June 1st, of the property in controversy under said judgment.

On learning of the violation of the alleged agreement in having the sale take place on June 1st, appellant Lane, on June 4, 1915, instituted a suit in the Forty-Eighth district court of Tarrant county against Turner & Dingee, the attorneys with whom said agreement was alleged to have been made, and I. H. Kempner, to set aside the execution sale made to Kempner on said June 1st, and so far as the record discloses this suit is still pending. On June 5, 1915, Kempner demanded of said Percy Webb the possession of the said premises, notifying Webb that he (Kempner) then owned the property. Webb refused to deliver possession to or to attorn to Kempner, and on July 16, 1915, Kempner sued Webb alone in trespass to try title to recover said property and cause a writ of sequestration to issue therein, said suit being No. 39,464, under which the sheriff was directed to sequester said property. Thereupon Sheriff Mann, under said writ of sequestration, took possession of said premises, and placed Percy Webb and his wife in possession thereof as the sheriff's agent to hold and take care of the same during the 10 days in which said Percy Webb was entitled to replevy said premises, and, in case he did not replevy the premises within said time, to put him out of same according to law. Whereupon, on July 21, 1915, the suit, which is now before us on appeal, was instituted by Lane to enjoin said Kempner and Mann from further proceeding under the authority of said writ of sequestration, or in any way disturbing the possession of plaintiffs of said premises, and from ousting, or in any way interfering with or disturbing the possession of, said Webb as plaintiff's tenant.

Plaintiffs, in their original and first supplemental petition, and in their reply to defendants' motion to dissolve, alleged, among other things, and in addition to what has heretofore been set out:

(1) That the premises involved were highly improved as residence property, and that, unless occupied by a careful and provident person, the improvements on the said premises would be wasted and the premises irreparably damaged.

(2) That when M. S. Blanton went to A. S. Dingee, of the firm of Turner & Dingee, he stated to Dingee that he desired to satisfy and pay off the judgment against Lane, together with all costs accruing by reason of said levy and advertisement of sale, and requested that release of said judgment in writing be prepared by said Turner & Dingee; that thereupon said Dingee, acting for himself and his firm, requested Blanton to take up the matter of payment of such judgment and the execution of the release with their attorney, Morgan Bryan, and, in case said Bryan could not be seen, to take up such mat-

ter with W. C. Blalock, who was an attorney at law and associated with said Morgan Bryan as one of the attorneys of Turner & Dingee; that both Bryan and Blalock were duly authorized to act for Turner & Dingee, and that the settlement that they, or either of them, made, would be satisfactory to Turner & Dingee.

(3) That, upon going to see Bryan, Blanton learned that Bryan was out of the city, and talked with Blalock, and received from said Blalock information as to the total amount due upon the judgment, and that Blalock advised Blanton that a release of said judgment would be promptly drawn and ready for delivery, and upon the payment of said amount not later than June 3, 1915, said release would be delivered to said Lane, or to said Blanton for said Lane, and that in the meantime no sale would be made under the judgment or further costs incurred.

(4) That the firm of Hunter, West & Hunter, the attorneys for I. H. Kempner, were also the attorneys for Turner & Dingee in seeking to collect the justice court judgment, and in effecting the levy and the execution sale thereunder, and said firm of Hunter, West & Hunter had notice prior to the sale of the premises on June 1, 1915, of the agreement entered into between W. C. Blalock, also attorney for Turner & Dingee, and Mat S. Blanton, acting for and representing R. L. Lane, and they further averred, on information and belief, that said Kempner, when he purchased said premises at said execution sale, had notice of the aforesaid agreement between plaintiffs and Blalock.

(5) That the improvements on the premises were of the reasonable value of \$5,000, the land being also of the reasonable value of \$5,000; that the residence was insured in several policies in the aggregate sum of \$6,000, or \$4,000, the allegations upon this point being somewhat ambiguous; and that each of said policies contained a provision that if any change should take place in the interest, title, or possession of the property insured, whether by legal process, or judgment, or by voluntary act of the insured, or otherwise; or if the hazard be increased by any means within the knowledge of insured; or if mechanics should be employed in building, altering, or repairing the described premises for more than 15 days at one time; or if the interest of the insured should be other than unconditional and sole ownership, etc.; that the policy should be null and void; and plaintiff averred that, by reason of the provisions in said policies, and if the injunction should be dissolved, he was in great danger, in case of loss or destruction by fire, of suffering irreparable injury.

[2] In defendants' answer there seems to be no denial of the several allegations contained in plaintiff's several pleadings, as set out hereinabove under Nos. 1 to 5, inclusive. Therefore we are of the opinion that, on the face of the pleadings, plaintiff presented just

grounds for the writ of injunction sought. Neither of plaintiffs in this suit was made a party defendant in the suit of Kempner v. Webb. Webb was holding possession of the premises as Lane's tenant, and therefore such possession was in law Lane's possession. Kempner's claim to the right of possession was predicated upon his possession of Lane's title, acquired through the execution sale. The sufficiency of this title was specifically attacked by the suit instituted June 4, 1915, by Lane and Freeman against Kempner and others, which suit was pending on July 16th, when Kempner sought by suit in trespass to try title against Webb to gain possession of the property involved, out of which suit the sequestration writ was issued. Under article 4643, Vernon's Sayles' Tex. Civ. St., injunctions may be granted:

"(1) Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

"(2) Where, pending litigation, it shall be made to appear that a party (is) doing some act respecting the subject of litigation, or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant, which act would tend to render judgment ineffectual.

"(3) In all cases where the applicant for such writ may show himself entitled thereto under the principles of equity, and as provided by statutes (and all other acts of this state providing for the granting of injunctions)," etc.

[3] These provisions of the statute have been construed in many cases by the courts of this state as giving an applicant, putting himself within their terms, a right to the injunctive relief, irrespective of the existence of a legal remedy at law. It is not a sufficient answer to say that the applicant had a remedy at law, and that he should first be forced to resort to such legal remedy. As said by Justice Denman in *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994:

"But it is contended that the trustee had an adequate remedy by suit for damages against the officer, and therefore was not entitled to an injunction. We have been cited to no authority which would have permitted him in such a suit to recover the loss the trust estate would have suffered by reason of the trustee's not being able to sell the goods not seized for as great a sum as he could have sold them for if the goods levied upon had not been taken out of the stock. It would be very difficult to estimate such loss. We do not think a court of equity should turn away the trustee seeking its aid in the execution of the trust, because of the existence of a remedy so doubtful as to its adequacy. 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the end of justice and its prompt administration as the remedy in equity.' *Watson v. Sutherland*, 5 Wall. 74 [18 L. Ed. 590]; *North v. Peters*, 138 U. S. 271 [11 Sup. Ct. 346, 34 L. Ed. 936]. In courts administering both law and equity, like ours, the rules denying injunction when there is a remedy at law should not be applied as rigidly as at common law, where the

issuance of the writ in equity was, to a certain extent, an invasion of the jurisdiction of another tribunal. If, as here, the applicant shows a clear right to be left in the undisturbed possession of certain property, and that such right is about to be invaded without semblance of right by another, such invasion, on principle, should be prevented in its incipency by injunction, instead of allowing the injury to be inflicted and then leaving the party to his legally adequate, but in fact generally very inadequate, remedy of an action for damages."

See, also, *Smith v. Carroll*, 28 Tex. Civ. App. 330, 66 S. W. 863; *McFarland v. Wilder*, 54 S. W. 267; *Green v. Gresham*, 21 Tex. Civ. App. 601, 53 S. W. 882; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589, 73 S. W. 82; *Mitchell v. Burnett*, 57 Tex. Civ. App. 124, 122 S. W. 937; *S. W., etc., Co. v. Smithdeal*, 104 Tex. 258, 136 S. W. 1049.

We held in *Tipton et al. v. Railway Postal Clerks' Association et al.*, 173 S. W. 562, where many of the material allegations of plaintiff's petition were not specifically denied by the answer, and such allegations showed a right in plaintiff to the relief sought, that it was error for the court to dissolve a temporary injunction previously granted.

[4-6] We question whether applicants had a remedy at law that was adequate or "as practical and efficient to the ends of justice and its prompt administration" as the remedy of injunctive relief. Not being a party to the suit of *Kempner v. Webb*, plaintiffs in this suit were not authorized to replevy the property. Only the defendant has this right. Article 7103, Vernon's Sayles' Tex. Civ. St.; *Harris v. Shackelford*, 6 Tex. 133; *Halle v. Oliver*, 52 Tex. 443; *Lang v. Dougherty*, 74 Tex. 226, 12 S. W. 29.

Further, plaintiffs could have permitted the sequestration to have been completed, and then, in case they had prevailed in their suit to set aside the execution sale, might have brought an action in damages for loss they might have sustained by reason of the sequestration; but such a remedy would certainly have not been as efficient as the relief herein sought, and especially so since the defendant *Kempner* is shown to have resided in Galveston county. Even if they had intervened in the trespass to try title suit of *Kempner v. Webb*, the attack therein on the validity of the execution sale would have been a collateral attack only, and as such could not have effected its avoidance for irregularities and defects not appearing on the face of the proceedings, such as are urged in the present suit.

For the reasons stated, the judgment of the trial court is reversed, and the cause remanded, and it is ordered by this court that the order of the trial court dissolving the injunction be set aside, and that said injunction theretofore granted continue in force until otherwise lawfully altered.

**SPRINGFIELD FIRE & MARINE INS. CO.
v. NELMS et al. (No. 8317.)**

(Court of Civil Appeals of Texas. Ft. Worth.
Feb. 5, 1916. Rehearing Denied
March 18, 1916.)

INSURANCE — §546 — FIRE INSURANCE — IMMATERIAL BREACH OF POLICY — STATUTE.

Under Act April 2, 1913 (Acts 33d Leg. c. 105, entitled "An act to prevent fire insurance companies from avoiding liability for loss * * * to personal property under technical and immaterial provisions of the policy * * * where the act breaching such provision has not contributed to bring about the loss, * * *") § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a), and section 3, an insurer of personalty against fire could not escape liability for a loss for insured's failure to comply with a special provision of the policy that he would, as part of his proofs of loss, if requested, furnish a certificate of the magistrate or notary public living nearest the place of fire, stating that he had examined the circumstances and believed the insured honestly sustained loss, where the fact of loss was undisputed, the amount not contested, and notice and proofs made, while the insured's pleadings and evidence contained no suggestion that the fire wrongfully originated by act or procurement of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1350, 1351; Dec. Dig. §546.]

Error from Erath County Court.

Suit by Mat Nelms and others against the Springfield Fire & Marine Insurance Company. To review a judgment for plaintiffs, defendant brings error. Affirmed.

Thompson, Knight, Baker & Harris and W. O. Thompson, all of Dallas, for plaintiff in error. Hickman & Bateman, of Dublin, for defendants in error.

CONNER, O. J. Mat Nelms and others sued to recover a loss by fire upon certain personal property covered by an insurance policy issued by the defendant company to Mat Nelms. The trial resulted in a judgment for the plaintiffs, and the insurance company prosecutes this writ of error.

Plaintiff in error's only material defense to the action was a special plea and evidence in its support, to the effect that after the loss Mat Nelms failed to comply with a special provision of the policy that he would, as part of his proofs of loss, if requested—

"furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor, or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

That the provision quoted is part of the policy is not questioned. It is also undisputed that Mat Nelms though requested so to do, failed to furnish the certificate so provided for in the policy. Furthermore, the record contains no explanation of such failure. Under such circumstances, in various forms, the defendant company insisted upon the trial, and now before us, that the plaintiffs

were not entitled to recover.

Generally speaking, it may be said that the weight of authority seems to be that a provision of the character quoted is a reasonable one, and that compliance therewith is a condition precedent to a recovery upon an insurance policy containing it. See *Kelly v. Sun Fire Office*, 141 Pa. 10, 21 Atl. 447, and notes as published in 23 Am. St. Rep. 254 et seq., where the cases on the subject are generally reviewed. We have but two undisturbed cases holding otherwise. One, the *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315, is based upon an Indiana statute. The other is the case of *German American Ins. Co. v. Norris*, by the Court of Appeals of Kentucky, reported in 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324. In the latter case the policy contained a provision such as we have quoted, and there had been a failure to comply therewith within the time specified in the policy. It was contended, as here, that there could be no recovery, but the court in disposing of the question said:

"Appellant insists very earnestly that the failure to furnish the certificate of the magistrate when required is a bar to appellees' right to recover, but we do not think that the policy, when fairly read and construed, constitutes such failure a bar to recovery. It could not be used as evidence against the appellant, and, as there is no law by which the insured could compel a magistrate to act in the matter, it is not reasonable that parties would undertake to procure the certificate of an officer when there was no law by which he could be required to certify at all. Such requirement should not be enforced. It could be of no real benefit to appellant, but only an inconvenience to appellees."

While the view of the Kentucky court, as expressed in the quotation, may seem forceful, the case perhaps should not be regarded as authority, inasmuch as the court recited further along in the opinion that the certificate there in question had, in fact, been presented before the trial. Regardless, however, of the general state of the authorities, we think that here, as in Indiana, we have statutes which, as we construe them, require a ruling against the insurance company on the question under consideration. By act approved on April 2, 1913, entitled "An act to prevent fire insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of the policy or contract of insurance where the act breaching such provision has not contributed to bring about the loss, and declaring an emergency," it was enacted by the Legislature of the state of Texas (section 1):

"That no breach or violation by the insured of any of the warranties, conditions or provisions of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

Section 3 of the same act reads:

"Whereas, under the existing laws, insurance policies and contracts may be defeated upon purely technical provisions and defenses that in no way affect the merits of the claim against the insurance company, and such defenses have been upheld to the extent of making it almost impossible for an insurance policy upon personal property to be collected by suit, creates an emergency and imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

Prior to this enactment, in chapter 15, tit. 71, of our Revised Statutes, and under the heading of "General Provisions," it had theretofore been enacted, in substance, that in order to constitute a defense in a suit on an insurance policy, where the loss has been established, false statements made in the application for the contract, or in the contract itself, or in the proofs of loss, must be shown to be material, and the new act was evidently intended in broad terms to operate against purely technical provisions and defenses that in no way affect the merits of the claim against the insurance company. In the case before us the loss is undisputed, the amount of the loss is not contested, notice and proofs of loss were made, and neither in plaintiff in error's pleadings nor in its evidence is there a suggestion that the fire wrongfully originated by act or procurement of Mat Nelms or any other person, and under such circumstances we cannot see how the failure of Mat Nelms, from whatever cause arising, materially affects any right of plaintiff in error in this cause. So believing and holding, it is ordered that all assignments of error be overruled, and the judgment affirmed.

Affirmed.

STAFFORD v. PATTERSON & NELSON. (No. 8321.)

(Court of Civil Appeals of Texas. Ft. Worth.
Feb. 12, 1916.)

1. EVIDENCE — 148 — COMPETENCY — IDENTITY OF PARTIES — KNOWLEDGE OF WITNESS.

Where plaintiff buyer of cotton seed and defendant seller testified that they were the only persons present at their meeting when the buyer claimed the contract of sale was made, evidence of a witness who testified that at the time and place in question he heard a conversation between the buyer and a man whom he did not know, but who resembled the seller, being about his size, and who was the seller, in the opinion of the witness, that the conversation between buyer and seller as heard by him was substantially as detailed by the seller, was improperly excluded in the buyer's suit for failure to deliver.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. § 148.]

2. APPEAL AND ERROR — 1064(1) — HARMLESS ERROR — INSTRUCTION.

In an action for failure to deliver cotton seed, the charge that, if the jury believed from a preponderance of the evidence that the contract was not made as alleged, they would find for defendant, if erroneous as placing the burden upon defendant to show by a preponderance

of evidence that he did not enter into the contract of sale alleged, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1004(1); Trial, Cent. Dig. §§ 475, 525, 528, 553.]

3. GARNISHMENT — 250 — WRONGFUL GARNISHMENT — DAMAGES — LOST PROFITS — SPECULATIVE CHARACTER.

In an action for failure to deliver cotton seed sold, the alleged seller could not recover, as damages on his counterclaim for profits lost by the buyer's having garnished his bank account and prevented his withdrawing a sum of money, \$195 which would have been his profits on the sale of cotton seed to another buyer could he have withdrawn the money from the bank to pay the freight on the seed.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 250.]

Appeal from Stonewall County Court; R. S. Tillotson, Judge.

Suit by E. A. Patterson and D. C. Nelson, composing the copartnership firm of Patterson & Nelson, against Lee Stafford. From a judgment for plaintiffs and denying defendant any recovery on his counterclaim, defendant appeals. Judgment reversed, and cause remanded.

W. J. Arrington, of Paducah, and Carl Springer, of Aspermont, for appellant. J. M. Carter, of Dallas, and Nelson & Hunter, of Wichita Falls, for appellees.

DUNKLIN, J. This suit was instituted by E. A. Patterson and D. C. Nelson, composing the copartnership firm of Patterson & Nelson, against Lee Stafford, to recover \$100 as profits which plaintiffs alleged they lost by reason of the failure of defendant to deliver to them five cars of cotton seed in accordance with his contract so to do. By writ of garnishment issued and served upon the First National Bank of Aspermont defendant was prevented from withdrawing from the bank the sum of \$90.90 to his credit, and by reason of that fact defendant filed a counterclaim against plaintiffs for \$195 as damages for alleged wrongful suing out of said garnishment writ. The suit originated in the justice court, and later was appealed to the county court. A judgment was rendered in the latter court in plaintiffs' favor for \$25 and denying defendant any recovery on his counterclaim. From that judgment defendant has appealed to this court.

According to the testimony of D. C. Nelson, he met the defendant in Aspermont on the night of January 17, 1915, at which time the defendant entered into a parol contract with him to sell plaintiffs' firm five cars of cotton seed, aggregating 100 tons, at \$22 per ton, that thereafter defendant breached his contract and that the market price of the seed had advanced \$2 to \$3 per ton.

Defendant testified to the meeting with Nelson on the night of January 17th, but flatly denied that he made the alleged contract at that time. He further testified that on the following morning he saw Nelson at

the depot as the latter was leaving town, and in that connection testified as follows:

"Nelson came up to me just before the train pulled out for Spur, and said to me: 'You had better let me have those seed.' I told him that, if I did not get a better price than he had offered, I would let him have them, and if I decided to let him have them I would wire him at Spur. He then said to me: 'If you decide to let me have them, wire my partner E. A. Patterson, at Wichita Falls, Tex.'"

Defendant further testified that Herman Shadle was present on that occasion. Nelson denied that conversation altogether. Defendant introduced Shadle as a witness, who testified that he was present at the depot on the occasion mentioned by defendant, and that he heard a conversation between defendant and a man whom he did not know, but who resembled Nelson, being about his size, and who in the opinion of the witness was Nelson. Had he been permitted to do so that witness would have testified that the conversation between Nelson and defendant so heard by witness was substantially to the same effect as detailed by defendant and noted above. But plaintiffs objected to that testimony, on the ground that the witness had not sufficiently identified Nelson as the man with whom defendant talked, and the objection was sustained.

[1] According to the testimony of both Nelson and Stafford, those two were the only persons present at their meeting on the night of January 17th, when Nelson claims the contract in controversy was made, and in view of the conflict between their testimony with respect to what was said on that occasion and also with respect to what, if anything, was said between them at the depot on the following morning, we are of the opinion that there was reversible error in excluding the proffered testimony of the witness Shadle. While he could not positively identify Nelson as the man he saw in conversation with defendant, we believe that the facts detailed by him, especially when considered in connection with the testimony of defendant, who said he saw Shadle present on that occasion, afforded sufficient predicate prima facie for the admission of the testimony.

[2] Following an instruction to the jury, in which the making of the alleged contract was submitted as a disputed issue, and the burden of proof upon that issue was imposed upon plaintiffs, the court gave this further instruction, which is assigned as error:

"If, however, you believe from a preponderance of the evidence that said contract was not made as alleged, then you will find for the defendant."

The criticism presented is that by the instruction quoted, the court placed the burden upon defendant to show by a preponderance of evidence that he did not enter into the contract alleged. The instruction was favorable to the defendant, and at all events would not be reversible error. *Ablene Light &*

Water Co. v. Robinson, 146 S. W. 1052, and authorities there cited. However, we suggest that on another trial the charge be so framed as to leave no ground for the criticism.

[3] Error has been assigned to the instruction given upon appellant's counterclaim for alleged profits he would have made in his business, if he had been permitted to draw his money from the bank. That assignment is overruled for the reason that, in our opinion, the damages so claimed were not recoverable at all. According to allegations in the plea of reconvention, at the time the writ of garnishment was served on the bank defendant had already contracted to sell five cars of cotton seed to another purchaser at a profit of \$195 and was ready to ship, and would have shipped, the same to such purchaser, and realized such profit if he could have used for payment of freight thereon the \$90.90 in bank which was tied up by the garnishment; but, as he was unable to withdraw such funds, and was unable to procure other funds necessary to pay such freight, he was unable to make the contemplated sale, and thereby lost said profits. The damages so alleged were not such damages as plaintiffs could reasonably have anticipated as a natural and probable result of suing out the writ, but were special damages only, very remote and speculative, and if under any supposable contingencies they could be recovered, no facts were alleged or proven sufficient to put plaintiffs on notice that such special losses to defendant might probably result in consequence of the levy of the writ.

For the error indicated, the judgment is reversed, and the cause remanded.

NORTON v. ELLIOTT. (No. 8476.)

(Court of Civil Appeals of Texas. Ft. Worth March 25, 1916.)

MECHANICS' LIENS §116—PROCEEDINGS TO PERFECT—NECESSITY.

Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 5621-5623, 5631, prescribing the method of fixing and securing a laborer's lien in advance on a building intended to be occupied as a homestead, where a laborer fails to take the means provided for securing a lien, he is not entitled to enjoin the contractor from delivering the building to the owner for occupancy to enable him to enforce his claim.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 160; Dec. Dig. § 116.]

Appeal from Wichita County Court; Harvey Harris, Judge.

Action by Robert Elliott against W. E. Norton and another. From a judgment for plaintiff, defendant Norton appeals. Reversed, with directions to dismiss petition.

Carrigan, Montgomery & Britain, of Wichita Falls, for appellant. Fitzgerald & Cox, of Wichita Falls, for appellee.

BUCK, J. This is an injunction suit brought by appellee against appellant, alleging, in substance, the following facts: That R. T. Hammersley built a residence for appellant, defendant below, the contract price of which was \$2,720; that Hammersley sublet to plaintiff the plumbing for said building, and, plaintiff having finished said job, there was still due him \$234; that Hammersley, having completed said building, was about to turn the same over to the said Norton without satisfying the indebtedness due plaintiff. It was further averred on information and belief that the reason Hammersley had not paid plaintiff the amount claimed was that said Norton had not paid all of said contract price. It was further alleged that Norton did not have sufficient property, except the building in question, to satisfy the plaintiff's debt, and that, if Hammersley delivered to Norton said building, plaintiff would be unable to collect his debt; that Hammersley did not have sufficient property to satisfy plaintiff's debt. It was further alleged that:

"Plaintiff further sues to foreclose his laborer's lien on said property, and represents to the court that, if the defendant is allowed to move into said property and establish his homestead, then the plaintiff would be unable to foreclose his lien against said property. Wherefore the plaintiff prays for an injunction to restrain the said R. T. Hammersley from turning over said property to the defendant until the plaintiff's debt is fully paid, as provided in the contract between the defendant and the said Hammersley, and restraining the said W. E. Norton from moving into said property until the plaintiff's debt herein is paid, as is fully provided for in the contract between said contracting parties."

Upon the presentation of the petition for injunction to Hon. Harvey Harris, county judge of Wichita county, the following fiat was indorsed thereon, to wit:

"The foregoing prayer for injunction considered, it is ordered that the clerk of the county court of Wichita county, Tex., issue a writ of injunction in all things as prayed for in the above upon the petitioners executing to the defendant, Norton, a bond with two or more good and sufficient sureties, in the sum of five hundred (\$500.00), conditioned as the law requires. [Signed by the judge.]"

Upon the execution and filing by the plaintiff of a bond in the sum of \$500, the writ of injunction issued, directed to both Norton and Hammersley, and was served on each of them. Norton alone appeals, and has filed in the lower court his supersedeas bond in the sum of \$500.

We are unable to understand upon what ground the county judge granted the writ. It is not alleged in plaintiff's petition that the defendant Norton owes plaintiff anything. If any cause of action is alleged as against Norton, it is a foreclosure of a subcontractor's lien upon real estate, of which action the county court would have no juris-

diction. Furthermore, it is not alleged that the statutory steps provided to fix such lien had been followed, and in fact the statement in the petition "that, if the defendant is allowed to move into said property and establish his homestead, then the plaintiff would be unable to foreclose a lien against said property," would seem to be tantamount to an allegation that the procedure required by statute to fix the lien had not been followed. If the house was erected as a homestead, defendant, Norton, being a married man, in order to fix and secure a lien upon the same, it would be necessary that a contract in writing be made and entered into prior to the furnishing of any material, or the performance of any labor, and executed by the owner and his wife in the manner required in making the sale of a homestead, as provided in article 5631, Vernon's Sayles' Texas Civil Statutes. If defendant, Norton, was not married, then the steps to be taken to fix the lien are provided in articles 5621, 5622, and 5623, as amended and added to in Acts of the Thirty-Fourth Legislature 1915, p. 223. Article 5623, as amended, and article 5623a provide for the execution of a written contract for the erection, repair, or improvement of a building, said contract to be filed with the county clerk of the county where the property is situated, and the execution and filing with the county clerk before the work is begun of a good and sufficient bond by the contractor, and further provides that suit may be filed on this bond "by the owner, subcontractor, workmen, laborers, mechanics, and furnishers of materials, or any of them, and they and each of them shall have the right to recover on said bond in the same manner as if the bond were made payable directly to them." And it is further provided in article 5623a that said bond "shall guarantee the payment of such claims, regardless of whether or not they are secured by any lien." But there is no allegation in the petition that the suit is on this bond or that any bond was ever executed, and in fact it is evident from the reading of the petition that no reliance is placed on the provisions of the 1915 statute.

If the plaintiff had fixed his lien as provided by law prior to the filing of this suit, the occupancy by the owner of the building would not impair such lien, and, if he had not fixed such lien, certainly he could not avoid the consequences of his failure by depriving the owner of the right to occupy the premises.

Finding no sound basis to support the action of the trial court in granting the writ, the judgment of the court below is reversed, and the court below is ordered to dismiss, at plaintiff's costs, the petition for injunction.

LANDON v. HALCOMB. (No. 8330.)(Court of Civil Appeals of Texas. Ft. Worth.
Feb. 19, 1916.)**1. ALTERATION OF INSTRUMENTS** \hookrightarrow 9—NOTE—
"ALTERATION."

Where the plaintiff's assignor and defendant, parties to a contract or order with a note attached, intended and understood that the note was not to be detached, its detachment for the purpose of negotiations was a material "alteration" of the note.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 47-63; Dec. Dig. \hookrightarrow 9.]

For other definitions, see *Words and Phrases*, First and Second Series, *Alteration*.]

2. BILLS AND NOTES \hookrightarrow 378—BONA FIDE
HOLDER—DEFENSE—ALTERATION OF NOTE.

A material alteration of a note precludes any claim on the part of the holder to protection as an innocent purchaser for value without notice.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 985-992; Dec. Dig. \hookrightarrow 378.]

3. BILLS AND NOTES \hookrightarrow 520—SUFFICIENCY OF
EVIDENCE—FRAUD.

Evidence in a suit on a note detached from a written contract or order executed by defendants and plaintiff's assignor, held to sustain a finding that the contract or order had been obtained for the fraudulent purpose of getting possession of the note and realizing on it by transfer to a third party.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. \hookrightarrow 520.]

4. BILLS AND NOTES \hookrightarrow 525—SUFFICIENCY OF
EVIDENCE—BONA FIDE PURCHASER.

Evidence in such suit held to sustain a finding that the plaintiff was not an innocent purchaser of the note before maturity without notice of any defense thereto.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. \hookrightarrow 525.]

5. EVIDENCE \hookrightarrow 75—PRESUMPTION—FAILURE
TO PRODUCE EVIDENCE.

The failure of a party to produce evidence within his control raises the presumption that if produced it would operate against him.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 95; Dec. Dig. \hookrightarrow 75.]

6. BILLS AND NOTES \hookrightarrow 525—GOOD FAITH—
CIRCUMSTANTIAL EVIDENCE.

In an action in a suit on a note, the issue of the plaintiff's bad faith in its purchase, like the issue of his assignor's fraud in obtaining it, could be established by circumstantial evidence.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. \hookrightarrow 525.]

Appeal from Wise County Court; J. W. Walker, Judge.

Action by A. C. Landon against V. S. Halcomb. Judgment for defendant, and plaintiff appeals. Affirmed.

R. E. Carswell, of Decatur, for appellant. Ratliff & Spencer, of Decatur, for appellee.

DUNKLIN, J. V. S. Halcomb, the proprietor of a drug store in the town of Bridgeport, gave a written order to the Vernon Ad-

vertising Company of Schell City, Mo., for a piano, a set of silver, fountain pens, and advertising matter to be shipped by the company to Halcomb, and attached to the order was Halcomb's promissory note, payable to the advertising company, or order, for \$400. The note and order were on the same piece of paper, but were separated by a perforated line. The order reads as follows:

The Vernon Advertising Company, of Schell City, Mo.

Pianos Direct From the Factory.

Town, Bridgeport, State, Texas, 6/23/1914.
County, Wise. Post Office, Bridgeport, Tex.

Gentlemen: Upon approval of this order, please deliver to me at your earliest convenience, f. o. b. factory or distributing point, the goods described in this order, with the understanding that this is to be the exclusive order for this town, I or we understand that this order cannot be countermanded. This order shall contain the following goods:

1 piano (guaranteed for 10 years).

2,500 duplicate tickets.

250 piano circulars.

250 nomination letters.

1 piano stool.

288 fountain pens.

250 pen circulars.

Merchant's instructions.

1 28 pc. silver set.

250 silver set circulars.

2,500 trade cards.

Contestants' instructions.

Price \$400, Payable Five Payments.

We guarantee the sale of 288 fountain pens at \$1.50 each by the close of the contest: Provided, the contest is run at least 26 weeks from opening date according to the advertised plans as per regular printed circulars furnished by the Vernon Advertising Company and awards all prizes accordingly, reports the gross sales of pens each 30 days, during the contest and makes each and every payment on the date or within 5 days from the date when due. In case the undersigned should for any reason desire to close the contest before all the pens have been sold, then the Vernon Advertising Company agrees to purchase all pens remaining unsold. The undersigned hereby accepts the above conditions and agrees that failure on his part to fulfill any of the above conditions will and does hereby release the Vernon Advertising Company, of Schell City, Mo., from any liability on this contract.

We hereby appoint the undersigned as agent for the Vernon Piano at Bridgeport, Texas, and agree to pay him a commission of \$50.00 on all sales made at the regular retail price of \$350.00, or through said agent, commission payable out of the first money received from such sale. No other agreements or conditions not embraced in this regular printed form will be accepted or recognized. This order is taken in duplicate.

[Signed]

V. S. Halcomb.

By B. Kupton, Representative.

It appears that these documents were executed by Halcomb in pursuance of an advertising scheme suggested and proposed by a traveling agent of the advertising company.

The present suit was instituted by A. C. Landon, residing at St. Louis, Mo., against Halcomb upon the note so executed which had been detached from the written order. The plaintiff alleged that he was an innocent purchaser of the note for value before ma-

turity, and from a judgment in favor of the defendant, the plaintiff has appealed.

The evidence showed beyond controversy that the defendant received 144 of the fountain pens and practically all the other articles mentioned in the order, except the piano and stool; and that defendant, in pursuance of the advertising scheme planned and arranged by the company, advertised to give away the piano and other articles as prizes; that the piano and stool never reached Bridgeport in time to be used in accordance with such advertising, although the defendant made repeated demands therefor; that later the piano did arrive at Bridgeport, consigned to shipper's order, but that the advertising company failed and refused to send defendant any bill of lading for said piano, and in the absence of which the defendant was unable to get it, and in consequence of which the defendant never received it.

The case was submitted to a jury upon special issues, and the jury found that the articles received by the defendant were of no value; that the advertising company at the time said contract was made did not intend to comply with its contract to ship the goods mentioned in the order; that the company entered into the contract for the fraudulent purpose of getting possession of the notes and realizing thereon by transferring the same to some other person. The jury further found that the plaintiff, London, was not a purchaser of the note in the usual course of trade and in good faith for value, and that at the time he purchased it he had notice that the same was given as a consideration for the obligation contained in the written order referred to above, and that the advertising company had obtained the note for the fraudulent purpose of cheating defendant. The jury further found that it was the intention of the parties to said note and written order at the time those instruments were executed and delivered that the same were to remain attached, together, as they were attached when executed, and to remain so until the obligations of both parties were fully complied with, and that the note was detached from the order without defendant's consent. The jury further found that at the time plaintiff purchased the note he had notice that the same had been attached to said order when those instruments were executed and delivered, and that the same had been detached without the consent of the defendant. They further found that the goods mentioned in the order, and for which the note was given, were intended to be used in furtherance of a lottery scheme, and that plaintiff knew of that fact at the time he bought the note, and that the separation of the note from the order was a material alteration.

The facts so found by the jury were pleaded, substantially, by Halcomb as defenses to the suit. All the findings of the jury have

been attacked by appellant as being unsupported by the evidence, and the contention is made that the evidence conclusively shows that plaintiff was an innocent purchaser of the note before maturity for value without notice of any defenses thereto.

[1, 2] The evidence shows conclusively that the note in suit and the order for goods embodying contractual obligations on the part of the Vernon Advertising Company, as well as on the part of defendant, Halcomb, which was originally attached thereto, were parts and parcels of one contract. If at the time the contract was executed the parties thereto intended and understood that the note was to remain permanently attached to the order, as found by the jury, then it follows that the separation of the order from the note for the purpose of negotiating the note was a material alteration of the note which precluded any claim on the part of plaintiff that he should be protected as an innocent purchaser and holder of the note for value without notice of any defense thereto. *Baldwin v. Haskell Nat. Bank*, 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178; *Otto v. Half*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56; 1 *Ruling Case Law*, p. 990; 2 *Corpus Juris*. 1176 and 1210; *Rochford v. McGee*, 16 S. D. 606, 94 N. W. 695, 61 L. R. A. 335, 102 Am. St. Rep. 719. And this is true notwithstanding the fact that the order was attached to the note by a perforated line, thus rendering the separation of the two instruments in such a manner as possibly to mislead the purchaser of the note. *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382; *First Nat. Bank v. Dorsey*, 166 S. W. 54; *Bothell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263, 133 Am. St. Rep. 623.

[3, 4] We are of the opinion, further, that the evidence was sufficient to support the findings referred to above, and also the further finding by the jury that plaintiff was not an innocent purchaser and holder of the note. While testimony introduced by plaintiff to refute the latter finding was positive, in terms, yet there were circumstances which tended to show the contrary and which presented more than a mere suspicion that such testimony was untrue. The purchase of the note in St. Louis, Mo., within three days after its execution, in Bridgeport, Tex., for an admitted discount of 12½ per cent., the failure of plaintiff to show how the indebtedness for which the note was further discounted, as claimed by plaintiff, arose, his failure to show what, if any, investigation he made to determine the solvency of the maker of the note before he purchased it, his implied denial of a lifelong and intimate acquaintance with Boatwright, the manager of the Vernon Advertising Company, as established by several disinterested witnesses residing in Scheff City, Mo., and his further implied denial that he was in the habit of making frequent trips

to Schell City where Boatwright conducted the business of payee of the note, as testified to by several of the same witnesses, were some of the circumstances which tended to impeach the alleged good faith of plaintiff in the purchase of the note.

[5] Pertinent to the failure of plaintiff to explain fully the discount of the principal of the note in his purchase and his failure to explain what investigation, if any, he made with respect to the solvency of the maker before he purchased the note, we wish to cite the familiar rule that a failure of a party to produce evidence within his control raises the presumption, under circumstances like the present suit, that if produced it would operate against him. *Mitchell v. Napier*, 22 Tex. 120; *G. H. & S. A. Ry. v. Young*, 45 Tex. Civ. App. 480, 100 S. W. 998.

[6] The issue of bad faith in the purchase of the note, like the issue of fraud, could be established by circumstantial evidence.

The findings of the jury indicated above were decisive of the whole case in favor of appellee, and therefore the judgment is affirmed.

Affirmed.

GULF, C. & S. F. RY. CO. v. HICKS et ux.
(No. 1598.)

(Court of Civil Appeals of Texas. Texarkana.
March 16, 1916.)

DEATH \S 99(5)—DAMAGES—EXCESSIVE DAMAGES.

In an action by surviving parents, about 65 years old, for the death of their son of 22, where it appeared that plaintiffs were farmers and stock raisers, worth about \$30,000, that deceased was skilled in such business, and when at home had helped them in their business and household work, that he was considerate of their health, and had called a physician to see them, and had stated that he intended to remain unmarried while his mother lived, a verdict of \$3,500 was excessive, and a remittitur of \$2,400 called for.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. \S 125, 126, 180; *Dec. Dig.* \S 99(5).]

Appeal from District Court, Hunt County; A. P. Dohoney, Judge.

Action by W. F. Hicks and wife against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed conditionally, upon filing of a remittitur; otherwise, reversed, and cause remanded.

Terry, Cavin & Mills and A. H. Culwell, all of Galveston, and Dinsmore, McMahan & Dinsmore, of Greenville, for appellant. B. Q. Evans and H. L. Carpenter, both of Greenville, for appellees.

LEVY, J. This is an action by the parents for the death of their son, 22 years old, who was killed in the wreck of a freight train due to appellant's negligence. At the time of the wreck the son was in the employ of the ap-

pellant as a brakeman, and was on top of one of the cars forming the train. The petition averred, and there is involved in the verdict of the jury the finding, that the wrecking of the train was due to negligence of the appellant, proximately causing the injury, in operating the train at too great a rate of speed over track not reasonably safe because of its defective condition. There is evidence to support the finding of fact made by the jury, and we adopt such finding. The verdict is for \$7,000; the trial court, though, required a remittitur of \$3,500.

In the former appeal of this case (*Railway Co. v. Hicks*, 168 S. W. 1190) the evidence respecting the award of damages is substantially set out, which is referred to and made a part hereof. We do not think the facts of the present appeal in respect to the amount of the verdict substantially differ from those of the former appeal. In that case it was concluded that the great weight of the evidence did not justify the award of a greater amount of damages than \$1,100. We have reached the same conclusion in the present appeal as in the former one, and are unwilling to approve the amount of \$3,500, upon the ground that it is, in point of fact, we think, excessive.

We have considered the other assignments of error, and think they should be overruled.

The judgment in this case is reversed, and the cause remanded, unless the appellees, within 15 days, shall enter a remittitur in the sum of \$2,400, in which event the judgment will then be affirmed.

DONALDSON v. McELROY. (No. 1593.)

(Court of Civil Appeals of Texas. Texarkana.
March 16, 1916.)

APPEAL AND ERROR \S 499(4)—REVIEW—NECESSITY OF OBJECTION.

An assignment of error in giving a peremptory instruction will not be considered where the record fails to show that an objection was made and exception reserved in the trial court, as required by the statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 2298; *Dec. Dig.* \S 499(4).]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by E. A. McElroy against J. S. Donaldson. Judgment for plaintiff, and defendant appeals. Affirmed.

Wood & Wood, of Dallas, and Walter Collins and B. Y. Cummings, both of Hillsboro, for appellant. Morrow & Morrow, of Hillsboro, for appellee.

HODGES, J. The appellee brought this suit on a promissory note for the sum of \$319.50, together with interest and attorney's fees, and sought a foreclosure of a vendor's lien on block 66 in the town of Odessa, Tex. The appellant, after a general denial, admit-

ted the execution of the note, but pleaded a failure of consideration and damages for misrepresentation and fraud as an offset. At the conclusion of the evidence the court gave a peremptory instruction, directing a verdict in favor of the plaintiff for the amount sued for, and entered judgment, foreclosing the vendor's lien.

In this appeal the only assignments of error presented are those which complain of the action of the court in giving the peremptory instruction. There was no objection made to this charge of the court, nor any exceptions reserved. It has heretofore been held by this court that assignments of this character will not be considered where the record fails to show that objections were made and exceptions reserved in the trial court, as required by the statute. *Denison Cotton Mill Co. v. McAmis*, 178 S. W. 621. See, also, *Walker v. Haley*, 181 S. W. 559, for a collection of similar rulings by other Courts of Civil Appeals. We adhere to the ruling referred to, and decline to consider the assignments of error.

There appearing no fundamental error that would justify a reversal of the judgment, it is affirmed.

OSBORNE & BECK v. SANDERS.

(No. 1594.)

(Court of Civil Appeals of Texas. Texarkana. March 9, 1916.)

JUDGMENT \Leftrightarrow 256(1)—SUPPORT BY FINDINGS.

In suit by realty brokers for damages because of the owner's breach of contract to give them the exclusive right to sell a tract of land for a specified time, where the finding that the owner had not so contracted was inconsistent with another, but there were other findings, denominated conclusions of law, first, that the terms upon which the owner was willing to sell had never been stated by him and communicated to the party to whom plaintiffs expected to sell, and second, that it could not be said from the evidence that such party would have been ready, willing, and able to comply with the terms plaintiffs might have imposed, judgment for defendant was proper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446, 454; Dec. Dig. \Leftrightarrow 256(1); Replevin, Cent. Dig. § 393.]

Appeal from Navarro County Court; R. R. Owens, Judge.

Suit by Osborne & Beck against I. A. Sanders. From a judgment for defendant, plaintiffs appeal. Affirmed.

Lawrence Treadwell, of Corsicana, for appellants. Richard Mays, of Corsicana, for appellee.

WILLSON, C. J. This was a suit by appellants, real estate brokers, for damages which they claimed they suffered because of a breach of an undertaking, they alleged, of appellee to give them for a time specified an exclusive right to sell a tract of land belonging to him, and which he himself sold before

the expiration of that time. The court found as a fact that appellee had not so contracted. The finding is attacked as not warranted by the evidence, and all of the assignments of error are predicated on the correctness of that contention. It is true the witness Watts testified to facts which might have supported a finding to the contrary of the one complained of, but the finding clearly was warranted by the testimony of appellee. It may be that the finding is not consistent with another one made by the court, the eleventh; but the correctness of the judgment is not questioned on that ground. And if it was, and if it should be held that the effect of the two findings was to leave the question as to whether there was such a contract or not undetermined, the judgment should be sustained on other findings made by the court, to wit: (1) That the terms upon which appellee was willing to sell the land had never been stated by appellee and communicated to Watts, to whom appellants expected to sell the land; and (2) that it could not be said from the evidence that Watts would have been willing, ready, and able to comply with the terms appellee might have imposed. These findings of fact, though among those denominated by the court "conclusions of law," cannot be ignored. *Trust Co. v. McCarthy*, 34 S. W. 806; *Robertson v. Kirby*, 26 Tex. Civ. App. 472, 61 S. W. 967.

The judgment is affirmed.

WESTERN NAT. BANK OF HEREFORD v. LAUGHLIN et al. (No. 948.)

(Court of Civil Appeals of Texas. Amarillo. March 22, 1916. Rehearing Denied April 12, 1916.)

BILLS AND NOTES \Leftrightarrow 365(2)—BONA FIDE PURCHASERS — EQUITABLE ESTOPPEL — WHEAT CONSTITUTES.

Where the owner of a note allows it to be made to a third person and permits such third person to exercise complete dominion, one receiving the note in good faith without notice, though after maturity, is entitled as against the owner to enforce payment; the owner being estopped.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 959; Dec. Dig. \Leftrightarrow 365(2).]

Appeal from Deaf Smith County Court; Jas. A. Hughes, Judge.

Action by the Western National Bank of Hereford against N. A. Laughlin and others. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Knight & Slaton, of Hereford, for appellant. Carl Gilliland, of Hereford, for appellees.

HALL, J. The appellant, as plaintiff below, sued N. A. Laughlin, as the maker of a promissory note, for \$390.61, and sought to foreclose a chattel mortgage upon certain property of the alleged value of \$500. The

petition alleges that the note was executed by Laughlin, in favor of S. S. Evants, and was thereafter indorsed and delivered by Evants to appellant bank, in the regular course of business. According to the allegations, the note was executed the 30th day of March, 1912, bearing interest at 10 per cent. from date, due in one year, and contained a provision for 10 per cent. attorney's fees. S. J. Dodson was made a defendant, upon the ground that he claimed to be the owner of the note. Defendants answered by general denial, and specially that the defendant Dodson was the real owner of the note; that it had been originally executed for his benefit and was held in trust by Evants, the payee, which facts were known to the plaintiff before it acquired the note. He further averred that appellant bank held the note as collateral to secure certain indebtedness due it from Evants; that in a suit in the district court of Deaf Smith county, between S. J. Dodson and S. S. Evants, that court adjudged the note to be the property of the defendant Dodson. It is also charged that appellant bank acquired the note after its maturity. By supplemental petition, the bank alleged that the defendant Dodson was estopped to claim ownership of the note by reason of the fact that he had permitted it to be executed and stand in the name of Evants as payee and had permitted Evants to handle and deal with the note as if he owned it; that on a former occasion defendant Dodson had assisted Evants in procuring the appellant to accept the note as collateral on another transaction, without disclosing the fact that he (Dodson) claimed any interest therein. It is specifically denied that the bank had any knowledge that Dodson claimed to have any interest in the note at the time it acquired the same. It is admitted that the note was acquired from Evants as collateral to secure a note due it by Evants and alleged that Evants' note had not been paid off.

Only one issue was submitted to the jury, viz.:

"Did the bank know at the time it acquired the note from Evants that the defendant Dodson claimed any interest in it?"

To this issue the jury replied in the negative. This was the only controverted issue of fact in the case. Judgment was rendered that the bank take nothing by its suit and pay all costs, and that the defendant Dodson should recover of the bank the title and possession of the note sued on.

Appellee Laughlin filed no defense to the note, but filed a joint answer with Dodson, as above stated. Under this state of the record, it is necessary to consider only one question; i. e., if the true owner of a note

permits another to appear as the owner thereof, with full power of disposition over it, who transfers the possession to innocent third parties for value, are such third parties entitled to protection, even though the note be acquired after its maturity?

In the case of *Kempner v. Huddleston*, 90 Tex. 182, 37 S. W. 1066, the Supreme Court considered this question and reviewed the early authorities in this state apparently bearing upon it. Judge Brown used this language:

"This case does not fall within the class of cases embraced in the decision of this court in *Walker v. Wilson*, 79 Tex. 185, 14 S. W. 798, 15 S. W. 402, and *Weathered v. Schmidt*, 9 Tex. 623 [60 Am. Dec. 186], because the language used in the indorsement written upon the back of the notes is of a character which evidences ownership of the notes themselves in the person to whom they are transferred. The rule stated by Mr. Bigelow, in his work on *Estoppels* (page 547), is: 'That where the true owner of property holds out another or allows another to appear as the owner of or as having full power of disposition over the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealing with such apparent owner, they will be protected; or, where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who caused such action, the rights so acquired are secured, whether contested at law or in equity. Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt, but are derived from an act of the real owner which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale.' * * * The language used in the transfer of the notes from C. E. Singletary to F. M. Huddleston clearly indicates that for value paid the title is passed to Huddleston, and if Mrs. Singletary signed this when she was a feme sole she is estopped to recover as against Kempner or his legal representatives who acted upon the appearance of title in Huddleston as shown by the indorsement." *May v. Martin*, 73 S. W. 841.

While the note in question has no indorsement upon it, Dodson's testimony without contradiction shows that with his knowledge and consent Laughlin executed the note to S. S. Evants as payee, thus vesting Evants with absolute authority to deal with the note at his option. The jury having found the only issuable fact, viz., that the bank had no knowledge of Dodson's ownership at the time it acquired the note in favor of the bank, the judgment should have been rendered in accordance with this finding. The judgment of the lower court is therefore reversed and here rendered in favor of the Western National Bank of Hereford, against N. A. Laughlin, for the full amount due upon the note and that S. J. Dodson take nothing.

Reversed and rendered.

TEXAS & N. O. R. CO. v. WEEMS et al.*
(No. 1536.)

(Court of Civil Appeals of Texas. Texarkana.
March 2, 1916. Rehearing Denied
March 30, 1916.)

1. APPEAL AND ERROR ⇐237(6) — REVIEW —
EVIDENCE TO SUPPORT JURY FINDING—MOTION
TO SET ASIDE.

In the absence of a motion to set aside the jury's findings, an assignment of error based on the insufficiency of the evidence to support them will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. ⇐237(6).]

2. APPEAL AND ERROR ⇐1008(1)—REVIEW—
FINDINGS.

A finding involved in a judgment must be treated with as much deference as if made by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. ⇐1008(1).]

3. CARRIERS ⇐45 — FAILURE TO FURNISH
CARS—DAMAGES.

Damages for breach of carrier's contract to deliver cars at orchard for shipment of peaches is not to be limited to cost of hauling the fruit to the depot, where it does not appear that it could and would have been cared for if taken there, but rather the contrary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123-128; Dec. Dig. ⇐45.]

4. CARRIERS ⇐45—PLEADING—VARIANCE—
"ON OR ABOUT."

Plaintiff, alleging that "on or about" June 14th he demanded and defendant refused to furnish cars, proof that it was on that day of July is not a variance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123-128; Dec. Dig. ⇐45.

For other definitions, see Words and Phrases, First and Second Series, On or About.]

5. CARRIERS ⇐44 — SPECIAL CONTRACT TO
FURNISH CARS—LIABILITY FOR BREACH.

A carrier is liable for the consequences of its breach of contract to furnish cars within a shorter time than required by statute, though the result of inability was due to an unusual demand for cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122, 230; Dec. Dig. ⇐44.]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Action by J. B. Weems and others against the Texas & New Orleans Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 165 S. W. 1194.

John T. Garrison, of Houston, and Guinn, Imboden & Guinn, of Rusk, for appellant. Norman, Shook & Gibson, of Rusk, for appellees.

HODGES, J. The appellees instituted this suit to recover damages from the appellant for the breach of a contract to furnish them refrigerator cars upon certain dates named in the petition. It is alleged that they were joint owners of a peach orchard situated about three miles from Rusk, Tex., near the line of the appellant's railroad; that on or

about the 1st day of June, 1910, the appellant, through its agent Mrs. Clark, contracted with the appellees to furnish them certain refrigerator cars for the purpose of moving their peach crop. The contract provided, it is claimed, that the refrigerator cars should be furnished upon one day's notice, and placed upon a spur near their orchard; that on or about the 14th, 15th, and 16th days of June, 1910, the appellees demanded of the appellant the cars agreed upon and that they be placed on this spur track; that appellant failed and refused to deliver the refrigerator cars in response to the request, and by reason of that failure the appellees sustained damages in losing an opportunity to ship their fruit. The cause of action appears to be based upon the failure of the appellant to deliver refrigerator cars according to the terms of a special contract, and for the failure to deliver cars as required by statute, after notice. The case was submitted to the jury upon special issues, and upon the answers of the jury the appellant moved for judgment in its favor. This motion was overruled and judgment entered in favor of the appellees for the sum of \$1,850.

[1, 2] The first assigned error complains of the action of the court in rendering judgment against the defendant, for various reasons stated, among which is the insufficiency of the evidence to establish a binding contract to furnish cars at a particular time and place. The evidence shows that the contract, if any, was made with Mrs. L. E. Clark; and the jury found, in response to the questions submitted, that Mrs. Clark was at the time the agent of the Texas State Railroad and also the agent of the appellant for the purpose of securing shipments of peaches. The jury further found that the appellant, through its agent Mrs. L. E. Clark, agreed with the appellees that if they (appellees) would use Pacific Fruit Express cars and route their shipments in part over the appellant's line of railroad the appellant would furnish Pacific Fruit Express cars and have them put on the "ore bed" road in their orchard, and would prepare to handle their shipments of peaches for the season of 1910. There was no complaint of this finding of the jury. This, we think, is tantamount to a finding that there was an agreement between the appellant's agent and the appellees to furnish the cars referred to above. That these cars were not furnished after notice and demand is undisputed. It is also undisputed that by reason of the failure to furnish the cars the appellees sustained damages in the loss of a considerable portion of their peach crop. This amount the jury fixed at \$1,850. The appellant is in no attitude to insist upon this assignment in the present condition of the record. There was no motion to set aside the findings of the jury upon these issues, and, in the absence of such a motion, an ob-

jection based upon the insufficiency of the evidence to support the jury's findings will not be considered. *Smith v. Hessey*, 184 S. W. 268. In the case cited, the subject was fully discussed by Justice Jenkins of the Austin Court of Civil Appeals, and a writ of error denied by the Supreme Court. It is true the jury did not find that there was a contract to place the cars upon the spur track at any particular time, or upon any given notice. But there was evidence from which the court might have concluded that the appellant had so contracted. The judgment rendered involves that finding, which finding must be treated with as much deference as if it had been made by the jury.

[3] In its second and third assignments of error the appellant complains that the court erred in rendering judgment for the sum of \$1,350, because, it is contended, the facts as found by the jury show that the only damage the appellees sustained was the sum of \$9 per car, that being the amount they would have been required to pay for the hauling of their peaches from their orchard to the station of the defendant company at Rusk. The evidence was not such as requires the court to find as a matter of law that the appellees should have pursued that course. The appellant had alleged in its answer that at the time the cars were demanded it did not have sufficient cars to accommodate the public and take care of all the fruit brought to its station at Rusk, and that it had caused people not to bring peaches to that station for shipment on account of the insufficiency of cars. It is further alleged that, if the appellees had gathered their fruit and delivered it to the agent of the appellant at Rusk on the dates specified, it would not have been accepted for transportation. It devolved upon the appellant to allege and prove that the appellees would have secured transportation for their fruit had they carried it to the depot at Rusk. The jury merely found that the cost of hauling the peaches from the orchard to the depot was \$9 per car. The court evidently concluded that under the evidence this was not required as a matter of prudence in avoiding or lessening the damages resulting from the failure to have cars at the place agreed upon.

[4] It is further contended that there was a variance between the testimony and the allegations in the appellees' petition as to the date of the breach of the contract. They had alleged that the dereliction complained of occurred on or about the 13th and 14th of June, 1910, when the testimony shows that it occurred on the corresponding dates in July, 1910. This testimony when offered was objected to upon the ground of variance from the allegations. The language "on or about," taken in connection with the further averments of the petition, we think was sufficient to admit the evidence. It was not proper for the court to hold the appellees to strict proof of facts occurring on very dates stated in their petition. The expression "on or about" was sufficient to justify the latitude allowed as to the dates.

There is also complaint of the insufficiency of the evidence to support a finding that the appellees had been damaged in the sum for which judgment was rendered. The jury found that those damages would amount to \$1,350. There was no motion to set aside that finding; and, under the rules announced in discussing the first assigned error, this will be overruled.

[5] It is further contended that the court erred in rendering judgment against the appellant because the evidence showed, and the jury found, that at that season of the year there was an unprecedented demand for refrigerator cars, and that this unusual demand was the reason why the cars were not furnished. As before stated, the appellees did not sue for a negligent failure to furnish cars, but for the breach of a special contract. That a carrier may, through its agent, contract to furnish cars within a less period of time than that required by statute, and that the carrier may be held responsible for the consequences of a failure to comply with these special contracts, regardless of its inability due to an unusual demand for cars, has been definitely settled by the decisions of our courts. *Texas & Pacific Ry. Co. v. Shawnee Cotton Oil Co.*, 55 Tex. Civ. App. 183, 118 S. W. 776, and cases there cited.

The judgment of the district court will therefore be affirmed.

CURTIS v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 28, 1916.)

1. HOMICIDE \S 340(4) — APPEAL — HARMLESS ERROR.

In a homicide case, a slight verbal inaccuracy in an instruction on murder is harmless, where accused was convicted only of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 720; Dec. Dig. \S 340(4).]

2. CRIMINAL LAW \S 770(2) — TRIAL — INSTRUCTIONS.

It is the duty of the court to instruct the jury in a criminal case upon every phase which is presented by the evidence, but the court should not instruct on a phase unsupported by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1806; Dec. Dig. \S 770(2).]

3. HOMICIDE \S 115 — DEFENSES — SELF-DEFENSE.

To justify a homicide on grounds of self-defense, it must appear that, when accused committed the homicide, there was an impending danger, or there appeared to him, in the exercise of a reasonable judgment, to be an impending danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 155-157; Dec. Dig. \S 115.]

4. HOMICIDE \S 340(2) — APPEAL — HARMLESS ERROR.

Where there was no evidence of self-defense, a verbal inaccuracy in an instruction on self-defense, which required accused to be guided by sound judgment instead of a reasonable judgment, was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 716; Dec. Dig. \S 340(2).]

5. HOMICIDE \S 293 — TRIAL — INSTRUCTIONS.

Where accused made no claim that the shooting on his part was accidental and it appeared that after firing the first shot he seized a second revolver when bystanders took from him his first weapon and followed deceased, an instruction that if the shooting was accidental, he should be acquitted was not warranted and was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 604; Dec. Dig. \S 293.]

6. HOMICIDE \S 33 — VOLUNTARY MANSLAUGHTER — ELEMENTS.

Where accused intentionally shot another in sudden heat and passion, or in sudden affray without previous malice and not in self-defense, he is guilty of voluntary manslaughter, and an instruction that if accused unlawfully and not in self-defense, in sudden heat and passion without previous malice, shot deceased, he is guilty of voluntary manslaughter is erroneous because not instructing that the shooting must have been intentional.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 54; Dec. Dig. \S 33.]

7. HOMICIDE \S 348 — APPEAL — HARMLESS ERROR.

Where the jury were charged that if accused did not intentionally shoot deceased he should be found guilty only of involuntary manslaughter, error in an instruction on voluntary manslaughter, which allowed a conviction though the jury did not find accused intended to kill, is harmless under Cr. Code Prac. \S 340, declaring that a conviction shall not be reversed for any error of law appearing on the record when the substantial rights of accused have not been prejudiced, for the jury must have understood that they could find accused guilty only of in-

voluntary manslaughter if he killed without intention, this being particularly true, as there was only a scintilla of evidence that the killing was unintentional.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 724; Dec. Dig. \S 348.]

8. HOMICIDE \S 340(4) — TRIAL — INSTRUCTIONS.

That an instruction on voluntary manslaughter did not recite that the killing might be done in sudden affray is not prejudicial to accused, who was convicted of that offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 720; Dec. Dig. \S 340(4).]

Appeal from Circuit Court, Bourbon County.

James J. Curtis was convicted of voluntary manslaughter, and he appeals. Affirmed.

James M. O'Brien, J. I. Blanton and Emmett M. Dickson, all of Paris, for appellant. M. M. Logan, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

HURT, J. The appellant, James J. Curtis, was in the business of conducting a saloon and restaurant in Paris, Ky. A door led from the restaurant into the saloon, opening opposite the counter in the saloon and about 8 or 10 feet from it. Curtis had in his employ a negro, whose name was Rueben Henderson, and who had been engaged by appellant for five or six weeks in cleaning up the saloon and restaurant and waiting upon the customers in both places. On the evening of the 13th day of February, 1914, the appellant was drunk, and the negro was drinking to some extent. Near to 12 o'clock on that evening the negro was behind the counter in the saloon waiting upon some customers, when the appellant came into the saloon from the restaurant, and directed the negro to serve certain parties, who were standing before the counter, with whisky or whatever they wanted. The negro replied to him that he had already given them a sufficiency of liquor, and that it was about time to close the saloon for the night. The appellant replied that it could be kept open for 15 minutes yet, and, going behind the counter, commanded the negro to go out, and that he would wait upon the customers himself. The negro said nothing but did not go, when appellant pushed him. The negro turned around, and the appellant struck him twice, once in the breast and once upon the face, when the negro seized appellant by each arm between the hand and elbow, when they scuffled down to the end or near to the end of the counter, when the negro pushed appellant against a door. Appellant had said several times to the negro to turn him loose, but the negro, without saying anything, continued to hold appellant, when two bystanders interfered, one of them going behind the counter and taking hold of Curtis and the other taking hold of the negro, pulled him from behind the counter and directed him to get out. The negro went to-

ward the door which led into the restaurant with his back to appellant, who instantly seized a revolver and discharged it across the counter, the bullet taking effect in the negro's back about two inches to the right of the median line and passing through his bladder and bowels, which it perforated in several places. The negro had just gotten inside the restaurant at the time he was shot, when he went on out of the restaurant and was next seen lying upon the ground, which was covered with snow, about 25 or 30 feet from the outside door of the restaurant. As quick as appellant discharged the pistol, the two men who interfered took the pistol from him, when he at once secured another and, rushing around the counter in the saloon, went into the restaurant, to which place one of the men followed him and took the revolver away from him. The negro died from the effects of the wound, in two or three days thereafter. The above is substantially the facts of the case, with substantially no contradiction of the evidence which tended to prove the facts above stated, except that appellant himself testified that some time before the beginning of the controversy in which the shooting occurred the deceased refused to serve two negro women in the restaurant, and that he had ordered him to go out, which he did, but returned in two or three minutes, and said he was going to close up the saloon, and he furthermore stated that when he took hold of the deceased behind the counter of the saloon, deceased had struck him a blow in the breast. Appellant did not pretend that deceased was offering him any violence of any kind at the time he shot him, and the only excuse which he gave for the shooting was that he was very mad, and that he fired the pistol without any intention of shooting the deceased and without intention of shooting any one in particular.

The appellant was indicted in the Bourbon circuit court for the crime of murder, and, his cause coming on for trial, he was found guilty by the jury of the crime of voluntary manslaughter, and sentenced by the court to confinement at hard labor in the state reformatory at Frankfort, Ky., for an indeterminate period of not less than 2 nor more than 21 years. He filed grounds and moved the court to set aside the verdict of the jury and the judgment of the court and to grant him a new trial, which motion was overruled, and, being dissatisfied with the judgment, he seeks a reversal of it upon the following grounds: First, that the court erred in giving instructions 1, 2, 3, and 4 to the jury as to the law of the case; second, because the court refused to give an instruction marked "A," which was offered by appellant; third, because the court erred in failing to instruct the jury upon the whole law of the case.

The instructions given to the jury by the

court provide that under the facts of the case the jury might find the appellant guilty of murder, voluntary manslaughter, or involuntary manslaughter, and might acquit him upon the ground of self-defense and apparent necessity for his conduct in shooting and killing the deceased. The jury was also directed that if it entertained a reasonable doubt from the evidence of appellant being proven guilty of any offense, to find him not guilty; and, if it believed beyond a reasonable doubt, him to be guilty of one of the three offenses, of murder, voluntary manslaughter, or involuntary manslaughter, but had a reasonable doubt of which, it should find him guilty in each instance of the one which was the lesser of the offenses, and by another instruction it defined the meaning of the word "malice" and of "aforethought," as used in the instructions.

[1] The instruction upon the subject of murder directed the jury that, if it believed from the evidence beyond a reasonable doubt that the appellant unlawfully, feloniously, willfully and of his malice aforethought, and not in his necessary, or apparently necessary, self-defense, shot and killed Henderson, it should find him guilty of murder. The contention is made that the court erred in defining the word "malice," as used in the instruction. The definition which the court gave of the word "malice" was the intentionally doing of the act of violence toward another without legal justification or excuse therefor. It is true that a better definition "of his malice" denotes the intentional doing, without just cause, of any wrongful act, but the criticism here is a mere verbal one and without merit. This small inaccuracy as to the particular word that should have been used, however, could not have been prejudicial in any wise to appellant or to any right of his, as the jury did not find him to be, nor the court did not adjudge him to be guilty of murder, but of voluntary manslaughter only, which was a finding that the criminal act of which he was accused was one not done with malice, but without malice. *Taber v. Com.*, 82 S. W. 443, 26 Ky. Law Rep. 754. If he had been found to be guilty of murder, another question would then be presented, but, having been found to be guilty of voluntary manslaughter, which is a finding that he committed the act without malice of any kind, an incorrect definition of malice could not have prejudiced him.

[2-4] The same may be said of the criticisms which are made in the brief of counsel upon instruction No. 3, in which the court undertook to advise the jury as to the law pertaining to the right of appellant to act in his self-defense upon the occasion upon which the homicide was committed. The instruction given by the court required the appellant to be guided by "a sound" judgment, which is a judgment incapable of error, in making up his mind as to the necessity, which was impending, for him to shoot and

kill the deceased, instead of a reasonable judgment, still this instruction could not have been prejudicial to the substantial rights of the appellant. It is true that it is the duty of the court to instruct the jury in a criminal case upon every phase of the case which is presented by the evidence, and by the instructions to give to the accused the opportunity for the jury to determine the merits of any lawful defense which he has. It is not, however, either proper or necessary for the court to instruct the jury as to the rights of the defendant to a defense when there is no evidence offered in support of such a defense. It is elementary that to justify a homicide upon the ground of self-defense, that some evidence at least must tend to prove that at the time the accused committed the homicide there was an impending danger or that there appeared to him, in the exercise of a reasonable judgment upon his part, to be a danger then and there impending. If there is no evidence which conduced to prove such a situation for the accused, there is no evidence upon which to base an instruction upon the right of self-defense. *Com. v. Rudert*, 109 Ky. 658, 60 S. W. 489, 22 Ky. Law Rep. 1308; *Hunn v. Com.*, 143 Ky. 143, 136 S. W. 144. At the time the accused, in the case at bar, shot and killed the deceased, there is not a scintilla of evidence which could be twisted into a support of the assertion that the shooting upon his part was done under the belief that any danger existed to himself from any threatened act of deceased. The only witness for the commonwealth who undertakes to say how the deceased was then acting testifies that the last he saw of him he was running toward the door of the restaurant, with his back turned to the accused. The accused, himself, testifies to no danger, or threatened danger, of himself from deceased at the time he shot him; in fact states that he was not doing anything more to him at the time than he was then doing while the accused was testifying at the trial. The accused further states that he shot because he was in a sudden passion, and gives no other reason for it. Any instruction then which the court might have given as to the accused's right to shoot in his self-defense, under the state of facts in the evidence, was not justified, and the accused received whatever benefits there was from it, when he was not entitled to any such instruction, and hence any verbal error which existed in the instruction could not have been prejudicial to his substantial rights. For the same reason the instruction offered by appellant and which was denied by the court was unauthorized in the case.

[5] The appellant also contends that the court should have instructed the jury that if the shooting upon his part was accidental, it should acquit him. We fail to find in the record any evidence that the shooting was accidental, and such an instruction would

have been entirely unjustified. The appellant, himself, does not make any such claim, and all of the evidence shows, both that for the commonwealth and for the accused, that the accused intentionally and purposely discharged the pistol, although he claims that he shot without intention to kill the deceased, but he fails to give any reason for the shooting, unless his purpose was to kill the deceased, and when this pistol was wrested from him, he immediately seized another pistol, and followed deceased into the restaurant, into which he had gone.

[6] The contention is earnestly made that the court erred in the instruction it gave the jury, in which it was advised as to the elements which constitute the crime of voluntary manslaughter, and that this was an error which prejudiced the substantial rights of the accused, and resulted in denying him a fair trial. The error asserted is that the court instructed the jury that if it believed from the evidence beyond a reasonable doubt that appellant unlawfully, and not in his necessary or apparently necessary self-defense, in sudden heat and passion, and without previous malice, shot the deceased, the jury should find the defendant guilty of voluntary manslaughter, when it was necessary, to constitute the crime of manslaughter, that appellant should have intentionally shot and killed the deceased, in sudden heat of passion, or in a sudden affray, without previous malice. To willfully kill one in a sudden affray, without previous malice, and not in self-defense, or apparently necessary self-defense, is one way of committing the crime of manslaughter there is no doubt. To willfully slay, in a sudden heat of passion, without previous malice, and not in necessary, or apparently necessary, self-defense, is also voluntary manslaughter. To unlawfully do an act is to do it without legal right so to do. It is, however, contended that to commit involuntary manslaughter is to unlawfully kill, and that involuntary manslaughter may likewise be committed by unlawfully slaying one in sudden heat and passion, without previous malice, and not in self-defense, or apparently necessary self-defense, and that the jury may have, under the instruction, found the appellant guilty of voluntary manslaughter when the facts, which they believed from the evidence to exist, constituted involuntary manslaughter only. There is no doubt that the elements necessary to constitute the crime of voluntary manslaughter is an unlawful, willful, and felonious killing, without previous malice, in sudden affray, or in sudden heat and passion, and not in the necessary, or apparently necessary, self-defense of the one doing the slaying. *Com. v. Mosser*, 133 Ky. 609, 118 S. W. 915; *Com. v. Saylor*, 156 Ky. 251, 160 S. W. 1032; *Wheeler v. Com.*, 120 Ky. 708, 87 S. W. 1106, 27 Ky. Law Rep. 1090; *Greer v. Com.*, 111 Ky. 93, 63 S. W. 443, 23 Ky. Law Rep. 489; *Montgomery v. Com.*, 81 S. W. 264, 26 Ky. Law Rep. 358;

Mitchell v. Com., 88 Ky. 351, 11 S. W. 209, 10 Ky. Law Rep. 910; *Roberson on Criminal Law*, § 189; *Wharton* (10th Ed.) § 803. To be guilty of voluntary manslaughter, one must intend to slay, as opposed to an unintentional slaying. Hence the failure to embrace in the instruction, by which the jury was directed to find the appellant guilty of voluntary manslaughter, if certain facts appeared from the evidence, some term making it necessary that the killing should have been done intentionally by the appellant renders the instruction defective and erroneous.

[7] Having arrived at this conclusion, before a reversal can be had, however, it must appear that the error, in this case, worked substantial injustice to the accused. Section 340 of the Criminal Code of Practice provides as follows:

"A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the court is satisfied that the substantial rights of the appellant have been prejudiced thereby."

In *Rutherford v. Com.*, 78 Ky. 639, construing this statute, it was held that two things must appear before this court was authorized to reverse a judgment of conviction in a felony case: (1) An error of law must appear upon the record; (2) the court must be satisfied, from the consideration of the whole case, that the substantial rights of the accused have been prejudiced by the error. *Collett v. Com.*, 121 S. W. 426; *Hargis v. Com.*, 135 Ky. 578, 123 S. W. 239; *Reed v. Com.*, 138 Ky. 568, 128 S. W. 874; *Parrish v. Com.*, 136 Ky. 77, 123 S. W. 339; and many others. In the case at bar, the only issue presented by the evidence was whether the shooting of deceased was intentional or unintentional. The overwhelming weight of the evidence is to the effect that appellant intentionally shot the deceased. There is a scintilla of evidence contained in the testimony of appellant that he did not intend to shoot him. The court gave effect to this scintilla of evidence by instructing the jury that if the appellant did not intentionally shoot deceased, to find him guilty of involuntary manslaughter. The jury was thereby specially directed that if it was convinced that the shooting of deceased was unintentional, it could find appellant guilty of involuntary manslaughter only, and not of voluntary manslaughter. It was obliged to understand that to find him to be guilty of voluntary manslaughter, the shooting must have been intentional. This, combined with the fact that it was instructed that if the killing was unlawful, done in a sudden heat and passion, without previous malice, and not in self-defense, and in the light of the other instructions we cannot conclude that the jury was misled in any way by the instruction.

[8] The contention that the instruction was prejudicial because the words "in sudden affray" were not included in it does not avail

the appellant anything, because the instruction in that respect was more favorable to appellant than he was entitled to, as it omitted one of the states of case in which, from the proof, he might have been found guilty of voluntary manslaughter. Where the accused is found guilty of voluntary manslaughter, the omission from the instruction upon that subject of the words "in sudden affray" is not prejudicial. *Peace v. Com.*, 146 Ky. 758, 143 S. W. 399; *Carson v. Com.*, 149 Ky. 294, 148 S. W. 30.

It does not appear that upon the facts the jury could have found any other verdict than it did.

The judgment is therefore affirmed.

BALTIMORE & O. R. CO. v. SMITH.

(Court of Appeals of Kentucky. April 25, 1916.)

1. MASTER AND SERVANT ⇄ 124(10)—INJURIES TO SERVANT—NEGLIGENCE—INSPECTION—EFFECT.

The mere inspection of cars by employes charged with that duty is not conclusive evidence of ordinary care by a railroad to keep its cars in reasonably safe condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 242; Dec. Dig. ⇄ 124(10).]

2. MASTER AND SERVANT ⇄ 286(13)—INJURIES TO SERVANT—QUESTIONS FOR JURY—DEFECTIVE RAILROAD CAR.

Where an injury was caused by a defective appliance on a railroad car, whether the railroad has exercised due care to keep the car in good condition is for the jury, where there is evidence, direct or circumstantial, that it would not otherwise have occurred.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1020; Dec. Dig. ⇄ 286(13).]

3. MASTER AND SERVANT ⇄ 223—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Whether a railroad employe assumes the risk of a defective handhold while boarding a car depends on whether the railroad had authorized him to board the car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 652-658; Dec. Dig. ⇄ 223.]

4. MASTER AND SERVANT ⇄ 276(10)—INJURIES TO SERVANT—EVIDENCE—SCOPE OF EMPLOYMENT.

Evidence of instructions by superior officer held sufficient to warrant finding that riding on a freight train was within the scope of plaintiff's authority.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 952; Dec. Dig. ⇄ 276(10).]

5. MASTER AND SERVANT ⇄ 278(6)—INJURIES TO SERVANT—DEFECTIVE APPLIANCE—EVIDENCE.

In a suit by employe for injuries, the mere fact that a handhold gave way, independent of other circumstances showing its defective or unsafe condition, is not sufficient to establish negligence by a railroad.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 962; Dec. Dig. ⇄ 278(6).]

6. MASTER AND SERVANT ⇨285(5)—INJURIES TO SERVANT—PRESUMPTION—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* does not apply with the same fullness in case of an injured servant as in a case where a third party is injured.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 881, 898, 955; Dec. Dig. ⇨285(5).]

7. MASTER AND SERVANT ⇨124(6)—INJURIES TO SERVANT—APPLIANCES—INSPECTION.

An inspection consisting merely of the inspector's looking at handholds while passing cars is insufficient.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 238; Dec. Dig. ⇨124(6).]

8. MASTER AND SERVANT ⇨286(25)—INJURIES TO SERVANT—APPLIANCES—QUESTIONS FOR JURY—INSPECTION.

Evidence that appliance was defective is sufficient to take to the jury the question whether the master would have discovered the defect by due care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1030; Dec. Dig. ⇨286(25).]

9. LIMITATION OF ACTIONS ⇨127(14)—FEDERAL EMPLOYERS' LIABILITY ACT—ACCRUAL—AMENDMENT OF PLEADINGS.

Where in an action for injuries an amended petition filed more than two years after the injury first sets up the interstate nature of the employment and right of recovery under the federal Employers' Liability Act,¹ the right of recovery is not barred by the two-year limitation of that statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 545; Dec. Dig. ⇨127(14); *Pleading*, Cent. Dig. § 688.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by James H. Smith against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gibson & Crawford, of Louisville, for appellant. S. L. Trusty and Eugene Hubbard, both of Louisville, Noggle & Graham, of Greensburg, and A. C. Popham, of Louisville, for appellee.

CARROLL, J. In this action by the appellee to recover damages for personal injuries sustained, as alleged, by the negligence of the appellant railroad company, there was a judgment in his favor for \$4,000, followed by this appeal.

A somewhat extended statement of the facts is made necessary on account of the grounds relied on for reversal, and so we will set them out before taking up the reasons assigned by counsel for the railroad company why a new trial should be ordered.

The appellee, Smith, was employed by the railroad company as a telegraph operator at a station on its road called Lavenia. So much of his evidence as it is important to relate in detail is as follows:

"Q. Who employed you, Mr. Smith, to work for the Baltimore & Ohio? A. Mr. George Day, division operator of the Baltimore & Ohio Railroad at Pittsburgh. Q. What were you employed to do? A. As telegraph operator. Q.

Mr. Smith, I will get you to state to the jury what he said to you at the time he employed you. A. He told me I would have to live at Layton; that that was the nearest place, and work at Lavenia. He told me there would be a freight train in there, usually about 10:30, in plenty of time for me to get to my work, and I could catch onto that freight train somewhere along there as I could, and go to my work.

* * * He told me I could ride back on a passenger train. He gave me a pass between those two stations. Q. Between what two stations did he give you a pass, Mr. Smith? A. Layton and Lavenia. He told me I could catch a train that would come in on the third track along about 10 o'clock every night. Q. What did he say to you with reference to the third track? A. He said there would be a freight train usually pull in on the third track to let a passenger train around; the fast passenger train was due about 10:30, and he told me there would be a train in there nearly every night. Q. What was the distance between Layton and Lavenia? A. About four miles. Q. When did you go on duty? A. I went on duty at 12 o'clock, and I had to catch this train, because, if it wouldn't be in there, it was liable to come there. Q. Was there any other way to get there except on the train? I mean by that was there any road? A. No, sir. Q. Did you get the train Mr. Day directed you to get, and at the time he directed you to get it, at the time you got hurt? A. Yes, sir; I got the freight train that pulled in on that slow track. Q. On this occasion was it an extra train or a regular train at all times that he told you to get? A. An extra train. Q. Was it on time or not? A. Yes, sir. Q. Ahead of time? A. A little bit ahead of time. I got there about the time I usually did, and this train was there. Q. Prior to the time you were injured I will get you to state whether or not you had ridden on a freight train, and boarded it at this place for your work. A. Yes, sir; I had been there 80 days, and I rode nearly every night. Q. What part of the train? A. I rode all over it. I rode in the conductor's caboose, and I rode on the engine, and on the box car; anywhere I could catch on. They knew it was customary for the operators to ride. Q. Did this train stop as it went through there, or go very slowly? A. It was going very slowly. Q. Was that instruction given you by Mr. Day, who employed you? A. Yes, sir; he said I would have to catch on this freight train that come in on that third track. Q. Mr. Smith, on the occasion that you got hurt, just tell the jury how the accident occurred. A. Well, I come out about 10:15 at night, and this train was pulling by. I caught hold of the handhold about five cars from the engine and made two steps, and when I attempted to step down on the stirrup I had hold of the handhold. The handhold was fixed something like my cane, and when I caught hold of that handhold and pulled down on it, I aimed to catch the stirrup, and the end of it pulled loose and come down. Q. What pulled down and came loose? A. The handhold pulled loose and came down. I hit the stirrup and missed it, didn't catch it, because this thing let my weight down, and I missed the stirrup. Q. What became of your foot? A. It landed right in front of the wheel, the moving wheel, and mashed the front end of my foot off. Q. Did this handhold — Did I understand you to say this handhold pulled loose and came down at the time you threw your weight against it? A. When the handhold pulled down—not pulled loose, but pulled down—and caused me to miss my footing. Q. Was your whole weight thrown against it? A. Yes, sir. Q. How fast was this train going? A. Well, not over five miles an hour, I don't think; not over five miles; about five miles an hour. Q. About how many cars were

in this freight train? A. Twenty-five or 30 anyway. Q. Why did you get on that train at this place? A. Why, because I was instructed to get on where I could, and I thought I had better get on right there. Q. How far was it, you say, from the engine—about how far? A. I would judge four cars back from the engine, up next to the engine. Q. Why couldn't you get the caboose? Why didn't you get the caboose sometimes, or why did you ride on different parts of the train? A. If I could have got the caboose before the train had been going too fast, I would have did so. This train was going too fast for me. I was afraid it would be before I got down there. There were 30 cars, I guess, and if I waited for the caboose I was afraid I would get hurt. Q. Had you ridden on different parts of the train before this? A. Yes, sir; I rode on the engine and the caboose. Q. You had gotten on the train when it was moving, had you? A. Yes, sir. Q. Did the officers and employees of that train see you? A. Yes, sir; they would see me; I don't know whether they seen me this night or not, but usually they seen me. Q. Is this the track Mr. Day told you to get the train on? A. Yes, sir; the third track—the slow track. Q. Now, Mr. Smith, would they stop the train for you at Lavenia? A. Yes, sir; they would have to stop the train, the freight train, to get out, because, before they could pull off of the third track onto the double track or the single track, they would have to get permission from the operator at Lavenia to pull out. Q. You had no trouble getting off of the train when you got to Lavenia? A. No, sir."

On his cross-examination he testified as follows:

"Q. You gave your deposition in this case on the 22d of December, 1911, at my office, didn't you? A. Yes, sir. Q. I will ask you if these questions weren't asked you, and if you didn't make these answers: 'Q. Do you know what kind of a car it was that you attempted to board? A. No, sir. Q. What portion of the train was it in? A. Well, the fourth or fifth from the caboose—the fourth or fifth car. Q. Four or five cars from the caboose? A. Yes, sir; I think so. Q. On the left-hand side of the train in the direction it was doing? A. Yes, sir; that is right.' That is what you said? A. No, sir; I didn't say caboose; I said the engine; it couldn't have been the caboose. Q. Weren't those questions asked you, and didn't you make those answers? A. I didn't say caboose; if he got it caboose, I said engine. He misunderstood me; I am positive it was the engine."

He was shown a written statement signed by him a few months after the accident in which he said, in describing how the accident happened:

"I caught ahold of the handhold and missed the foot stirrup, and my foot slipped over the rail, and the wheels passed over my foot."

The witness admitted signing this statement, but said he did not write it or read it himself, and that he was very busy at the time with his duties as telegraph operator, and the agent of the company who read it to him did not read that part of the statement saying that his foot slipped, causing him to fall under the train, and that he did not know that statement was in there when he signed the paper, but admitted telling the agent that his foot slipped after the handhold came loose. This was all the evidence for appellee, except that in rebuttal he denied

making statements attributed to him by witnesses for the company.

On the part of the company the conductor on the freight train testified that he did not know or hear of any trouble with the handhold. Several other witnesses, who were employees of the company were inquired of as to statements made by appellee after the injury, and all of them said that he told them that his foot slipped, but did not say anything about a defective handhold. There is also a stipulation showing that regular car inspectors of the company inspected this freight train at a place where it was customary to inspect trains some two or three hours before the accident; and it was agreed that the inspectors would say on the trial that they inspected the cars in this freight train without finding any defective or unsafe—

"that the method of inspection was to examine by inspection all the parts not necessary for the persons using the cars to catch hold of and look at the handholds and grabirons, and catch hold of those that could be reached from the ground, to ascertain whether any were defective; that, if any defect was found in any of the parts, an immediate note of that was made by them in books which were thereafter kept as records of the inspection; that they made the following record of the condition of the cars in the train above referred to at the time in their own handwriting in books from which they were now testifying. They say that there were no defects in any of the cars inspected by them except the defects hereinafter noted as set out in the schedule opposite each numbered car. Where no defect is set out, none was found in the car."

Day, the man who employed appellee, after denying that he had instructed, or directed, or authorized appellee to get on freight trains and ride from Layton to Lavenia, said that he gave him a pass to ride on passenger trains from Lavenia to Layton, but told him that on returning to his work each day he would have to walk from Layton to Lavenia; that he could ride one way, but would have to walk the other. On this evidence the contention of the appellee is that he had a right, under the instructions given him by his superior officer, to board the freight train at the time and place and manner he did, and that his injury was caused by a defective and unsafe handhold, the condition of which could have been discovered by ordinary care on the part of the company.

On the other hand, the defense for the company was rested on the ground that appellee was not authorized or instructed to ride on the freight trains, and hence, in attempting to get on the train, was a trespasser, and assumed the risk of defective appliances. It is further contended that the handhold was not defective or unsafe, and, even if it was, the inspection made by the company showed that it exercised ordinary care to maintain it in safe condition, and so there should have been a directed verdict in its favor.

It will be seen from the evidence that the appellee is the only witness who testified as

to the cause that produced the injuries received by him, and it is urged that the evidence contradicts appellee as to the cause that produced the accident to such an extent as to make the verdict upon this issue so flagrantly against the evidence as to justify a reversal of the case. The evidence thus relied on consists of the statements of employés of the company that appellee did not mention a defective handhold in relating how the accident happened, but attributed it to the fact that his foot slipped, and in the evidence of the car inspectors who said they did not discover any defective handhold, supplemented by the paper signed by appellee detailing the circumstances of the accident in which no mention is made of defective handholds.

In this, as in almost all cases of this character, the evidence on several issues is very contradictory, although there is no evidence as to the immediate cause of the accident, except the testimony of appellee, nor is there any contradiction of the evidence of the inspectors, except such as may be found in its insufficiency and in the circumstances attending the accident as related by appellee. In view, therefore, of the fact that there is no evidence showing that the car inspectors did not make the inspection testified to by them, it is said that their evidence showed that they exercised ordinary care in making the inspection, and, this being so, there was no evidence that the company failed to exercise ordinary care in its effort to maintain this handhold in reasonably safe condition.

[1] Passing for the present a more detailed examination of the sufficiency of the inspection made, we cannot agree that the mere inspection of cars by employés who are charged with the duty of inspection is conclusive evidence of the exercise of ordinary care on the part of the company to keep its cars and appliances in reasonably safe condition, or that the inspection made in this case is conclusive evidence of the fact that the handhold was not in a defective and unsafe condition at the time the inspection was made or at the time the accident happened. The evidence of these inspectors is entitled to the same weight as would be the evidence of any other witnesses who testified that an appliance was in good condition, and no more. It was subject to be put in issue to the same extent as any other disputed fact in the case, and, if the evidence of appellee is to be believed, it is plain that the handhold was in a defective and unsafe condition, and that it had not been sufficiently inspected.

[2] It is very true that, when a railroad company exercises that degree of care that the conditions of the service demand, and care corresponding to the dangers of the employment, to keep its cars and appliances in reasonably safe condition for the use of its servants, it has discharged its whole duty. But whether it has performed its duty in this respect is an issuable fact, and when it

is put in issue, if there is evidence, direct or circumstantial, showing that the accident would not have happened except for a defective appliance, the jury have the same right to weigh and consider the evidence supporting and opposing the proposition that the company exercised due care that they have to weigh and consider any other issuable fact in the case.

In *Huddleston's Adm'r v. Straight Creek Coal & Coke Co.*, 138 Ky. 506, 128 S. W. 589, the coal company proved by its mine boss that he inspected, shortly before the accident to Huddleston, the roof of the entry at the place the slate fell; and in the argument of the case the contention was made by counsel for the coal company that, as the uncontradicted evidence showed that the company, through its employés, exercised ordinary care to put the mine at the place Huddleston was killed in a reasonably safe condition, and as there was no known cause that interfered with or changed that condition between the time it was thus inspected and the time Huddleston was killed; the court properly directed a verdict in its favor. But, rejecting this view, the court said:

"Must the statements of Elawick be accepted as conclusive of the fact that the company fully discharged its duty to keep the mine in a reasonably safe condition, or was the question whether or not it performed this duty one for the jury to determine from all the facts and circumstances in the case? It can readily be seen that this is a most important question, not only as it affects the case before us, but as it will affect other similar cases in which a recovery is sought against the master for the destruction of the life of the servant based on the failure of the master to furnish the servant reasonably safe places or appliances. If the principle contended for by counsel for the company is correct law, then in every case involving a question like this the master will be absolved from liability if he can prove that the place or appliance was examined and inspected shortly before the injury, and found to be reasonably safe for the use of the servant, and there is no evidence to disprove that the inspection was made, or to contradict the evidence of those who say that in making it they exercised ordinary care. If this is the law, then, when a servant is killed by a defective appliance or unsafe place, all the master need do to compel a verdict and judgment in his favor is to show by uncontradicted evidence that such an inspection as we have pointed out was made, and that no change had taken place or been made in or about the thing inspected between the time of inspection and the death, although the jury might be authorized to believe from the physical facts shown in evidence that the appliance or place where the servant was killed was not in a reasonably safe condition at the time of the accident. Thus the law would place almost certainly in the power of the master the means by which he could defeat an action and deprive the complaining party of the right to rely for his recovery upon facts and circumstances that in the opinion of the triers of the facts might be amply sufficient to show that the degree of care required was not exercised. We cannot give our approval to a doctrine like this. The jury have the right to hear and consider, not only the evidence from the mouths of witnesses as to what they did and what was done, but they have also the right to hear and consider other evidence from witnesses who are qualified to testify as to the physical condition of the place or appli-

ance before, at the time, and immediately after the accident, and the jury may from the facts and circumstances thus proven be warranted in concluding that they are entitled to more weight than the personal evidence of the witnesses whose testimony was in contradiction of these facts and circumstances."

Nor is the later case of *Lile v. Louisville Ry. Co.*, 161 Ky. 347, 170 S. W. 936, in conflict with the *Huddleston Case*. On the contrary, the *Lile Case* was clearly distinguished from the *Huddleston Case* on the facts.

The evidence of the witnesses who testified that appellee said his foot slipped, without mentioning the handhold, is entitled to weight. But the jury had the right to accept the evidence of appellee in preference to that of the witnesses for the railroad company; and, although the weight of the evidence, as well as some of the circumstances developed in the case, conduces to show that the accident happened on account of appellee's foot slipping in the stirrup on the side of the car when he attempted to get on rather than on account of the defective handhold, we are not prepared to say that the finding of the jury on this issue is so flagrantly against the evidence as that the verdict should be set aside. In *Howard v. Louisville Ry. Co.*, 105 S. W. 932, 32 Ky. Law Rep. 309, it was said, and is pertinent here:

"The number of witnesses who testify to a fact is not necessarily a controlling feature in determining its truth; neither does the fact that their evidence may not be contradicted by word of mouth compel its acceptance as true. The jury have the right to disregard the whole or any part of the testimony of any witness, and it is their province to give such weight to the evidence as in their judgment and discretion it is entitled to. In considering the weight to which evidence is entitled, and the credibility that shall be attached to the words of the witness, the jury may, and often do, take into consideration the demeanor, the appearance, and the manner of the witness, and from these and other circumstances that come under their observation during the trial may conclude that the witness is not worthy of credit, or is not testifying to the truth, and disregard his entire testimony. . . . A stronger impression may be made on the juror's mind by what he sees than by what he hears. A juror can see as well as hear, and has the right to use his eyes as well as his ears in making up his mind as to what weight if any shall be given the evidence of a witness."

[3] It is further insisted that when appellee, in going to his work, attempted to board a moving freight train, not at the caboose, he assumed the risk of defective appliances such as an unsafe handhold. Whether he assumed this risk or not depends on the question whether he had, under his employment, the right and authority to get on this moving train at the time and place and in the manner described in his evidence. He was an employé of the company, and, if he was directed by his superior officer to board this train and other freight trains at the time and in the manner in which he was attempting to board this train, the company owed him the same duty to keep its appliances in safe condition that it would owe to any other employé;

for example, a brakeman, whose duties might require him to board cars as appellee was attempting to do when he was injured.

[4] Looking now to the evidence of appellee to learn whether he was acting within the line of his instructions, we find that he testifies very positively—although his evidence is contradicted by Day—that Day, who had authority so to do, instructed him at the time he was employed that he would have to live at Layton, as there was no place at which he could find board and lodging at Lavenia, the place at which he was employed to work; that Day gave him a pass on which he could ride on a passenger train from Lavenia to Layton early in the morning when his night's work was over, and that in returning to his work at night he could get on a freight train that passed Layton about 10:30 and ride on it to Lavenia; that he further told him that he could get on the passing freight, which ran slowly at Layton, as best he could, and at any place he could; that in obedience to these instructions he had gotten on this 10:30 freight train at Layton every night, except one during the 80 days he worked preceding the accident; that sometimes he rode on the engine, sometimes in the caboose, and sometimes on the freight cars, getting on the train as it passed as best he could.

Assuming, as found by the jury, that the directions and instructions testified to by appellee were given to him by Day, we think that he had the right, in the exercise of care for his own safety, to attempt to get on this freight train at the time and place and in the manner he did. He would not, of course, under the instructions have had the right to attempt to get on a fast-moving train, or at a place at which it would not have been reasonably safe to have attempted to board the train; but, according to his evidence, the train was running at a speed of only four or five miles an hour, and, except for the fact that the handhold gave way, he could and would have boarded the train with safety. In other words, the sole cause of the accident, according to appellee's version of the affair, was the defective handhold. And if this handhold was defective, as the jury must have found, the railroad company was remiss in the duty that it owed appellee, because he had the right, under the circumstances stated, to assume that an appliance like a handhold, which is attached to the side of a car for the purpose of assisting those who wish to board the car, was in reasonably safe condition for the use for which it was intended.

Upon the issues in the case the right of appellee to recover depended upon his establishing by sufficient evidence three propositions: First, that his instructions from a superior officer authorized him to get on this train at the place he made the attempt; second, that in his effort to board the train he was exercising ordinary care for his own safety; and, third, that his injury was caused by

a defective handhold, the condition of which could have been discovered by the company if it had exercised the required care.

As to the first of these questions we think, as stated, that the instructions of Day were broad enough to authorize appellee to attempt to get on this train at the time he did; and as to the second one there is really no dispute that the train was running at such a slow rate of speed as that he could have boarded it with safety if the appliance furnished for his assistance had been in reasonably safe condition. As to the third there was much conflict in the evidence, and we will now look into this feature of the case.

In *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court, in speaking of the duty of the master in respect to furnishing safe appliances for the use of the servant, used this language:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant."

In *New Galt House Co. v. Chapman*, 124 Ky. 527, 97 S. W. 632, 30 Ky. Law Rep. 692, *Lancaster's Adm'r v. Central City Light & Power Co.*, 137 Ky. 855, 125 S. W. 739, 27 L. R. A. (N. S.) 181, *Truesdell v. O. & O. R. Co.*, 159 Ky. 713, 169 S. W. 471, and in many other cases, this court has announced substantially, although in different forms of expression, the same rule.

[5, 6] Tested now by this rule, and assuming that the handhold gave way in the manner described by appellee, the question is: Did the evidence for the appellee show with sufficient certainty to take the case to the jury and support the verdict the failure of the railroad company to use reasonable care in equipping and maintaining the car which appellee attempted to board with handholds reasonably safe for the purposes for which they were intended? It is true that he mere fact that the handhold gave way, independent of any other circumstances showing its defective and unsafe condition, would not be sufficient to convict the railroad company of negligence, as it seems to be generally held that the doctrine of *res ipsa loquitur* does not apply with the same fullness and weight in cases where the servant is injured by a defective appliance as it does in cases where, for example, a passenger or other person not occupying the relation of servant is injured by an unsafe appliance. The rule announced by this court in *Lile v. Louisville Ry. Co.*, 161 Ky. 847, 170 S. W. 936, and

followed in *Thomas v. National Concrete Construction Co.*, 186 Ky. 512, 179 S. W. 439, is in harmony with the weight of authority on this subject, and is thus stated:

"While some courts take the position that the doctrine of *res ipsa loquitur* never applies in a case of master and servant, yet it is generally held that the doctrine does apply in such a case, but in a more restricted sense than in a case of carrier and passenger, because of the difference in the degree of care imposed, and in the character of defenses that may be made. * * * A master is not required to furnish the servant absolutely safe appliances with which to work. He discharges the full measure of his duty when he exercises ordinary care to furnish appliances which are reasonably safe. When, therefore, the servant seeks to recover for an injury growing out of defective appliances, the mere fact that a piece of machinery breaks is not of itself sufficient to make out a *prima facie* case. It must therefore appear that the master knew of the defective condition of the machinery, or could have known of it by the exercise of ordinary care. Therefore it is generally held in a case of master and servant that the inference of negligence is deducible, not from the mere happening of the accident, but from the attending circumstances. * * * In *Shearman & Redfield on Negligence*, § 59, the rule, which has frequently been quoted by courts with approval, is stated as follows: 'It is not that in any case negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer.'

"The rule has also been stated in the following language: 'There must be reasonable evidence of negligence, but, when the thing causing the injury is shown to be under the control of the defendant, and the accident is such that, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part.'"

This does not mean, however, that in suits by the servant against the master the doctrine of *res ipsa loquitur* cannot be invoked in aid of the servant's cause of action. It only means that in cases of this sort its effectiveness is more restricted than in other cases. Or, as said by the New York Court of Appeals in *Marceau v. Rutland Railroad Co.*, 211 N. Y. 208, 105 N. E. 206, 51 L. R. A. (N. S.) 1221, Ann. Cas. 1915C, 511, a case presenting a question very much like the one here involved:

"While it is therefore the settled law that the maxim is applicable to any case where the facts warrant its application, it is apparent that the employe who invokes it against his employer encounters difficulties that do not hamper the wayfarer in a public place or the passenger in a common carrier's conveyance. * * * In the nature of things the injured employe who sues his employer must present a much higher degree of proof than is necessary in the case of a wayfarer or passenger. It is to be emphasized, however, that the difference is one of degree, and not of kind. * * *

"The employer is bound merely to the exercise of reasonable care in providing his employe with a safe place in which to work, with prop-

er and adequate tools, appliances, and machinery, and with fellow employees competent for the tasks to which they are assigned. If the injured employee sues at common law and seeks to invoke the maxim, he must necessarily make proof of facts and circumstances which, under the common law, exclude every inference except that of the employer's negligence. * * *

"The same rule applies, in a modified degree, where the employee sues under the Employers' Liability Act, as the plaintiff in this case has done. In such a case the plaintiff must establish facts and circumstances which, under the statute, would entitle him to recover in the absence of a sufficient explanation by the defendant absolving him from the imputation of negligence."

Nor do we find anything in the leading federal case of *Patton v. Texas & Pacific Ry. Co.*, supra, in conflict with the views expressed in the *Lile* and *Marceau* Cases.

When the company equipped the car with a handhold, the duty of maintaining it in reasonably safe condition for use imposed on the company the duty of inspection, but at the same time the mere fact that the handhold pulled loose, standing alone and unsupported by other facts or circumstances, would not be sufficient to show negligence on the part of the company because the company did not insure its safety. It merely agreed that it would exercise ordinary care to keep it in safe condition. And so it was essential that the plaintiff, in making out his case, should show by facts or circumstances the failure of the company to exercise this degree of care. This link in the chain of evidence that was necessary to show negligence on the part of the company is, we think, supplied by the manner of inspection and the circumstances attending the transaction. The exposed location and use of the handhold was such that a reasonably care inspection could not well have failed to discover its defective or unsafe condition.

[7] If it pulled loose when appellee took hold of it, it is reasonable to assume that it would have given way if the inspectors had taken hold of it with a view of testing its security. The outward appearance of the handhold might not have disclosed its unsafeness, but an inspection that merely consists in looking at handholds as the inspector walks by the cars does not satisfy the duty the company was under to exercise ordinary care to see that they were safe, and this it appears is the character of inspection that was made.

An instruction and pertinent case upon the point under consideration is *Felton v. Bulard*, 94 Fed. 781, 37 C. C. A. 1. In that case a brakeman in the service of the railroad was killed while descending from the top of a moving car by reason of the defective character of a grabiron which broke off and threw him beneath the wheels. The defense of the company was that it had fulfilled its duty of inspection, and therefore was not liable for the accident. In support of this theory it asked the court to charge the jury that:

"If the defect was latent—that is, one not visible—the defendant is not liable, if the injury occurred by reason of such latent or invisible defects."

The trial court refused to so instruct the jury, and the federal Court of Appeals, Judge Lurton writing the opinion, in commenting on this ruling of the trial court, said:

"The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grabiron was held to the wood of the car nor the decayed condition of the wood surrounding this broken screw was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grabiron. But would a mere visual inspection of such an attachment be due and reasonable inspection of such an instrumentality? Was no other inspection reasonable and possible, under the circumstances under which such cars are received and forwarded? Would a mere visual inspection of a car wheel be regarded as ordinary and reasonable? If the tapping of the wheel with a hammer would disclose by sound the presence or absence of a fracture which might not be disclosed to the eye, could it be said that so ready and accessible a test should not be applied? As much may be said touching the firmness and security with which the grabiron was fastened to the end of this car. This grabiron was one of the rounds in a ladder provided for the use of brakemen, whose duty called them more or less often to the top of such cars. The life of the brakeman may often depend upon the firmness with which such an iron is attached to the end or side of the car. Was there no other ready means of ascertaining whether it was properly and safely attached than a visual inspection? If the application of some force would disclose a dangerous weakness, ought not such a test to be applied? The plaintiff in error did not regard a visual test as alone sufficient; for the inspector says that his habit was to go up such ladders at one end of a car and down the ladder at the other end. Did he do that in this instance? If he did, did he do so in such a way as to throw his weight upon this particular iron, or upon that end of the grabiron supported by the broken screw? If not, would such a test be feasible and calculated to disclose a broken screw or rotten wood? These were proper questions for the jury to consider, and it was not error to modify this request as was done.

"Neither was it error to refuse the request for an instruction to find for the defendant. This request was based upon the insistence that there was no evidence upon which the jury could reasonably find that the railroad company had been guilty of negligence. The inspector testified that he did inspect this car upon the day it was received, being the day before the happening of the accident. He says he did so by going up one ladder and down the other. He also testified that neither the condition of the broken screw nor of the wood into which it had been driven could be discovered by the eye. * * * Did he in truth and in fact test this particular grabiron by any means likely to disclose its weakness? * * * Did the inspection made involve any strain upon the weak end of this grabiron? Did the inspector use this ladder at all? If so, did he use it in such way as to really afford a test of the firmness of its attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless? The circumstances were such as that it was not error to take the opinion of the jury."

We do not undertake to say how an inspection should be made, but, clearly as we think, appliances like handholds, that can easily be subjected by inspection to some test corresponding to the test to which they are put in practical use, should be subjected to such a test before the company can claim that it has fulfilled its duty of exercising ordinary care to maintain appliances like this in reasonably safe condition for the use for which they are intended. A handhold that for any reason is so insecure that it will pull loose when subjected to the use for which it was intended is manifestly a very dangerous appliance, and it would be farcical to rule as a matter of law that such an inspection as was made by these inspectors satisfied the requirements of ordinary care.

[6] The only reasonable inference from the evidence is that the handhold was unsafe and defective when the inspection was made, and that this condition could have been discovered by a proper inspection is plain. What caused the defect, or when it first existed, are not material inquiries, as we need not go beyond the time of inspection to speculate as to the cause that produced the unsafe condition. It is as much the duty of the master to exercise ordinary care in inspecting appliances used by servants in order that they may be maintained in reasonably safe condition as it is to exercise ordinary care to ascertain the sufficiency and safety of these appliances when they are first installed. What will answer the requirements of ordinary care either in equipment or in inspection depends on such a variety of circumstances and conditions that it must be left to be determined by the facts of each particular case. But, generally speaking, it is a question for the jury to say whether the required care has been exercised when there are any facts or circumstances showing that it has not.

Our conclusion therefore is that there was sufficient evidence and reasonable inference therefrom to show negligence in the inspection, and this, in connection with the fact that the handhold pulled loose, was enough to take the case to the jury on the issue that the appliance was unsafe, and its condition could have been discovered by the company if it had exercised ordinary care.

[9] The remaining question is the sufficiency of the plea of limitation to bar a recovery. The accident resulting in the injury complained of occurred in 1909, and in March, 1911, within two years thereafter, the appellee brought this suit to recover damages. In his petition he alleged that the defendant company operated passenger and freight trains over its line of road in the states of Maryland, Virginia, Pennsylvania, and elsewhere, and that at the time he received the injury complained of he was employed by it as a telegraph operator. He further set up the identical state of facts upon which the case went to trial when the judgment was

recovered from which this appeal was prosecuted. The plea of limitation authorized by the state law was interposed to this petition and sustained by the lower court; but on appeal to this court the judgment of the lower court was reversed, and the case remanded for trial. *Smith v. Baltimore & Ohio R. Co.*, 157 Ky. 113, 162 S. W. 564.

On the return of the case to the trial court the plaintiff filed an amended petition increasing the sum asked in damages, but not changing in any material way the nature of his cause of action as stated in his original petition. Thereupon the railroad company filed an answer setting up that at the time of the accident it was engaged in interstate commerce, and the appellee was employed by it in such commerce, and pleaded and relied on the two-year statute of limitation fixed in the federal statute for the commencement of actions under the Employers' Liability Act.

There is some confusion as to the pleadings in the case after it went back from this court for trial, but there is no dispute that issues were made and tendered sufficient to bring the case under the federal Employers' Liability Act, and the contention now is that, as the amended pleading that first expressly set up the interstate nature of the employment and the right of recovery under the federal act was filed more than two years after the accident occurred, the right of recovery was barred by the federal statute fixing the time in which action of this character must be brought at two years.

The original petition, which was filed within two years from the date of the accident, although it did not show specifically that the suit was brought under the federal act, set up, as we think, facts showing that the railroad company was engaged in interstate commerce, and that the appellee was employed by it in such commerce; and so we think that the original petition stated sufficiently a cause of action under the federal act. But, if we should be mistaken about this, and it should be held that the amended petition, showing in terms that the cause of action arose under and was prosecuted under the federal act, and was not filed until two years after the accident, the plea of limitation was not available. In *C. & T. P. Ry. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329, we had before us the question that is here presented, and, after referring to the cases of *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; and *St. Louis, S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, we said:

"On the authority of these cases we think it is clear that, when the cause of action arises under the federal statute, but suit is brought under the state law, or by some person not authorized to maintain an action under the federal statute, defects in the original petition may be cured by an amendment that does not set up a

new and distinct cause of action filed after the expiration of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition."

And the cases of Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 38 Sup. Ct. 126, 60 L. Ed. —; and Kansas City Western Ry. Co. v. McAdow, 240 U. S. 51, 38 Sup. Ct. 252, 60 L. Ed. —, support this ruling.

Wherefore the judgment is affirmed.

J. B. B. COAL CO. v. HALBERT, Judge.
(Court of Appeals of Kentucky. April 28, 1916.)

1. PLEADING \S 218(2) — **DEMURRER—DELAYING DECISION.**

Where plaintiff's counsel demanded an early decision of a question of jurisdiction arising on the demurrer to the answer, the judge should not have awaited the decision of the Supreme Court of the United States in a case before it, pertinent to the matter, before making his decision.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 552, 553; Dec. Dig. \S 218(2).]

2. MANDAMUS \S 15 — **COMPELLING DECISION ON DEMURRER—DELAY OF PARTIES OR COUNSEL.**

On mandamus to compel a judge to render a decision on a demurrer, parties to the action in which the demurrer was filed could not complain of delay to which they or their counsel contributed, even unintentionally.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 47, 49; Dec. Dig. \S 15.]

3. MANDAMUS \S 26 — **COERCING JUDICIAL ACTION.**

Mandamus being an extraordinary writ, with prerogative features, and not a writ of right, a strong case must be presented to coerce action by a judge; the presumption being that he has done his duty.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 62; Dec. Dig. \S 26.]

4. MANDAMUS \S 26 — **COERCING JUDICIAL ACTION—NEGLECT OR REFUSAL.**

Mandamus is a proper remedy to compel an inferior court to adjudicate upon a subject within its jurisdiction where it neglects or refuses to do so, but where it has adjudicated, mandamus will not lie to revise or correct the decision.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 62; Dec. Dig. \S 26.]

5. CONSTITUTIONAL LAW \S 827, 828 — **RIGHT TO JUSTICE—COURTS TO BE OPEN.**

The provision of Const. Bill of Rights, \S 14, that the courts shall be open, and every person, for an injury done to him in his lands, goods, person, or reputation, shall have remedy by due course of law and right or justice administered without sale, denial, or delay, cannot be invoked on mandamus to compel a judge to render decision on a demurrer, unless it clearly appears that there has been such an unreasonable or arbitrary failure or refusal on his part to act as would unduly delay a trial, or preparation for trial, as to amount to a denial of justice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 950-963; Dec. Dig. \S 327, 328.]

6. MANDAMUS \S 39 — **COERCING JUDICIAL ACTION—DECISION ON DEMURRER.**

Where a judge delayed in deciding a demurrer to the answer in a case on account of the congested condition of the docket, the compli-

cated pleadings, and the nonresidence of counsel, writ of mandamus will not issue to compel him to act.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 84; Dec. Dig. \S 39.]

Petition for writ of mandamus by the J. B. B. Coal Company against W. C. Halbert, Circuit Judge. Writ denied, and petition dismissed.

Drury & Drury, of Morganfield, for plaintiff. Proctor K. Malin, of Ashland, for defendant.

SETTLE, J. The plaintiff, J. B. B. Coal Company, a corporation created under the laws of West Virginia and having its chief office in that state, by petition filed in this court complains of the failure of the defendant, W. C. Halbert, judge of the Twentieth judicial district, which includes the county of Boyd, to pass upon its demurrer to the sixth paragraph of an answer filed by the Norfolk & Western Railway Company to the petition in an action instituted by it against that company in the Boyd circuit court April 22, 1918, and prays that he be compelled by the writ of mandamus from this court to pass on the demurrer and decide the questions of law raised thereby. The action of the plaintiff against the Norfolk & Western Railway Company was brought by the former to recover damages claimed to have been sustained by it because of the latter's alleged failure to supply it with cars for use in its mining operations.

The ground of complaint in this action for the mandamus is that the defendant, W. C. Halbert, judge of the Boyd circuit court, by his failure to act upon the demurrer to the sixth paragraph of the defendant's answer in the case of J. B. B. Coal Company v. Norfolk & Western Railway Company, pending in that court, has prevented the making up of the issues therein and so unreasonably delayed a trial of the case as to substantially constitute a denial of justice to the litigants, and particularly resulting in injury to the plaintiff's right. It appears from the averments of the petition herein that the Norfolk & Western Railway Company, at the first term of the Boyd circuit court succeeding the filing of the plaintiff's petition against it, entered a general demurrer thereto, which was later submitted upon briefs, and that during the month of February, 1914—the date not given in the petition—the demurrer was sustained and the plaintiff given leave to amend; that on April 9, 1914, plaintiff filed an amended petition, following which, the date not being stated, the Norfolk & Western Railway Company renewed its demurrer to the petition, as amended, and on January 7, 1915, same was overruled. Shortly thereafter, the date not given, the Norfolk & Western Railway Company filed its answer, to the sixth paragraph of which the plaintiff, on March 24, 1915, filed a general

demurrer, which, by an order of March 30, 1915, was by agreement submitted upon briefs that were later filed, but the dates upon which the briefs were filed are not stated in the petition. However, on December 4, 1915, the court heard argument from counsel representing plaintiff and defendant, and then entered an agreed order that both sides should file additional briefs, which was done on a date not given, but as down to February 22, 1916, there had been no decision by the court of the demurrer, the petition for the mandamus was then filed.

The answer of the defendant to the petition for the mandamus, after denying that there was on his part any intentional or unnecessary delay in the trial of the plaintiff's action or in any of the preliminary motions or steps therein looking to the completion of the issues or to a trial, sets out that when he became judge of the Boyd circuit court in January, 1910, the docket of that court was, and for a great many years prior thereto had been, so heavily congested that cases on the ordinary docket were usually not tried under 4 or 5 years subsequent to their institution, and that while this condition has to a considerable extent been relieved since he became judge of the court, yet the litigation in Boyd county, both civil and criminal, has increased that with all the time he had been able to devote to Boyd county under the court schedule given him by statute, he has been unable to clear up the docket there and at the same time discharge his other duties as judge in other counties of the district and as special judge without his own district; that because of the congested condition of the docket in Boyd county and the constantly increasing litigation therein, the General Assembly in 1912, at defendant's request, so amended the statute fixing the terms of his district as to give six instead of three terms of court in each year to Boyd county, which amendment became effective August 1, 1912; that in order to more expeditiously dispose of the business before the court, by the adoption of a proper rule the January, April, and September terms of the Boyd circuit court each year were designated criminal terms, at which only criminal and penal cases were tried and disposed of, and the March, June, and November terms were designated as civil terms, at which only civil cases are tried or heard; that since the passage of the act in question defendant has held six full terms of court each year in Boyd county, and since the filing of the plaintiff's action in that court against the Norfolk & Western Railway Company, the defendant has tried or otherwise disposed of 495 ordinary cases, 495 equity cases, and 266 criminal and penal cases, and that there are now pending upon the docket of that court 266 ordinary cases, 271 equity cases, and 316 commonwealth cases, many of which were brought prior to the institution of the plaintiff's action referred to; that by a rule

of the Boyd circuit court Tuesday and Friday of each week of the civil terms are set apart as "motion and decision days," and because of the large number of motions and demurrers in the many cases pending on the docket, it has been the rule and custom since defendant became the judge of that court for counsel in cases in which such motions or demurrers were pending to deliver the papers in such cases to the court, and that the court has not been expected or required to go to the clerk's office or other place to hunt up the papers in such cases; that in the plaintiff's case the counsel on both sides live outside the district and did not hand or otherwise deliver the papers in the case in question to defendant or see that they were placed in his hands, and having an abundance of work to do in cases in which the papers were given him by counsel, he did not look up the papers in this case, and for these reasons much of the delay in the case has been caused by failure of the counsel to deliver the papers to defendant, and they were not, in fact, delivered to him by the clerk or otherwise, after the filing of the demurrer to the sixth paragraph of the answer or following the argument thereon, December 4, 1915, until after his return from Estill county in December, 1915, to which county he was required to go on December 6, 1915, to try certain cases as special judge, that county being outside of his judicial district; and upon receiving the papers in plaintiff's case, following his return from Estill county to his home at Vanceburg, Lewis county, near the end of the year, he was unable to complete his investigation of the question raised by plaintiff's demurrer to the sixth paragraph of the defendant's answer before having to return to Boyd county for the purpose of holding the January criminal term of court therein, beginning on the first Monday of that month.

It further appears from the answer that the investigation defendant desired to make was as to the question of jurisdiction raised by plaintiff's demurrer to the sixth paragraph of the defendant railway company's answer, which, to the mind of the defendant, became necessary from a statement made in the oral argument on the demurrer of December 4, 1915, as well as in one of the briefs of counsel later filed, that a case had recently been decided by the Supreme Court of the United States involving the question raised by the demurrer and claimed to be conclusive thereof; that defendant made diligent effort to obtain a copy of the opinion of the Supreme Court of the United States in the case referred to, but was unable to do so, and was later advised that the case was still pending in that court upon a petition for rehearing, upon which oral argument had been allowed, but not heard; that being in doubt as to the question of jurisdiction raised by the demurrer to the answer in the plaintiff's

case, the defendant concluded to defer a reasonable length of time his decision upon the demurrer in the belief that an early decision from the Supreme Court would enable him in passing thereon to follow the ruling of the Supreme Court in the case therein; that the case in the Supreme Court, as he is advised, has not yet been decided, but that it was his purpose at the March civil term, 1916, of the Boyd circuit court, to pass on the demurrer, even in the absence of a decision of the Supreme Court in the case pending therein, and such action would have been taken by him during the March term, 1916, but for the filing of plaintiff's petition for the mandamus herein.

The answer concludes as follows:

"Defendant states that the main trouble in the preparation of plaintiff's case is the fact that all the counsel in the case, on both sides, are nonresidents of the district, and most of them of the state; that they are not familiar with the rules of the court, nor the condition of its trial docket and expect, no doubt, to find rules and conditions existing there as they do in their own courts, and to have the court suspend the trial of jury cases when they do occasionally attend court to take up and consider their particular case. The trial docket of the Boyd circuit court for the past two years will disclose that from four to seven ordinary cases have been set down for trial each and every day during the entire civil term of the court, save on Saturday, and that jury trials are constantly going on during the entire term, and the only time the court has to ever consider an equity case, or the motions or preliminary steps of an ordinary case, is at night, or when at home in vacation between courts. Defendant says that so hard had he worked to relieve the congested condition of the docket in Boyd county, that the entire bar of that county, regardless of politics, indorsed him for re-election, without any solicitation on his part, and in their indorsement publicly stated that defendant had done more than it was believed possible to do under the circumstances. Defendant says that he found on the docket of the Boyd circuit court, when he became its judge in January, 1910, many cases that had been pending there from 5 to 17 years, although a very able and industrious judge, Honorable S. G. Kinner of that county, had been judge of the court for 17 years continuously preceding defendant's election, and had done everything that ability, energy, and industry could do to relieve the congested conditions there."

By an amended answer entitled a "supplemental response," filed by the defendant, it is stated that it is the custom in the Boyd circuit court, after the ordinary cases upon the civil docket have been set for trial, that the clerk of the court causes to be issued a small printed docket, which is distributed to the members of the bar practicing in the court; that the defendant, for his own convenience, keeps on this docket memoranda of the disposition of the several cases thereon, and finding after the filing of his original answer the printed docket kept by him for the November term, 1915, he made it a part of the supplemental answer; that the fact that there was a demurrer pending to paragraph 6 of the answer was not called to his attention as judge of the court until after the docket referred to had been printed; that he assigned the case

for oral argument on the demurrer for December 4, 1915, as appears from an entry on the docket; and that, as appears from a further entry of December 4, 1915, it was argued on that day and the cause submitted on the demurrer and upon briefs then and thereafter to be filed.

The replies to the answer and amended answer do not controvert the material facts contained therein. No proof has been offered by either party, nor have counsel filed briefs. so whatever decision we may make must be based upon the facts presented by the pleadings, record in the first action, and law applicable thereto. While more than 2 years elapsed between the institution of the plaintiff's action against the Norfolk & Western Railway Company and the submission of the case on the general demurrer of the former to the sixth paragraph of the answer of the latter, December 4, 1915, we are unable to say from the admitted facts furnished by the record that the delay thus shown was caused by the failure of the defendant, Halbert, to take any action required of him as judge of the Boyd circuit court. Following the institution of the action he passed upon and overruled a special demurrer to the petition, making objection to the court's jurisdiction of the action. Thereafter, at the succeeding June civil term and on July 1, 1913, plaintiff filed an amended petition, and on the same day the defendant filed a general demurrer to the petition; and during the same term, some days later, the cause was submitted upon that demurrer, the parties being given leave to file briefs, but it does not appear from the record when the briefs were filed. It does appear, however, that at the March civil term, 1914, and on the 2d day of March, an order was entered sustaining the general demurrer to the petition and plaintiff given leave to amend, and that on the 16th day of March, 1914, during the same term, the plaintiff filed an amended petition, whereupon the defendant insisted upon its demurrer to the petition, as amended, and the cause was later submitted on this demurrer. The date of this submission, however, is not shown, but on the 12th day of December, 1914, which was during the November civil term, 1914, of the Boyd circuit court, the defendant's demurrer to the petition, as amended, was overruled, at which time it was by an order of the court then entered given 60 days from January 1, 1915, in which to file its answer. At the March civil term, 1915, and on the 8th day of March, the defendant's answer was filed, to the sixth paragraph of which, raising the question of jurisdiction, the plaintiff filed the general demurrer March 30, 1915, at which time the following order was entered:

"This day came the plaintiff, J. B. B. Coe Company, and tendered and filed its demurrer to the sixth paragraph of the defendant's answer to the petition herein, in which demurrer the defendant joined. Thereupon the court gave the

plaintiff 30 days from the 1st day of April, 1915, in which to file a brief in support of its said demurrer, and to the defendant 30 days thereafter in which to file a reply brief, and the said cause shall be submitted upon said briefs."

It will thus be seen that the time given plaintiff to file a brief upon the demurrer did not expire until May 1, 1915, and that given the defendant to file its brief did not expire until May 31, 1915. Assuming that each party took advantage of all the time allowed it for the filing of a brief on the demurrer, it is patent that there could have been no decision on the demurrer by the court before the June civil term, 1915. It does not appear from the record that the papers of the case were given to the court during that term, or that either plaintiff or defendant insisted upon a decision of the demurrer before the term ended. The record does not contain an order setting the case down for argument on the demurrer at the November civil term, 1915, but the fact that it was argued during that term and on the 4th day of December leads us to the conclusion that the argument was allowed on the motion of one or both of the parties.

It should here be remarked that the amount of damages sought to be recovered by the plaintiff against the Norfolk & Western Railway Company is \$97,023.16, and that the record in that action contains 481 pages, made up of the pleadings, exhibits, and orders of the court, showing the rulings referred to, down to December 4, 1915; furthermore, that the issues made involve transactions in mining operations, and the shipment and sale of coal running through a series of years, in view of which it was not to be expected that the case would proceed to trial with the ease and dispatch that ordinarily attend the great bulk of cases litigated in the courts. Moreover, it is to be considered that the plaintiff's counsel, by whom the action was instituted, reside in the extreme western part of the state, at a great distance from Catlettsburg, where the Boyd circuit court is held, and that defendant's counsel reside in the state of West Virginia. In such a situation counsel were necessarily placed at a disadvantage by their ignorance of the condition of the dockets of the Boyd circuit court and their want of familiarity with its rules of procedure, to say nothing of their inability to be present throughout the terms of the court and thereby be enabled to watch for opportunities to call up the case and obtain of the court such rulings as might have been therein when it was not otherwise engaged. On the other hand, the judge of that court was naturally embarrassed by the necessary absence of counsel at time when he might have taken up and ruled upon questions of pleading required to be decided, and his disinclination to make such decision when they were not present. In addition, he had at all times to consider the congested condition of the dockets in his

court and first try or otherwise dispose of the cases thereon, instituted, ahead of plaintiff's with all the dispatch possible, consistent with the rights of the parties concerned.

These conditions considered, the record fails to show any culpable delay on the part of the defendant, either in the matter of not ruling on the plaintiff's demurrer to the sixth paragraph of the Norfolk & Western Railway Company's answer, or in any other particular complained of by the plaintiff. Manifestly this is true as to any default alleged as occurring prior to December 4, 1915, and not materially less true as to the failure of defendant to pass on the demurrer since that date, which is the thing chiefly complained of. It is apparent from the facts appearing in the defendant's answer, as amended, which are uncontradicted by anything appearing in the record, that when the demurrer was argued December 4, 1915, near the close of the November civil term, the case was submitted on the demurrer, with leave to counsel to file briefs, no time being fixed for the filing of same. At what date after December 4th they were filed, or whether they were filed at all, does not appear. It does appear, however, that on December 6th, two days after the argument, defendant was compelled to go and did go to Estill county, by order of the Governor, to try, as special judge, several cases in the Estill circuit court, and that he did not complete his work there until about the beginning of the Christmas holidays, when he returned to his home at Vanceburg, Lewis county, to which place, some time during the holidays, the papers constituting the record in the case of J. B. B. Coal Co. v. Norfolk & Western Railway Co., together with those in other cases under submission, was sent him by the clerk of the Boyd circuit court, and that all these cases, or the questions presented for decision therein, were by him disposed of during the holidays, except the demurrer to the defendant's answer in the first-mentioned cases. On the first Monday in January, 1916, he was again at Catlettsburg, and on that day began the January criminal term of the Boyd circuit court, which continued throughout the month of January and was succeeded by another of his courts in a different county during the month of February, and down to the time plaintiff filed its petition for the mandamus asked in this case.

[1] The reason given by the defendant for not deciding the demurrer to the sixth paragraph of the answer in the action of plaintiff against the Norfolk & Western Railway Company following the argument of December 4, 1915, is that following a suggestion contained in the brief of counsel and his discovery of the fact that the Supreme Court of the United States had pending before it on a petition for rehearing a case which had decided the question of jurisdiction raised by plaintiff's demurrer to the answer of the railway company, his desire to await the

final decision of that case led to the postponement of his decision on the demurrer until the petition for rehearing in that court might and could reasonably be acted upon and decided; it being his opinion that it was his duty to be controlled by the decision of the Supreme Court of the United States in such case. In view of the demand of plaintiff's counsel for an early decision of the question of jurisdiction arising on the demurrer, the defendant should not have awaited the decision of the Supreme Court of the United States in the case before it. The postponement by defendant of his decision on the ground indicated, though a mistake of judgment, does not amount to an intentional failure or refusal to rule on the demurrer or a willful disregard of the plaintiff's rights. Indeed, his answer declares that it was his intention, at the March civil term of his court, 1916, to pass on the demurrer, regardless of whether the case pending in the Supreme Court of the United States had or not been decided, but that such action was prevented by plaintiff's filing of the petition against him in this case, and that he will pass on the demurrer as soon as this court renders its judgment herein, whether it grant or refuse the mandamus prayed.

[2] It is the contention of the defendant that it is the practice in his courts for counsel, when cases are submitted for any purpose, to hand the papers to the court or cause the clerk to do so, and that at no time did he unreasonably delay in the plaintiff's action against the Norfolk & Western Railway Company, the decision of any matter or question after receiving the papers from the clerk of the court. This contention seems to be sustained by the record, and the rule of practice in question cannot be condemned as unreasonable. In view of the innumerable motions and demurrers that are presented to the court for decision each term, in the absence of such rule and the assistance it requires the clerk and counsel to render the court, delays in ruling upon such matters would be so great as to disastrously obstruct the business of the court and prejudice the rights of litigants. Speed in disposing of litigation is desirable, but accuracy of decision is equally so, and parties to an action cannot complain of delay to which they or their counsel may have contributed, even unintentionally.

[3, 4] As well said in 26 Cyc. 193:

"Mandamus being an extraordinary writ, with prerogative features, and not a writ of right, a strong case must be presented to coerce action by a judge, the presumption being that he had done his duty. There must always be a previous request to act, and a definite, unqualified refusal, before the writ will issue."

The last statement, that there must be a definite, unqualified refusal to act before the writ will issue, is not recognized as the correct rule in this jurisdiction, for as far back

as 1812 this court, in the case of County Court of Warren v. Daniel, 2 Bibb, 573, declared the rule to be as follows:

"[It mandamus] is a proper remedy to compel an inferior court to adjudicate upon a subject within their jurisdiction, where they neglect or refuse to do so; but where they have adjudicated the mandamus will not lie for the purpose of revising or correcting their decision."

See Muhlenburg County v. Morehead, 46 S. W. 484, 20 Ky. Law Rep. 376; Commonwealth v. Harbeson, 13 Ky. Law Rep. 878; Alexander v. Moss, 89 S. W. 118, 28 Ky. Law Rep. 171.

And in the very recent case of Speckert v. Ray, Judge, 166 Ky. 622, 179 S. W. 592, we held that notwithstanding the authority conferred by section 110 of the Constitution upon the Court of Appeals, which declared it "shall have power to issue such writs as may be necessary to give it general control of inferior jurisdiction," it would only issue the writ of mandamus to compel action on the part of a judicial officer; but that if such officer has a discretion over the subject-matter, the writ will not issue to control such discretion, although it may have been improperly exercised. If, however, there be a refusal to act upon the subject-matter or to pass upon the question upon which such discretion is to be exercised, then the writ may be used to enforce obedience to the law. But when the question has been passed upon the writ will not be used for the purpose of correcting the decision. City of Louisville v. Kean, 18 B. Mon. 9; Board of Trustees v. McCrory, 132 Ky. 89, 116 S. W. 326, 21 L. R. A. (N. S.) 583.

Here there is no charge that the defendant has willfully neglected or refused to act. Negligence and failure to act is what is charged. As said in Alexander, etc., v. Moss, Judge, supra:

"However cocksure of their position counsel in a suit may be, it is due to the trial court that it have reasonable time to consider the matter and to enter such decree or orders as may reflect the judgment of the court. The trial court, the litigants and this court are all entitled to have the views and conclusion of the trial judge in the matter presented. It is not unusual that judges, not feeling that they are fully advised of novel questions presented or their adjudication, take time to consider of them, to consult authorities, or even to request further argument. The circuit judge is not an automaton, to enter orders and decrees upon counsel's being satisfied of their correctness, or otherwise. He, too, must be satisfied. In the course of judicial investigation, the deliberate conclusions of the trial judge, whether concerning law or fact, ought to have, and do have, weight in the final determination of the question. While dispatch of litigations before the court is a course to be commended, certainly skill takes rank of celerity."

[5, 6] We are aware that section 14, Bill of Rights, found in the Constitution of the state, declares:

"All courts shall be open and every person, for an injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

But this provision cannot be invoked as here attempted, unless it is clearly made to appear that there has been such an unreasonable or arbitrary failure or refusal upon the part of the judge to act as would so unduly delay a trial or such preparation for trial, as to amount to a denial of justice. As in our opinion no such showing has been made in this case, the writ of mandamus is denied, and the petition therefor dismissed.

COMMONWEALTH v. DAVIS, District Judge.

SAME v. WINFREY.

(Court of Appeals of Kentucky. April 25, 1916.)

1. INDICTMENT AND INFORMATION — 144 — PROHIBITION — 5(4) — DISMISSAL — DISCRETION OF COURT.

Under Cr. Code Prac. § 243, providing that the commonwealth's attorney may, with the permission of the court, dismiss an indictment, and Ky. St. § 123, providing that before court shall permit the commonwealth's attorney to dismiss an indictment the attorney shall file a statement in writing, showing the reason for such dismissal, the circuit judge had discretion to sustain or overrule a motion by the commonwealth's attorney for the dismissal of an indictment for felony, and prohibition therefore will not issue to restrain him from proceeding with the trial after overruling such motion.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. — 144; Prohibition, Cent. Dig. § 30; Dec. Dig. — 5(4).]

2. PROHIBITION — 10(1) — RIGHT OF RELIEF — DISCRETION.

The Court of Appeals may grant prohibition only to prevent an inferior court from exceeding its jurisdiction, not to control a discretion vested in such court.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-42; Dec. Dig. — 10(1).]

3. CRIMINAL LAW — 1023(8) — APPEAL BY COMMONWEALTH — DISMISSAL OF INDICTMENT.

Under Cr. Code Prac. § 337, providing for the taking of appeals by the commonwealth, the Court of Appeals is authorized to review any appealable order of the lower court within its jurisdiction, and to decide whether upon the facts the order was proper, and can review an order denying the commonwealth attorney's motion to dismiss an indictment for felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2591; Dec. Dig. — 1023(8).]

4. CRIMINAL LAW — 573 — RIGHT TO SPEEDY TRIAL — DISMISSAL OF INDICTMENT.

Const. U. S. Amend. 6, guaranteeing to an accused the right to a speedy trial, does not prevent the dismissal of an indictment over the objection of accused, for the reason that he had married the prosecuting witness and thereby rendered incompetent the testimony of the only witness to the offense, since the purpose of that guaranty was merely to secure accused against being held without trial, not to enable him to protect himself against subsequent prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1292; Dec. Dig. — 573.]

Appeal from Circuit Court, Bell County.

Petition for writ of prohibition by Commonwealth against W. T. Davis, Judge of the

Twenty-Sixth Judicial District; and appeal by the Commonwealth from an order denying the prosecuting attorney's motion to dismiss an indictment, charging M. O. Winfrey with a felony. Petition for prohibition dismissed, and order reversed, with directions to sustain motion and dismiss the indictment.

M. M. Logan, Atty. Gen., C. I. Dawson, of Pineville, J. G. Forester, of Harlan, and Chas H. Morris, Asst. Atty. Gen., for the Commonwealth. Isham G. Leabow, of Middlesboro, for appellee.

CLARKE, J. M. O. Winfrey was indicted in the Bell circuit court for the offense of criminal abortion under section 1219a of the Kentucky Statutes. After indictment, but before trial, he married the prosecuting witness upon whom the abortion was alleged to have been performed. When the case was called for trial the commonwealth attorney moved to dismiss the indictment, indorsing thereon his reasons for the motion, whereupon the court entered the following order:

"Upon the calling of this case for trial, the commonwealth's attorney, Hon. J. G. Forester, made the following indorsement on the indictment, to wit: 'As commonwealth's attorney, I hereby move to dismiss this case for the reason that since the last term of this court, and on February 1, 1916, the defendant married the prosecuting witness, Nannie Louise Lynn, and therefore she became disqualified as a witness against him, she being the only eyewitness to the crime, and, the commonwealth being unable, without her testimony, to make a case, the indictment therefore is dismissed, a certified copy of the marriage is filed herewith. This March 15, 1916, J. G. Forester'—and moved the court to dismiss the case and in support of said motion filed a certified copy of the marriage of the defendant M. O. Winfrey to the prosecuting witness, Nannie Louise Lynn, to which motion the defendant objected. The defendant announced ready and demanded a trial of the case, to which the commonwealth objected, and insisted that it was entitled, as a matter of law, to have this case dismissed without a trial. The court, being advised, is of the opinion that the grounds indorsed on the indictment are sufficient to support the motion of the commonwealth, if no objection was made by the defendant, but that the motion ought not to prevail over the objection of the defendant. It is therefore ordered and adjudged that the motion of the commonwealth to dismiss this case is overruled. It is further ordered and adjudged that the defendant is entitled to have this case tried upon its merits, and the same is passed until the forty-fifth day of the present term of this court for that purpose. To the ruling of the court in overruling its motion to dismiss and holding that the defendant is entitled to a trial of this case on its merits the commonwealth excepted, and prayed an appeal to the Court of Appeals, which is granted."

The commonwealth, in an original proceeding against the circuit judge, is seeking a writ of prohibition to prevent the circuit court from proceeding further with the trial of this case, and is also appealing from the order refusing to dismiss the indictment. Since the same facts are involved in both proceedings, they were heard together.

[1] L. Section 243 of the Criminal Code

provides that the commonwealth attorney may, with the permission of the court, dismiss an indictment. Section 123 of the Statutes provides that before the court shall permit the commonwealth attorney to dismiss any indictment, the attorney shall file a statement in writing, showing the reasons for such dismissal. Under these provisions the commonwealth attorney cannot dismiss an indictment without permission of the court, and will be permitted to do so only upon reasons deemed sufficient by the court. *Husbands v. Commonwealth*, 143 Ky. 290, 136 S. W. 632; *Commonwealth v. Cundiff*, 149 Ky. 37, 147 S. W. 767; *Commonwealth v. Hughes*, 153 Ky. 34, 154 S. W. 399. This necessarily vests in the circuit judge the right and duty to exercise a discretion in sustaining or overruling such a motion.

[2] A writ of prohibition may be granted by this court only to prevent an inferior court from exceeding its jurisdiction, but not for the purpose of controlling a discretion vested in said court. *Weaver v. Toney*, 54 S. W. 732, 21 Ky. Law Rep. 1157, 50 L. R. A. 105; *Bank Lick T. & P. Co. v. Phelps*, 81 Ky. 613; *Goldsmith v. Owen*, 95 Ky. 420, 26 S. W. 8, 15 Ky. Law Rep. 806. Wherefore it results that this court is without power to issue a writ of prohibition to control the action of a circuit judge upon a motion to dismiss an indictment, and the application for a writ of prohibition herein must be denied.

[3] 2. Upon appeal, however, this court is authorized and will review any appealable order of the lower court within its jurisdiction, and decide whether or not upon the facts involved the order was proper. Section 337 of the Criminal Code; *Commonwealth v. Cain*, 14 Bush, 525; *Commonwealth v. Bruce*, 79 Ky. 560. It therefore devolves upon us on the appeal here to decide whether upon the written statement and motion of the commonwealth attorney the lower court properly refused to dismiss the indictment.

[4] Counsel for appellee contends that under the sixth amendment to the Constitution of the United States, guaranteeing to an accused person a speedy trial, he is entitled to a trial upon the merits of the charge against him; that he is entitled to an exoneration by an acquittal if the commonwealth is unable to sustain the charge preferred against him, and that the commonwealth, after an indictment has been returned, is without power, over his objection, to dismiss the indictment and thereby defeat his complete exoneration. In support of this contention counsel for the accused relies upon *Jones v. Commonwealth*, 114 Ky. 599, 71 S. W. 643, 24 Ky. Law Rep. 1434; *Commonwealth v. Wade*, 17 Pick. (Mass.) 395; *United States v. Shoemaker*, Fed. Cas. No. 16,279, in which cases, construing said amendment, it is held that the commonwealth may not file away an indictment, which carries with it the right to reinstate, over the objection of the defendant; but, to our minds, the motion to "dismiss" pre-

sents an entirely different proposition from the motion to "file away," and the questions are in no wise analogous.

The effect of the latter motion, when granted, is to continue indefinitely the charge against the accused, and to deny him a speedy trial such as is guaranteed to him by the constitutional amendment above referred to, but a motion to dismiss, when allowed, terminates absolutely the prosecution, and unconditionally releases the accused. It is true that the dismissal is not a bar to another indictment upon the same facts, but it cannot be said that, because of that fact, the accused has been denied a speedy trial of the charge existing against him. It would be a vain and foolish thing to require the commonwealth to read the indictment to a jury, and then announce that by reason of death of its witness, or of its inability from any other cause, it was unable to introduce any evidence in support of the indictment. The court then, of necessity, would have to instruct the jury to return a verdict of acquittal. The effect of this farcical procedure would be neither a vindication nor an exoneration of the defendant, even if he was entitled to demand either, any more than a dismissal of the indictment, but it would render him immune from subsequent prosecution if sufficient testimony should thereafter become available, and it would annul so much of section 243 of the Code as provides that such a dismissal of an indictment is not a bar to a subsequent prosecution. No more striking illustration of the injustice of such a procedure could be found than the case at bar, and, unless clearly authorized, ought not to be sanctioned.

Appellant, by his marriage to the only witness who could supply the testimony necessary to sustain the indictment, has by his own act defeated, for the time at least the attempt upon the part of the commonwealth to convict him of a crime, and his counsel now argues that the commonwealth should be required to proceed to a trial and certain slaughter in order that his client may enjoy immunity from the risk of a future prosecution if he and his wife should hereafter be divorced and the testimony thereby become available that cannot now be produced against him. In other words, immunity is demanded of the commonwealth upon the ground that the defendant and the commonwealth's only eyewitness are entitled to be relieved from the necessity of a continued observance of the protecting marriage vows. The recognition of such a right could be justified only where clearly warranted by express provision of law, and we know of no such provision.

The clear purpose and only guaranty of the constitutional amendment relied upon is that the strong arm of the government shall never be permitted to hold an accused person without opportunity for a fair and speedy trial.

Under it the accused is entitled to demand a trial or a release. It was never intended to, and cannot be construed to, offer to any person the opportunity to forestall a future prosecution. The dismissal of the indictment here would release the defendant absolutely from the charge. That is all to which, under the Constitution and the law, he is entitled, and in our judgment, the trial court upon the showing made should have sustained the motion of the commonwealth attorney to dismiss the indictment herein, as the order shows clearly the ruling resulted solely from the objection of the accused, and not from the insufficiency of the facts stated by the commonwealth attorney in his written statement.

Wherefore the ruling of the trial court upon the motion to dismiss is reversed, with direction to sustain the motion.

HURT, J., not sitting.

LOUISVILLE & N. R. CO. v. SAWYERS.

(Court of Appeals of Kentucky. April 26, 1916.)

1. MASTER AND SERVANT §206—INJURIES TO SERVANT—LIABILITY OF MASTER—HEAT.

A railroad employé, who worked drying sand for use in the sand boxes on locomotives, could not recover for physical injuries occasioned by his having become overheated at his work, having assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. §206.]

2. MASTER AND SERVANT §206—INJURIES TO SERVANT—LIABILITY OF MASTER—OVERWORK.

A railroad employé, who worked drying sand for use in locomotive sand boxes, could not recover against the road for physical injuries received through overwork or through his being required to overtax his physical strength.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. §206.]

Appeal from Circuit Court, Whitley County.

Suit by Charley Sawyers against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

H. H. Tye, of Williamsburg, and Benjamin D. Warfield, of Louisville, for appellant. Rose & Pope, of Williamsburg, for appellee.

TURNER, J. Appellee brought this suit for personal injuries against appellant alleged to have been suffered by him on account of its negligence. The substance of his complaint is contained in the following allegations in his petition, to wit:

"That on or about the 14th day of July, 1914, while in the employment of the defendant company as a shoveler and mover of sand in the defendant company's sand pits, in Corbin, Ky., and while in the line of his employment, and while in the exercise of ordinary care for his own safety, he was severely, permanently, and painfully injured by becoming too hot, and by

being overworked as a shoveler and mover of sand in the defendant company's sand pits in its railroad yards, at Corbin, Whitley county, Ky.; that by reason of his becoming overheated, which was done by the gross negligence and carelessness of the defendant company, its agents, employes, and servants superior to plaintiff in charge of said work," he received the injuries complained of.

The company answered controverting the allegations of the petition and pleading assumed risk. A trial resulted in a verdict and judgment of \$3,000 for the plaintiff, and the company has appealed.

There was no demurrer filed to the petition, but on the trial the defendant asked for a directed verdict at the close of the plaintiff's testimony and again at the close of all of the evidence; and whether it was entitled to have these motions sustained is the only question necessary to be passed upon.

The evidence showed that the plaintiff was about 49 years of age and had previously been a strong and vigorous man and accustomed to manual labor; that he had been employed by the defendant in various capacities for more than ten years; and that for about 4½ years prior to the occasion referred to in the pleadings he had been engaged at work in the sandhouse. His duty at that place was to dry the wet sand so that it might be prepared for use in the sand boxes on locomotives, and in doing so it was necessary for him to shovel the wet sand through screens and into stove drums wherein it was dried, and also at times to put the sand in buckets and lift it into a position from which it was taken by others and put into the sand boxes on the engines. Two men were employed at the sandhouse, one a day man, who worked from 6 in the morning until 6 p. m., and another, a night man, who worked from 6 p. m. until 6 a. m. At the time referred to in the pleadings, appellee was the day man. The evidence further tends to show that at times during the 4½ years appellee was engaged at the sandhouse the night men, of whom there were several during that period, did not do as much work as they ought to have done in consequence of which the plaintiff, the day man, had to do more than his share of the work, and the plaintiff was permitted to testify that at various times during the 4½ years he complained to his superiors of the alleged failure of the night men to do their share of the work; that on the day plaintiff was taken ill he worked at the sandhouse up to within a few minutes of quitting time, but he complained just before quitting that he was feeling bad and went home and went to bed and was quite seriously sick for some time. There is no claim by him in his evidence that he was overheated, or that he hurt himself or strained himself in his work, or that he was wounded in any way by any accident.

[1] If the case is to be treated as one seeking a recovery because the plaintiff became

overheated while engaged in his work, it is clear that there can be no recovery under the principles laid down in the recent case of *L. & N. R. R. Co. v. Williams*, 185 Ky. 386, 176 S. W. 1186, L. R. A. 1915E, 613. That was an action wherein the plaintiff sought damages because of the alleged negligence of the defendant in permitting him to become overheated while at work in a cinder pit. The court in that case in denying a recovery said:

"The master is under no duty to prevent his servant from becoming overheated at his work, resulting from atmospheric or weather conditions, as they are matters entirely beyond his control. In such case, while the servant may not always certainly know how to keep himself within the limits of safety, he is better able to judge than any one else how much heat he can safely stand, how it affects him, and when his endurance reaches a point beyond which he ought not, for his own safety, to continue at work. For these reasons it is for him, and not the master, to determine whether he shall engage in the work at all; or, if so, how energetically, and when he should rest or quit. If this were not true, an employer could never afford to employ a laborer to do work at which there was any probability of his becoming overheated; and it is not to be overlooked that in operating furnaces, engines, and overheat producing machinery or appliances, there is always more or less danger to the operatives of becoming overheated, and the same is likewise true of farming and other occupations which compel the laborer to be exposed to the heat of the sun. * * * There being in this case no defect in the place, appliances, or material in, or with, which appellee worked, or danger in the manner in which he was required to perform the work, there can be no just complaint that there was a failure on the part of the appellant to use ordinary care to furnish him a reasonably safe place to work. The facts therefore authorized the application of the doctrine of assumed risk, for the injuries he sustained were such as resulted from no fault of appellant or its foreman, but from a cause or causes purely incidental to the risk he assumed by continuing the work."

That case is also reported in L. R. A. 1915E (N. S.) with notes by the author approving it and citing other authorities.

[2] But if under the allegations of the petition the action could be properly treated as one for damages because the plaintiff was overworked or was required to overtax his physical strength, the same result must be reached.

The case of *Sandy Valley & Elkhorn R. Co. v. Tackitt*, 167 Ky. 756, 181 S. W. 849, was an action for damages alleged to have been suffered by the plaintiff because of the negligence of the defendant in directing him to operate a jack alone and in failing to furnish a sufficient force to properly operate the same. The court in that case, after distinguishing it from another class of cases relied upon by the plaintiff therein to support a recovery, said:

"In the case at bar, however, plaintiff was not placed in a position where he was required to sustain an unexpected weight. The jack was stationary and was operated by means of a lever which plaintiff could release at any time

without danger. It is simply a case where the servant, with knowledge of the fact that he was not equal to the task, overstrained himself. It is the general rule that a servant is the best judge of his own physical strength, and the duty is on him not to overtax it. Therefore, if he misconceives the amount of strength required to accomplish the task and overstrains himself, the master is not liable. It may be doubted if the remarks of the foreman in this case amounted to anything more than the mere expression of an opinion; but, even if it be conceded that they amount to an expressed command to plaintiff to operate the jack alone, that fact does not alter the rule. Such remarks did not authorize plaintiff, when he found that he was not equal to the task, to persist in the attempt until he was injured by overtaxing his own strength, of which he was the best judge. *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Leitner v. Grieb*, 104 Mo. App. 173, 77 S. W. 764; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53; *Roberts v. Indianapolis Street R. Co.*, 158 Ind. 634, 64 N. E. 217; *Stenvog v. Minn. Transfer R. Co.*, 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362 [17 Ann. Cas. 240]; *L. & N. R. R. Co. v. Williams*, 185 Ky. 386 [176 S. W. 1186, L. R. A. 1915E, 613]."

It is a pathetic thing to see a trusted employe, who has faithfully toiled in the service of his employer until he has reached the limit of his physical endurance, cast adrift; but until there has been a revolution in our whole industrial system such things must be. It is an inexorable decree of nature that worn-out things, no matter what may have been their value in the past, shall be cast aside. The only safe and practical rule is that each man is the best judge of his own physical strength and powers of endurance; that he knows better than any other can when the limit has been reached, and when, in following his own instinct of self-preservation, he must desist and exercise his right under the law to give up his work if it is more than he can stand.

In either view of the case, the motion for a directed verdict should have been sustained.

The judgment is reversed, with directions to grant appellant a new trial and for further proceedings consistent herewith.

FIDELITY & COLUMBIA TRUST CO. v. McOABE.

(Court of Appeals of Kentucky. April 25, 1916.)

1. LIMITATION OF ACTIONS \Leftrightarrow 108—KNOWLEDGE—TRUST—REPUDIATION.

Plaintiff, who, with her two sisters, owned in equal shares all the capital stock of a company, sold her stock or assigned it as security for a debt, and it was afterwards transferred to a sister, defendant's testatrix, who procured the company to issue to her in her name a new certificate of stock and to indorse upon the stub of its stock book that it was sold to her, and she thereafter received the dividends therefrom and took no evidence of indebtedness from the plaintiff for the amount she had paid for the stock and bequeathed it to defendant trust company by will reciting that it had been formerly owned by plaintiff and had been bought for \$3,500 in trust for plaintiff when she reimbursed the

estate in the amount of \$3,500, and thereafter to pay the income to plaintiff for life, with remainder over to her children. Held that, from the publication and probate of the will, plaintiff was charged with the notice of the adverse nature of the title claimed by testatrix and of the adverse holding of defendant as executor and trustee under the will, and that from that date the five-year statute of limitation (Ky. St. § 2515) began to run against her.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. ¶103.]

2. LIMITATION OF ACTIONS ¶83(1) — RUNNING OF STATUTE—ACTS OF PERSONAL REPRESENTATIVE.

A personal representative or trustee may stop the running of the statute of limitation by such action upon his part as will prevent the person against whom the statute is pleaded from proceeding to establish his rights before the expiration of the statutory limit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 431, 434, 436, 437; Dec. Dig. ¶83(1).]

3. LIMITATION OF ACTIONS ¶195(3) — RUNNING OF STATUTE—ACTS OF PERSONAL REPRESENTATIVE—BURDEN OF PROOF.

In such case, the party asserting such acts of a personal representative as will stop the running of the statute of limitations against him has the burden of proving such acts by convincing evidence.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 713; Dec. Dig. ¶195(3).]

4. LIMITATION OF ACTIONS ¶197(1) — RUNNING OF STATUTE—ACTS OF PERSONAL REPRESENTATIVE—SUFFICIENCY OF EVIDENCE.

Evidence, in a suit to recover possession of shares of stock, alleging that plaintiff was the owner and entitled to the possession thereof as against the trustee and executor of the will of her deceased sister, held to show that defendant held the title adversely to plaintiff's claim, in which she acquiesced, and that no act of defendant had stopped the running the statute of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722, 723; Dec. Dig. ¶197(1).]

5. LIMITATION OF ACTIONS ¶45—RECOVERY—PERSONAL PROPERTY.

An action to recover possession of personal property, brought more than five years after plaintiff's notice of the adverse claim of the defendant's testatrix, was barred by Ky. St. § 2515.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 233-239; Dec. Dig. ¶45.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Sallie McCabe against the Fidelity & Columbia Trust Company, as executor and trustee under the will of Effie Jackson Russell. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson & Crawford, of Louisville, for appellant. Humphrey, Middleton & Humphrey, of Louisville, for appellee.

CLARKE, J. Mrs. Sallie McCabe, the appellee, Mrs. Effie Jackson Russell, appellant's testate, and Mrs. Maude M. Cook, who were sisters, owned in equal shares all of the \$75,000 capital stock of the Anchorage Planting

Company, a Louisiana corporation, which owned and operated a large island in the Mississippi river upon which were valuable sand and gravel deposits. In 1899, Mrs. McCabe sold or assigned as collateral security for a debt 24 of the 25 shares of said stock owned by her of the par value of \$24,000 to August Keller. In 1901 or 1902, August Keller assigned his interest in said stock to his brother Herman Keller, who a short time thereafter, in 1902, transferred his interest to Mrs. Effie Jackson Russell, who procured said company to issue to her in her own name a new certificate of stock, for the entire 25 shares owned by Mrs. McCabe and to indorse upon the stub of the company's stock book the following:

"This stock was sold by August Keller to his brother Herman Keller and was sold by Herman Keller to Mrs. Effie Jackson Russell."

Mrs. Russell left a will, by the second clause of which she made the following disposition of said stock:

"Item 2. I will, devise and bequeath unto the Fidelity Trust Company of Louisville, Kentucky, on the trusts hereinafter named, twenty-five shares of capital stock of the Anchorage Planting Company, bought by me of August Keller, and formerly owned by my sister, Mrs. Sallie McCabe. I paid for said stock the sum of \$3,500.00 and I now will the said stock to the said Fidelity Trust Company, in trust for my sister, Sallie McCabe, who is to receive the same after my estate is reimbursed in the full sum of \$3,500 together with eight per cent. per annum interest thereon from the first day of March, 1901, until the same is repaid to my estate. After such repayment said Fidelity Trust Company shall pay to my said sister for and during her natural life, all of the net income and dividends of said stock, and after her death, the same shall go to her children or issue, the issue of any deceased child to take the share the parent would take, if living, but I charge the said stock with a lien of said sum of \$3,500 and interest."

From the time said testatrix came into possession of said stock until her death, she received the dividends therefrom and made to her sister Mrs. McCabe an allowance of \$100 per month; and, after the death of said testatrix, said allowance was continued by appellant by consent of the residuary legatee and the children of Mrs. McCabe. A written contract in reference thereto, having been made in 1912, is in evidence. In 1914, appellee brought this suit to recover possession of said 24 shares of stock in the Anchorage Planting Company, alleging that she was the owner and entitled to possession thereof. The lower court sustained this contention and entered a judgment directing appellant to surrender possession of said stock to the appellee, from which judgment this appeal is prosecuted.

Appellant defended upon three grounds:

(1) That Mrs. Russell bought the stock outright and had the right to dispose of it by her will. (2) That, however she may have held it in the first instance, she and appellant had held and claimed it as her own with notice to Mrs. McCabe for more than five

years prior to the institution of this suit, and that Mrs. McCabe's claim is barred by limitation. (3) That even though Mrs. Russell did not own the stock at the time of her death, as Mrs. McCabe has received and accepted benefits under said will, she is now estopped to deny disposition made of said stock by the will.

Upon the first question involved in the testimony, it is not clear as to what title Mrs. Russell acquired in this stock at the time she obtained possession of same from Herman Keller, nor do we consider of controlling effect the fact that she procured the issuance to herself of a new certificate for said stock and had the indorsement made upon the stub of the stock book which we have quoted; but the fact that she collected the dividends upon the stock and took no evidence of indebtedness from her sister Mrs. McCabe for the amount she had paid for the stock in view of her subsequent disposition thereof, inclines us to believe that Mrs. Russell took and held absolute title with the intention not to profit thereby, but with the determination to hold and dispose of same for the benefit of her sister and children upon such terms as she saw fit to dictate. We must confess, however, that the testimony is not entirely in accord with that conclusion, and that some of it seems rather to support the contention of appellee; however, in view of our conclusion upon the next proposition presented, it is not necessary to a decision of this case to decide what title Mrs. Russell acquired when she came into possession of this stock, or how she held it prior to the execution of her will.

[1] 2. It seems to us that there is no reasonable doubt as to the intention of the testatrix to assert in herself and dispose of this property as her own by her will in the clause set out above. It would be hard to conceive how language could more positively indicate absolute ownership upon the part of the testatrix and no ownership whatever in Mrs. McCabe. Her statements in reference to the stock are "I will, devise and bequeath" the stock "bought by me" and "formerly owned by my sister Mrs. Sallie McCabe." "I paid for said stock the sum of \$3,500 and I now will the said stock." And that she did not recognize any ownership in her sister Sallie McCabe is further made certain by the fact that she gave to her sister no interest whatever in the stock even after the payment of the \$3,500 charged against it, except the income therefrom during her lifetime with remainder to her children. Every line and almost every word of that clause is a declaration of absolute ownership in Mrs. Russell, and a denial of any title or right thereto in Mrs. McCabe except such as Mrs. Russell desired to give. The fact that the gift is charged with a lien for \$3,500 in favor of the residuary legatee does not change the

character of the title asserted by the testatrix. Page on Wills, § 752.

The title that Mrs. Russell acquired from Herman Keller in this stock, as we have stated, is doubtful; but there can be no doubt whatever about the title she asserted therein by the execution of her will. The will was published and probated September 6, 1906, eight years before the filing of this action, from which time Mrs. McCabe is charged with notice of the adverse nature of the title claimed by Mrs. Russell, and of the adverse holding of appellant as executor and trustee under the will, and from that date the statutes of limitations began to run against her. Section 2515 of the Kentucky Statutes; *Jolly v. Miller*, 124 Ky. 100, 98 S. W. 326, 30 Ky. Law Rep. 341; *Yeager v. Bank of Kentucky*, 127 Ky. 751, 106 S. W. 806, 32 Ky. Law Rep. 547, 16 Ann. Cas. 537.

[2, 3] Appellee contends that, even though the statute of limitation began running against Mrs. McCabe when the will was published, appellant by its transaction with Mrs. McCabe recognized her ownership, and thereby stopped the running of the statute, citing *Northcut's Adm'r v. Wilkinson*, 12 B. Mon. 408, and *Hamilton v. Wright*, 87 S. W. 1093. In the *Northcut Case*, it was held that, where a note was not barred by the statute at the time of the death of the obligor, a promise of payment upon the part of the administrator was sufficient to relieve the case from the statutory bar. In the *Hamilton Case*, it was held that, if the bar of the statute had not occurred at the time of the decedent's death, the personal representative may stop the running of the limitation either by part payment or by promise to pay, or by such acknowledgment of the debt as will imply a promise to pay. It would therefore appear upon the principle announced in these two cases, which is supported by authority and seems sound in reason, that a personal representative or trustee may stop the running of the statute of limitations by such action upon his part as will prevent the person against whom the statute is pleaded from proceeding to establish his right before the expiration of the statutory limit; but unquestionably the burden of proving such acts by convincing evidence is upon the party asserting them. It therefore becomes necessary for us to examine the evidence relied upon by appellee to ascertain whether or not it is sufficient to establish a recognition upon the part of the appellant of her claim to ownership of the stock.

[4, 5] The evidence relied upon by appellee consists of: (1) A statement of Mrs. McCabe's indebtedness to the estate of Mrs. Russell prepared a short time after the death of Mrs. Russell by a Mr. Macrae, an expert accountant employed by appellant, in which the stock is treated as belonging to Mrs. McCabe and held by Mrs. Russell as

collateral security; (2) statements sent by appellant to appellee upon at least two occasions of the amount of interest then due upon the \$3,500 with which Mrs. McCabe is charged in the will of Mrs. Russell; and (3) the contract entered into in 1912 by appellant, appellee, and the children of appellee.

The Macrae letter is, in part, as follows:

"Louisville, Dec. 21, 1906.

"John Stites, Esq., Chairman, etc., Fidelity Trust Co.—Dear Sir: I have examined, with care, the books of accounts of the Anchorage Planting Co., Lt., of Louisiana and have made out from them, statements, showing the amounts which each of the three stockholders and real, beneficial owners of the Co. and property have received from it. These statements are filed herewith. They cover the entire period from 1893 to 1906 Nov. 30. They are numbered 1, 2, 3 respectively. * * *

"Yours truly, W. S. Macrae.
"The stock of Mrs. McCabe in the Co. has been treated throughout as her own property, only pledged not absolutely sold to Keller or Mrs. Russell."

From which it will be seen that this letter, with accompanying statements, is a report by Mr. Macrae to his employer, the appellant; that same is a report of the condition of the affairs of the Anchorage Planting Company as shown by its books; and that the postscript to Mr. Macrae's letter is simply his statement to appellant of the fact that on the books of the Anchorage Planting Company, and in his report, Mrs. McCabe's title to the stock in controversy was recognized. This, at the most, is a statement, not that the appellant recognized Mrs. McCabe's ownership, but that the books of the Anchorage Planting Company did so. This certainly is not to be considered a binding representation of the attitude of appellant such as could stop the running of the statute of limitation, even if the testimony had shown that Mrs. McCabe ever knew of the contents of this Macrae statement, which does not appear from the testimony; so it will be seen there is nothing in this statement that could have had the effect of lulling her into a sense of security or could have prevented her from enforcing her claim.

The next evidence relied upon by appellee is the following statements furnished or mailed to Mrs. McCabe on or about July 15, 1912:

"There will be due and payable to the office of the Fidelity Trust Co., Louisville, Ky., by Mrs. Sallie S. McCabe, Baton Rouge, La., on July 15, 1912, Loan of \$3,500. Interest, \$140. Total, \$140. Payable in Louisville, New York or Chicago funds. Checks on Louisville banks must be certified after 11:30 a. m. Please bring this notice with you."

"There will be due and payable at the office Fidelity Trust Co., Louisville, Ky., by Mrs. Sallie S. McCabe, Baton Rouge, La., on July 15, 1912, Loan of \$4,263.18. Interest, \$127.90. Total, Payable in Louisville, New York or Chicago funds. Checks on Louisville banks must be certified after 11:30 a. m. Please bring this notice with you."

We are unable to see how these statements can in any way indicate the position

of the trust company with reference to this stock. They are simply statements of the condition of Mrs. McCabe's accounts with the company and are equally consistent with the contention of either appellant or appellee. There is certainly nothing in them sufficient to obstruct the operation of the statute.

The last of the three items of evidence relied upon by appellee to avoid the statutory bar is a written contract entered into in 1912 by the appellee, her children, and appellant. How appellee can contend that this contract in any way sustains her contention we cannot understand, for not only does it not sustain her contention, but, upon the other hand, it absolutely and conclusively refutes it. If Mrs. McCabe owned or even claimed to own at that time this stock, and if that claim was recognized by appellant, there would have been no reason at all why Mrs. McCabe's children should have been a party to that contract, because it is only under the terms of the will that they could have acquired or claimed any interest whatsoever in said stock. By the execution of this contract both Mrs. McCabe and appellant recognized the title of Mrs. McCabe's children to an interest in said stock which is consonant with the provisions of the will, but entirely inconsistent with and repugnant to appellee's claim in this suit.

The above is all of the evidence presented by the record that is claimed by appellee to show a recognition by appellant of absolute title in her and, in our judgment, not only does it fail to uphold her contention, but, upon the other hand, is convincing that the trust company held the title adversely to her claim here, in which she not only acquiesced, but openly consented by overt act in the execution of said contract.

This being an action to recover possession of personal property, and more than five years having elapsed from the time the statutes of limitations began to run and the institution of this action, its prosecution is barred by section 2515 of the Statutes.

In view of our conclusion upon this question, it becomes unnecessary to consider the other question presented by the record.

Wherefore the judgment of the chancellor is reversed for proceedings consistent with this opinion.

POLK v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 25, 1916.)

CRIMINAL LAW §1064(7)—APPEAL—MOTION FOR NEW TRIAL—REVIEW OF INSTRUCTIONS.

Alleged errors in the instructions in a criminal case will not be considered on appeal unless relied on as a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2683; Dec. Dig. §1064(7).]

Appeal from Circuit Court, McCracken County.

Jim Polk was convicted of robbery, and he appeals. Affirmed.

Clay & Reed, of Paducah, for appellant. M. M. Logan, Atty. Gen., and C. H. Morris, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant was indicted for robbery and convicted. Two errors are assigned for reversal, one that the verdict of the jury was not sustained by the evidence, and the other that the instructions were erroneous.

In the motion and grounds for a new trial no complaint was made of the instructions, and they were not mentioned. In *Thompson v. Com.*, 122 Ky. 501, 91 S. W. 701, 28 Ky. Law Rep. 1137, and *Cheek v. Com.*, 162 Ky. 53, 171 S. W. 998, and in many other cases we have held that alleged errors in the instructions in criminal cases will not be considered on appeal unless relied on as a ground for a new trial.

We have read the evidence, and, while it is conflicting, there was sufficient to support the verdict.

The judgment is affirmed.

CHESAPEAKE & O. RY. CO. v. WITTE.

(Court of Appeals of Kentucky. April 20, 1916.)

1. NEW TRIAL \S 76(4)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

In a servant's action for injuries where the plaintiff sustained a cut on the right leg above the knee seven inches long and one-half to one inch in depth, was confined to his room for six weeks, on crutches for six weeks, and at the end of a year, his leg was yet sore and its freedom of movement somewhat impaired, a verdict of \$1,375, while large, is not so against the evidence as to justify a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 155; Dec. Dig. \S 76(4).]

2. NEW TRIAL \S 76(1) — EXCESSIVE RECOVERY.

The mere fact that a jury awards higher damages than the court thinks an injury justifies, does not authorize the court to interfere with the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 153; Dec. Dig. \S 76(1).]

3. TRIAL \S 125(1)—ARGUMENTS OF COUNSEL.

In servant's action for injuries, plaintiff's counsel stated that plaintiff had been turned over to a doctor employed by defendant; that opposing counsel had said in substance that railroads had to be carried on, men assumed risks, and, if plaintiff got hurt, it was his own fault; and that in reply to this he had to say, "Has it come to the time in this country that railroads and money are so precious and blood and bone and flesh so cheap, that they can operate their cars to injure a fellow being or a fellow man? Are we to become a nation of cripples? Is the brood to become less?" Also, "Dr. Robertson said he took twelve stitches and it was one-half inch deep, and I suppose Dr. Robertson is as fair a man as any of the physicians on your side. After Dr. Robertson was called, then your physician, the C. & O. physi-

cian, was called in." Held not to justify reversal on the ground of improper argument.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 303; Dec. Dig. \S 125(1).]

Appeal from Circuit Court, Campbell County.

Action by Charles Witte against the Chesapeake & Ohio Railway Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Galvin & Galvin, of Cincinnati, Ohio, and W. A. Burkamp, of Newport, for appellant. B. F. Graziani, of Covington, and Horace W. Root, of Newport, for appellee.

CARROLL, J. The appellee, an employe of the appellant railway company, sustained personal injuries on account of its negligence, and in a suit for damages had a judgment for \$1,375.

A reversal is asked on two grounds: First, that the verdict is excessive; and, second, misconduct on the part of counsel for appellee in the argument of the case.

[1] The injury complained of consisted of a cut on the right leg above the knee about seven inches long, and from a half inch to an inch in depth, together with some bruises. He was confined to his room for about six weeks with his leg propped on a chair, and after this he walked about on crutches for about six weeks. The trial occurred a year after the injury, and there was some evidence that his leg was yet sore, and the locomotion or movement of the leg somewhat impaired, accompanied by a sensation of numbness.

The medical evidence for the company was to the effect that the wound had healed without leaving any bad effects.

[2] A consideration of the record on the subject of appellee's injury inclines us to the opinion that the damages are larger than should have been assessed, but at the same time we cannot say that the assessment is so flagrantly against the evidence as to authorize us to order a new trial on this ground. The mere fact that a jury awards larger damages than we think the injury justified does not authorize us to interfere with the verdict.

[3] On the trial of the case, during the examination of Dr. Robertson, a witness for appellee, and who attended him as a physician, he said that after making two or three visits he turned appellee over to Dr. Franz who, he said, was at the time the assistant surgeon for the appellant company. Counsel for appellee asked the court to exclude from the jury the statement that Dr. Franz was the assistant surgeon for the railway company, and this motion was sustained, the jury being instructed not to consider the evidence of Dr. Robertson on this point.

The bill of exceptions shows that in the ar-

gument of the case counsel for the appellee said to the jury that opposing counsel said:

"In substance, this: 'That the business of the railroads had to be carried on, and, naturally, of course men assumed certain risks, and, if this man got hurt, why that was his own fault.' I, in response, say this, your honor, and I address myself to the jury: Has it come to the time in this country that railroads and money are so precious, and blood and bone and flesh so cheap, that they can operate their cars to injure a fellow being or a fellow man? Are we to become a nation of cripples? Is the brood to become less?"

Counsel for appellant objected to the foregoing argument and moved that the swearing of the jury be set aside and the case continued, and also moved the court to admonish the jury that the argument was improper, but all of these motions were overruled.

Farther along in the argument counsel for appellee said:

"Dr. Robertson said he took twelve stitches and it was half an inch deep, and I suppose Dr. Robertson is as fair a man as any of the physicians offered on your side. * * * After Dr. Robertson was called, then your physician, the C. & O. physician, was called in."

Counsel for appellant objected to this statement, saying that it was ruled out, and in response the court said:

"Yes; the defendant made a motion that two physicians be appointed to examine, and the court appointed physicians."

Whereupon counsel for appellee said:

"We have an exception to that statement. Now he is objecting because I said that this man, Dr. Franz, of the C. & O. Railroad, attended him after Dr. Robertson."

Counsel for appellant then said:

"And we say that that was not permitted in evidence."

In answer to this the court ruled out any testimony about Dr. Franz being a C. & O. physician, because it was not then proper, and the jury were instructed to disregard it. Counsel for appellee then said:

"We will withdraw that part of it."

It should be further stated that Dr. Franz was not offered as a witness for either party.

This is the whole of the alleged objectionable argument, and we find nothing in it that would warrant us in reversing the case on the ground of improper argument. We have frequently ordered new trials on account of improper argument, but it would be pressing the rule beyond reasonable bounds to hold that the argument made by counsel for appellee was so objectionable as to authorize a reversal of the case.

The judgment is affirmed.

DAMRON et al. v. DAMRON'S GUARDIAN.
(Court of Appeals of Kentucky. April 26, 1916.)

1. INFANTS §38—SALE OF LAND—SUPPORT.

In a suit under Civ. Code Prac. § 489, to sell the interest of an infant in land to provide for his maintenance and education, where it appeared that he also owned a one-fourth interest

in a town lot worth \$250 and a one-half interest in land worth \$400, that the tract to be sold was rough mountainous land containing about 2,700 acres, valuable chiefly for its mineral and timber, and producing no income, but the most likely of his property to enhance in value, that the sale of the other property would provide enough for his immediate education, and that the sale of the tract would provide more than was required, there was no necessity for the sale of his interest in the tract.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 84; Dec. Dig. §38.]

2. INFANTS §38—SALE OF PROPERTY—POWER OF COURT.

The chancellor is without authority to sell an infant's realty for his maintenance and education in the absence of evidence of inability of his parents to maintain and educate him.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 84; Dec. Dig. §38.]

3. INFANTS §39—SUPPORT—SALE OF LAND.

In a suit under Civ. Code Prac. § 489, to sell the interest of an infant in a tract of land to provide for his maintenance and education, evidence held insufficient to show the father's inability to support and educate the infant.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. §39.]

Appeal from Circuit Court, Pike County.

Suit for sale of infant's lands by the father and guardian of Edgar C. Damron, an infant, in which a guardian ad litem was appointed. Sale ordered, and the infant's and the purchaser's exceptions thereto overruled, and they appeal. Reversed and remanded.

A. L. Ratliff and W. W. Reynolds, both of Pikeville, for appellants. J. J. Moore, of Pikeville, for appellee.

CLAY, C. Edgar C. Damron, an infant 18 years of age, is the owner of an undivided one-fourteenth interest in a tract of land lying in Pike county and containing about 2,700 acres. This suit was brought by the father and guardian of the infant under subsection 3, § 489, of the Civil Code of Practice to sell the interest of the infant in the above tract of land for the purpose of raising funds for his maintenance and education. A guardian ad litem was appointed, proof taken on interrogatories and a sale ordered. E. F. Pierce became the purchaser, at the price of \$35 per acre. The sale was excepted to on the ground that the proof was insufficient to authorize a sale, and that the advertisement of the sale was defective. These exceptions were overruled, and both the infant and the purchaser appeal.

It appears from the petition and proof that the land in controversy is rough, mountainous land, and not susceptible of cultivation. It is valuable chiefly for its mineral and timber. At present the infant derives no income from the property. The only other property he owns is a one-fourth interest in a town lot worth about \$250, and a one-half interest in a tract of land worth about \$400. The father testifies that the land cannot be divided without impairing its value, and that the price offered and bid by the purchaser

is a better price than the coal companies have been paying for similar lands. He also says that the infant is an eighth grade student, and it will take him three more years to finish the high school; that the completion of his high school education will require about \$1,500, and of his college course about \$2,000 more. The father also says that he is not able to give the infant an education, and that at present the infant is not deriving any income from the land in question, or from any other lands in which he has an interest. A brother of the infant testifies to substantially the same facts. He says that it will require about \$3,000 to complete the infant's education, and that, so far as he knew, his father's financial condition was not such as would permit him to educate the infant to any extent. He further says that the financial condition of the infant would not enable him to procure an education without the benefits derived from the sale of the land. Edward Holley, a civil engineer, also testifies as to the rough character of the land, and says that it cannot be divided without impairing its value.

[1] The courts which are charged with the duty of looking after the welfare of infants and carefully guarding their property rights should not order a sale of their real estate, even for the purpose of their maintenance and education, except in a case of clear necessity. Here the land sought to be sold is valuable chiefly for its mineral and timber. While the purchase price may be all that it is reasonably worth at the present time, it is by no means probable that its value will decrease. On the contrary, it is altogether likely that the land will increase in value. Though it may be true that the infant at the present time intends to complete both his high school and college courses—a fact which the record fails to show—yet common experience tells us that young men not infrequently abandon their intentions respecting the completion of their education. The proceeds of the sale in this instance amount to about \$4,500. It is clear that this sum will not be required for the infant's present maintenance and education, and whether or not the greater portion of it will be required for his future necessities is altogether problematical. On the other hand, he has an interest in two other small tracts of land, which are not so likely to increase in value as the tract in controversy, and the proceeds of the sale of these two tracts would be sufficient for his present necessities. Under the circumstances it would seem to be the part of wisdom to

sell the two smaller tracts, which are not likely to increase in value, and whose proceeds will be sufficient for the infant's present necessities, rather than sell the tract in controversy, which will probably increase in value, for a sum far in excess of his present necessities, and for a purpose which may never require the expenditure of any considerable portion of that sum. It is clear, therefore, that the facts and circumstances, as shown by the record, do not make out a clear case of necessity for the sale of the infant's interest in the tract in controversy.

[2] We may also add that the chancellor is without authority to sell an infant's real estate for his maintenance and education, in the absence of evidence of inability of his parents to maintain and educate him. *Taylor et al. v. Taylor's Guardian et al.*, 149 Ky. 707, 149 S. W. 1000, Ann. Cas. 1914B, 275; *Dixon v. Hosick*, 101 Ky. 231, 41 S. W. 282, 19 Ky. Law Rep. 387; *Campbell v. Goodin*, 128 Ky. 278, 108 S. W. 248, 32 Ky. Law Rep. 1137.

[3] On this question the brother of the infant says: "The financial condition of our father, so far as I know, would not permit him to educate Edgar C. Damron to any extent." The father himself says: "I am not able to give him an education." Very few people agree with respect to their financial ability to help others. Their opinions vary with their characters and their particular points of view. One father whose financial ability is unquestioned may honestly believe that his income is not sufficient to enable him to maintain and educate his child, especially if that child has some property of his own. Another parent, under the same circumstances, will readily concede his ability and inclination to bear such a burden. We therefore conclude that a case of this kind should not turn on a mere expression of opinion by the father that he is unable to maintain and educate the child. He should state the facts, so that the court itself can pass on the question of his ability. To that end he should state the amount and character of his property, his income therefrom and from other sources, and give a list of the members of his family dependent on him. We therefore conclude that the evidence in this case is insufficient to show the father's inability to support and educate the infant.

The foregoing conclusions make it unnecessary for us to pass on the sufficiency of the advertisement.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

JONES v. HAZARD DEAN COAL CO. et al.

(Court of Appeals of Kentucky. April 21, 1916.)

1. TRIAL \S 5—TERM OF COURT—EQUITABLE ACTION—STATUTES.

Civ. Code Prac. \S 366, provides that plaintiff shall be entitled to a trial in an equitable action at the first term after the summons has been served on all of the defendants, if no issue of fact is made by the pleadings, or if plaintiff consent that the statement of the answer be taken as true, and section 367a, subsec. 5, provides that suits in equity shall stand for trial at the first term of court after the issues have been completed, or by the provisions of the act have been completed 30 days before the commencement of the term. Summons in an action in equity on both the petition and cross-petition were duly served, and the answers made issues of fact, and there was no consent that the answers be taken as true, and such answers were not filed in time for the issues to be completed 30 days before the commencement of the first term of the court succeeding the institution of the action. Held, that a submission and judgment on both the petition and cross-petition at that term was premature and unauthorized.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 11, 12; Dec. Dig. \S 5.]

2. APPEAL AND ERROR \S 190—PRESENTATION OF QUESTION BELOW — PREMATURE JUDGMENT—STATUTES.

Under Civ. Code Prac. \S 517, providing that to render a judgment before the action stands for trial under the Code shall be a clerical misprision, section 516, providing that a misprision of the clerk shall not be ground for an appeal until it has been presented and acted upon in the circuit court, and section 518, subsec. 3, conferring on the court rendering the judgment power after the term to vacate it for a misprision of the clerk, an appeal from a premature submission and judgment would be dismissed, where the appellants had not attempted to correct the clerical misprision in the court below before taking their appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1148-1150, 1152, 1155; Dec. Dig. \S 190.]

Appeal from Circuit Court, Perry County.

Action in equity by D. Y. Combs against W. M. Jones and the Hazard Dean Coal Company, with cross-action by the Coal Company against Jones. Judgment for plaintiff against both defendants, and they appeal, and judgment for the Coal Company against Jones, from which he appeals. Appeal of each dismissed.

Wootton & Morgan, of Hazard, and Elmer D. Hays and J. Smith Hays, both of Winchester, for appellant. J. B. Eversole, H. C. Faulkner, Miller & Wheeler, and D. Y. Combs, all of Hazard, for appellees.

SETTLE, J. By a judgment of the Perry circuit court in the action in equity of D. Y. Combs v. W. M. Jones and Hazard Dean Coal Company, and the cross-action in the same case of Hazard Dean Coal Company v. W. M. Jones, Combs recovered of both Jones and Hazard Dean Coal Company ten shares of the capital stock of the Haz-

ard Dean Coal Company, of the par value of \$100 each, if to be had, and, if not, \$1,000, the cash value of the whole of such stock, with interest from the date of the judgment and costs; and the Hazard Dean Coal Company on its cross-petition recovered of W. M. Jones \$1,500, with interest from the date of the judgment and its costs. Jones has appealed from the judgment as to each recovery, and the Hazard Dean Coal Company from so much thereof as allowed the recovery in favor of Combs against it.

[1] It is the contention of the appellant W. M. Jones that the case, neither on the petition nor cross-petition, stood for trial at the term of the circuit court during which the judgment appealed from was rendered, and that its submission and the judgment rendered on both the petition and cross-petition were premature and unauthorized. This contention seems to be sound. Section 366, Civil Code, provides:

"The plaintiff shall be entitled to a trial in an equitable action, at the first term after the summons has been served on all the defendants as provided in section 102, if no issue of fact be made by the pleadings; or, if the plaintiff consent that the statements of the answer may be taken as true."

Summons in the case, on both the petition and cross-petition, had been served as required by section 102, Civil Code, but the answers to the petition and cross-petition made issues of fact, and there was no consent that the statements of the answers be taken as true; and such answers, though filed without substantial default on the part of the parties making them, were not filed in time for the issues to be completed 30 days before the commencement of the first term of the court succeeding the institution of the action, as provided by section 367a, subsec. 5, Civil Code, which declares:

"Suits in equity shall stand for trial at the first term of court after the issues shall have been completed or, by the provisions of this act shall have been completed thirty days before the commencement of the term."

See Board of Councilmen v. Brislan, 126 Ky. 477, 104 S. W. 311, 81 Ky. Law Rep. 867; Id., 126 Ky. 477, 104 S. W. 1199, 32 Ky. Law Rep. 377; Combs v. Va. Coal Co., 98 S. W. 1013, 30 Ky. Law Rep. 408.

[2] In this case appellant had no opportunity to take his proof or otherwise properly prepare his case for trial, but, notwithstanding the conclusive showing made of the premature submission of the case and rendition of the judgment, both on the petition and cross-petition, the reversal of same would be unauthorized, for section 517, Civil Code, provides:

"It shall be deemed a clerical misprision: (1) To render judgment before the action stood for trial pursuant to the provisions of this Code. * * *

And section 516 provides:

"A misprision of the clerk shall not be a ground for an appeal until the same shall have been presented and acted upon in the circuit court."

Section 518, subsec. 3, Civil Code, confers upon the court in which a judgment has been rendered power, after the expiration of the term, to vacate it for a misprision of the clerk; and there was in this case no attempt upon the part of either the appellant Jones or the Hazard Dean Coal Company to correct the clerical misprision in the court below before taking or granting the appeal.

For the reasons indicated, the appeal of each is dismissed.

CINCINNATI, N. O. & T. P. RY. CO. v. LUKE.

(Court of Appeals of Kentucky. April 20, 1916.)

1. CARRIERS — 218(3) — CARRIAGE OF LIVE STOCK — STIPULATION AS TO PRESENTING CLAIM FOR DAMAGES.

A reasonable stipulation in reference to presenting a claim for damages under a contract for the carriage of live stock is valid and enforceable, and the shipper must show compliance before he can maintain an action against the carrier to recover the character of damages covered by the stipulation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933; Dec. Dig. 218(3).]

2. CARRIERS — 218(6) — CARRIAGE OF LIVE STOCK — STIPULATION AS TO NOTICE OF CLAIM—MATTER COVERED.

A stipulation in the bill of lading for the shipment of live stock that no claim for damages should be allowed, paid, claimed, or sued for unless the shipper gave prompt notice to the nearest agent of the carrier, etc., did not cover the shipper's claim for damages through the railroad's breach of agreement to accord the shipper the privilege of taking the cattle, shipped from Kentucky to Chicago, off at Cincinnati, Ohio.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 940-945, 949; Dec. Dig. 218(6).]

3. CARRIERS — 212 — CARRIAGE OF LIVE STOCK—DUTY TO DELIVER—CONSIGNEE.

Where cattle shipped from Kentucky were consigned to "C., R. & Co., Chicago, Illinois, care of G. & E., Cincinnati, Ohio," independent firms of cattle brokers in the separate cities, Cincinnati being on the route of the shipment, it was the duty of the railroad to deliver the shipment to the Cincinnati firm at such city.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 918, 919; Dec. Dig. 212.]

4. CARRIERS — 205 — CARRIAGE OF LIVE STOCK — AMBIGUITY IN CONTRACT — CONSTRUCTION.

An ambiguity in a contract for the shipment of live stock in designating the consignee, or in not clearly showing who they are, or the place of destination, should be construed most favorably to the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 918, 920, 923; Dec. Dig. 205.]

5. EVIDENCE — 450(5) — PAROL EVIDENCE — AMBIGUITY—SHIPPING CONTRACT.

Where ambiguity or uncertainty in a contract for the shipment of live stock exists as to

who are the consignees or what the place of destination, oral evidence is admissible to explain the matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071; Dec. Dig. 450(5).]

Appeal from Circuit Court, Scott County.

Suit by J. L. Luke against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Craig Bradley, of Georgetown, for appellant. L. F. Sinclair, of Georgetown, for appellee.

CARROLL, J. The appellee brought this suit against the appellant company to recover damages growing out of its failure to stop a shipment of cattle at Cincinnati, Ohio. The cattle, as claimed by appellee, were shipped from Georgetown, Ky., to Chicago, Ill., with the privilege to the shipper of taking them off at Cincinnati, Ohio, through which place they would pass on the journey from Georgetown to Chicago, for the purpose of selling them, if he desired to do so. But the railroad company shipped the cattle through from Georgetown to Chicago without stopping them in Cincinnati in accordance with the contract and the direction of the shipper; and it is the difference between the Cincinnati market and the Chicago market, as well as the expense attending the shipment of the cattle from Cincinnati to Chicago, that the appellee sought to and did recover in this action. Two grounds are relied on for reversal.

The bill of lading, which manifested the contract between the shipper and the railroad company, stipulated, in clause 13, that:

"No claims for damages which may accrue to said shipper under this contract shall be allowed or paid by said carrier, or claimed, or sued for in any court by said shipper, unless said shipper gives prompt notice of said damages to the nearest agent of said carrier, thereby enabling said carrier to make an inspection of the stock alleged to be damaged, and, unless claim for such loss or damage shall be made in writing and verified by an affidavit of said shipper, or his agent, and filed with the freight claim department of said carrier in the city of Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars."

And the trial court sustained a demurrer to an answer pleading and relying on this clause in the contract and the failure of the appellee to give the notice therein specified as a bar to the action.

[1] It is well settled that a reasonable stipulation in reference to presenting a claim for damages in a contract for carriage is valid and enforceable, and that the shipper must show compliance with its terms before he can successfully maintain an action against the carrier to recover the character of damages contemplated by the condition. *Howard & Callahan v. Illinois Central R. R. Co.*, 161 Ky. 783, 171 S. W. 442; *Armstrong v. Illinois Central R. R. Co.*, 162 Ky. 589, 172 S. W. 947; *Adams Express Co. v. Cook*, 162 Ky.

592, 172 S. W. 1006; *M., K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

[2] The rule thus being that a condition such as we have described in a contract of shipment is valid, the question arises: Did the clause in the contract relied on embrace a claim for damages such as was asserted in this case? We think not. Under a fair construction of this clause in the contract the shipper is only required to give the notice provided for when he is seeking to recover damages on account of some physical injury or loss suffered by the live stock in course of transportation, or while it is in the custody or under the control of the carrier, and it does not apply to or include a claim for damages such as was asserted in this case. The appellee, as shipper, did not seek to recover damages for any injury, physical or otherwise, sustained by the stock. His claim was based on the ground that the railroad company committed a breach of its contract of carriage in refusing to stop the cattle at Cincinnati, Ohio, for sale. The other ground relied on for reversal is the failure of the trial court to order a directed verdict in favor of the railroad company. In order to set forth the basis of this contention so that it may be clearly understood, it should be stated that the appellee in his petition alleged that in the contract of carriage the railroad company agreed to carry the cattle to Chicago, Ill., with the privilege on his part of stopping them for sale at Cincinnati, Ohio, and that it refused to stop the cattle at Cincinnati, to his damage in the sum claimed. In its answer, after setting up the interstate nature of the shipment and that it was subject to the rules and regulations concerning interstate shipments made and provided by the laws of the United States, the railroad company averred that the written contract was for shipment direct from Georgetown to Chicago without any stop-over at Cincinnati. It further set up that, under the provisions of the act of Congress covering interstate commerce, it prepared and filed with the Interstate Commerce Commission, and published and printed a schedule showing the freight rates for interstate shipments in general, and for this shipment in particular, as provided in said act, that the rate from Georgetown, Ky., to Chicago, Ill., for the stock in question was contained in the schedule filed by it with the Interstate Commerce Commission, and that it did not provide for any stop-over at Cincinnati for the purposes of sale.

It further averred that the contract set up by the appellee that he should have the privilege of stopping the cattle at Cincinnati, Ohio, for purposes of sale was not contained in the written contract, and would have been a special privilege granted to him, as well as an undue and unreasonable ad-

vantage that it was forbidden by the act of Congress and the rules of the Interstate Commerce Commission to grant, and therefore the contract relied on by appellee was void and nonenforceable.

It was further shown in an agreed stipulation of fact that there was no rate on cattle shipped from Georgetown to Chicago providing for a stop-over for sale purposes at Cincinnati, and that the contract of shipment and the rate of freight charged was in accordance with the published tariff rate of the company on file with the Interstate Commerce Commission.

The evidence for the appellee showed without contradiction that, when the contract of shipment was entered into at Georgetown between appellee and the agent of the company at that place, it was understood and agreed between them, independent of the written contract, that although the cattle were consigned to Chicago, Ill., appellee should have the privilege, if he desired to exercise it, of stopping them on their journey at Cincinnati for purposes of sale. It is further shown without dispute in his behalf that he intended to stop the cattle at Cincinnati, and there sell them, and endeavored so to do, but that the company, in violation of the contract, failed and refused to stop the cattle at Cincinnati and carried them directly from Georgetown to Chicago.

In the bill of lading, which constitutes the written contract between the parties and by the conditions of which their rights must be determined under the head of "Consignee, Destination, and Route," we find this: "Clay, Robinson & Co., Chicago, Ill., care of Green & Embry, Cincinnati, Ohio." This is all that the contract contains in reference to who are the consignees or the place of destination, and it will be observed that two consignees are named, one in Chicago, Ill., and the other in Cincinnati, Ohio. Manifestly it was not intended that the stock should be shipped to Clay, Robinson & Co., Chicago, Ill., in care of Green & Embry, of Cincinnati, Ohio, as it appears in the record that Clay, Robinson & Co. are cattle brokers located in and doing business in Chicago, and that Green & Embry are cattle brokers located at and doing business in Cincinnati, and that neither is a branch of the other. They are independent, distinct concerns, one conducting its business at Cincinnati, and the other at Chicago.

[3] With this understanding of the record, about which there is no dispute, and, looking to the contract alone for the purpose of ascertaining who were the consignees and the destination of the cattle, it would appear that the cattle were consigned to Clay, Robinson & Co., Chicago, and to Green & Embry, at Cincinnati. Cincinnati is on the route the cattle took on their journey between Georgetown and Chicago, and under the contract, as the cattle were consigned to

Green & Embry at Cincinnati, we think it was the duty of the company to have delivered them to this firm at that place. If they had been so delivered, the shipper could not have complained, because his agreement, aside from the written contract, was that they were to be stopped at Cincinnati for sale, although we do not find it necessary to put the right of the shipper to have the cattle stopped at Cincinnati for sale on the oral contract to this effect admittedly made between the shipper and the railroad agent at Georgetown.

The argument of counsel for the railroad company is that under the written contract the cattle were to be shipped directly from Georgetown to Chicago, but the written contract does not clearly show that Chicago was the destination of the cattle. On the contrary, we think it shows that they were to be shipped first to Cincinnati. Whether they might afterwards be shipped to Chicago from Cincinnati on the contract made and bill of lading issued at Georgetown is a question not necessary to be decided, as it is not a material one in the case. But we think it reasonable, and may so assume that, if the cattle had been put off at Cincinnati, and the shipper after this was done had concluded to send them to Chicago, he would need to have made a new contract concerning the carriage from Cincinnati to Chicago, as his right to ship under the contract made at Georgetown would have ended when the cattle were taken from the cars at Cincinnati and delivered to the party named as consignee at that place.

A large part of the argument of counsel for the railroad company is taken up with a discussion of the contention that under the Interstate Commerce Act, and under the rules and regulations relating thereto, the terms of a written contract, such as the bill of lading entered into between the shipper and the railroad company, cannot be varied or contradicted by parol agreement made between the shipper and the agent of the company with whom the initial contract is made. Whether under any circumstances a written contract may be varied or contradicted by oral agreements between the shipper and the agent of the company, we do not deem it necessary to express an opinion concerning, because we think the written contract itself shows that the stock were consigned to Green & Embry at Cincinnati, and, as this place was between Georgetown and Chicago, it was the duty of the company to deliver the stock to the consignees, Green & Embry, at Cincinnati.

[4, 5] We are further of the opinion that, if it should be considered that the contract is ambiguous in designating the consignees, or in not clearly showing who the consignees were or the place of destination, this ambiguity should be construed most favorably

to the shipper, and, if the ambiguity or uncertainty in the contract is of such a nature as to require oral evidence to explain its meaning or make it clear, such evidence may be introduced for this purpose. A railroad company cannot prepare and hand to the shipper for his signature an uncertain or ambiguous contract, and then deny the shipper the right to make plain what was the understanding between him and the agent at the time the contract was entered into.

Wherefore the judgment is affirmed.

PRUITT v. GOLDSTEIN MILLINERY CO.

(Court of Appeals of Kentucky. April 25, 1916.)

1. MASTER AND SERVANT — 302(2) — MASTER'S LIABILITY TO THIRD PERSONS — SLANDER.

A master is not liable for slander spoken by an employe, even when acting in the scope of his employment, unless the master authorizes or ratifies the slander.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1218, 1219; Dec. Dig. ¶ 302(2).]

2. MASTER AND SERVANT — 308 — MASTER'S LIABILITY TO THIRD PERSONS — SLANDER — RATIFICATION.

The mere retention in service of an employe after the master's knowledge that the employe has spoken a slander does not ratify the slander so as to make the master liable therefor, since for ratification there must be both a knowledge of the act and an intention to ratify it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1234; Dec. Dig. ¶ 308.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action for slander by Ethel Pruitt against the Goldstein Millinery Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

O'Doherty & Yonts, of Louisville, for appellant. Alfred Selligman and Selligman & Selligman, all of Louisville, for appellee.

THOMAS, J. The appellee (defendant below) is a partnership composed of Barney Goldstein and Leo Goldstein as members, and the partnership is engaged in the millinery business in the city of Louisville under the firm name of Goldstein Millinery Company. The appellant (plaintiff below) was employed by and working in the store of the defendant as a saleslady. The two members of the partnership are nonresidents of that city, residing in Chicago, Ill., and the general management and conduct of the store was in charge of a brother of the two partners, one Edward A. Goldstein. Some time previous to the 11th day of February, 1915, which is the day this suit was filed, the manager of the firm, Edward A. Goldstein, is alleged to have falsely and maliciously spoken of and concerning the plaintiff in the presence and hearing of divers persons, these words:

"You have stolen some goods from this company (meaning the Goldstein Millinery Company) and if you don't bring these goods back with \$25 by 5 o'clock this afternoon, I will have a policeman arrest you, and you will spend a very pleasant Thanksgiving in jail."

To recover damages for this slander the plaintiff filed suit against the two members of the partnership and its general manager, charging that all three of them were members of the firm, but the petition was afterwards amended in which the facts concerning the membership of the firm, as well as the relation which Edward A. Goldstein sustained to it, were fully stated, and in which amendment the suit was dismissed as to the general manager. The usual allegations in a petition of this character are found in this one, but in addition it is charged in the pleadings as amended that the general manager had full charge and control of the business, with power to employ and discharge necessary servants and clerks, and that he spoke the words while acting within the scope of his employment, and by reason thereof the two members of the partnership are liable for this slander, charged to have been uttered by the partnership's general manager. It is furthermore alleged that if this contention should be untrue in law, the partnership and its members became liable for the slander because of a ratification of it. This ratification, as alleged, consisted of the partnership continuing to retain its general manager in its employment after it was known that he had spoken the words constituting the slander. A motion to strike a great portion of the plaintiff's pleading was sustained, as was also a demurrer filed to it, and, plaintiff declining to plead further, the petition was dismissed, from which judgment this appeal is prosecuted.

The rulings of the trial court upon the motion to strike and in sustaining the demurrer were made because it held that under the facts disclosed an individual principal could not be chargeable with oral slander uttered by its agent without an express authorization, direction, or consent for him to do so.

The questions sharply presented for our determination are: (1) May an individual be charged with slander uttered by his agent or servant even in the line of his employment, if such agent or servant had no authority to do so from his principal, and did not utter it with the knowledge, direction, or consent of his principals? And (2) the further one, that although the slander might not be so uttered by the agent, will a retention of the services of the agent by the principal after knowledge of the slander amount to a ratification?

[1] 1. Considering these questions in the order named, we find the first case from this court touching the principle involved to be that of *Hardin v. Cumstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427. In that case the client was attempted to be held liable for a libelous

statement in a pleading which had been prepared by the defendant's attorney, it having been incorporated into the pleading without his knowledge, consent, or direction. This court denied the liability of the defendant, and in doing so said:

"In such an action, malice is the gist of the action; and, without evidence of malice, Cumstock cannot be accountable. And, assuming the evidence true, there is no pretext for the imputation of malice to Cumstock in charging the robbery. He appears to have engaged the attorney to prosecute an action for assault and battery, and the robbery is proven to have been charged by the attorney without his knowledge or directions."

That case was not identical in all of its features with the instant one, but the principle determined is analogous to that involved here, in that liability of the principal for the unauthorized utterances of libelous or slanderous words by his agent, without the principal's authority or direction, is denied, although in that case the words uttered constituted a libel; they being in writing and contained in the pleading prepared by the agent (the attorney of defendant). This is mentioned because in some jurisdictions and by some authorities a difference is made, as to the principal's liability, between libel and slander in such cases. It would seem, however, that such distinction was not recognized by this court in that case.

A somewhat analogous question to this, showing who is liable for the uttering of slanderous words, was before this court in the case of *Webb v. Cecil*, etc., 9 B. Mon. 198, 48 Am. Dec. 423. In that case the plaintiff's title to land had been slandered, as he charged, by several defendants, whom he sued jointly. The question arose as to whether the defendants could be proceeded against jointly in one suit. It was determined, however, that no one was liable for uttering of slanderous words except the one who spoke them, and in denying the right of joinder, which involved the question as to who is liable for slander, this court said:

"The tort complained of is verbal slander, and nothing more, for which it seems a joint action against two cannot be maintained; for a libel, signed and published, to a joint action, it has been held, may be supported, and upon the ground that it is an entire offense, and one joint act done by them both. But such an action cannot be maintained against two for slanderous words, because the words of one are not the words of the other. The act of each constitutes an entire and distinct offense. And a farther reason may be suggested that the same words spoken by one may occasion much greater injury than spoken by another, and that each should only be responsible for the injury inflicted by his own independent act."

The question was again before this court in the comparatively recent case of *Duquesne Distributing Co. v. Greenbaum*, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481, where it received a very exhaustive consideration. After quoting with approval the excerpt from the *Webb* Case,

supra, and referring to many others from foreign jurisdictions, the opinion continues:

"Without including in what we say the rules applicable when the action is for libel, and confining our opinion to actions for slander, as that is the question we are dealing with, we think that a partnership or corporation cannot be held liable for the slanderous utterances of its agents or servants unless the actionable words were spoken by its express consent, direction, or authority, or are ratified or approved by it. Generally speaking, when it is attempted to hold the master or principal liable for the wrongful acts of his servant or agent, it is sufficient to describe, in a general way, the wrongful act, and charge that it was done by the servant while acting within the scope of his employment. This is particularly true in cases involving injury to persons or property, where some physical act is done or omitted to be done by the servant that involved a wrongful act or a breach of duty upon the part of the master to the person injured. But a different rule should be applied when it is attempted to hold the master or principal in slander for defamatory words spoken by his agent or servant. Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and, more frequently than otherwise, are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be. It would be entirely out of the question to hold the principal or master responsible for every reckless, thoughtless, or even deliberate speech made by his agent or servant concerning or relating to persons that the agent or servant may meet, or know, or come in contact with, while in the service of his principal, or master. As to other torts or wrongful acts committed by the servant or agent, and for which the master or principal may be liable, they can, as a general rule, guard against by exercising care in the employment of agents and servants and in the selection and use of the appliances or things they work with. But no sort of reasonable care that the master or principal could exercise in employment or control would enable him to prevent his servant or agent from the use, in his absence, of language that might be actionable. A speech by the agent or servant when absent from the principal or master is absolutely within his power alone to regulate or control. He may be prudent and discreet, or reckless or careless in his conversation. He may have his tongue under perfect control, or under no control whatever, may talk freely about persons and things, or talk little. And so we think that, when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his 'employment' in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking."

The question of the liability of a principal for the slanderous utterances of his agent was again before this court in the still more

recent case of *Stewart Dry Goods Co. v. Heuchtker*, 148 Ky. 228, 146 S. W. 423. The principal in that case was a corporation, and the agent who uttered the slander was one John H. Hill, it being alleged that he was employed in the capacity of general manager of the business of the corporation, and part of his duty was to detect thefts committed by employes and to take such means as were necessary to apprehend the offender. He accused the plaintiff of theft of some of the company's goods, and it was charged that this was done by him in the interest and on behalf of the company. Under these facts, this court held the principal not liable for the slander and in the course of the opinion, said:

"A verbal slander is the individual act of him who utters it, often arising out of his momentary excitement. It is the voluntary and tortious act of the speaker. There can be no joint utterance; and so two persons are not liable. He alone is liable who spoke the words. Many things are actionable when printed or published which are not actionable if published orally, and it seems to us a sound principle that the verbal utterances of an agent of limited powers should be regarded as his personal act rather than the act of his principal, unless authorized by the principal in fact or ratified by him."

Authorities to the same effect might be multiplied, although in some jurisdictions the rule is different. We, however, are not only committed to the previous utterances of this court in the cases supra, but we think they hold the better rule upon the subject. It will be remembered that the case in hand is one of oral slander by an agent with an individual principal. Whatever may be the rule in such cases elsewhere, we are not inclined to extend it so as to charge the defendant with liability in cases of the character of the one before us. Moreover, to hold otherwise would open a wide door for fraudulent collusion between a disloyal agent and a prospective mercenary plaintiff. Through such collusion the agent, without the authority, procurement, knowledge, or consent of his principal, could utter indiscriminate slanders concerning the future plaintiffs with the understood purpose of sharing the spoils recovered from the principal as balm for the wounds made by his unauthorized slanders, and thus the principal would be made to suffer financial ruin and disaster. This could be accomplished even though the principal had expressly directed the agent not to engage in any slanderous utterances toward any one; for if the rule insisted upon by appellant should be upheld, the only thing essential to the liability of the principal in such cases is that the agent should utter the words in the apparent scope of his employment. If it should be insisted that this could be done as to other torts committed by agents and for which the principal is liable, the answer is that in such cases the injury is to the person or property of plaintiff, which he is not so willing to suffer for the mere purpose of sharing with the agent the compensation he might

recover therefor. Such a holding as contended for would be entirely out of harmony with the just purposes of the law, and we are not prepared to give our indorsement to it.

[2] 2. It is contended that the defendants ratified the slander uttered by their agent because with a knowledge of it they declined to discharge him from their services. It is difficult to see upon what reasonable basis this contention is made. We are aware of the fact that in some instances unguarded expressions are made in law books which, taken singly and alone, might form the basis for an earnest and interested litigant to conclude that a rule of law was thereby announced, and even sometimes an erroneous rule is announced, but we acknowledge ourselves unable to find any convincing authority justifying the extension of the doctrine of ratification to the limits contended for. The guilty servant in cases like this may be high-class in some respects, and possibly of great business ability and supreme adaptation for the purposes for which he is employed, and to discharge him would entail great loss and inconvenience to his principal, yet notwithstanding these considerations, if the plaintiff's theory is correct, the principal would be bound to do so or else be liable for the past unauthorized slanders of his agent. This, according to our view, would violate all rules underlying the doctrine of ratification as taught by all the authorities. Moreover, in *Newell on Slander*, § 35, page 377, it is said:

"In order that there may be a valid ratification there must be both knowledge of the fact to be ratified and an intention to ratify it. The master must do something more than merely stand by and let the servant act. Nonintervention is not ratification."

In the case of *Donivan v. Manhattan Ry. Co.*, 1 Misc. Rep. 368, 21 N. Y. Supp. 457, this question of ratification was before the court, and it was determined that the mere retention of the servant by the master after the commission of the tort constituted no

ratification by the master. The court quoted with approval from the case of *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235, as follows:

"A company cannot be held to ratify an assault and battery committed by its servant by retaining him in its service, where it believed his account of the affair, and thought it just to maintain the status quo at least until a judicial determination of the matter."

This statement is supported by the following cases: *Williams v. Car. Co.*, 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Gullick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

That the act of retention of the servant after the commission of the tort does not constitute a ratification by the master is also upheld by the Texas courts in the cases of *International & G. N. R. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860, and *Gulf, C. & S. F. R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495. In the *McDonald Case*, that court, upon the question under consideration, said:

"The mere fact that the defendant retained the servant in its employ after the act was performed does not constitute a ratification."

Other cases in point are *Grattan v. Suedmeyer*, 144 Mo. App. 719, 129 S. W. 1038, and *Kwiechen v. Holmes & Hallowell Co.*, 106 Minn. 148, 118 N. W. 668, 19 L. R. A. (N. S.) 255.

We concur with these authorities in holding that a retention by the master of a servant in his employ will not ratify a previously spoken slander by the servant so as to hold the master liable therefor. We have carefully considered the authorities to which appellant refers us, but without giving them a specific consideration herein, we deem it sufficient to say that, in our opinion, they do not conflict with the views herein expressed.

Having arrived at these conclusions, it results that the judgment must be, and it is, affirmed.

ORCHARD v. MISSOURI LUMBER & MINING CO. (No. 17411.)(Supreme Court of Missouri, Division No. 2
March 31, 1916.)**1. APPEAL AND ERROR ⇐762—BRIEFS—SPECIFICATION OF ERRORS.**

A point mentioned for the first time in a reply brief on appeal is raised too late for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097; Dec. Dig. ⇐762.]

2. APPEAL AND ERROR ⇐1010(1)—REVIEW—TRIAL BY COURT.

In a trial by the court, a general finding will be approved on appeal if it can be upheld on any substantial ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ⇐1010(1).]

3. QUIETING TITLE ⇐10(1)—TITLE OF PLAINTIFF.

A plaintiff having no title cannot attack that of defendant.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 36; Dec. Dig. ⇐10(1).]

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by James Orchard against the Missouri Lumber & Mining Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a suit to quiet title to 2,240 acres of land in Shannon county. There was a judgment for the defendant, and the plaintiff appealed. Thereafter the appellant died, and the cause has been revived in the names of his widow and heirs.

In the year 1861 the land in controversy was owned as follows: Ethan Whitney, of Illinois, owned 640 acres of it, William J. Pfautch, of Illinois, owned 560 acres, John R. Stephenson, residence not given, owned 480 acres, and Horace A. Reynolds, of New York, owned 560 acres. We deem it unnecessary here to give the numerical descriptions of the various tracts. Those four persons had the record title by proper conveyances duly recorded from the persons who entered the land. Both parties to this suit claim under those four persons as the common sources of their titles to the several tracts in controversy. The plaintiff claims title under the records of four deeds, one from each of the above-named persons who owned the land as above stated, each of said deeds purporting to convey all the land so owned by said respective parties. Each of those deeds was dated on some day in March, 1886, and all purported to be acknowledged on the days of their respective dates before John W. Hague, notary public, Pittsburg, Pa., and the grantees in each of those deeds were P. T. Pitts, W. N. Evans, and F. L. Winkler. They were all filed for record in Shannon county on February 26, 1887. On April 17, 1887, Pitts, Evans, and Winkler conveyed the land to the South Missouri Real Estate Association. On July 12, 1909, that cor-

poration by James Orchard, its president, executed what purported to be a deed of conveyance of the land to James Orchard, the plaintiff.

The defendant in its answer alleged that the plaintiff claimed title through those four deeds purporting to have been made by the persons who were the common sources of title as above stated. Said answer then made the following allegations:

"Defendant further states and avers that each and all of the four deeds above described are and were false and forged; were never executed by such parties as are named therein as grantors.

"Defendant further states that the said P. T. Pitts being the principal promoter in the organization of said corporation, having procured the aforesaid false and forged instruments purporting to be deeds, and knowing the same to be false and forged, caused said forged deeds to be placed of record in Book "V" of the records of Shannon county, Missouri, and after having said instruments placed of record, caused the originals to be destroyed."

The defendant claims title through numerous sheriffs' deeds made under executions on judgments for taxes. The plaintiff claims that those deeds and the proceedings on which they are based are irregular and void. The defendant also claims title under the statute of limitations by adverse possession.

The evidence shows that P. T. Pitts was the organizer and principal stockholder of the South Missouri Real Estate Association, and that about January, 1887, he had an arrangement with a man, who called himself Robert Landon, to meet him at Hoxie, Ark., for the purpose of receiving those four deeds above mentioned and paying therefor. Evans testified that he and Dr. F. L. Winkler had some small interest in the corporation above mentioned, and that Pitts, making some excuse for not going himself, requested Evans to go to Hoxie and close the deal with Landon. Pitts furnished Evans with several packages of money, each containing \$500. Evans went to Hoxie, met Landon, received from him the deeds and delivered the money to Landon, who put it in his pocket without counting it. Evans testified that Landon at that time told him that his real name was not Landon, but was Robert L. Lindsay; and that Lindsay then stated to him that all that land had been entered in the name of straw men, that there was no danger in dealing in it, and that he could furnish deeds for any amount of it. Evans further testified that the four deeds above mentioned were all blank as to grantees when he received them from Lindsay, that he delivered them to Pitts in that condition, and that Pitts, without the knowledge or consent of Winkler or Evans wrote the names of the three in the deeds as grantees and put them on record in that condition. Evans testified that he thought that Pitts told him that those four deeds were destroyed after being recorded; that he (Evans) learned that Lindsay had at one time been

sent to the penitentiary in Ohio for frauds in land titles, and that he and Winkler went out of the South Missouri Real Estate Association because for those reasons they did not want to have any connection with it. Pitts died about 1891. Lindsay died in 1908. Evans' testimony was given by deposition and was admitted over plaintiff's objection as follows:

"The plaintiff objected to the deposition of W. N. Evans as not referring or having any connection with any of the land in controversy; and for the further reason that it is nothing but an alleged conversation between the witness and two dead persons, to wit, Dr. Pitts and Robert L. Lindsay, and moved to strike out the entire deposition."

The deposition of John W. Hague of Pittsburg, Pa., was read in evidence by the defendant. He testified that he was a lawyer and a notary public for many years in Pittsburg, including the year 1886, but that he had no recollection of having taken the acknowledgment to any of the said four deeds which purported to be acknowledged before him, and that he had no recollection of ever having met or known any of the parties to those deeds; that his record as notary covering that period had been destroyed in a fire.

The plaintiff at the trial read in evidence the records of those four deeds from Whitney, Pfautsch, Stephenson, and Reynolds, but did not produce the deeds themselves nor make any effort to account for them. There was no evidence explaining why it was that all four of the deeds were acknowledged before the notary Hague. The testimony of C. C. Sheppard and I. C. Lucy for the defendant tended to show that shortly before Lindsay's death in 1908, he delivered to Lucy four or five notary seals, one purporting to be the seal of John W. Hague, notary public, Pittsburg, Pa.

The trial was to the court without a jury. No instructions or declarations of law were asked or given. The trial court found that the defendant was the owner of the land in controversy, and that the plaintiff had no right, title, or interest in it, and entered its judgment and decree accordingly.

Lew R. Thomason, of Poplar Bluff (A. T. Brewster, of Poplar Bluff, of counsel), for appellant. L. F. Dinning, of Poplar Bluff, L. B. Shuck, of Webb City, and W. J. Orr, of Springfield, for respondent.

ROY, C. (after stating the facts as above).

[1] I. Appellants in their original brief did not raise any question as to the competency of the deposition of W. N. Evans, but mentioned it for the first time in this court in their reply brief. The point is raised too late for consideration here. See *Simmons v. Affolter, & Cowan*, 254 Mo. loc. cit. 174, 162 S. W. 168.

[2, 3] II. The trial in this case was one at law. The verdict was in effect a general

one. No declarations of law were asked or given. If that verdict can be upheld on any substantial ground, we are required to approve it. *Heynbrock v. Hornmann*, 256 Mo. 21, 164 S. W. 547. The evidence showing that the four deeds were forgeries as alleged by defendant is so overwhelming that the plaintiff made no effort to withstand its force. We deem it unnecessary to discuss that evidence here. As the verdict and judgment can and must stand on that ground, it is needless to consider the question as to the validity of defendant's title. The plaintiff having no title whatever is not concerned as to that of the defendants.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

WOLF v. HARRIS. (No. 17619.)

(Supreme Court of Missouri, Division No. 2.
March 31, 1916.)

1. COURTS ⇨487(1)—TRANSFER OF APPEAL—ABSTRACT OF RECORD — COMPLIANCE WITH RULES.

Where the case comes upon transfer by order of a Court of Appeals on account of a constitutional question, the Supreme Court will not scrutinize too closely the abstract of the record to detect noncompliance with its rules.

[Ed. Note.—For other cases, see *Courts, Cent. Dig. §§ 1307, 1311, 1313-1315; Dec. Dig. ⇨487(1).*]

2. APPEAL AND ERROR ⇨193(9)—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF OBJECTION.

Where a petition states no cause of action, the point may be raised in the Supreme Court for the first time.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 1232-1236; Dec. Dig. ⇨193(9); Pleading, Cent. Dig. § 1366.*]

3. INJUNCTION ⇨98(2) — LIBEL AND SLANDER.

Under Const. 1875, art. 2, § 14, guaranteeing freedom of speech and writing, subject only to liability, civil, criminal, or both, for any abuse of such privilege, an action solely for injunction, will not lie on behalf of a physician to restrain continued publication by his deceased patient's father of libelous matter charging malpractice, there being no element of conspiracy in the case, since injunction will not lie to restrain threatened publication of either a libel or slander; the right of one accused of libel or slander to a trial by jury being inviolate.

[Ed. Note.—For other cases, see *Injunction, Cent. Dig. § 170; Dec. Dig. ⇨98(2).*]

4. INJUNCTION ⇨98(1) — LIBEL AND SLANDER.

Where a party libeled secures a judgment at law against the libeler, which, owing to the latter's insolvency, he cannot collect, he can enjoin in equity further publication of a libel of like import.

[Ed. Note.—For other cases, see *Injunction, Cent. Dig. § 169; Dec. Dig. ⇨98(1).*]

5. INJUNCTION ~~§~~98(1) — LIBEL AND SLANDER.

Where a party libeled joins a count at law for damages for the libel with a count for injunction to restrain threatened continuance of the false publication, and alleges and proves either inadequacy of legal remedy by reason of the libeler's insolvency, or the legal necessity of the restraining injunction to avoid a multiplicity of suits, the court, the jury having found the fact of the libel, and itself having found the necessary facts on the equity side of the case, can enjoin continued publication.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 169; Dec. Dig. ~~§~~98(1).]

Appeal from Circuit Court, Jackson County; W. A. Powell, Judge.

Action by I. J. Wolf against Henry Harris. From a judgment for plaintiff, defendant appeals. Judgment reversed.

Respondent herein, who was plaintiff below, brought this action in equity in the circuit court of Jackson county to perpetually restrain and enjoin defendant from publishing certain alleged false, defamatory, and libelous statements concerning respondent. From a judgment for plaintiff enjoining defendant as prayed, the latter appealed.

The case turns on the application to plaintiff's petition of section 14 of article 2 of the Constitution of Missouri, which section is pleaded by defendant in his answer. This petition is lengthy, and we do not deem it necessary to set it out in *hæc verba*, but will content ourselves with stating the substance of it. It may help toward an understanding of the case to say that the petition sounds in equity only, and contains but one count.

The plaintiff, after averring that he is a practicing physician and surgeon in Kansas City, Mo., and that he has been such for nearly a quarter of a century, and reciting the extent of his studies, practice, and experience, avers that he was called to treat a young daughter of defendant, and, though exercising in that behalf the utmost care and skill, the patient, without fault of plaintiff, died; that thereafter defendant demanded of plaintiff in divers ways and at divers times and places the sum of \$10,000 because of the death of said patient, and threatened that, unless said sum was paid, defendant, by circulating charges of criminal negligence of plaintiff in connection with the death of the patient aforesaid, would destroy the reputation, business, and professional standing and income of plaintiff, which plaintiff avers to be lucrative and large, and that in pursuance of said threats defendant circulated and published more than 1,000 copies of a certain false and libelous writing concerning plaintiff. This writing is set out in the petition, and is, if untrue, manifestly libelous.

It is further alleged that thereafter defendant, with the same malicious intent and design, published and circulated among plaintiff's patients, friends, and acquaintances more than 5,000 copies of a certain pamphlet in which were repeated the same or similar

false, defamatory, and libelous statements, and that subsequently defendant procured the printing of a large placard, likewise containing false and libelous statements concerning the plaintiff, and that all this was done for the purpose of wrongfully extorting from plaintiff the said sum of \$10,000.

Plaintiff further alleged that all charges so made by defendant touching the wrongdoing and alleged malpractice of plaintiff were false, and were known by defendant to be false, and that they were made and circulated solely to gratify the spite and ill will of defendant against plaintiff and for the purpose of extorting money from plaintiff.

It is further alleged that defendant threatens to continue, and until and unless restrained and enjoined will continue, to print, publish, and circulate the same or similar libelous statements touching plaintiff; that, if plaintiff has any property, the same is so wholly incumbered and covered up, and so insufficient in quantity and value that plaintiff would be unable to collect any judgment which might be rendered in his favor as damages in any action at law that plaintiff might bring on account of the publication of said libelous statements; that, if he were to sue defendant on each successive libelous publication, he would be compelled to bring a multiplicity of actions at law, at great cost, inconvenience, and expense, and that said actions would be so numerous and would for that so incumber the dockets of the courts of Jackson county as to obstruct the administration of justice therein, and so by reason of the premises plaintiff avers that he has no adequate remedy at law and is compelled to resort to his action in equity.

The prayer for relief is substantially followed in the decree as first above stated; that is to say, that defendant be perpetually restrained and enjoined from printing or publishing, or attempting so to do, the false, defamatory, and libelous statements aforesaid, or any others of like or similar import.

As stated, defendant in his answer invoked the provisions of section 14 of article 2 of the Constitution of Missouri, and denied that, when measured thereby, plaintiff's petition stated any cause of action, denied that defendant is insolvent, but averred his solvency, and, being solvent, averred that plaintiff had an adequate remedy by an action at law for damages. Further answering, defendant pleaded the truth of the statements made by him; that is to say, in substance admitting publication, but averring justification.

The case went first to the Kansas City Court of Appeals, but, on account of the invocation of the Constitution by defendant in his answer, the latter court upon motion sent the case up to us.

Such further facts as will suffice to make the points clear will be found in the opinion.

T. A. Frank Jones, of Kansas City, for appellant.

FARIS, P. J. (after stating the facts as above). [1] As a foreword we may say that the abstract and the brief in this case upon appellant's part (we have not been favored with a brief from respondent) are exceedingly meager, and are not such as our rules require. But, since the case comes here on transfer by order of a Court of Appeals, on account of a constitutional question, the rule in such case is not to scrutinize too closely the abstract of the record, lest an appellant caught unwittingly between their rules and ours should be pinched out of any appeal at all.

[2] There are set forth in the abstract the petition in full and the answer of the defendant invoking section 14 of article 2 of our Constitution. One point in his brief keeps alive this contention that an absolute defense is afforded him by the Constitution. Another point urges that "under the allegations of the petition plaintiff had no right to an injunction against the defendant." We will treat these points thus coupled together, as we have the right to do under authority, as an attack upon the sufficiency of the petition; for, where a petition states no facts upon which a judgment may be bottomed—in short, where it states no cause of action—that point may be raised here for the first time. *Sexton v. Metropolitan Street Railway Co.*, 245 Mo. 254, 149 S. W. 21; *Monmouth College v. Dockery*, 341 Mo. 522, 145 S. W. 785.

[3] Coming then to a consideration of this contention, we are constrained to hold that the point is well taken; that the petition states no cause of action, because injunction (when, as here, that is the sole relief prayed for) will not lie to restrain the threatened publication of either a libel or a slander. Any other view overlooks the spirit, if not the letter, of the Constitution (section 14, art. 2, Const. 1875), which substantially guarantees to the citizen the privilege of saying, writing and publishing whatever he desires on any matter, subject only to liability (either civil or criminal, or both) for any abuse of that privilege. So far, it could not be said with any certainty from the bare language set forth that an abuse of the liberty so guaranteed, when such abuse is so flagrantly present as is conceded by the appellant's brief to be the fact here, could not be remedied by injunction. If the Constitution had stopped with this, we might well say that such a remedy lies. But this section continues:

"In all suits and prosecutions for libel the truth thereof may be given in evidence and the jury, under the direction of the court, shall determine the law and the fact."

It follows that, if the statements made are true, the appellant is permitted to publish them when and where and as often as he

will, and that he is entitled to a jury of his country to determine whether the statements are true or false. That the statements on which this action is bottomed seem upon their face to be malicious and obviously untrue does not change the case. It has been so often ruled that in a plain case of slander of the person or slander of title injunction will not lie that reiteration should be unnecessary. *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. loc. cit. 500, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476; *Life Association v. Boogher*, 3 Mo. App. 173; *Thummel v. Holden*, 149 Mo. loc. cit. 685, 51 S. W. 404; *Clothing Co. v. Watson*, 168 Mo. loc. cit. 148, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; section 14, art. 2, Const. 1875; *American Malting Co. v. Keitel*, 209 Fed. 356, 126 C. C. A. 277. In the case of *Flint v. Hutchinson, etc., Co.*, supra, 110 Mo., at page 500, 19 S. W., at page 806, 16 L. R. A. 243, 33 Am. St. Rep. 476, Black, J., speaking for this court, said:

"We live under a written Constitution which declares that the right of a trial by jury shall remain inviolate; and the question of libel or no libel, slander or no slander, is one for a jury to determine. Such was certainly the settled law when the various Constitutions of this state were adopted, and it is all-important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen the law furnishes a remedy. In view of these considerations a court of equity has no power to restrain a slander or libel; and it can make no difference whether the words are spoken of a person or his title to property. In either case it is for a jury to first determine the question of slander or libel in an action at law. This, we conclude, is the result of the better cases in this country and in England."

The facts before us lacking the element of conspiracy obviously distinguish the instant case from the case of *Lohse Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 128 Am. St. Rep. 499, and from the case of *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332. For the former case was bottomed upon the theory of conspiracy; while the latter case dealt not only with a false publication amounting to slander of title, but with threats toward divers and sundry others, and toward all who might buy or use the alleged patent-infringed article. Besides, the ultimate fact had been already ruled in a proper action, to wit, that there was no infringement and therefore the alleged slanders of title which the court enjoined had beforehand (but in the same action) been found and declared to be false, and therefore, as to title, slanderous.

[4, 5] It is stated in the *Flint Case*, supra, that after an action at law in which there is a verdict finding the statements published to be false plaintiff, on an otherwise proper showing, could have injunction restraining any further publication of that which the jury has found to be actionable libel or slander, and of slanders or libel of a like or similar import. So say we in this case. If

plaintiff had gone to a jury with this alleged libel and obtained a judgment, which, owing to the insolvency of defendant, he was unable to collect, further publication of a libel of like or similar import ought to be enjoined. Or, even if plaintiff had joined a count at law for damages for libel with a count for injunction on the theory of a threatened continuance of the false publication, and had alleged and proved, either the inadequacy of remedy by reason of the libeler's insolvency, or the legal necessity of the remedy sought in order to avoid a multiplicity of suits, the court nisi, upon a finding by the jury of the libel, and by the court of the said necessary facts on the equity side, could have enjoined continued publication thereof. Since, however, there is in the instant case neither conspiracy nor threats to others, nor a verdict of a jury upon the fact of libel, we are constrained to say that this judgment cannot stand.

Let it be reversed. All concur.

BLAIN v. MISSOURI PAC. RY. CO.
(No. 17338.)

(Supreme Court of Missouri, Division No. 2.
March 31, 1916.)

**RAILROADS — §330(2)—INJURY AT CROSSING—
FAILURE TO LOOK AND LISTEN.**

Where a foot passenger, 44 years old, in full possession of all his faculties, at midday attempted to cross a railroad track without looking for the approach of a train, looking back when some one called him when he was within two feet of the tracks, in which posture he was struck by the pilot beam of the engine of an approaching train, though the railroad was negligent in allowing an electric warning bell at the crossing to be out of repair, it was not liable for the death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1072; Dec. Dig. § 330(2).]

Appeal from Circuit Court, Jackson County; R. B. Middlebrook, Judge.

Suit by Harriet I. Blain, administratrix of J. C. Blain, deceased, against the Missouri Pacific Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. C. Blain on June 17, 1908, was struck by defendant's passenger train in the town of Paola, Kan., and died a few days thereafter of his injuries. His wife, as his administratrix, has sued for \$10,000 for his death under the Kansas statute. The trial court, after plaintiff's evidence was in, was about to give an instruction in the nature of a demurrer to the evidence, whereupon the plaintiff suffered an involuntary nonsuit with leave to move to set it aside; and after the necessary motions the cause is here on appeal.

Blain was in the lumber and furniture business at Centerville, Kan., at the time of his death, and had been in that business there about 6 years. He was in Paola about

once a month. He was 44 years old, and in full possession of his faculties.

Peoria street, in Paola, runs east and west across the tracks of three railroad systems all parallel and lying within a strip of about 200 feet. About 24 passenger trains on those roads cross that street within that many hours, and many more freights. As those tracks are approached from the east the first is a switch of the defendant running to an elevator standing just west of Peoria street and just east of the switch. Next comes the main track of defendant. Between it and said switch on the north side of the street is a cobhouse used in connection with the elevator. The main track spoken of above curves round that cobhouse to the eastward. About four blocks north of Peoria street is the defendant's station. The regular passenger train was due there at 11:40 a. m. Just at noon Blain was proceeding west on the sidewalk on the south side of that street. When he had crossed the switch track and got within 8 or 10 feet of defendant's main track, had he looked westward, he could have seen a train on that main track a distance of 400 or 500 feet. The regular passenger train south bound left the station just at noon, gave two long and two short whistles when about 400 feet from Peoria street, and continued ringing the engine bell from that point until it crossed the street above named. Blain proceeded straight ahead without looking for the approach of any train. He was in about 2 feet of defendant's main track when some one called to him. He looked back, and, while doing so, was struck by the pilot beam of the engine and knocked about 20 feet. The train was going down grade at from 15 to 18 miles an hour. For about two years there had been an electric bell at that crossing, but for a great portion of the time it had been out of repair, and was out of repair and not working on the day in question.

L. C. Boyle and Guthrie, Gamble & Street, all of Kansas City, for appellant. White, Hackney & Lyons, of Kansas City, for respondent.

ROY, C. (after stating the facts as above). When a person, capable of seeing and hearing, in broad daylight, attempts to cross a railroad track in front of a rapidly moving train, without looking or listening for such train, and is struck by it and injured, his own negligence is the proximate cause of his injury, and he cannot recover, nor can his representative after his death. Let it be conceded that it was negligence in the defendant to allow the electric bell to be out of repair. In *Schmidt v. Railroad*, 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196, this court held that the running of the train at a speed in excess of the rate allowed by city ordinance was negligence, but that such

negligence did not absolve the pedestrian from the duty to look or listen for approaching trains.

In *Keele v. Railroad*, 258 Mo. loc. cit. 78, 167 S. W. 433, it was said that, though the defendant may be negligent in the matter of signals, outlook, slackening, and stopping, yet, when the injured party is *sui juris*, and moves from a place of safety to a place of danger so close before the engine that by ordinary care his injury cannot be averted, then there can be no recovery.

We call attention to the fact that Blain was in the prime of life and in full possession of all his faculties. It was midday, and he was on foot. The law of this state as laid down in the above-mentioned cases will have to be rewritten before a recovery can be had on the facts of this case.

The judgment is affirmed.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

TODD et al. v. SUPPER et al. (No. 17713.)
(Supreme Court of Missouri, Division No. 2,
March 31, 1916.)

TAXATION ⇨642—SALE FOR TAXES—SERVICE BY PUBLICATION—SUFFICIENCY.

In proceedings for the collection of delinquent taxes, where service was had on nonresident owners by publication giving their initials only instead of their Christian names, their recorded deed appearing in their Christian names, and, after judgment was rendered and the property sold, one of the owners wrote to the sheriff, signing his name by initials, while a year after sale the collector issued a receipt to such person, using only his initials and transmitting the same by mail, the case did not come within the exception which estoppel creates to the rule that a publication directed to an owner by initials instead of his Christian name, when his recorded deed appears in his Christian name, is insufficient to confer jurisdiction on the court, and a judgment rendered pursuant thereto absolutely void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1305-1307; Dec. Dig. ⇨642.]

Appeal from Circuit Court, Taney County; John T. Moore, Judge.

Action to quiet title by V. C. Todd and another against Henry Supper and others. From a decree for plaintiffs, defendants appeal. Judgment reversed, with directions.

This is an action brought in the circuit court of Taney county, for the purpose of quieting title to certain real estate located in that county. Upon trial a decree was rendered, finding and adjudging the title to be in plaintiffs, and from this defendants have regularly and timely prosecuted this appeal.

The facts are few and undisputed. At the April term, 1911, of the Taney county circuit court the state of Missouri at the relation of

the county collector filed a petition for delinquent taxes, alleging, among other things, that defendants therein were nonresidents. Service was had by publication, and on the 29th day of April, 1911, a decree was rendered against the persons so served, to wit, H. Supper, J. G. Bishop, and J. A. Bowers for the sum of \$4.84, plus costs. On August 31, 1911, the sheriff duly levied on said land, and on the 27th day of October, 1911, same was sold under execution to plaintiffs herein.

The record further discloses that on January 21, 1905, the land in question was conveyed to Henry Supper, John G. Bishop, and Joseph A. Bowers, this constituting appellants' only deed of record to said lands.

It further appears that on September 24, 1912, which was subsequent to the date of both the judgment and the execution sale, one of the three appellants wrote a letter to the sheriff in which he signed his name by initials.

J. William Cook, of Crane, and Chas. V. Gray, of Hollister, for appellants. C. B. Sharp, of Forsyth, for respondents.

REVELLE, J. I. We have so frequently and harmoniously ruled on the question presented by this record that our various decisions have become a fixed rule of property, upon which all persons have a right to depend. We have declared time after time, and without variation, that, absent elements of estoppel, a publication directed to a defendant by initials, instead of his Christian name, when his record deed appears in his Christian name, is wholly insufficient to confer jurisdiction, and a judgment rendered in pursuance thereof is absolutely void. *Stevenson v. Brown*, 264 Mo. 182, 174 S. W. 414; *Gillingham v. Brown*, 187 Mo. 181, 85 S. W. 1113; *Shuck v. Moore*, 232 Mo. 656, 135 S. W. 59; *White v. Gramley*, 236 Mo. 648, 139 S. W. 127; *Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874; *Vincent v. Means*, 184 Mo. 344, 82 S. W. 96; *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 234.

The only thing upon which respondents rely to bring this case within the exception which estoppel creates is the fact that, after the judgment was rendered and the property was sold, one of the three record owners wrote a letter to the sheriff in which he signed his name by initials, and that about a year after the sale the collector issued a receipt to such person using only his initials and transmitting same by mail. Minds that are curious and not immediately impressed with the insufficiency of this to bring the case within the recognized class of exceptions are referred to such cases as *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 234; *Shuck v. Moore*, 232 Mo. 649, 135 S. W. 59; *Stevenson v. Brown*, 264 Mo. loc. cit. 188-190, 174 S. W. 414.

The judgment should be reversed, with di-

rections to enter a decree for appellants, and to adjudge that respondents acquired by the sheriff's deed no interest in or title to the property involved. It is so ordered.

FARIS, P. J., and WALKER, J., concur.

HOWARD et ux. v. SCARRITT ESTATE CO.
(No. 17629.)

(Supreme Court of Missouri, Division No. 2.
March 31, 1916.)

1. NEGLIGENCE —141(11)—IMPUTED NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF PARENTS—INSTRUCTIONS.

An instruction that plaintiff parents could not recover for the death of their child if the failure by either of them to watch their child in an elevator contributed "in the least degree to cause the accident," is erroneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 395, 396; Dec. Dig. —141(11).]

2. NEGLIGENCE —82—CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE OF INJURY.

The quantum of contributory negligence sufficient to prevent recovery must be such as to enter into and form the direct, producing, and efficient cause of the casualty without which it would not have happened.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. —82.]

3. NEGLIGENCE —141(11)—IMPUTED NEGLIGENCE OF CHILD'S PARENTS—INSTRUCTIONS.

In an action for death, in a passenger elevator, of a four year old child accompanied by its parents, defendant was entitled to instructions as to the care or carelessness of the parents affecting recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 395, 396; Dec. Dig. —141(11).]

4. NEGLIGENCE —96—CONTRIBUTORY NEGLIGENCE—CARE OF CHILDREN.

Where a young child accompanied by its parents was killed in a passenger elevator, it was not negligence that both parents did not guard it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 157-161; Dec. Dig. —96.]

5. CARRIERS —280(4)—INJURIES—ELEVATORS—CARE REQUIRED.

That elevator shaft doors causing the injury were operated in the usual and customary way that this and other similar elevators and doors were operated would not necessarily relieve defendant from liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1092, 1117; Dec. Dig. —280(4).]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by Frank Howard and wife against the Scarritt Estate Company. From an order granting a new trial, defendant appeals. Affirmed.

Plaintiffs, who are husband and wife, sued the defendant, a corporation, engaged in Kansas City in operating an office building, for the alleged negligent killing of their infant son in a passenger elevator in said building. Upon trial the jury found for defendant whereupon the court granted plaintiffs a new trial and defendant, appealed. The amount sued for being \$10,-

000 and within our jurisdiction, the case is here. This is the second appeal in this case. Heretofore it was tried and plaintiffs had judgment for \$5,000. Thereon an appeal was taken to the Kansas City Court of Appeals, wherein for errors, the case was reversed and remanded. *Howard v. Scarritt Estate Co.*, 161 Mo. App. 552, 144 S. W. 185. The facts upon the instant appeal, so far as they are pertinent, do not so greatly differ from those shown upon the first trial and set out in the report of this case in *Howard v. Scarritt Estate Company*, supra, as to make it necessary to again use space in reciting them. They have been published once and the curious may read them in the book cited above. Upon the instant trial the testimony tended to show that the operator of the elevator in question had given the two sliding doors (which closed the entrance to the elevator shaft) a shove with one hand while he threw the starting lever over with the other. The starting apparatus was equipped with five electrical contact points, the office of which was to start the car with different degrees of rapidity, increasing till the last point of contact was reached, which gave a very rapid movement to the car. The effect of such contemporaneous closing of the sliding doors and throwing on of the speeds so rapidly accelerated the car as that it was always some six or eight feet above the floor before the doors had time to become closely shut. There was some testimony offered by plaintiffs from the operator of the elevator in question, as well as from other witnesses engaged in operating elevators in the same building and in similar buildings, that the method thus pursued in closing the doors in question in the instant case and in contemporaneously starting the elevator cage was the usual and customary way of so operating these appliances. Upon the trial an instruction was offered by defendant and given by the court upon this phase of the case. This instruction will be found set out at length in the opinion herein in connection with the discussion of its alleged incorrectness. The court, also, upon the trial of the case, gave an instruction upon the theory of the alleged contributory negligence of plaintiffs herein in failing to properly guard the child while he was riding in the elevator and just before he fell through and was killed. This instruction will also be found in the opinion, and so we need not set it forth here.

Boyle & Howell, Joseph S. Brooks, and George L. Boyle, all of Kansas City, for appellant. Ellis, Cook & Barnett, of Kansas City, for respondents.

FARIS, P. J. (after stating the facts as above). The new trial herein was granted "on account of error in instructions." Of this error, or errors, no further and more

definite specifications are furnished us. Counsel for appellant broadly urge that instructions 7 to 13, inclusive, given for defendant, are each the law, citing us as proof of the faith which is in them to the case of *Manlier v. Railroad*, 167 Mo. loc. cit. 120, 66 S. W. 1072, and to two cases in the Courts of Appeals: *Spencer v. Bruner*, 128 Mo. App. loc. cit. 102, 108 S. W. 578, and *Brunke v. Telegraph Co.*, 115 Mo. App. loc. cit. 89, 90 S. W. 753. These cases are not, in our view, authority sufficient to sustain all seven of the instructions complained of; some one or more of which must have been held in mind by the court below.

[1] Among others the court nisi gave for the defendant this instruction, numbered 10 in the record, to wit:

"The court instructs the jury that, inasmuch as the son of plaintiffs was a child of tender years, it was their duty at all times to guard and look after him, and that it was the duty of the parents to take care for their child in proportion to the dangers of his surroundings, and if you believe from the evidence that plaintiffs, or either of them, failed to watch and care for their child in manner and form as defined by these instructions in the elevator in question, and that such failure on the part of the parents, or either of them, contributed in the least degree to cause the accident to their child, then plaintiffs cannot recover in this suit, and it is your duty to return a verdict for defendant."

We think it is evident from a mere casual reading that the above instruction is erroneous, and that the giving of it alone was a sufficient warrant for the action of the learned court in setting aside the verdict for defendant. For it will be seen that the jury are advised by this instruction that if the failure of either of the parents of the dead child to guard him and look after him "contributed in the least degree" to the happening of the "accident" to the child, then the finding should be for defendant.

[2] It is not the law that the least negligence of him who is hurt will excuse an otherwise guilty tort-feasor for his negligent act. *Moore v. Railroad*, 128 Mo. loc. cit. 277, 29 S. W. 9; *Oates v. Railroad*, 168 Mo. loc. cit. 548, 68 S. W. 906, 58 L. R. A. 447. It is plain (and it has so been ruled) that to hold otherwise would be to hold that there exists in this state the doctrine of comparative negligence, a doctrine which has been, when sought to be invoked, always expressly repudiated. *Hurt v. Railroad*, 94 Mo. loc. cit. 264, 7 S. W. 1, 4 Am. St. Rep. 374; *Oates v. Railroad*, supra. The rule as to the quantum of contributory negligence which is sufficient to prevent recovery is that it must be such as to enter into and form the direct, producing, and efficient cause of the casualty, and absent which the casualty would not have happened.

[3] The unfortunate facts of this casualty present a peculiarly difficult case in which to apply the doctrine of contributory negligence. The circumscribed area in which the child and his parents were confined and the

closeness of the child to the door opening were such that a mere step may have caused his fall and death. We think, however that defendant was entitled to have this issue presented to the jury by a proper instruction. We are convinced that the instruction given was improper.

[4] In addition to the error above pointed out this instruction put upon plaintiffs too great a burden of care. It might well be proper to leave to the jury the question of the care of one parent, but to say to the jury, as this instruction in effect does, that unless both parents were guarding the child no recovery could be had was, in a practical sense, to instruct the jury to find for defendant. If both parents were negligent in performing the duty of guarding the child, then no recovery should be had; but one parent at a time ought to be all the guard a four year old child needs in order to ride safely in a passenger elevator.

[5] II. While it necessarily results that this case must, for the error noted above, be affirmed and remanded for the new trial properly granted by the learned trial court, it may be well to say that in our opinion instruction 9 was likewise erroneous. This instruction reads thus:

"The court instructs the jury that if you believe from the evidence the elevator doors to the elevator shaft were operated at the time in question in the usual and customary way that this and other similar elevators and doors in this and other buildings are operated, then you should not find that defendant was negligent at the time in question in the operation thereof, and your verdict should be in favor of defendant."

If the matter of time and manner of closing a door to an elevator shaft were a peculiarly intricate one, which, by reason of its abstruseness, the populace, lacking scientific knowledge, are unable to grasp and know and understand, then evidence of experts as to the safeness or unsafeness of a given method of operation might be permissible, and an instruction based on such testimony be allowable. But no such case is presented. Rather is this a case analogous in all substantial respects as to this feature to that of *Hughes v. Railroad*, 127 Mo. 447, at page 454, 30 S. W. 127, at page 129, wherein it was said:

"The giving of the instruction would amount to the assertion that a custom, however dangerous to human life it might be, had it been pursued for a period of eight months by defendant without injury to any one up to the date of the injury complained of, might be interposed as a defense, by the party exercising it, from the consequences of its dangerous continuance. The duty enjoined upon defendant to exercise care, caution, and vigilance is not dependent upon the fact that on some former occasion a like injury had happened at this exact place, and under similar circumstances and conditions. The act itself was dangerous. The consequences of it could have been reasonably foreseen, and injuries from it reasonably been avoided, only by the exercise of the greatest care on part of defendant to warn all persons on its platform to be on the lookout."

Conceding that a rule similar to that stated in the above instruction exists in matters demanding expert exposition, and likewise as to the duty of the master to furnish only customarily used appliances, and not the very best and newest and most improved appliances to an employé, we yet do not think it can apply in a case like this. *Reichla v. Gruensfelder*, 52 Mo. App. 43; *Peterson v. Railroad*, 211 Mo. 498, 111 S. W. 37; *Penney v. Stockyards Co.*, 212 Mo. 309, 111 S. W. 79.

The question of the degree of duty, if any, which defendant owed to plaintiffs upon the facts is not raised here by appellant, and while respondent tacitly calls it to our attention, we are not for that called on to discuss it. But pass it, saying simply that it is not before us upon the record. If it was ever in the case, it has been waived in this review.

It results from what is said that the action of the learned trial court in granting a new trial was correct, and that the case should be affirmed, and remanded for the new trial properly ordered by the court nisi. Let this be done. All concur.

WILLIAMS v. UNITED STATES EXPRESS CO. (No. 17637.)

(Supreme Court of Missouri, Division No. 2. March 31, 1916.)

1. COURTS ⇨231(23) — SUPREME COURT OF MISSOURI — CONSTITUTIONAL QUESTIONS — MODE OF RAISING.

A constitutional question not raised by appellant, but by which respondent secured a new trial in the court below, does not give the Supreme Court jurisdiction on appeal of a case not otherwise within its appellate jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. ⇨231(23).]

2. COURTS ⇨231(6) — COURT OF APPEAL — MISSOURI.

Courts of Appeals may not construe the Constitution or declare a statute unconstitutional.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. ⇨231(6).]

3. CONSTITUTIONAL LAW ⇨26 — CONSTRUCTION — VALIDITY OF LEGISLATION.

The Legislature may pass any statute (federal questions aside) not forbidden by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. ⇨26.]

4. COURTS ⇨231(22) — SUPREME COURT OF MISSOURI — CONSTITUTIONAL QUESTIONS.

Where statutes, the validity of which is not questioned, govern a case, it is not appealable to the Supreme Court as involving a constitutional question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. ⇨231(22).]

Appeal from Circuit Court, Jackson County; James E. Goodrich, Judge.

Action by H. R. Williams against the United States Express Company. From an order granting a new trial, plaintiff appeals. Transferred to Kansas City Court of Appeals.

T. A. Witten, of Kansas City, for appellant.

FARIS, P. J. Plaintiff sued defendant in the circuit court of Jackson county for \$141.85, and had judgment for that sum. Some of the facts will be set out in our discussion of the case. Such others as are necessary to an understanding of what we shall say, run thus: Defendant was sued, summoned, and served as a corporation. It appeared specially, and, averring that it is a foreign joint-stock company and not a corporation, moved to quash the summons. This motion was overruled. Thereafter plaintiff had the sheriff to amend his return so as to show service on defendant as a joint-stock company, and a default was noted. Subsequently plaintiff amended his petition to show the fact that defendant is a corporation and a joint-stock company. After the making of both of said amendments and pending the holding of the case under advisement, defendant appeared and filed its demurrer to the petition, for that: (a) Plaintiff's petition is insufficient; and (b) defendant is not a suable legal entity; which demurrer was overruled, and, defendant pleading no farther, judgment nisi was rendered for plaintiff for the sum prayed for. The trial court, on motion of defendant, set this judgment aside and granted a new trial to defendant, whereupon plaintiff appealed.

[1] It is urged, tacitly at least, that we have jurisdiction because construction of the Constitution is involved. Let us see if this be so. Respondent complains for the first time, in its motion for a new trial, that section 28, art. 2, of the Constitution was violated, for that, being entitled to a trial by jury, it was denied the same. But respondent got a new trial, and it did not appeal. If it got such appeal on any constitutional ground deemed erroneous by appellant, then appellant ought—as he did not—to have raised that point in his appeal; failing to do so, the constitutional question mooted by respondent falls out of the case. So that it does not lie in the mouth of respondent to urge any denial of a constitutional right in such wise as to confer jurisdiction in us. Touching the right of appellant to raise a constitutional question, we note that the record nowhere refers to the Constitution, except it is given in narrative form as the reason for the action of the court nisi in sustaining the motion for a new trial, that:

"While the court is of the opinion that the constitutional and statutory provisions of this state, making joint-stock companies corporations, are applicable, the Kansas City Court of Appeals has decided that a joint-stock company cannot be sued as such."

In other words, the learned court nisi inferably says that while it is of opinion that section 11, art. 12, of the Constitution of Missouri makes defendant a corporation,

though it avers itself to be a joint-stock company, the Kansas City Court of Appeals has held to the contrary in some other cases. Taking judicial notice of the limitations of jurisdiction in a Court of Appeals in the matter of passing upon a constitutional question, we are not able to see wherein the Constitution is involved. We can see wherein section 2963, R. S. 1909, which, *mutatis mutandis* is in the exact words of the Constitution, was held in mind by the court nisi and is, it may be, involved. This section declares that:

"The term 'corporation' as used in this chapter [chapter 33] shall be construed to include all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships."

It may also be true that the construction of section 2990, which *prima facie* seems to put joint-stock companies and corporations in the same category, for the purposes of chapter 33, and likewise section 1760, which provides for the manner of service of process on joint-stock companies, may be involved. This latter section was lately amended (Laws 1915, p. 225), apparently in a meticulous legislative effort to resolve the exact situation here present. Whether an amendment was in fact necessary we need not rule. But the statutes, *supra* (sections 1760, 2990, 2963, R. S. 1909), seem to us to stand between the court and the Constitution. Till said sections have been construed by declaring that joint-stock companies are not for the uses and purposes of chapter 33 and chapter 21 in the same category as corporations, no need arises in our opinion to construe the Constitution. Every question in this case can be determined without reference to any provision of the Constitution. In such situation we have no jurisdiction, since this case falls otherwise among those cases wherein our jurisdiction is referable alone to a constitutional question. *Brookline, etc., Co. v. Evans*, 238 Mo. 599, 142 S. W. 319.

[2] If there is a constitutional question in this case, it got into it solely by virtue of the declaration of the learned judge nisi that he felt constrained to follow the ruling of the Kansas City Court of Appeals in certain cases (*Adams Express Co. v. Metropolitan Street Ry. Co.*, 126 Mo. App. 471, 103 S. W. 583; *Metropolitan, etc., Railway Co. v. Adams Express Co.*, 145 Mo. App. 371, 130 S. W. 101), wherein said Court of Appeals had, however, seemingly not considered the effect of certain constitutional and statutory provisions, which had the effect (at least in the view of the learned trial court) to place joint-stock companies in the same category as corporations for the purposes of suing and being sued. If this be so, then the trouble is not with the Constitution, but, as stated above, with the statutes now existing (sections 1760, 2963, 2990), or for (the then) lack of any statute expressly providing for the manner in which joint-stock companies may sue and be sued in

this state. The Kansas City Court of Appeals has the same right to construe the above sections of the statute, or any other sections thereof as we have, and in all cases otherwise falling within its jurisdiction, it construes any statute authoritatively. It may not, of course, construe the Constitution, nor declare a statute to be unconstitutional. As we understand the situation here it has not so ruled. The learned trial court thought it his duty to follow the *Adams Express Company Cases*, *supra*, though seemingly doubtful of the correctness thereof, and though fearing that what he deemed to be the bearing of the Constitution upon the matter in hand had been overlooked in those cases and might again be overlooked in the case at bar. In short, so far as we find ourselves able to appreciate the point made, this case is here because the learned court and counsel believed the Court of Appeals had failed to give effect to a section of the Constitution in two prior cases, and they feared that it might do so again. The suggested constitutional point is not within the issues of the case; so we are not permitted to assume jurisdiction. *Moler v. Whisman*, 243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, Ann. Cas. 1913D, 392. As we stated before, when the Court of Appeals shall have ruled whether our statutes provide for the manner in which joint-stock companies shall be sued, and then shall rule if that manner was followed here, this case will be decided without any occasion to construe the Constitution, or to ascertain whether any existing statute contravenes the Constitution.

[3] Since our Constitution is a limitation of power and not a grant thereof, the Legislature may pass any statute (federal questions aside, of course), which the Constitution does not forbid. So, it necessarily follows that constitutional questions present themselves only from two general angles, *viz.*, is a constitutional provision, absent any statute whatever, self-enforcing, or, does any given statute in controversy contravene the Constitution? Sometimes we are asked to construe the language of the organic law itself, but in such case such construction is ordinarily but a means to one of the ends above noted.

[4] No party raised below, nor did the court itself, raise a question as to the validity of any statute whatever; nor is there any question possible as to any applicatory part of the Constitution being self-enforcing, since there is an existing statute in the very words of the Constitution, the constitutionality *vel non* of which is herein nowise raised. If this statute and others mentioned by us, or others found in the books, do not reach and solve appellant's troubles, the matter is ended.

It follows that jurisdiction of this case lies in the Kansas City Court of Appeals, to which court we order that it be transferred. All concur.

MILLER v. BOULWARE et al. (COX, Intervener). (No. 17404.)

(Supreme Court of Missouri, Division No. 2.
March 31, 1916.)

PARTIES \S 40(2) — **INTERVENERS** — **STATUTE** —
"INTEREST IN THE CONTROVERSY."

Laws 1873, p. 48, enacted to establish evidence of title to real property, provided by section 3 (Rev. St. 1909, \S 2541) that any person claiming an interest or estate in the land adverse to that alleged in the petition might be made a party. Rev. St. 1909, \S 2535, provides for suits to quiet title, in which all interests may be determined, and states the effect of the judgment, and section 8086 declares that the provisions of the Revised Statutes, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws. Section 1733 provides that persons in unity in interest must join as plaintiffs, and that on failure to so join they may be made defendants, and section 1732 provides that any person may be a defendant who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination, and that in actions to recover the possession of real estate any person claiming title or right of possession may be made a defendant. Plaintiff, suing to quiet title under section 2535, alleged title by adverse possession under claim or color of title, and that defendant's record title was of no force, and asked for a determination of the rights of the parties but not for the possession of the land. *Held*, that a party filing an answer alleging title in himself to a part of the land by adverse possession was improperly allowed to intervene as a party defendant, as section 2541 had no application to section 2535, as the intervener had no interest "in the controversy," and was not a necessary party, and as the suit was not a suit for the possession.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 62, 67; Dec. Dig. \S 40(2).]

Appeal from Circuit Court, Osage County;
R. A. Breuer, Judge.

Proceeding to quiet title by Warren M. Miller against George Boulware and others, in which Wm. T. Cox intervened as a party defendant. Judgment for plaintiff and for the intervener, and plaintiff appeals. Reversed and remanded, with direction to enter judgment for the plaintiff against the original defendants.

This is a proceeding to quiet title under section 2535, R. S. 1909. The petition, among other things, contains the following:

"For cause of action plaintiff says that he is the absolute owner of the south one-half of the northwest $\frac{1}{4}$, section 35, township 43, range 7, all situate in Osage county, in the state of Missouri, he and those under whom he claims having acquired title to said realty by actual, peaceable, open, and continuous and adverse possession thereof for more than 30 years next preceding the filing of this suit and under claim and color of title thereto; that the above-named George Boulware is the apparent owner of record to said land by deed duly entered of record in Osage county, Mo., deed records by purchase from one George Mann, who entered said land in the year 1833, as shown by the Osage county records; that whatever title said Boulware ever had has long since passed away by reason of long possession under claim of title as aforesaid."

It prays for a determination of the rights of the parties, but does not ask for the possession of the land.

Respondent Cox, on his own motion, over plaintiff's objection, was made a party defendant, and filed an answer in which he alleged title in himself to a part of the land (describing that part) by adverse possession. Plaintiff moved to strike out that answer, but the motion was overruled. There was judgment in favor of respondent as to the part claimed by him, and judgment in favor of the plaintiff as to the residue. The plaintiff has appealed.

Vosholl & Monroe, of Linn, for appellant.
Gove & Davidson, of Linn, for respondents.

BOY, C. (after stating the facts as above). Defendant Cox, respondent here, was improperly made a party to this suit. He claims the right to be made such party under sections 1732, 1733, and 2541, R. S. 1909.

The writer was at first of the opinion that the latter section authorized Cox to be made a defendant, but his attention has been called to the fact that such section was originally enacted in 1873 (Laws 1873, p. 49, \S 3) as a part of an act entitled "An act to establish evidence of title to real property, and to restore the records of the same, and to provide for the recording of deeds." Section 1 of that act provided that persons whose deeds or other evidence of title are lost or destroyed may have their title to the land adjudged to them. Section 3, the original of our present section 2541, provides that any person claiming an interest or estate in the lands adverse to that alleged in the petition may be made a party defendant, and that the decree rendered in such cause shall be conclusive against the parties to the suit, and shall be prima facie evidence against all other persons.

In the connection in which section 2541 appears in our Revised Statutes it seems to apply to proceedings under section 2535 to quiet title. Section 8086, R. S. 1909, provides that:

"The provisions of the Revised Statutes, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

Section 2541 had no application to section 2535 prior to the revision, and, for that reason, can have none now. Section 1733, R. S. 1909, provides that persons who are united in interest must join as plaintiff, and that, in case of a failure of one of such persons to consent to be plaintiff, he may be made a defendant. That section does not justify making Cox a defendant herein. He is not united in interest with any other party to the suit. Section 1732 does not authorize making the respondent a party defendant herein. There are three classes of persons provided for in that section: (1) Those having

or claiming an interest in the controversy adverse to the plaintiff; (2) those who are necessary parties to a complete determination or settlement of the question involved therein; (3) The landlord and tenant and "any person claiming title or right of possession to real estate" may be made defendants in a suit for the possession of such real estate. We will consider those classes of persons in the order named.

1. This respondent is not of the first class. In *Cape Girardeau S. W. Ry. Co. v. Hatton*, 102 Mo. 45, 14 S. W. 763, the county judges had executed a deed purporting to convey a large tract of land from the county to the railroad company. That deed was placed in escrow in the hands of one of the judges. The railroad company sued the judges of the county court to determine its rights to the deed. It did not make the county a defendant. It was held that the county was properly made a defendant on its own motion, because, as there stated, it was "the real party in interest." It should be kept in mind that the deed purported to be executed by the county and to convey the land of the county; consequently its delivery to the grantee therein was a matter in which the county was deeply interested. If that deed had been made between the parties other than the county, though it purported to convey the county land, the county would not have been interested in the controversy as to such deed. The fact that the county owned the land did not of itself make it a proper party defendant, but that fact, coupled with the additional one that it was a party to the deed, gave it an interest in the controversy. In this cause Cox claimed and actually owned a part of the land by adverse possession. He had no paper title from anybody, and had no interest in any controversy between other parties as to such paper title. If he had remained out of the suit, a decree therein would have had no effect whatever on his rights. He neither claimed nor possessed any interest in the controversy.

2. The respondent was not a necessary party to a determination or settlement of the question involved. In *Carr v. Waldron*, 44 Mo. 398, one of several mortgagees of real and personal property sued another of the mortgagees to recover plaintiff's share of the money realized by the sale of the property. It was there said:

"In the present case the parties were all mortgagees, and had an interest in the mortgaged property. There had been no ascertainment or adjustment of the respective amounts to which each was entitled; and, where such is the case, all should be brought in, in order that there may be a final determination binding all the parties."

That case illustrates the meaning of the statute, but furnishes no ground for respondent's contention here.

3. The third class includes only those who

are interested in a suit for the possession of real estate, and for that reason cannot include the respondent here. This is not a suit for the possession of real estate. The petition alleges possession in the plaintiff, and that he has title by adverse possession. The plaintiff had the right to choose his opponent, to frame his petition in such a way as not to affect the respondent, and to have his controversy settled without being interfered with by the respondent.

The judgment is reversed, and the cause remanded, with directions to strike out respondent's answer and overrule his motion to be made a party defendant herein, and to enter judgment in favor of the plaintiff and against the original defendants in the cause.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

DONOHO v. MISSOURI PAC. RY. CO. (No. 17616.)

(Supreme Court of Missouri, Division No. 2.
Feb. 15, 1916.)

1. COURTS \S 231(23) — MISSOURI SUPREME COURT—CONSTITUTIONAL QUESTION.

A constitutional question giving the Supreme Court jurisdiction may be raised by objection to the refusal of a court to give instructions asked.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 658; Dec. Dig. \S 231(23).]

2. COURTS \S 231(6) — MISSOURI SUPREME COURT—CONSTITUTIONAL QUESTION.

The claim that the interpretation of a contract by a trial court was in violation of the Constitution as impairing the obligation of the contract and denying equal protection of the laws does not raise constitutional questions giving the Supreme Court jurisdiction on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 658; Dec. Dig. \S 231(6).]

Appeal from Circuit Court, Jackson County; James E. Goodrich, Judge.

Action by Lester Donoho against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Transferred to Kansas City Court of Appeals.

Action to recover for injury to an alleged valuable race horse while in process of transportation from Independence, Mo., to Denver, Colo., over defendant's railroad and connecting lines. Petition alleges delivery of horse to the defendant, its value of \$2,500, defendant's agreement to well and safely carry from initial point to destination, and such injury, through defendant's negligence, as rendered the horse useless and without substantial value. The prayer is for \$2,700, of which it is alleged \$2,440 was the reasonable value of the horse, after deducting the amount for which it was sold, and \$350 al-

leged to have been expended in attempting to restore the horse to its normal condition. The answer admits that defendant received the horse for shipment as above stated, but denies the alleged value. It further alleges that it agreed only to transport the horse to the end of its own line, and there deliver to a connecting carrier, and that its line of railroad extended only to Pueblo, which is more than 100 miles distant from Denver, and that if any injury was sustained by said horse the same occurred after it had left defendant's line of railroad, and was not due to any fault or negligence on its part. It further sets up that plaintiff agreed that, as a condition precedent to the recovery of any damages for any loss or injury to said horse, he should give notice, in writing, of the claim therefor to some representative of the company before said horse was removed from the place of destination, and that no such notice was ever served on defendant or any of its representatives. The answer further alleges that plaintiff contracted with defendant that, in the event of total loss of the horse, defendant should not be liable for any amount in excess of \$100, and that in case of injury or partial loss the amount of damage should not exceed the same proportions. The reply denies these allegations, as well as certain others set up in the answer, but which are not pertinent here.

Upon trial a verdict in the sum of \$900 was rendered in favor of plaintiff, and, upon appellant's application, an appeal was granted to the Kansas City Court of Appeals. On the 17th day of February, 1913, and upon appellant's motion, this cause was transferred by the Kansas City Court of Appeals to this court, for the alleged reason that the determination of the issues herein involve the construction of certain provisions of the state and federal Constitutions. On the 2d day of July, 1913, respondent filed in this court his motion to remand the case upon the ground that a decision herein involves no constitutional question, and that this court was without jurisdiction. On the 10th day of July, 1913, said motion to remand was overruled.

Martin L. Clardy and Edw. J. White, both of St. Louis, for appellant. D. C. Finley and Ben T. Hardin, both of Kansas City, for respondent.

REVELLE, J. (after stating the facts as above). I. In overruling the motion to remand this cause to the Kansas City Court of Appeals no reasons were assigned and no opinion filed. Notwithstanding this we would, under ordinary conditions, regard this action as final and conclusive; but since that time this division has, on two occasions, and after careful consideration, unanimously decided the identical question presented by this record and has held that

we are without jurisdiction. Feeling entirely satisfied with the correctness of the views expressed in those cases, we can consistently do no other than apply them here.

[1] The judgment is for \$900, and it is clear that we have no jurisdiction, unless upon the ground that a determination of the pertinent issues involve a construction of some provisions of either the state or federal Constitution. Although neither the pleadings nor objections to evidence in any manner refer to a constitutional subject, its nonexistence is not due to a failure of earlier appearance. The particular question which defendant insists upon could not have been invoked any sooner than it was. The record discloses that after all the evidence was in, and when the trial court refused to give a certain instruction which defendant requested, its counsel made the following objection:

"The defendant objects and excepts to the refusal of the court to give to the jury said instruction numbered D-7, because said action of the court impairs the obligation of the defendant's shipping contract, in violation of section 15, art. 2, of the Constitution of Missouri, and denies the defendant equal protection and benefit of the law under the Fourteenth Amendment to the Constitution of the United States."

In its motion for new trial defendant assigned as error the following:

"Because the court erred in failing to enforce the contract entered into between the defendant and plaintiff for the shipment of plaintiff's horse * * * and in refusing to hold the plaintiff to the conditions of said contract and limit the plaintiff's recovery to the sum of \$100 specified in said contract, but in permitting a recovery in excess of the amount limited in said contract, the action of the court and the verdict of the jury impaired the obligation of said contract in violation of section 15, art. 2, of the Constitution of Missouri, and denied to the defendant the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and deprived the defendant of its property without due process of law, in violation of said Fourteenth Amendment to the federal Constitution."

[2] It will be observed that these objections do not go to the validity of legislative acts, or the absence of due process, as those terms are defined, but to the correctness of an interpretation of a contract by a court of lawful jurisdiction. The most that could be said is that the court erred when judicially construing the agreement, and, if so, the Court of Appeals is the tribunal designated by law to correct the error. We cannot assume, any more for jurisdictional purposes than for others, that the Court of Appeals will decide incorrectly, or so construe a plain contract as to violate the law or the Constitution. To hold otherwise would be to usurp powers expressly denied us, and to destroy the jurisdiction of a part of the state's judiciary. In *Kemper Mill & Elevator Co. v. Mo. Pac. Ry. Co.*, 178 S. W. 502, this court held that this lodged no constitutional question in a jurisdictional sense, and directly ruled on this identical objection, in so far as it attempts to invoke the provisions of section 15, art. 2, of the Constitution of Missouri. In

Stegall v. American Pigment & Chemical Co., 173 S. W. 674, this court likewise held that the provisions of the Fourteenth Amendment to the federal Constitution could not be thus and in that wise invoked, and were not applicable to a subject-matter of this character. To the same effect is *Connelly v. Illinois Central R. R. Co.*, 186 S. W. — (not yet reported). Numerous decisions of this court are cited in support of the conclusions reached in the above cases, and the reasons therein assigned are sufficient without adding others.

It follows that since the record presents no real issue which gives this court jurisdiction of the cause, the same must be transferred to the Kansas City Court of Appeals; and it is so ordered.

FARIS, P. J., and WALKER, J., concur.

SHAW v. CHICAGO & A. R. CO. (No. 16497.)
(Supreme Court of Missouri, Division No. 1
March 30, 1916.)

1. RAILROADS §361, 362(1)—OBLIGATION —
FENCES—PLATTED TERRITORY.

The adoption of the stock restraint law, one section of which (Rev. St. 1909, § 777) provides that its adoption shall not lessen or interfere with the obligation of railroads to fence their tracks as is now provided by law, and the fact that the double damage act does not apply to incorporated towns and platted territory does not relieve a railroad company of its common-law obligation to fence its right of way where possible to do so through platted territory, or render it negligent for maintaining a cattle guard at a road crossing in such territory.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1245, 1248; Dec. Dig. §361, 362(1).]

2. NEGLIGENCE §39—ATTRACTIVE NUISANCE
—IMPLIED INVITATION.

Where a railroad company maintained ordinary fences along its right of way between the abutments of a bridge over one highway and a cattle guard at the grade crossing of another, the fact that persons had been in the habit of climbing up the abutments to the bridge and walking along paths beside the track over the cattle guard and on the grade crossing is not an implied invitation, which will aid the contention that this mode of construction rendered the cattle guard in which plaintiff's foot was caught a dangerous trap or attractive nuisance.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 55; Dec. Dig. §39.]

3. RAILROADS §358(1)—INJURIES TO LICENSEE—DUTY OF COMPANY.

A railroad company is under no obligation to reconstruct a cattle guard at a highway grade crossing to make it safe for a mere licensee using a path along the right of way, which was in the same condition it had been since footmen first began traveling there.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1236; Dec. Dig. §358(1).]

4. NEGLIGENCE §39—INJURIES TO LICENSEE
—ATTRACTIVE NUISANCE.

A railroad right of way between two highways, fenced in the usual manner and having at one end an abutment to a bridge over a highway, constructed so as to form steps leading from the highway to the track, is not an attractive nuisance, which renders the company liable for injuries to a girl who climbed up the

abutment and was injured while walking along the right of way.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 55; Dec. Dig. §39.]

5. NEGLIGENCE §39—INJURIES TO LICENSEE
—ATTRACTIVE NUISANCE.

Only very exceptional circumstances would render the attractive nuisance doctrine applicable to an intelligent girl 15½ years old.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 55; Dec. Dig. §39.]

Appeal from Circuit Court, Jackson County; Jas. E. Goodrich, Judge.

Action by Frances Shaw, by William Shaw, her next friend, against the Chicago & Alton Railroad Company. From an order granting a new trial after verdict for the plaintiff, plaintiff appeals. Affirmed.

The following Missouri cases were cited in briefs as bearing on the question whether plaintiff was a trespasser or an invitee: *Frye v. Railway*, 200 Mo. 377, loc. cit. 400, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; *Ahnfeldt v. Railroad*, 212 Mo. loc. cit. 305, 111 S. W. 95; *Everett v. Railroad*, 214 Mo. loc. cit. 83, 84, 112 S. W. 486; *Murphy v. Railroad*, 228 Mo. loc. cit. 78, 128 S. W. 481; *Glaser v. Rothschild*, 221 Mo. 180, loc. cit. 186, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; *Gurley v. Railroad*, 104 Mo. 211, 16 S. W. 11; *Morgan v. Railroad*, 159 Mo. 276, 60 S. W. 195.

A. F. Smith, Boyle & Howell, and Guthrie, Gamble & Street, all of Kansas City, for appellant. Scarritt, Scarritt, Jones & Miller, of Kansas City, for respondent.

BLAIR, J. In the Jackson circuit court appellant began this action for damages for injuries she received when struck by one of respondent's trains. The appeal is taken from an order granting a new trial on the ground the evidence was insufficient to support a verdict against respondent company. No question arises on the pleadings, and these need not be set forth.

Appellant offered evidence tending to show: That at the time she was injured there was an unincorporated, but platted, district lying in Jackson county, containing a area of nearly three-fifths of a square mile and a population of 1,500 to 2,000. That respondent's single track and right of way, 100 feet wide, traversed the platted area mentioned, speaking generally, from the southeast to the northwest, about the center of the platted district. Dividing that portion of it platted under the name of Evanston, on the south, from a portion platted under the name of North Evanston, on the north, ran Independence avenue, a street 150 feet wide. Independence road lay about 1,200 feet north of Independence avenue and ran parallel to it, east and west. Between Independence avenue and Independence road respondent's track ran nearly north, curving somewhat to the west. South of Independence avenue and about 700 feet

therefrom, respondent's track curves to the east. Running north and south between Independence avenue and Independence road are eight streets or avenues within a distance, from east to west, of about 2,900 feet. Windsor avenue adjoins respondent's right of way for the entire distance between the avenue and the road mentioned. Glenwood avenue crosses the north line of Independence avenue 34 feet east of respondent's right of way fence, and crosses the south line of Independence road 202 feet east of the right of way fence, being that much nearer the business portion (store and post office) of the platted district than is respondent's right of way. Respondent had fenced its right of way years before the accident, and its fence extended the full distance from Independence avenue to Independence road. On the north side of Independence avenue wing fences extended to points a short distance from the rail on either side and between the ends of these east and west wing fences respondent had long before constructed a cattle guard, designed for the uses to which such structures are ordinarily adapted. From Independence avenue northwardly to Independence road there was first a cut and then a fill, which latter, at the road mentioned, attained a height of 16 to 18 feet, and the north end of which was supported by a stone abutment from which an I-beam steel girder bridge (without superstructure) carried the track across Independence road and to the north side thereof to another abutment. These abutments were of stone, and are shown to have been of the usual sort, narrowing toward the top, the successive layers of stone being each shorter at each end than the one next below. The first or lowest one was 2 feet high or thick, and those above it were 14 inches thick. Each side of the abutment, therefore, presented the appearance of a succession of "steps," each step much higher than "steps" usually are, but resembling them in appearance. At Independence road the right of way wing fence extended to the southwest corner of the lower stone, leaving the stone portion of the abutment north of the line of this wing fence. The fences on the east and west sides of the right of way between Independence avenue and Independence road were shown to be "ordinary right of way fences" of five to seven wires and these wires were barbed. The fence had been in place for years and the wires were old, but none was broken or down; neither were any posts shown to be missing. Two or three paths leading from these fences to the track had been worn by footsteps of those who pried the fence wires apart and entered upon the right of way, some to cross the right of way and some to reach the track, upon which they walked north or south along or near the track, using, as exits, either the abutment or the cattle guard above mentioned. Sometimes staples would be pulled out and the wires of the fence would hang apart

sufficiently to admit persons desiring to enter upon the right of way. One witness testified there was a gate in the fence at one point, and we shall specifically mention this testimony later. Persons also entered upon the right of way over the cattle guard at Independence avenue and by climbing up the abutment at Independence road. There were paths on each side of the track from the cattle guard to the abutment mentioned, and evidences of use of the abutment itself as a means of egress from and ingress to the right of way. The cattle guard was 11 feet long from north to south and was constructed of oaken timbers of like length, 2 inches thick at the base, resting upon the cross-ties and ballast. These timbers were $4\frac{1}{2}$ inches in height, the upper $1\frac{1}{4}$ inches of each timber being beveled to a center line, and the timbers being 3 inches apart at the base, and this distance being maintained for $2\frac{3}{4}$ inches from the base or cross-ties up to the lower edge of the beveling. A space of 3 inches separated the nearest cattle guard timbers from the rails of the track. The abutments, tracks, cut, fill, fences, rails, and cattle guard were in the same condition they had been from the time people began to pass along and over them, and there was no evidence of anything unusual in the construction of any of them, or of any defect or disrepair, unless it is found in what is above set out concerning the fences enclosing the right of way. There was a crossing warning sign and an electric gong signal at Independence avenue, and signs at each end of the Independence road bridge, warning persons against crossing that bridge. There was no special sign forbidding trespassing on the tracks south of Independence road.

At the time she was injured appellant was a bright, intelligent, and more than usually strong and active girl of the age of $15\frac{1}{2}$ years. She lived with her parents in Kansas City, Kan., and on a Sunday afternoon came by street car to North Evanston for the purpose of visiting kinsfolk. Leaving the street railway station she walked east along Independence avenue, crossing respondent's track thereon, observing, as she passed, the cattle guard and electric gong at the crossing, and thence proceeded to the home of her relations. During the afternoon she and a cousin, about 13 years old, walked about the neighborhood, and when she was ready to return to the electric railway station, in order to go to her home, she and her cousin, instead of going south to Independence avenue and thence west to the electric line, walked north to Independence road, thence west to respondent's overhead crossing, thence up the abutment to respondent's track, and thence down the track to the cattle guard at Independence avenue. In walking over the cattle guard, the extension sole of the shoe on appellant's left foot became wedged or caught between the rail and the cattle guard timber or strip inside the rail and paralleling

It. Soon thereafter the electric gong announced the approach of respondent's train. Appellant failed in her efforts to release her foot, pushed her companion out of danger, threw herself down beside the track and saved her life, but lost her foot. Approaching from the southwest, those operating a train could not see the cattle guard until they arrived within about 700 feet of it.

Appellant did not on the trial and does not now base her claim to damages upon any theory depending at all upon the speed of the train or the distance within which it could have been stopped; consequently she did not offer any evidence of either of those things. Appellant's theory is that respondent was maintaining a cattle guard, neither required by law nor necessary in the proper operation of the road; that this cattle guard, constructed as above described and situated 700 feet from a curve cutting off the view of employes operating northbound trains, constituted a dangerous trap; that the abutment at Independence road and the right of way and paths along the tracks, considered in connection with the character of the surrounding community and the use of the paths by the people thereof, constituted an "attractive nuisance"; and that the "turn-table" doctrine is applicable, and appellant entitled to recover under it. This is the substance of the contention put forth in appellant's brief, as we understand it.

[1] I. (a) The adoption of the stock restraint law affected in no way respondent's obligation to fence its track. Section 777, R. S. 1909, of that law, expressly provides that its adoption shall not "lessen or interfere with the obligation" of railroads to fence their tracks "as is now provided by law." Neither does the fact that the provisions of the double damage act are not construed to apply to incorporated towns and platted territory relieve appellant of all obligations to fence. Double damages would not be recoverable, but the single damage act applies where railroad companies, though not required to fence, may fence. *Rhea v. Railway*, 84 Mo. loc. cit. 348; *Hillman v. Railway*, 99 Mo. App. loc. cit. 274, 73 S. W. 220. Further, the common law is applicable to a like situation. It is clear the failure to fence in a place where the company may do so without invading rights of others brings penalties with it; that is, the company may fence under such circumstances or take unpleasant consequences. This is the law's usual method of requiring things to be done.

(b) Clearly the numerous cited decisions discussing the exemption of switchyards and depot grounds from the mandate of statutes requiring railroads to fence are inapplicable here. The cattle guard and fences as located in this case had no connection with switchyards or depot grounds. The people using the tracks, according to the evidence in this case, had no sort of business with respondent, and

neither depot grounds, nor switchyards, nor the like, are mentioned in the record.

(c) There is no pretense appellant's injury resulted from any change in the track, right of way, or cattle guard after the public had begun to travel along and over respondent's property. Neither is it contended appellant was "attracted" by the cattle guard. Not at all. It is contended, however, that the cattle guard, under all the circumstances, was a dangerous place, and that, while the attraction lay in another quarter, yet, yielding to such attraction, appellant was drawn into proximity with a dangerous trap, whereby she was injured.

[2] The next contention of appellant, in order, is that she was an invitee. This argument is advanced rather to repel the idea she was a trespasser than to assert a cause of action as an invitee. Appellant was not an invitee at all. The Missouri cases (see briefs) cited are, in the main, those discussing the duty of railroad employes to keep a lookout on portions of track which the public uses as a footway in a manner sufficient in time and character. In a few of these cases the words "invitation" and "invited" appear. In at least one of them the court expressed itself upon the question of the status of a person using the track in such a place. In that case (*Ahnfeldt v. Railway*, 212 Mo. loc. cit. 300, 111 S. W. 95), after discussing the use of the words mentioned above and discussing the status of the injured party, it was said, in substance, that if one goes upon a railroad track where the use of it by footmen is sufficient in time and character, it makes no difference whether you call such person an invitee, a licensee, or a trespasser. The terms used in the several cases were not important, the single vital thing being that each case held that the result of such a use was to raise a duty on the part of the railroad company to keep a lookout for persons on or near the track in such places and "to use ordinary care in avoiding any injury to them." In that case this court so stated the rights accruing to persons falling within the rule.

It is clear appellant does not fall within the principle of those cases, and it is fair to her counsel to say they do not contend she does. Nor can it be contended there was any act of respondent inviting any use of the tracks. The abutments were of the usual sort. The openings in the fences were not made by respondent. The gate mentioned is not shown to have been constructed by respondent, and its existence was not shown to have been known to respondent before the accident. In truth, the fair construction of the record is the gate did not exist until after appellant was injured. Further, appellant did not get upon the track through a gate, nor did she so much as see it. She was at most a licensee, and there is neither evidence nor contention any of her rights as such were violated. In fact, it is not contended she could recover under any ordinary rule pro-

tecting licensees, or, for that matter, invitees. The matter is advanced, as stated in appellant's brief, on the ground that, while the "attractive nuisance" or "turntable" doctrine is that upon which her case rests, and while the matters discussed in this and preceding paragraphs are "outside of the general principle specially involved in the allurements cases," yet these things have "an influence upon the application of these special principles to the case at bar."

[3] Our conclusion on these preliminary suggestions is that respondent is shown to have been maintaining a cattle guard at a place where such structure was not only permitted, but required; that there was nothing in the use of its grounds at the place either forbidding respondent so to maintain it or relieving it of the duty to do so; that the status of appellant was that of a licensee injured in the use of a place in the condition it was in when footmen first began to go over it; and that, whatever her rights to have a lookout kept for her, respondent was under no obligation to reconstruct its cattle guard, so as to adapt it to the use established without its invitation, there being nothing to show there was any hidden danger of any sort, or that the cattle guard differed from those generally in use at the time. We do not hold that a showing of the matter recapitulated would render respondent liable, but do hold that in the circumstances stated there could be no liability predicated merely upon a claim by appellant in her character as licensee. *Moore v. Railway*, 84 Mo. loc. cit. 487, 488; *Straub v. Soderer*, 53 Mo. loc. cit. 42, 45; *Butler v. Railway*, 155 Mo. App. loc. cit. 296, 136 S. W. 729. As stated above, appellant's counsel do not contend to the contrary, and what is said is said for the purpose of showing the irrelevancy of the facts mentioned to the real contention as to the applicability of the doctrine of attractive nuisances.

[4] II. In view of the conclusions reached in the preceding paragraphs, we are brought to the simple question whether a railroad right of way, with the usual track in the center, fenced on every side and having at one end a stone abutment up which people were in the habit of climbing, and having along the right of way paths made by the passage of persons thereon, is an attractive nuisance and falls within the doctrine of the "child allurements" or "turntable" cases. We have no hesitation in saying that the doctrine is unquestionably inapplicable. Of course, there is no precedent directly supporting appellant's contention, and a careful examination of all the cases which industrious counsel have cited (and which accompany this opinion) discloses none which is in conflict with the conclusion stated. The principle has been recently discussed, and the cases in this state reviewed, and we are satisfied with what was then said (*Kelly v.*

Benas, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903; *O'Hara v. Gaslight Co.*, 244 Mo. 395, 148 S. W. 884), and regard the inclusion in this opinion of a repetition of that examination and discussion as unnecessary. Appellant's counsel present her cause forcefully and clearly, but we are convinced the facts of this case fall wholly without the doctrine invoked. It is not contended the cattle guard itself was an element of the "attractive nuisance," but that, allured by the abutment and the path along the track, appellant was brought into proximity with the cattle guard and that it was rendered dangerous by its situation near a curve and by the manner of its construction. The contention of appellant is but another effort to enlarge, by combining with it the "turntable" doctrine, the doctrine as to the rights of persons upon railroad tracks at a point where a use of the track by the public has raised a duty to keep a lookout.

[5] III. It would be a very exceptional state of facts which would render the doctrine of attractive nuisances applicable to a strong, active, healthy, and intelligent girl 15½ years old. The industry of counsel has unearthed one case applying the doctrine to a 14 year old boy. That case was exceptional in its facts. *Biggs v. Wire Co.*, 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655. A part of the doctrine, the basis of it, is that the injured person is of such tender years that the "attractive nuisance" would so appeal to childish impulses as, in a sense, to constitute an invitation, and that such appeal should be foreseen and care taken to prevent evil consequences. We are of the opinion appellant is not shown to be within the class to which the doctrine applies.

IV. The record shows appellant was not "attracted" to respondent's track by any "childish impulse," but went upon it for the definite purpose of using it as a way to reach the station of the electric railway, upon the cars of which she intended to return home. There is authority that such a showing renders inapplicable the "turntable" doctrine.

We are unable to discover any reason for the view that the trial court was in error in granting the new trial on the ground of the insufficiency of the evidence.

The judgment is affirmed, and the cause remanded. All concur.

HUNNELL et al. v. ZINN et al. (No. 17693.)
(Supreme Court of Missouri, Division No. 2
March 31, 1916.)

1. TRUSTS — § 89(5) — RESULTING TRUSTS — DEGREE OF PROOF REQUIRED.

Strong, unequivocal, and convincing proof is required to establish a resulting trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 137; Dec. Dig. § 89(5).]

2. DESCENT AND DISTRIBUTION ⚡115—**RESULTING TRUSTS—PRESUMPTION.**

Where the purchase price of land is paid by a father or a husband and the title taken in the name of a child or wife, the strong prima facie presumption is that such land was intended as a gift or advancement.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 426; Dec. Dig. ⚡115.]

3. ELECTION OF REMEDIES ⚡3(1)—**INCONSISTENT REMEDIES—ADVANCEMENTS—RESULTING TRUSTS.**

The remedies of requiring property to be brought into hotchpotch and establishing a resulting trust for other heirs are inconsistent, and election of one precludes the other.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 8; Dec. Dig. ⚡3(1).]

4. APPEAL AND ERROR ⚡1009(4)—**REVIEW—CHANCELLOR'S FINDING.**

Even where the weight of evidence is slightly against the findings of the chancellor, they will not be disturbed, except in a plain case of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⚡1009(4).]

5. TRUSTS ⚡89(1)—**RESULTING TRUST—EVIDENCE—SUFFICIENCY.**

In an action to establish a resulting trust in land, part of purchase price of which was advanced by the grantee's father, evidence held to show a gift.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 134; Dec. Dig. ⚡89(1).]

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

Action by Ida M. Hunnell and another against R. D. Zinn and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an action in equity, the object of which was to have a resulting trust decreed in favor of plaintiffs in certain lands situate in Lawrence county, the legal title of which was in defendant R. D. Zinn. From a decree nisi, refusing the relief prayed for and dismissing their bill, plaintiffs have appealed. Since the case has been pending here Leah A. Grissom, one of the appellants, has departed this life, suggestions of which fact coming in, her legal representatives have been duly made parties herein and have entered their appearances.

Plaintiffs, Ida M. Hunnell and said Leah A. Grissom, were daughters of one Peter Zinn, deceased. Defendant R. D. Zinn was a son of said Peter Zinn, and defendants Alberta Zinn, Della Zinn, Prussia Zinn, and Elmore Zinn are the children and heirs at law of one Elmore J. Zinn, deceased, who was likewise a son of Peter Zinn, and defendant Elizabeth Zinn is the widow of said Peter Zinn (hereinafter called Peter, for brevity).

No point is made touching the form of the petition here. That such point could have been made is therefore beside the question. This petition is brief, but no necessity exists for cumbering the record with it. Stated es-

entially, it avers that the legal title to the south half of the northeast quarter and the west half of the southeast quarter of section 23, in township 26 and range 27, situate in Lawrence county, Mo., is in the name of defendant Rezin D. Zinn (hereinafter for brevity called Rezin); that the value of said land is \$10,000, and that the said Peter was, and was in his lifetime treated as, the equitable owner of said lands, or of a part thereof, by reason of the fact that the said Peter had furnished \$2,000 of the \$4,800 paid as the purchase price of said land, but that the title thereto was placed in the name of said Rezin. There is a further averment that in the lifetime of said Peter he made large and valuable advancements to the defendants and to each of them, far exceeding the advancements made to plaintiffs, or to either of them. But no further details are furnished by said petition touching the nature of said advancements. The prayer is that the court ascertain and determine what are the rights of the heirs of said Peter in and to said lands, and that said Rezin be declared to be a trustee thereof for the heirs at law of the said Peter, deceased, in the proportion that the sum paid by the latter bears to the whole purchase price, and to require plaintiffs and defendants to bring into hotchpotch the several advancements received by them, and for all proper relief. The answer of Rezin was a general denial, a claim of ownership in fee simple of the lands described in the petition, and a prayer that the court ascertain, determine and adjudge defendant's title therein as against plaintiffs. The other defendants, including those who were infants and who answered by guardian ad litem, answered by general denials.

The judgment found the issues for the defendants, and found and declared that the title to the real estate above described was vested in fee simple in said defendant Rezin, and that plaintiffs, nor either of them, had any right, title, or interest therein. Touching the other, or advancement phase of the case, if any such phase there be, no reference is made in the judgment, and no substantial reference was made as to this upon the trial of the case.

The sole theory of the case as it was tried turned upon the question of whether the title to the 160 acres of land described above and admittedly as to the paper title thereof in Rezin was held by him (to the extent of the \$2,000 paid by Peter) in fee, or as an equitable estate. Touching the matter of advancements to the other defendants, there are neither sufficient allegations in the petition nor sufficient proof in the record, not to mention an entire lack of reference to that point in the judgment. We will treat the case here therefore as it was treated by the parties below, and devote our entire consideration of

it to the question of the creation in Rezin of a resulting trust in the land in dispute.

The said Peter, ancestor of all of the parties to this action, died in Lawrence county in 1912, and shortly before this suit was commenced, leaving surviving him the two daughters, one son, said Rezin and certain grandchildren, all but one of whom are minors and are represented herein by their guardian ad litem, and who, as already stated, are the children of another son, one Elmore Zinn, who died before the death of Peter. Peter had been twice married. At a date, not definite and not of the essence here, he was divorced from his first wife. Later they were remarried, but again later, they separated and were finally divorced. Upon one of the separations, which one is immaterial here, a division of the property up to that time accumulated by them was made, and Peter seems to have given to his wife, who is apparently the mother of all of his four children who are represented here, 100 acres of land at least, perhaps more. This division, as witnesses throughout the record quote him as saying, "put him rather heavily in debt," and he told his son Rezin and his son Elmore that if they would stay with him he would give them all of his remaining property. Some nine years before Peter's death his son Elmore died; thereafter Peter conveyed to defendants Alberta Zinn and Della Zinn each 80 acres of land, and to Prussia Zinn 40 acres of land, retaining in the last two conveyances the right of use and control and in the one first mentioned two-thirds of the crops and rents thereof, during his life. To the defendant Elmore Zinn, Jr., he gave nothing, since the latter was a posthumous child, and born apparently after the making of the above conveyances. To Rezin he likewise conveyed at one time 120 acres of land, besides that in controversy here. These four last-mentioned conveyances are possibly the matters of advancements so meagerly referred to in plaintiffs' petition.

The tract of 160 acres forming the crux of this action, and which alone was dealt with in the proof and judgment, was purchased from one Arch L. Simms. The proof is conclusive that Peter paid of his own money the sum of \$2,000 on the total purchase price of \$4,800 for this land. When doing so he said to Simms, the grantor, that he (Peter) was going to pay part of the purchase price, but that he wanted the deed made to Rezin and not to himself. Upon being asked by Simms why he desired to do this when he could will the land to Rezin just as well, he replied: "I know if the deed goes to him there won't be any lawsuit about it." Further referring to the matter and quoting the testimony of the witness Simms substantially, Peter said he was going to give this land to Rezin, and if it were deeded to him "there won't be any lawsuit about it, or any fights about it," and for that reason he wanted Simms to convey it directly to Rezin, for if he (Peter) deeded

it to Rezin, there would be "lawsuits or fights about it." Discussing with one Elim Anglin, who was a brother of Peter's first wife, the latter gave as a reason for conveying, or having conveyed to his two sons the whole of his land remaining to him, or accumulated by him after the division with his first wife, that these sons had "stayed by him and had helped him" and that his first wife would sufficiently provide for the two daughters, the plaintiffs here. Similar conversations were testified to by Mrs. Anglin, wife of the last-mentioned witness. To one Lloyd Howard, who seems to have been the assessor or deputy assessor, Peter said that he had given his son Rezin the \$2,000 which went to form the portion of the purchase price of the land in dispute, and which is here in controversy.

On the part of plaintiffs much testimony came in to the effect that defendant Rezin had, in the lifetime of said Peter, repeatedly stated that his father was to receive, and was receiving, a part of the rents on the lands in controversy. The record further shows that in the lifetime of Peter he was consulted by Rezin as to repairs and improvements on this land.

Subsequent to the purchase of the land here in controversy, and on the 10th of June, 1907, Peter gave Rezin a receipt signed by him, which receipt, date and signature omitted, reads thus: "This receipt shows that my son Rezin does not owe me anything whatever."

Further facts will be found set out in the opinion in connection with the discussion of the law applicable to the facts disclosed.

Oscar B. Elam, of Aurora, for appellants. William B. Skinner, of Mt. Vernon, for respondents.

FARIS, P. J. (after stating the facts as above). Regardless of the patent joinder of unnecessary parties defendant, of some loose allegations in the petition, and the occasional wide range of the testimony, the only question, after all, is whether the proof has established a resulting trust in the defendant Rezin to the five-twelfths part of the lands in dispute.

[1, 2] Since such a trust works in a sense uphill against the statute of frauds, the rule has ever been to require strong, unequivocal, and convincing proof before finding and decreeing the existence of such a trust. *Derry v. Fielder*, 216 Mo. loc. cit. 192, 115 S. W. 412; *Curd v. Brown*, 148 Mo. loc. cit. 92, 49 S. W. 990, and cases cited. And where the purchase price of land is paid by a father or a husband and the title taken in the name of the child or of the wife, the *prima facie* presumption is, naught else appearing, that such land was intended as a gift or as an advancement. And while such presumption is said to be and is, of course, rebuttable, such rebuttal must be accomplished, says this

court, by evidence which is strong, unequivocal, and convincing. *Derry v. Elder*, supra. With these premises conceded, how stands this case upon the facts?

There can be little doubt but that Peter Zinn paid of his own money \$2,000 of the \$4,800 with which this land was bought; nor, on the other hand can there be any doubt that he, by his express command, caused the deed of conveyance for the whole of this land to be made to Rezin. He did this because, as he said at the time, "he wanted Rezin to have the land," and was endeavoring, by thus causing the deed to be made, to prevent "any lawsuit about it." To others Peter gave a reason, sufficient to him at least, for desiring to give his sons, or their children, all of his lands. This reason was that when he was divorced from his first wife he had made such division of his then accumulations of property with her as to cause him to become indebted heavily, or as he expressed it, "left him in a hard place," and that he had said to his two sons, if they would stay with him, "stick to him," and help him out, they should have all he had left, and he further stated that they had done their part. He excused his seemingly inequitable attitude toward his daughters, the plaintiffs, by saying that they would get a sufficiently fair provision out of the property he had given their mother when dividing with her after the divorce. This testimony comes from witnesses who ought to be unbiased and indifferent between the parties—from Simms, who sold the land and conveyed it by Peter's express direction to Rezin; from Howard, the deputy assessor, to whom he said he had given the land, or the money which partly bought it, to his son; from Anglin, his former brother-in-law, and from the wife of the latter, to both of whom he gave his reasons for the different provisions he had made for his children. Opposed to this is the testimony of certain loose statements made by the defendant Rezin to the tenants on the land in controversy, in substance that Peter, "his father, had a share in the farm and received part of the rent." These statements are not denied (and we need not say whether under our statute Rezin would have been a competent witness to deny them), and so we may treat them as having been uttered by defendant precisely as stated by the witnesses. Conceding them to be facts, they amount to no more than that, by means of some agreement resting seemingly between Rezin and Peter in parol, Peter was to have his pro rata of the rents and profits from this land while he lived, but that it was to go to Rezin "when," as he said of his property generally, "he was done with it." This view finds strong corroboration in the fact that in one other deed to Rezin, as well as in all of the several deeds to others of the defendants who are the children of his son Elmore, he retained either a life estate in himself, or reserved all, or a part of the rents and prof-

its thereof during his life. Fully conceding as we may, that he got a part of the rents, and that he was consulted about, and had a voice in, the management of, and the improvements on, the land in dispute, yet this only shows that pursuant to his course in similar cases with Rezin and with his grandchildren, he had some sort of friendly agreement with his son by which he was to share for his life in the rents and profits on this land. It aids us to no material extent in eking out that unequivocal proof, which the rules demand in this kind of case. For this testimony is, of itself, ambiguous and equivocal.

[3] In passing, lest it be said that it was raised and kept vital and we overlooked it, we will look briefly to the casually mentioned matter of advancements. While it is loosely asked in the prayer of the petition that each of the defendants be required to bring the property conveyed to him or her into hotchpotch, there are no sufficiently definite allegations in the petition to warrant such a prayer. No reference is made to any facts which would require Rezin's codefendants to so bring their lands in. No such judgment was rendered, and what proof there was wholly disproves the theory of an advancement, and makes of the case which was actually tried either an outright gift, or one which creates a resulting trust. The case was tried below on this latter theory and none other. So, if there were proof of an advancement (as there is not, but per contra disproof thereof), the rule of consistency of theory would preclude relief. Besides, the theory of a resulting trust of itself shuts out and precludes the theory of an advancement. They are logical and legal antitheses each of the other. One connotes the retention of ownership; the other a passing of ownership, but an accounting for the value of the property so transferred.

[4, 5] We are constrained to say that, in our view, the learned chancellor could not have found in any other way than that found by him. The rule is ancient and well settled that, even where upon the cold record on appeal the weight of the evidence may seem to us to be slightly against the finding of the chancellor, so that if left to ourselves we might have found otherwise, we will nevertheless defer to his findings, except in a plain case, where such finding is clearly erroneous. This, because of the chancellor's better opportunity to see and hear the witnesses. For evidence which may look as if it were inspired by the very breathing image of truth, when we read it on the cold record, may, in fact, have been inspired by the Father of Lies, and, as it fell from the witness' lips in front of the chancellor, have borne the hall-mark of its inspiring ancestor on its face. So much was said in substance by our former Brother Lamm in the case of *Creamer v. Bivert*, 214 Mo. loc. cit. 479, 113 S. W. 1118. But be this as may be, there

are two rules of law confronting appellants here, making it impossible for them to recover upon such a state of facts as is presented by this record; one is the necessity of such proof as shows an unequivocal right to recover; the other is the rule of deference to the chancellor's finding. Here the weight of evidence is against plaintiffs, not for them, or so much as evenly balanced. Plaintiffs have not met in this record either one of these requirements. The decree nisi was right, and should be affirmed. Let this be done. All concur.

KILLE v. GOOCH et al. (No. 17892.)
(Supreme Court of Missouri, Division No. 1.
March 30, 1913.)

1. WITNESSES ¶159(2) — COMPETENCY — TRANSACTION WITH DECEASED PERSON.

In a suit for partition, where an intervenor claimed the land by virtue of a parol gift from the common source of title to his father, and a parol gift from the father to intervenor with possession thereunder for the period of limitations, while the father could not under Rev. St. 1909, § 6354, testify as to the gift made to him after the death of the donor, both intervenor and his father were competent witnesses to testify as to the gift to intervenor and his holding thereunder, which would entitle intervenor to the land regardless of whether the gift to his father was ever made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 667, 668, 678; Dec. Dig. ¶159(2).]

2. GIFTS ¶25—INTEREST IN LAND—PAROL GIFT.

Where a claimant of land under a parol gift did not allege or prove that he took possession of land under the gift, he is not entitled to the land by virtue of the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 43-48; Dec. Dig. ¶25.]

3. APPEAL AND ERROR ¶1008 — REVIEW — FINDINGS BY TRIAL COURT.

Where the claim of intervenor to land sought to be partitioned was submitted to the court without a jury and without instructions, the court's conclusion is binding on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. ¶1008.]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Suit for partition by Howard F. Kille against John T. Gooch and another, in which William P. Gooch intervened as claimant of the land. From a decree against the intervenor, he appeals. Reversed and remanded, with directions.

This is an action for partition brought in the circuit court of Sullivan county, Mo., by plaintiff, who is the record owner of the undivided three-sevenths of the northwest quarter of the northeast quarter of section 27, township 61, range 20, of said county, against defendant John T. Gooch, the record owner of the undivided three-sevenths of said land, and defendant Wm. H. C. Gooch the record owner of the undivided one-seventh of above land. Defendant Wm. P. Gooch, upon his own motion, was permitted to become a de-

fendant. He filed an answer claiming to be the owner and in possession of said land.

Thomas S. Gooch was the common source of title. The land was conveyed by the United States government to the state of Missouri by act of Congress approved September 28, 1850. It was patented by the state of Missouri to Sullivan county aforesaid, and by the latter sold and conveyed on November 7, 1863, to said Thomas S. Gooch, the common source of title. The latter died intestate, July 31, 1873. He left a widow, who died 12 or 15 years later, and eight children, named as follows: John T. Gooch, James W. Gooch, William H. C. Gooch, Thomas H. Gooch, Sarah A. Gooch, Adam P. Gooch, Isaac T. Gooch, and Charles B. Gooch. Sarah Gooch married John Carter. Adam P. Gooch died before his mother, and was unmarried. Thomas H. Gooch died in May, 1896, and left a widow and four children. His widow was named Luella, and his four children were named: Lulu Seller (née Gooch), Annie Scoles (née Gooch), Emma Johnson (née Gooch), who married Charles A. Johnson, and Thomas H. Gooch (commonly known as Harry).

On April 1, 1913, Isaac T. Gooch and wife, with Charles B. Gooch and wife, for the expressed consideration of \$571.45, conveyed to plaintiff by quitclaim deed the land in controversy. This deed was recorded April 2, 1913. On April 2, 1913, the heirs of Thomas H. Gooch, deceased, conveyed to plaintiff their interest in said land. This gave to respondent the record title to the undivided three-sevenths of said land. On November 13, 1897, the heirs of James W. Gooch, deceased, conveyed said land by quitclaim deed to defendant John T. Gooch, and the deed, after describing the land, contained this recital: "First parties conveying as heirs of Thomas S. Gooch, deceased." On February 15, 1898, Thomas B. Gooch, heir of Sarah A. and John Carter, for the expressed consideration of \$10, executed a quitclaim deed to the land in controversy to defendant John T. Gooch. After describing the land, said deed recites: "First party conveying as heir of Thomas S. Gooch, deceased." The two deeds last mentioned conveyed to defendant John T. Gooch the record title to the undivided two-sevenths of the land in controversy. Defendant Wm. H. C. Gooch holds the record title to the undivided one-seventh of said land, as son and heir of Thomas S. Gooch, deceased, the common source of title. Defendant John T. Gooch is a son of said Thomas S. Gooch, and defendant William P. Gooch is a son of defendant John T. Gooch.

Defendant William P. Gooch in his answer to amended petition alleges that said Thomas S. Gooch, his grandfather, more than 40 years prior to the institution of this suit made a parol gift of said land to his sons John T. Gooch and James W. Gooch, and that more than 30 years prior to the commencement of

this action, said John T. Gooch, father of said defendant Wm. P. Gooch, made a parol gift of said land to the latter and that said John T. Gooch acquired the interest of said James W. Gooch in said land. The answer then alleges that defendant Wm. P. Gooch has been in the actual, exclusive, adverse, and continuous possession of said land, claiming the same as his own absolutely, for a period of 10 years and more next before the commencement of this suit. The answer further alleges that neither plaintiff nor any of those under whom he claims have been in possession of said land for 30 consecutive years, and that neither said plaintiff nor his grantors have ever paid any taxes on said land; that he (appellant) is in possession of said land, and has been for more than one year from the date of the expiration of said period of 30 years. He thereupon asks that the title to said land be declared to be vested in him, and that his right and title thereto be quieted in him as against the plaintiff, and for all proper and equitable relief.

Plaintiff's reply admits that Thomas S. Gooch is the common source of title; that John T. Gooch, by quitclaim deed from the heirs of James W. Gooch, deceased, acquired the undivided one-seventh interest in said land, and no more. Plaintiff denied every other allegation of new matter in said answer. Plaintiff likewise pleads the statute of frauds as a defense against said alleged parol gifts of the land in controversy.

We will consider the objections to the admission of evidence and the exclusion of same and the alleged title of defendant Wm. P. Gooch to the land in controversy in the opinion.

John T. Gooch and Wm. H. C. Gooch filed no answer, but made default. The case was submitted to the court without the intervention of a jury, and without instructions. The court found for plaintiff, and further found that defendant Wm. P. Gooch has no right, title, or interest in the land in controversy, to wit, the northwest quarter of the northeast quarter of section 27, township 61, range 20, in Sullivan county, Mo., and is not entitled to the possession thereof, but that the allegations of plaintiff's petition are true.

The court, after finding and describing the interests of the parties as heretofore shown, decreed a partition of the land, and ordered sale of same, as it could not be divided in kind, etc. Defendant Wm. P. Gooch alone filed motion for a new trial, which was overruled, and the cause duly appealed by him to this court.

J. W. Clapp, of Milan, and A. W. Mullins, of Linneus, for appellant. E. B. Fields, of Browning, and J. M. Wattenbarger, of Milan, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. It is contended by appellant that the court committed error in refusing

to permit defendant John T. Gooch and himself to testify as witnesses in the trial of this cause.

It may be conceded for the purposes of the case that neither John T. Gooch nor his son, William P. Gooch, were competent witnesses, in view of section 6354, R. S. 1909, to testify concerning the alleged parol gift of the land in controversy from Thomas S. Gooch to John T. and James W. Gooch, as alleged in the answer. *Angell v. Hester*, 64 Mo. 142; *Ring v. Jamison*, 66 Mo. 424; *Hughes v. Israel*, 73 Mo. 538; *Wood v. Matthews*, 73 Mo. loc. cit. 482; *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Meler v. Thielman*, 90 Mo. loc. cit. 434, 2 S. W. 485; *O'Bryan v. Allen*, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595; *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955; *Teats v. Flanders*, 118 Mo. 660, 24 S. W. 126; *Curd v. Brown*, 148 Mo. loc. cit. 95, 49 S. W. 990; *Hach v. Rollins*, 158 Mo. loc. cit. 190, 191, 59 S. W. 232; *Miller v. Slupsky*, 158 Mo. 648, 59 S. W. 990; *Baker v. Reed*, 162 Mo. 841, 62 S. W. 1001; *Patton v. Fox*, 169 Mo. loc. cit. 107, 69 S. W. 287; *Smith v. Smith*, 201 Mo. loc. cit. 546, 100 S. W. 579; *Weiermueller v. Scullin*, 203 Mo. loc. cit. 472, 101 S. W. 1088; *Bishop v. Brittain Inv. Co.*, 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; *Lieber v. Lieber*, 239 Mo. loc. cit. 22, 143 S. W. 458; *Goodale v. Evans*, 263 Mo. loc. cit. 229, 172 S. W. 370; *Eaton v. Cates*, 175 S. W. loc. cit. 953; *Leavea v. Southern Ry. Co.*, 181 S. W. loc. cit. 8, and cases cited; *Stone v. Fry*, 191 Mo. App. 607, 179 S. W. loc. cit. 290; *Chandler v. Hedrick*, 187 Mo. App. loc. cit. 670, 173 S. W. 93; *Diggs v. Henson*, 181 Mo. App. 84, 163 S. W. 565; *Bone v. Friday*, 180 Mo. App. 577, 167 S. W. 599; *Taylor v. George*, 176 Mo. App. loc. cit. 222-223, 161 S. W. 1187; *Leavea v. Railroad*, 171 Mo. App. loc. cit. 27, 153 S. W. 500. The testimony sought to be elicited from John T. Gooch in behalf of his son and codefendant, Wm. P. Gooch, did not relate to the alleged parol gift of said land from Thomas S. Gooch, deceased, to his two sons John T. and James W. Gooch. On the other hand, the defendant John T. Gooch was offered as a witness in behalf of appellant, to prove that he had made a parol gift of said land to defendant Wm. P. Gooch more than 30 years prior to the commencement of this suit; that his said son had been in the sole and exclusive possession of said land for 29 years prior to the commencement of this action, and holding it for himself absolutely; that he (John T. Gooch) had paid the taxes continually on this land for the last 40 years before the trial; and that nobody else had paid any taxes on it.

Even if it should be conceded that appellant failed to establish the fact that his grandfather had made a parol gift of said land to his father and uncle, as alleged in the answer, yet it does not follow that John T. Gooch was an incompetent witness to prove that while in possession of above land

he made a parol gift of same to defendant Wm. P. Gooch, and placed him in possession thereof under said gift. Nor does it follow that John T. Gooch was not a competent witness to testify in behalf of his son as to the adverse holding of the latter after he was placed in possession by his father under the parol gift from the latter. Thomas S. Gooch was not a party to the alleged transaction between John T. Gooch and his son. If John T. Gooch, while in possession of the land, made a parol gift of same to appellant and put him in possession thereof, it constituted a separate and distinct transaction, in which the deceased, Thomas S. Gooch, was not involved. The defendant John T. Gooch was therefore a competent witness to testify as to those matters which appellant offered to prove by him, and the court erred in excluding him as a witness for that purpose. *Clara Bajohr v. Alma M. Bajohr*, 184 S. W. 76, not yet officially reported, opinion by Graves, P. J.; *Marion Ray et al. v. Lou Westall et al.*, 183 S. W. 629, not yet officially reported, opinion by Bailey, C.; *Lead & Zinc Inv. Co. v. Lead Co.*, 251 Mo. loc. cit. 741, 158 S. W. 369; *Brown v. Patterson*, 224 Mo. loc. cit. 651, 652, 124 S. W. 1; *Freeland v. Williamson*, 220 Mo. loc. cit. 231, 119 S. W. 560; *Welermueller v. Scullin*, 203 Mo. loc. cit. 469, 101 S. W. 1088; *Lynn v. Hockaday*, 162 Mo. loc. cit. 121, 61 S. W. 885, 85 Am. St. Rep. 480; *Shanklin v. McCracken*, 140 Mo. loc. cit. 356, 41 S. W. 898; *Banking House v. Rood*, 132 Mo. loc. cit. 258, 33 S. W. 816; *First Nat. Bank of St. Charles v. Payne*, 111 Mo. 297, 20 S. W. 41, 33 Am. St. Rep. 520; *Bates v. Forcht*, 89 Mo. loc. cit. 126, 1 S. W. 120; *German-American Bank v. Camery* (App.) 176 S. W. loc. cit. 1077; *Denning v. Butcher*, 91 Iowa, 432, 433, 59 N. W. 69; *Kosteletzky v. Scherhart*, 99 Iowa loc. cit. 124, 125, 68 N. W. 591.

(a) The conclusions, heretofore reached in regard to the competency of John T. Gooch to testify in regard to the matters therein enumerated apply with equal force to the competency of appellant to testify concerning the matters his counsel offered to prove by him. The court therefore committed error in excluding the testimony of defendant Wm. P. Gooch in respect to the matters offered to be proven by him.

[2] II. It is insisted by appellant that the evidence in the case is sufficient to show a parol gift of the land in controversy by Thomas S. Gooch to his sons John T. and James W. Gooch. As we are urged to reverse and remand the cause, with directions to the trial court to enter a judgment for appellant, we will briefly consider the above question. The only testimony relating to above subject is that of J. W. Cassity. He testified that Thomas S. Gooch was at his father's house in 1863 or 1864, and he heard him say that he calculated for John T. and Jim to have the land in controversy. This testimony was competent for what it was worth, tending to show adverse possession

upon the part of appellant. The answer of defendant Wm. P. Gooch does not allege that his father, John T. Gooch, entered into the possession of the land in controversy under the alleged parol gift from Thomas S. Gooch to John T. and James W. Gooch. In order that a parol gift of land may become effective and pass to the donee the equitable title thereto, it is necessary that possession should be taken under and pursuant to the parol gift. In *Dozier v. Matson*, 94 Mo. loc. cit. 332, 7 S. W. 270, 4 Am. St. Rep. 388, Judge Sherwood, in discussing this subject, said:

"It is well settled that, where a party has been placed in possession of a tract of land, and on the faith of an oral gift of the same to him has made valuable and lasting improvements thereon, this is a sufficient basis upon which the donee may compel a conveyance to him of such land. When he does this, it constitutes a valuable consideration, and he stands before a court of equity in the attitude of a purchaser and with equal rights and remedies; the donee's status in such case falling within the domain of the doctrine of part performance."

In *Caffee v. Smith*, 101 Mo. loc. cit. 233, 19 S. W. 1061, this court said:

"The defendant being placed in possession of the premises in question by R. R. Smith, his son, in accordance with a valid parol agreement, made upon a valuable consideration, and at a time when R. R. Smith was not in debt, and having performed that agreement, he acquired such an equity in the premises as would have warranted specific performance against the son and in favor of the father. *Waterman on Specific Perform.* §§ 270, 272, 274-276; *Fry on Specific Perform.* 180, 181; 2 *Story Eq. Jur.* (13th Ed.) pp. 76, 77."

In the cases cited by appellant on this subject possession of the land was taken in each instance under the parol gift. The answer of appellant alleges that his grandfather made a parol gift of said land to his sons John T. and James W. Gooch, but failed to allege that either took possession of said land under said alleged parol gift. Neither is there a syllable of evidence in the record tending to show that either John T. or James W. Gooch took possession of the land in controversy under said alleged parol gift from their father.

Appellant therefore, under his answer and proof, is not entitled to have the cause reversed and remanded, with directions to enter a decree in his behalf, based upon said alleged parol gift of the land from Thomas S. Gooch to his said sons.

[3] III. It is contended by appellant that his title to the land in question was perfect and absolute, under the general statute of limitations of ten years, when this suit was commenced. The trial court held to the contrary, and we are not prepared to assert, either as a matter of law or fact, that its ruling in respect to this matter is erroneous. The case was submitted without instructions, and the conclusion reached by the lower court is binding upon us in this proceeding.

IV. On account of the error heretofore pointed out, in excluding defendant John T. Gooch and appellant as witnesses, the cause

is reversed and remanded, with directions to the trial court to proceed with same in conformity to the views here expressed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All concur.

FRICK et al. v. MILLERS' NAT. INS. CO.
(No. 17710.)

(Supreme Court of Missouri, Division No. 2,
March 31, 1916.)

1. INSURANCE — 387 — CONDITIONS — WAIVER-KNOWLEDGE.

The insurer's express waiver of a condition of its policy relating to the vacancy of the insured premises, and its indorsement that they might remain vacant if the insured, in consideration of a reduction in the basis rate, should fully comply with a warranty requiring him to maintain a watchman with an approved watch clock and to keep watch clock records and forward them to a named party as a basis for the service credit, was not a waiver of compliance with the warranty, where the insurer had no knowledge of the insured's breach thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1025; Dec. Dig. — 387.]

2. INSURANCE — 334(2) — CONDITIONS — WATCHMAN CLAUSE—FORFEITURE.

Under a warranty whereby insured, in consideration of a reduction of the basis rate of the policy, agreed to maintain a watchman day and night and at all times when the machinery was not running, except when other employes were on duty, defining the duties of the watchman and requiring the insured to date and keep all watch clock records, and after 90 days to forward them to a named party to determine whether the service conformed to the requirements for credit, and that on failure to observe such conditions the credit allowed for the service should be forfeited for 6 months, and the amount of the forfeit should be added to the first assessment made after the breach was established, the insured's breach of the warranty did not limit the insurer to the enforcement of the penalty, but entitled it to forfeit the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 848-850; Dec. Dig. — 334(2).]

Appeal from Circuit Court, Henry County;
C. A. Calverd, Judge.

Action by J. A. Frick and another against the Millers' National Insurance Company. From a judgment of nonsuit with leave, which nonsuit the court refused to vacate, the plaintiffs appeal. Affirmed.

Fyke & Snider, of Kansas City, O. P. Engenbright, of Independence, and Parks & Son, of Clinton, for appellants. White, Hackney & Lyons, of Kansas City, W. E. Owen, of Clinton, and Barger & Hicks, of Chicago, Ill., for respondent.

FARIS, P. J. Plaintiffs sued defendant in the circuit court of Henry county on a policy of insurance for a fire loss. The court nisi sustained a demurrer to the evidence of plaintiffs; whereupon plaintiffs took a

nonsuit, with leave, which nonsuit the court refused to vacate and plaintiffs appealed.

Defendant is a mutual fire insurance company, having its chief office in Chicago, Ill., but authorized to do business in Missouri, and we apprehend in Kansas as well, and having in Kansas City, Mo., a department or agency managed by one Charles H. Ridgway. On the 12th day of December, 1911, defendant issued to the Caney Mill & Elevator Company, a corporation (called hereinafter the Caney Company) doing business at Caney, Kan., a policy of fire insurance, insuring for a term of five years the machinery of the assured's flouring mill for \$5,000, the building for \$3,000, and stock on hand for \$2,000. The initial premium was \$212.50, which was paid in cash. There was a further provision that the assured should make and deposit, and it did make and deposit, its premium note for the additional sum of \$2,125 to cover such assessments as the board of directors of defendant should make against assured under defendant's charter and by-laws. Attached to said policy was what is called in the record a "watchman, with approved watch clock clause." The policy also contained a provision forbidding the mill's remaining idle for a longer period than 10 days, which was by an indorsement modified to read 60 days. Plaintiff Home National Bank (called hereinafter the Bank), had possession of the policy of insurance as mortgagee to secure to it the payment of a \$3,500 loan and the interest thereon. On April 20, 1912, finding that the mill would remain idle longer than the 60 days allowed by the terms of the policy, the plaintiff Bank wrote to the agent of defendant, saying that consent of defendant being necessary to continue policy in force after a vacancy of 60 days, asked that consent, and procured the placing on the policy 2 days thereafter of an indorsement allowing the mill to continue idle till the next harvest. This indorsement is as follows:

"In consideration of the full compliance by the assured with the watchman warranty attached to this policy permission is hereby granted to the insured to remain inoperative until next harvest if necessary." (Italics ours.)

The watchman warranty referred to in the indorsement last above is as follows:

"In consideration of a reduction of twenty-five cents (25c.) in the basis rate, at which this policy is written, the assured hereby agrees to maintain a watchman provided with an approved watch clock to watch day and night at all times when the machinery is not running, except when other employes are on duty, and then he is relieved from duty only in the day time while such other employes are actually on the premises; and it is particularly understood and agreed that the first duty of the watchman is the care and examination of the property in his charge, and he shall be required to examine all fast running bearings, commencing immediately after machinery shuts down, and make at least three thorough and careful examinations of machinery and bearings, one each hour after machinery stops running; and there shall be at

least one watch clock station on each floor of each building covered by this policy, including the engine and boiler house, whether insured or not, to each of which stations he shall make hourly rounds while on duty; and the assured further agrees to date all watch clock records and file same in a fire proof safe, if kept on the premises, or in some safe place outside the premises not endangered by a fire therein, retaining same for a period of not less than ninety (90) days, subject to examination of inspectors; and at the termination of the ninety (90) days periods ending September 1, December 1, March 1, and June 1, all records to be forwarded to the Mutual Fire Prevention Bureau at Oxford, Mich., for examination and checking, to determine whether or not the service conforms to the requirements for above credit; failure on the part of the assured to furnish records as per this agreement to be prima facie evidence that the assured is not entitled to credit for the service maintained.

"It is hereby warranted by the assured that the conditions herein named shall be observed, and failing to do so, it is agreed that the credit allowed for the service shall be forfeited for a period of six months, the amount so forfeited to be added to the first assessment made after the breach of conditions is established.

"Attached to and made part of policy No. 35949 of the Western Millers' Mutual Fire Insurance Company, of Chicago, Ill."

When this policy was issued the assured, Caney Company, wrote to defendant that some change would occur in the management of the mill about January 1, 1912, and asked that a former policy be extended and kept in force till that time leaving to the new management to insure or not as it saw fit. In reply the defendant wrote to the Caney Company on December 6, 1911, the below letter, formal parts and signature omitted, viz.:

"Your favor of December 5th, explaining that there is likely to be a change in the management of your company after January 1st, is at hand, and we note your request to hold our insurance binding until that time, without issuing a new contract.

"Inasmuch as the new contract can be transferred or even canceled if the new parties do not wish to continue it, my suggestion is that the application be signed, and sent to us for renewal, so that a policy may be issued and in your possession. It is not always satisfactory to the company or the assured to extend a policy by indorsement after it has expired. For this reason, we would suggest that the policy be renewed in the regular form."

Thereafter, and on December 12, 1911, the policy in suit was issued (or perhaps, to be more exact, was renewed). It contained, in addition to the clauses above referred to, some of which are set forth, this provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock; or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; * * * or if the interest of the insured be other than unconditional and sole ownership; * * * or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by vol-

untary act of the insured, or otherwise; or if this policy be assigned before a loss."

About the 28th of December, 1911, the Caney Company sold the mill to one McKissick, who on January 28, 1912, sold it to the plaintiff Frick. On March 29, 1912, the Caney Company wrote to defendant advising it of the sale of the mill to Frick and requesting a change in the policy, so as to make same payable to Frick after payment of amount due plaintiff Bank, also asking cancellation of the item of \$2,000 insurance borne by this policy on stock on hand. In answer to this letter, which had been sent to the defendant's Chicago office, defendant's agent, Ridgway, on the 16th day of April, 1912, wrote to the Caney Company the following letter, which, omitting signature and address, is, to wit:

"As we are the Southwestern representative of the Millers' National Insurance Company of Chicago, they have referred to us your letter to them under date of April 1st, requesting them to transfer to J. F. Frick their policy 35949, covering on the milling property.

"We note you want the amount on stock out of the policy, so we are herewith handing you application for the rewriting of the policy for \$3,000.00, \$3,000.00 on building, and \$5,000.00 on machinery. Kindly have Mr. Frick complete this application, answering all questions pertaining to the risk, sign and return to us, and the new policy will be issued to him."

Plaintiff Frick on the 19th day of April, 1912, replied to the above letter thus:

"Your letter to the Caney Mill & Elevator of April 16th, received, and in reply will say that am not operating the plant, and have not yet decided if will. There is a policy which is perhaps the one that you want to renew, that wanted the Caney Company to send in in January and have it cut down to enough to protect the mortgage, but they did not do it, so why not let it eat up the premium which it will by the first of June, and it only protects the \$3,500.00 that the bank has, anyway. By that time will have the plant sold or in operation, and if do not will arrange for enough to protect the bank."

Prior to all this, and on January 25, 1912, and just the day before plaintiff Frick bought the mill, he wrote to defendant this letter:

"Am here having the title to the Caney Mill & Elevator Company examined, and if all right will take the plant. Will have Mr. Dolezal send the policies in for transfer, and you can send the blanks to me at Eldorado Springs to fill in. The bank at Caney holds \$5,000 on the plant which will run for a time."

To which defendant replied thus:

"Answering yours of the 25th, which was held awaiting the writer's attention. We note you contemplate buying the mill at Caney, and as soon as we receive your further advice that you have bought the mill, and how you desire the application to be written, we will take the matter up with you further."

Nothing further was done toward making application for a policy or toward the issuance of a new policy to Frick; nor was the policy sent in for transfer. The policy continued in custody of plaintiff Bank, as it had been before the sale to Frick, and was neither assigned in writing nor was it ever physically delivered to Frick. But it is evident that the Caney Company was willing

to and intended to assign it to Frick. No watchman was put in charge of the mill in accordance with the requirements of the policy. The nature of the attempted compliance with the policy requirements in that behalf the below excerpt from Frick's testimony discloses fully:

"Q. You didn't notice the rider on the policy authorizing the mill to remain idle, only when there was a strict compliance? A. Yes, sir; Mr. Sharpless called my attention to it when I was down there, and he suggested that I hire a watchman. I told him I would do that, because I wanted somebody down there, and I went down and hired Mr. Baumgarden. That is the only watchman I employed. I took him over there and took him through the plant, and he looked through the water barrels, and hunted up enough buckets for all of them. We got enough buckets to comply with the request, and I told him to put a lot of water in them, that they needed filling up occasionally, to go over there and fill them twice a day, and, if anybody showed any sign of molesting it, to report it to me. I never heard from him though until after the fire. I never got down there after I got him employed. Q. Did you fix the time twice a day when he was to see it? A. I believe that is what I told him. I was to pay him \$10 a month. I gave him a check for a month's pay when I hired him."

The mill was totally destroyed by fire on May 15, 1912, and notice thereof was by the Bank given to defendant by wire. Answering this notice by a letter directed to the Caney Company, defendant stated that its adjuster had left for Caney, Kan., and that he would attend to the adjustment and to the making of the necessary proof of loss. On the 18th day of May, 1912, the attorneys for plaintiff Frick wrote to defendant "for Frick," advising defendant "that Mr. Frick makes claim for the amount of said policy on account of the loss," and asking that forms of proof of loss be sent. This letter defendant answered, referring to the loss as that under policy issued to Caney Mill & Elevator Company, saying that the adjuster of the defendant had left for Caney, Kan., to attend to the loss, and that he would prepare the necessary proofs of loss for the assured. Defendant's adjuster reached Caney, Kan., looked over the ruins, saw the cashier of the Bank, who showed him the policy of insurance, and called his attention to the clause permitting the mill to be idle. The adjuster thereupon said defendant would not assume liability, because it had no proper knowledge of the change in the ownership of the property, and he said, upon being shown the indorsement permitting the mill to be idle, that he had not been advised of the issuance of such an indorsement.

[1] I. There is no contention but that there was a failure on the part of the assured to comply with the watchman warranty and with the provisions of the vacancy clause in the policy. Such failure on assured's part is palpably, but tactily, conceded in the brief. But, looking to the last point first, it is urged that vacancy was waived, because the policy was not canceled when defendant was advised of such vacancy.

We need not trouble ourselves with the

substantive fact of waiver as arising from failure to cancel the policy after vacancy. Learned counsel for the moment lose sight of some compelling facts. There was an agreement to waive vacancy, and express "permission to remain inoperative till next harvest if necessary" was granted upon condition of "full compliance by the assured with the watchman warranty." So we need not consider whether there was an actual, but tacit, waiver to be deduced from defendant's acts, or a legal waiver, which inevitably followed its acts as a matter of law. For we have an express waiver upon condition, which is amply sufficient for plaintiffs' purposes if the condition was complied with. Again, it is tactily confessed that it was not complied with. But that we need not stand on, for the record plainly shows a lack of compliance with this condition of waiver. There is no showing that defendant, or any agent of defendant, knew of assured's failure to comply with the watchman clause. There can be no waiver when there is no knowledge. Since, then, the express waiver was on a plain condition, which condition without defendant's knowledge was violated, there is no waiver in the case.

[2] But plaintiffs urge that no such meaning as that a watchman must be employed and a watch clock must be used can be deduced from the terms of the watchman warranty as the same is found in the policy. It is contended that this clause provides a money penalty only for its violation, and therefore such penalty is all that can be insisted on by defendant. This is true as this clause originally stood in the policy. If there were nothing else in the case, if as to the matter of operation and vacancy there were no question raised, then undoubtedly plaintiffs would be correct in this contention. But on the 22d day of April, 1912, at the written request of the Bank, at a time when the 60 days of vacancy grace lacked but 4 days of expiration, defendant gave an extension of vacancy by an indorsement permitting the mill to remain inoperative and vacant till next harvest, on condition of full compliance with the watchman warranty. If that agreement simply meant nothing, as learned counsel for plaintiffs contend, why take the trouble to make it? The defendant in such view said, in effect, to the assured that it would permit the mill to continue inoperative indefinitely, at a large increase in the hazard, provided the assured, as a consideration for such extra hazard, would do nothing more than it was already bound to do. It was either a consideration for an otherwise unwarranted vacancy or it was not. No one can read it without concluding that it meant that a watchman must thereafter be provided and maintained. No other meaning can be attached to the use of the words "full compliance with the watchman warranty." The policy by other provisions which we have set out was to become

void if it continued vacant for more than 60 days. When the mill burnt, it had then been vacant for at least 19 days more, or 75 days in all. Such vacancy was by the express terms of the policy forbidden, and ipso facto rendered the policy void. But a forfeiture was to be saved if plaintiffs maintained a watchman whose presence and attention to his duties were to be proved by a watch clock. Plaintiffs confessedly did not comply with either of the conditions which were agreed on as sufficient to save a forfeiture in the event of a prohibited vacancy. We do not think they showed facts nisi sufficient to allow them to recover and hold that the learned trial court was right in sustaining a demurrer to the evidence.

The point as to whether there can be a recovery upon this policy by Frick under the facts disclosed ceases to be necessary to a decision of the case. So we lay it aside till we shall meet it again in a case wherein it is vital.

We conclude that the case should be affirmed. Let this be done. All concur.

HORSTMANN v. CAPITOL LIFE INS. CO. OF COLORADO. (No. 14276.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

INSURANCE — 388(3) — DEFAULT IN PREMIUM — "WAIVER" — KNOWLEDGE.

Where a policy of insurance issued by defendant and assigned by the insured to plaintiff, a creditor, automatically lapsed and became forfeited by reason of the failure to pay the second annual premium on or about September 6, 1910, a letter of defendant written September 27th when it had no knowledge of the insured's death or of plaintiff's interest therein, addressed to the insured, and offering to assist him in carrying the policy by an extension of time, or by permitting quarterly payments, etc., was not a waiver of the forfeiture; as a "waiver" in law is the intentional relinquishment of a known right, and could not be found unless it appeared that the act relied upon as constituting it was done with knowledge of all the material facts which would probably have influenced the defendant's conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1027; Dec. Dig. — 388(3).

For other definitions, see Words and Phrases, First and Second Series, Waiver.]

Appeal from St. Louis Circuit Court; Thomas O. Hennings, Judge.

"To be officially published."

Action by George W. Horstmann against the Capitol Life Insurance Company of Colorado. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert M. Zeppenfeld, of St. Louis, for appellant. Stewart, Bryan & Williams, of St. Louis, for respondent.

ALLEN, J. This is a suit upon a policy of insurance issued by the defendant insurance company upon the life of one August Goerts on August 6, 1909. It appears that Goerts

was indebted to plaintiff, an agent and local manager of defendant, and, being unable to otherwise secure the indebtedness, he obtained, through plaintiff, this policy for \$2,000 upon his life, paid the first annual premium thereon, and assigned the policy to plaintiff. The policy in terms provides that an assignment thereof shall not be binding upon the company until it is filed at the company's home office. The assignment thereof to plaintiff was not so filed, and defendant had no knowledge that plaintiff had or claimed any interest therein.

The record discloses that the second annual premium, which was due on August 6, 1910, was never paid. By the terms of the policy a grace of one month was allowed for the payment of premiums, subsequent to the first premium, during which time the insurance remained in force. This period of grace for the payment of the second annual premium elapsed on September 6, 1910, the premium remaining unpaid; and by the terms of the policy the insurance became thereby forfeited. On September 24, 1910, Goerts died. Prior to the death of the assured defendant had not communicated with him in any way regarding the payment of this second annual premium, but on September 27, 1910, i. e., three days after the death of the assured, defendant, being ignorant of such death, mailed the following letter from its home office in Denver, Colo., addressed to the assured at his residence in the city of St. Louis, viz.:

"Dear Sir: When you applied for your policy, we are sure that you were satisfied as to the many advantages contained in the contract, both for yourself, family, and estate, and that you did not intend to lapse or discontinue it at this early date. The amount of the premium is \$51.08.

"It occurs to us if you are finding it inconvenient to meet the whole of your premium at this time we can suggest some means of assisting you, such as granting an extension of several months accompanied by a small cash payment, or making the premium payable semi-annually or quarterly.

"You cannot lapse this policy without loss to yourself or your dependents. Therefore write us to-day. To-morrow may be too late."

At the close of plaintiff's case a demurrer to the evidence was interposed by defendant, which was overruled; but at the close of all the evidence in the case defendant offered a like demurrer which was sustained. Plaintiff thereupon took a nonsuit, and, after unsuccessfully moving to set it aside, appealed.

While questions relating to the validity of the assignment, and to plaintiff's right to recover upon a policy thus procured by him in the company which he represented, are discussed in the briefs, we need not consider them in the view which we take of the case. That the policy automatically lapsed by its terms, and the insurance became forfeited, by reason of the failure to pay the second annual premium on or before September 6, 1910, cannot be doubted. But it is argued by

appellant that defendant's letter of September 27, 1910, quoted above, constitutes such evidence of a waiver of the forfeiture as to make this matter a question for the jury. But, as this letter was written after the death of the insured, defendant having no knowledge of the death, we do not perceive how any waiver of the forfeiture may be predicated thereupon. Waiver in law consists of the intentional relinquishment of a known right. And before a waiver can be found it must appear that the act relied upon as constituting it was done with knowledge of all the material facts which would probably have influenced the conduct of the party against whom the waiver is asserted. Had defendant known that the assured was dead, the letter, of course, would not have been written; and, not having had knowledge of this material fact, defendant cannot be held to have waived its rights under the policy by writing the letter. The policy by its terms lapsed on September 6, 1910; and the death of Goerts thereafter, without anything having been done in the meantime to operate as a waiver, fixed the rights of the parties to the contract of insurance. While the defendant could still voluntarily waive any or all of its rights in the premises, no such waiver can be predicated upon a letter subsequently written by defendant in the belief and upon the implied understanding that the assured was then alive. The following authorities relied upon by respondent fully sustain these views, viz.: *Patterson v. Equitable Life Assurance Society*, 112 Ark. 171, 165 S. W. 454; *Kennedy v. Metropolitan Life Ins. Co.*, 116 La. 66, 40 South. 533; *McGeachie v. North American Life Ass'n Co.*, 20 Ontario App. 187; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *United Order, etc., v. Hooser*, 160 Ala. 334, 49 South. 354; *Harvey v. Grand Lodge, A. O. U. W.*, 50 Mo. App. 472; *Bliss on Life Insurance*, § 190.

Appellant places much reliance upon the decision in *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410. But, in so far as the ruling in that case conflicts with the views expressed above, we must respectfully decline to follow it.

Appellant's reasoning is that the letter is evidence that from September 6, 1910, to the date of the insured's death, the defendant continued to carry the policy on its books as in force; the forfeiture being waived. But we think that this argument is fallacious, for the reason, if none other, that the letter cannot be construed to mean more than that defendant was at all times willing to accept the premium provided that the assured was alive at the time and complied with the rules and regulations of the company regarding reinstatement, in so far as at least as the company might see fit to insist thereupon. And the evidence shows that the company's rules required that an application and a health cer-

tificate accompany the premium in such cases. But, aside from this, to establish a waiver it devolved upon plaintiff to show some outward act on the part of defendant manifesting an intention to waive the forfeiture and done with full knowledge at the time of all of the facts which might be reasonably expected to have influenced its conduct in the premises.

The judgment must be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

TUEMLER v. ST. LOUIS COFFEE & SPICE MILLS. (No. 14283.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 13, 1916.)

GARNISHMENT §164—CONNIVANCE BETWEEN GARNISHEE AND DEFENDANT—SUFFICIENCY OF EVIDENCE.

In garnishment proceedings by the divorced wife of a city salesman of the garnishee, which claimed that the salesman's salary was payable in advance, evidence held sufficient to justify finding that the garnishee connived with the salesman to defeat the wife's rights by employing him through an arrangement to pay his salary in advance.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 302; Dec. Dig. § 164.]

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

"Not to be officially published."

Garnishment proceedings by Luella Tuemler against the St. Louis Coffee & Spice Mills, garnishee of Charles Tuemler. From a judgment for plaintiff, the garnishee appeals. Judgment affirmed.

Holland, Rutledge & Lashly, of St. Louis, for appellant. William H. Killoren and Taylor R. Young, both of St. Louis, for respondent.

NORTONI, J. This is a garnishment proceeding. Plaintiff is the divorced wife of defendant Charles F. Tuemler. In the divorce proceeding, the court awarded her a judgment for alimony at the rate of \$30 per month. Defendant paid two installments of the alimony, but refused to pay more. Defendant was earning about \$116 a month at the time; but this he surrendered, it is said in order to defeat the collection of the alimony, and entered the employ of the garnishee, St. Louis Coffee & Spice Mills, at a salary of about \$100 per month. Upon defendant's entering the employment of the latter, plaintiff caused it to be summoned in due time thereafter as a garnishee under execution on her judgment for alimony against defendant. The garnishee defends on the ground that it did not owe plaintiff's husband anything, for that it employed him under a contract whereby his salary was payable in

advance, and it is said the salary was so paid. Plaintiff, in her reply to the answer of the garnishee, averred that the garnishee corruptly entered into the agreement to pay defendant his salary in advance in fraud of her rights in the premises. The case was tried before the court without a jury, and the issue relates to this matter. The court found the issue for plaintiff and against the garnishee in the view that it fraudulently connived with plaintiff's husband in the contract of hire as stated.

It is argued on the part of the garnishee that the court erred in its finding because there is no evidence whatever in support of it, but we are not so persuaded. It appears defendant's husband was employed at \$116 per month, and, upon his wages being garnished on the judgment for alimony in favor of his wife, he quit the employment and entered that of defendant for a lesser salary, but it is said under an agreement whereby he should receive his pay in advance. Plaintiff's husband entered the employ of defendant about the middle of June, and plaintiff testifies that she notified the president of the garnishee, St. Louis Coffee & Spice Mills, on June 16th that she proposed to garnishee the wages of her husband on her judgment, and he replied to her that he would see she did not get a cent.

In the first place, it is somewhat unusual to employ city salesmen, as was done in this case, under an agreement to pay their salary in advance, though it is competent, of course, to do so. However, this affords a circumstance to be considered, and when taken together with the statement of the president of the garnishee that he would see plaintiff did not collect a cent on garnishment levied against his company to compensate her judgment for alimony against defendant, an ample inference is afforded that the garnishee fraudulently connived with defendant in employing him through an arrangement to pay his salary in advance so as to defeat her rights.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

TUEMLER v. ST. LOUIS COFFEE & SPICE MILLS. (No. 14438.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

"Not to be officially published."

Garnishment proceedings by Luella Tuemler against the St. Louis Coffee & Spice Mills, garnishee of Charles F. Tuemler. From a judgment for plaintiff, defendant appeals. Affirmed.

Holland, Rutledge & Lashly, of St. Louis, for appellant. Taylor R. Young, of St. Louis, for respondent.

NORTONI, J. This is a garnishment proceeding. It involves the same parties and facts similar to those set forth in the case of Tuemler v. St. Louis Coffee & Spice Mills, Garnishee of Charles F. Tuemler, 184 S. W. 1166, decided today.

The judgment should be affirmed for the reasons stated in the opinion in that case. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

STATE ex rel. O'DONNELL v. BOEPPLE et al. (No. 14281.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. APPEAL AND ERROR ⇐979(5)—REVIEW—DISCRETION OF TRIAL COURT.

The granting of a new trial on the ground that the damages were excessive, resting in the sound discretion of the trial court, will not be reviewed, unless a manifest abuse amounting to arbitrary conduct, prejudice, or corruption appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3873; Dec. Dig. ⇐979(5).]

2. APPEAL AND ERROR ⇐1015(4)—REVIEW—REMITTITUR.

In a personal injury action, the question of the assessment of damages being a matter peculiarly for the jury, the appellate court will not, the trial court having set aside a verdict as excessive, reinstate the verdict and order a remittitur; for that would amount to an invasion of the jury's province.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3866, 3871-3873; Dec. Dig. ⇐1015(4).]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

"Not to be officially published."

Action by the State of Missouri, on the relation of Jennie O'Donnell, against John C. Boepple and another. From a judgment setting aside the verdict and awarding new trial, plaintiff appeals. Affirmed.

Charles A. Lich, of St. Louis, for appellant. Thos. J. Rowe, Jr., of St. Louis, for respondents.

NORTONI, J. Plaintiff prosecutes this appeal from an order of the court setting the verdict aside because the damages awarded by the jury were excessive.

[1] Defendant Boepple is constable, and John J. Willmar was his deputy. A replevin suit was instituted against plaintiff, and the writ delivered to the constable. In serving the writ of replevin Willmar, the deputy constable, it is said, committed an assault on plaintiff so as to inflict severe and permanent injuries upon her. The suit proceeds against the constable and the sureties on his bond on account of this. At the trial the jury awarded plaintiff a recovery in the amount of \$4,150, and this verdict the court set aside on defendant's motion because, as the order of record recites, the damages assessed are excessive. Plaintiff prosecutes the appeal from this

judgment, and urges that the verdict should be reinstated here. Obviously the matter in judgment is one so peculiarly within the sound discretion of the trial court that it may not be reviewed on appeal in the absence of a showing of arbitrary conduct, of prejudice or passion or corruption, or something of that character on the part of the court. Such must be true in the very nature of things; for the trial court possesses an opportunity in witnessing the proceedings at the trial which is not present on appeal. The trial court sees the witnesses on the stand, and is thus enabled to form an opinion respecting their veracity, their good faith, and as to whether or not they are biased or prejudiced for one party or another. It is also within the purview of the trial court to discover whether improper influences may or may not have entered into the formation of the verdict. These considerations render it peculiarly proper that the question of granting new trial on account of the excess of a verdict should remain with the trial court immune from interference, except for some substantial reason. In this view it is said in *McCloskey v. Pulitzer Pub. Co.*, 163 Mo. 22, 32, 63 S. W. 99, 101, that:

The appellate courts "defer very largely to the action of the trial courts with respect to such matters, and that a judgment is rarely ever reversed upon the ground of the unwarranted exercise of the power of such courts under such circumstances."

In a more recent case the Supreme Court said, in speaking concerning the question presented here:

"That is a point peculiarly within the province of the trial judge. It is one that he is better qualified to judge than an appellate court. The law puts the important responsibility upon him, and it advances the cause of justice when the trial judge courageously performs that duty." *Morrell v. Lawrence*, 203 Mo. 363, 381, 101 S. W. 571, 575 (120 Am. St. Rep. 660, 11 Ann. Cas. 650).

There is nothing in the record before us to indicate that the trial court arbitrarily exercised its power in respect of this matter or acted from bias or prejudice or baneful motive, and it is therefore, of course, presumed that its discretion was wisely exercised.

[2] But it is argued it is competent for this court to order a remittitur, and therefore we should indicate the amount plaintiff should recover and permit plaintiff to remit, and then reinstate the judgment accordingly. It is to be conceded that remittiturs are sometimes ordered where a proper showing touching the matter appears in the record, but such power is to be exercised either in the trial or the appellate court only where the court can reasonably estimate the excess in the verdict, and no injury will be entailed upon defendant through entering such remittitur. But, where the case presented is one for damages accrued on account of personal

injuries received, and it is clear that there is no positive criterion for determining what the damages ought to be, the court should hesitate to order a remittitur for that the matter pertains rather to the functions of the jury in ascertaining the fact, and it may be that such an order so arbitrarily made would work a hardship on defendant. See *Smoot v. Kansas City*, 194 Mo. 513, 525, 92 S. W. 363.

There appears no sufficient criterion here to indicate what damages plaintiff should recover for and on account of the injuries received, and the matter is so peculiarly one for the jury that it should be remitted to that tribunal to be disposed of under the supervision of the trial court.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

AMERICAN MFG. CO. v. ALT. (No. 14233.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

1. COURTS \S 91(1) — RULES OF DECISION — STARE DECISIS.

Under the Constitution it is the duty of Courts of Appeal to follow the last previous decision of the Supreme Court on any question of law or equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 313, 325; Dec. Dig. \S 91(1).]

2. TAXATION \S 543(6)—RIGHT OF RECOVERY —DURESS.

A complaint in an action to recover paid taxes alleging that they were paid to the collecting officer, not arresting, but threatening to prosecute, plaintiff, and that unless they were paid "it was impossible for plaintiff to continue in business as a manufacturer in said city," is demurrable as not showing payment under duress.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1012; Dec. Dig. \S 543(6).]

3. MANDAMUS \S 118—REMEDY FOR WRONGFUL ENFORCEMENT OF TAXES.

Where one is threatened by a tax collecting officer with prosecution unless he pays a tax, he may tender the amount he deems due, and, on refusal of the collector to accept it, proceed by mandamus to ascertain his rights.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 250; Dec. Dig. \S 118.]

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

"Not to be officially published."

Action by the American Manufacturing Company against Louis Alt. From a judgment for defendant, plaintiff appeals. Affirmed.

Barclay, Orthwein & Wallace, of St. Louis, for appellant. E. C. Slevin, of St. Louis, for respondent.

NORTONI, J. Plaintiff prosecutes this appeal from a judgment against it on demurrer to its petition. The petition is in three counts. The material averments presenting

the question for consideration here are the same in each count and it is therefore unnecessary to set forth more than one.

The first count of the petition is as follows:

"(1) The American Manufacturing Company, plaintiff, states that it was at all times hereafter stated a corporation duly organized and incorporated under the laws of the state of West Virginia and licensed to do business in the state of Missouri, and had at said times in the city of St. Louis an office and factories for the manufacture of bagging, and was doing business in the city of St. Louis as a manufacturer, and that defendant, Louis Alt, is and was at said times the license collector of and for the city of St. Louis, Mo.

"(2) Plaintiff further states that the greatest aggregate amount of raw materials of plaintiff on hand in the city of St. Louis at any one time between the first Monday of March and the first Monday of June of the year 1908 included jute butts, in the original packages, of the value of \$75,855, imported by plaintiff from foreign countries for the purpose of being manufactured by it into bagging and then awaiting manufacture.

"(3) Plaintiff further states that said defendant demanded that plaintiff should pay (in addition to all taxes on all of plaintiff's other raw material, finished products, tools, machinery, and appliances which plaintiff paid), as a condition to the issuance of its license for the then succeeding year, a sum of money equal to a tax of 17 cents (imposed by the state of Missouri on each \$100 of value of the greatest aggregate amount of raw material of plaintiff on hand in said city at any one time between the first Monday of March and the first Monday of June of the year 1908) on each \$100 of value of said imported material, and said defendant refused to issue to plaintiff a manufacturer's license unless it paid him said sum amounting to \$128.95, and, assuming to act by virtue of the authority vested in said office of license collector, threatened to have plaintiff prosecuted daily in the courts of this state, and daily fined for carrying on in the city of St. Louis without a manufacturer's license the business of a manufacturer; that plaintiff was not authorized to continue its business in said city without a manufacturer's license from said defendant as said collector, and each day's continuance in business without such license was a separate offense under the laws of the state of Missouri and ordinances of the city of St. Louis, and said defendant was empowered under said statutes and ordinances to institute prosecutions against plaintiff for each day it continued its business in the city of St. Louis without said manufacturer's license, and it was impossible for plaintiff to continue in business as a manufacturer in said city without said license; and the plaintiff says that because of its liability to and the threat of such prosecutions and the duress thereby created, and the urgent business necessity of the situation, it paid to said defendant, in order to avoid prosecution and continue its business under protest, said sum of \$128.95, and thereupon received from said defendant a manufacturer's license for the then succeeding year, and plaintiff was compelled to make such payment in order to continue in business as a manufacturer in the city of St. Louis. Plaintiff further states that, under the ordinances of said city of St. Louis, its failure to have acceded to said defendant's demand for the payment of said sum and secured its license would have subjected it to the liability of a double assessment of its said property by said collector for said city's taxes, and also to a fine of \$500 for each day it continued its said business in said city without said license.

"(4) Plaintiff states that at and before the time of the payment of said \$128.95 to said defendant he, the said defendant, was advised by

plaintiff that said material upon which plaintiff was so required to pay said sum was imported from a foreign country by said plaintiff, and was then remaining in original packages awaiting manufacture by plaintiff. Plaintiff further states that at and before said time it also notified said defendant in writing that said property was not a subject for taxation, and that same was claimed by plaintiff as wholly exempt therefrom, and that it, the said plaintiff, would institute and prosecute suit for the recovery of said sum so paid thereon.

"(5) Plaintiff further states that said defendant had no right or authority to require the payment of any sum on said imported material, and that the exaction of said sum of \$128.95 or any part thereof by said defendant under color of his office was a wrongful exaction, and said sum was unlawfully collected from plaintiff by said defendant.

"(6) Plaintiff further states that it paid to said defendant said sum of \$128.95 illegally exacted as aforesaid on the 19th day of September, 1908, and it prays judgment against said defendant for said sum of \$128.95."

[1] The court sustained defendant's demurrer to each count of the petition in the view that the taxes were voluntarily paid and not under duress. It is argued that this was error, but the question presented appears to be settled by the judgment of the Supreme Court in a similar case in *Claffin et al. v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54. Under the Constitution it is our duty to follow the last previous decision of the Supreme Court on any question of law or equity whatever our views on the subject may be, and we are certainly not inclined to proceed contrary to this command when a judgment of that tribunal on a similar question is before us. We see nothing in *Manufacturing Co. v. St. Louis*, 238 Mo. 267, 142 S. W. 297, indicating that the Supreme Court has taken a broader view in cases of this character where the suit proceeds against a public officer. Indeed, it is to be inferred from that case, when read in connection with *Claffin v. McDonough*, supra, that the plaintiff made the payment under duress; that is, after arrest, or at least a threatened arrest, and, as the court said, "to avoid prosecution under defendant's ordinance."

[2] The averments in the petition before us are that defendant threatened to prosecute plaintiff, and there is nothing to the effect that it or its officers were arrested or its immediate arrest threatened. However, it is true the petition avers "that it was impossible for plaintiff to continue in business as a manufacturer in said city without said license," etc. But this, when considered in connection with the context, it is clear is not tantamount to a threat to close plaintiff's business down immediately such as appeared in the case of *Westlake v. City of St. Louis*, 77 Mo. 47, 46 Am. Rep. 4, as by shutting off the water in a large plant. The rule reflected in *Link v. Real Estate Co.*, 182 Mo. App. 531, 165 S. W. 832, and *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082, relates rather to an urgent business necessity than to a claim against a public officer who has exacted taxes which the law apparently

devolved the duty upon him to collect as in the case of *Claffin v. McDonough*, supra.

[3] In cases of that character plaintiff may tender the amount of the taxes it concedes to be due and on the refusal of the collector to accept it proceeded by mandamus to ascertain its rights in the premises, and thus obviate an urgent necessity. See *Butler v. Moberly*, 131 Mo. App. 172, 110 S. W. 682.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

AMERICAN MFG. CO. v. ALT. (No. 14234.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

Appeal from St. Louis Circuit Court; Leo S. Rassiour, Judge.

"Not to be officially published."

Action by the American Manufacturing Company against Louis Alt. From a judgment for defendant, plaintiff appeals. Affirmed.

Barelay, Orthwein & Wallace, of St. Louis, for appellant. E. C. Slevin, of St. Louis, for respondent.

NORTONI, J. The question presented in this case is identical in all respects with that in the case of *American Manufacturing Company v. Alt*, 184 S. W. 1167, decided to-day, and reference thereto is made for a statement of facts and conclusion of law.

For the reasons there given, the judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

PARR et al. v. CHICAGO, B. & Q. R. CO. (No. 15088.)

(St. Louis Court of Appeals. Missouri. April 4, 1916.)

1. ATTORNEY AND CLIENT \S 85, 101(1)—POWERS OF ATTORNEY — "RELEASE" OR "COMPROMISE."

An attorney has no implied authority to release or compromise his client's claim or cause of action; but the act of the attorney for defendant railroad in signing a written offer to allow judgment to be taken for a certain sum, filed under Rev. St. 1909, § 1965, was not a "release" or "compromise" of a claim or cause of action in his hands for enforcement.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 137, 209-213, 216; Dec. Dig. \S 85, 101(1).

For other definitions, see *Words and Phrases*, First and Second Series, *Compromise*; *Release*.]

2. ATTORNEY AND CLIENT \S 85—POWERS OF ATTORNEY—CONFESSION OF JUDGMENT.

An attorney of record in a cause has implied authority to confess judgment for his client, and hence under Rev. St. 1909, § 1965, authorizing such offer, the attorney for defendant railroad had authority to sign and serve an offer in writing to allow judgment against his client for a certain sum.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 137; Dec. Dig. \S 85.]

3. ATTORNEY AND CLIENT \S 72—POWERS OF ATTORNEY — PRESUMPTION AND BURDEN OF PROOF.

When an attorney who has appeared of record for a party litigant performs an act in the nature of an offer of judgment, his authority to do so is presumed, prima facie at least, and the burden of showing his want of authority rests on the party who questions it, unless such authority is denied by his client.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 102-104; Dec. Dig. \S 72.]

4. COSTS \S 42(2) — OFFER OF JUDGMENT — POWERS OF ATTORNEY—OBJECTION.

Plaintiff, in an action against a railroad for damages from the setting of fire on his premises, who raised no question as to the authority of defendant's counsel to make a written offer of judgment in a certain amount, pursuant to Rev. St. 1909, § 1965, either at the time of the service thereof or at any time prior to the hearing on defendant's motion to have the costs accruing after the making of the offer taxed against plaintiff, could not by wholly ignoring the offer thereby frustrate the purpose of the statute.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 138, 143; Dec. Dig. \S 42(2).]

5. COSTS \S 42(2)—OFFER OF JUDGMENT—SUFFICIENCY—STATUTE.

Under Rev. St. 1909, § 1965, providing that defendant at any time before trial or judgment may serve on plaintiff an offer in writing to allow judgment against him for the sum specified, which plaintiff may accept, and that, if plaintiff fails to accept and does not obtain a more favorable judgment, he shall pay defendant's costs from the time of the offer, a written offer to allow plaintiff to take judgment for \$750, signed by the defendant by its attorney of record, was sufficient.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 138, 143; Dec. Dig. \S 42(2).]

6. COSTS \S 198 — OFFER TO CONFESS JUDGMENT—SUFFICIENCY OF MOTION.

Under such provision, it was not necessary for defendant in its motion to have the costs accrued after the making of the offer taxed against the plaintiff, who had obtained a verdict in a lesser amount, to specify items of cost which had accrued subsequent to the service of the offer.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 761; Dec. Dig. \S 198.]

Appeal from Circuit Court, Montgomery County; James D. Barnett, Judge.

"To be officially published."

Action by John C. Parr and another against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiffs, and from the overruling of a motion to tax costs accrued since its offer to confess judgment, the defendant appeals. Order reversed, and cause remanded, with direction to reinstate and sustain the motion.

O. M. Spencer, of St. Joseph, Ball & Ball, of Montgomery City, Palmer Trimble, of Keokuk, Iowa, and M. G. Roberts, of St. Joseph, for appellant. E. P. Rosenberger, of Montgomery City, and J. W. Wilson, and C. W. Wilson, both of St. Charles, for respondents.

ALLEN, J. Plaintiff sued the defendant railroad company for damages in the sum of \$2,965, alleged to have resulted from the set-

ting out of a fire on his premises by one of defendant's locomotives. Some months prior to the trial, defendant served plaintiff's counsel of record with a written offer to allow plaintiff to take judgment for the sum of \$750. To this instrument was signed the name of the defendant railroad company by its attorneys of record in the cause. The offer was not accepted. The trial resulted in a verdict and judgment for plaintiff in the sum of \$100. Defendant then moved to have the costs accrued after the making of the offer taxed against the plaintiff. The trial court overruled this motion, and the defendant appealed.

It appears that the trial court overruled the motion upon the theory that defendant failed to show authority on the part of its counsel to sign the written offer. There was some attempt to show that the making of the offer was a matter within the authority conferred by defendant upon its counsel, but testimony proffered along this line was for the most part excluded for reasons which need not be here considered.

The statute under which the offer was made, to wit, section 1965, Revised Statutes 1909, provides as follows:

"The defendant in any action may, at any time before trial or judgment, serve upon the plaintiff or his attorney of record an offer in writing, to allow judgment to be taken against him for the sum or to the effect therein specified. If the plaintiff accept the offer and give notice thereof within ten days, he may file the offer and an affidavit of notice of acceptance, and judgment shall be entered accordingly. If the notice of acceptance be not given the offer shall be deemed withdrawn, and shall not be given in evidence or commented on before a jury; and if the plaintiff fail to obtain a more favorable judgment he shall pay the defendant's cost from the time of the offer."

The argument advanced in support of the court's ruling below is that the offer was one of compromise, and that an attorney, by virtue of his employment as such, has no authority to compromise his client's case; that the statute is to be strictly construed, and, since the offer must be made by "the defendant," it must appear to have been made either directly by the defendant or by some one clothed with authority to bind it.

[1, 2] It is true that the courts hold that an attorney representing a claimant has, by virtue of his employment, no implied authority to release or compromise his client's claim or cause of action. Among the cases in this state to this effect are *State v. Clifford*, 124 Mo. 492, 28 S. W. 5; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382; *Melcher v. Exchange Bank*, 85 Mo. 362; *Semple v. Atkinson*, 64 Mo. 504; *Bay v. Trusdell*, 92 Mo. App. 377; *Barton Bros. v. Hunter*, 59 Mo. App. 610. But this rule has here no application. The signing of this instrument was not the release or compromise of a claim or cause of action in the hands of defendant's counsel for enforcement. It is true that the statute contemplates that a plaintiff

may, if he desires, utilize such an offer as a confession of judgment for the amount therein specified. But the prevailing rule, supported by the great weight of authority, is that an attorney of record in a cause has implied authority to even confess judgment for his client. See *Taylor v. Land & Mortgage Co.*, 106 Ga. 238, 32 S. E. 153; *Thompson v. Pershing*, 86 Ind. 303; *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42; *Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321; 4 Cyc. 936; 3 Amer. & Eng. Ency. Law, 368; 2 Ruling Case Law, § 71.

In *Scarritt Furniture Co. v. Moser & Co.*, 48 Mo. App. 543, this court, in an opinion by Thompson, J., held that an attorney of record in a cause had implied authority to stipulate that the case should abide the result of other litigation of a like character, under the control of other counsel, saying:

"An attorney in charge of a case has implied authority from his client to enter into any stipulation for the control of the progress of the action, even to the entering of judgment in favor of the opposite party. *Thompson v. Pershing*, 86 Ind. 304, 310; 1 *Thomp. Trials*, § 191, and cases cited."

[3] But aside from this, when an attorney who has appeared for a party litigant, and is an attorney of record in the cause, performs an act of this character, his authority so to do is presumed, *prima facie* at least; and the burden of showing his want of authority rests upon the party who questions it, unless such authority is denied by the attorney's client. See *State ex rel. v. Muench*, 230 Mo. 236, 130 S. W. 282; *Riley v. O'Kelly*, 250 Mo. loc. cit. 662, 157 S. W. 566. Such presumption naturally attends the acts of attorneys, duly authorized to practice at the bar, and follows from the confidence reposed in them as sworn officers of the court, and the consequent belief in their honor and integrity. Upon this presumption judicial action is time and again predicated, and any other course would lead to interminable confusion and disorder.

[4] We are unable to conceive upon what theory plaintiff, without having raised any question of the authority of defendant's counsel to make this written offer in defendant's behalf, at the time of the service thereof or at any time prior to the hearing on the motion, may ignore it altogether upon the theory that it was not an offer made by defendant as the statute requires. It carried with it, upon its face, the presumption that it was made by defendant's authority. And assuming, for the sake of argument merely, that plaintiff had any cause to dispute the authority of defendant's counsel, it devolved upon plaintiff to make timely objection to the instrument on this ground. Plaintiff could not wholly ignore the offer thus made, and thereby frustrate the whole some object and purpose of the statute.

[5, 6] The contention that the written offer is insufficient in form is without merit.

The meaning of the statute is that, if the plaintiff does not recover an amount in excess of the offer, all costs accruing after the date of service of the offer are taxable against him. See *Rosenberger v. Harper*, 83 Mo. App. 169; *Brown v. Cole*, 146 Mo. App. 705, 125 S. W. 537. And it was not necessary for defendant to specify in the motion the items of cost which had accrued subsequent to the service of the offer. The motion was not one to retax costs. Following the rendition of the verdict and the entry of judgment thereupon, and on the same day, defendant filed this motion, the object of which was to have the costs taxed in accordance with section 1905, supra.

The order of the trial court overruling defendant's said motion is reversed, and the cause remanded, with directions to that court to reinstate the motion and sustain it.

REYNOLDS, P. J., and NORTONI, J., concur.

BANK OF WILLOW SPRINGS v. UTTERMAN. (No. 1777.)

(Springfield Court of Appeals. Missouri. April 15, 1918.)

1. USURY — 117—METHOD OF COMPUTATION.

Evidence that interest at 8 per cent. was calculated for 93 or 92 days on several 90-day extensions held to show usury.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 328-340; Dec. Dig. —117.]

2. USURY — 113—INTEREST.

The intent to charge usury is presumed from an intentional charging of more than the legal rate.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 308-323; Dec. Dig. —113.]

3. USURY — 50—CUSTOM AFFECTING TRANSACTION.

That a method of calculating interest is customary in banks is no defense if by such method more than the legal rate is charged.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 107; Dec. Dig. —50.]

4. REPLEVIN — 103(2)—JUDGMENT—FORM.

Where defendant's answer in a replevin suit in which property has been taken from him contains no demand for a return of the property, the only judgment that can be rendered in his favor is for a return of the property and any damages sustained from the taking.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 390-403; Dec. Dig. —103(2).]

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Replevin by Bank of Willow Springs against H. O. Utterman. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Barton & Impey, of Houston, Mo., and M. E. Morrow, of West Plains, for appellant. N. B. Wilkinson, of Willow Springs, for respondent.

FARRINGTON, J. The plaintiff (respondent) recovered judgment in the circuit court,

and defendant appeals. The action was in replevin, the plaintiff seeking to recover some cows, heifers, and calves, and the right to them is asserted under a chattel mortgage given by defendant to plaintiff to secure a promissory note for money borrowed. Among other defenses set up in the answer is the following:

"Further answering plaintiff's petition, defendant says that according to the terms of said promissory note, defendant promised and agreed to pay the plaintiff 8 per cent. interest, and no more, the highest legal rate of interest in this state. But defendant alleges and states that the plaintiff, in violation of the terms of said note and the laws of this state, demanded, exacted, and received of and from this defendant the sum of \$2.10 in excess of said highest legal rate of interest on said note as follows: On or about February 25, 1913, \$7.50; May 25, 1913, \$7.50; August 25, 1913, \$7.50; November 25, 1913, \$7.50; February 25, 1914, \$7.50; May 25, 1914, \$7.50; August 25, 1914, \$7.50—each being for interest on a note for \$360 for 90 days, and each 30 cents in excess of the legal rate; and that under and by virtue of section 7184, R. S. 1909, said chattel mortgage has become inoperative, void, and of no force or effect. Defendant says that by reason of the seizure of the cattle herein, he has been damaged in the sum of \$200."

The reply to this answer is as follows:

"For its reply to defendant's answer plaintiff states that it denies that it ever at any time charged or collected, or received knowingly, or exacted intentionally, any interest from defendant upon the loan secured by the chattel mortgage in issue except the legal rate of 8 per cent. interest per annum provided for in such note of defendant."

[1] As we think the undisputed evidence shows that more than a lawful rate of interest was charged and exacted and thereby rendered the chattel mortgage void, we will dispose of the case on that ground.

It will be noted that the answer specifically charges usury, setting up the amounts and times of payment, and the note introduced in evidence by the plaintiff shows credits on the back thereof without showing the amounts of the payments. They are as follows:

"6-14-13. Int. pd. to Aug. 25-13.
 "8-23-13. Int. pd. to Nov. 25-13.
 "10-8-13. Int. pd. to Feb. 25-14.
 "2-7-14. Int. pd. to May 25-14.
 "7-6-14. Int. pd. to Aug. 25-14.
 "8-6-14. Int. pd. to Nov. 25-14."

[2] It is admitted by both parties that the first installment of interest was taken out of the amount lent, on February 25, 1913, which paid the interest in advance to May 25, 1913, and from then on the notations on the back show to what date each payment in advance of interest was made, and the exact date the payments were made. The defendant testified positively that each time a payment was made and the credit made on the back of the note, the amount charged and exacted of him was \$7.50. Defendant's wife, who testified, states that she made two of the interest payments, and that each time she paid \$7.50. The defendant further says that he protested against paying \$7.50, and

that he told the cashier of the plaintiff bank that his interest, figured at 8 per cent., would make the amount due at each interest paying period only \$7.20, but that he was required to make the payments of \$7.50, and that he was afraid not to pay that amount, fearing the bank would call the loan. The transactions were had with the president of the bank, Thomas, or the cashier—generally both taking part. Plaintiff introduced Thomas as a witness, but not the cashier. The memory of Thomas was very deficient as to just what were the amounts charged as interest. He says there was no intention on the part of those acting for the bank to charge more than the contractual rate, 8 per cent., and that if more was charged it was not intentional. He admitted that the books of the bank show just the amount taken out as interest when the loan was made, and that they would also show the amount that was charged each time interest was collected, but he could not remember what the books of the bank showed that to be, and this, though he and the cashier with him had attended to the receiving of these interest charges. The books of the bank were not produced, but this might be accounted for and excused from the fact that the case was tried in Texas county, having gone there on a change of venue, and, as the record before us shows only the amended answer which was filed on the same day the case was tried, unless the original answer also contained the defense of usury, it could be said that it would have been impossible to have gotten the books from Willow Springs to Houston. Thomas never at any time testified that defendant did not pay \$7.50 to cover the interest periods. He only says that he does not remember what were the amounts of the payments, but that defendant only paid 8 per cent., and that there was no intention on the part of the bank to charge and collect more than 8 per cent. However, be that as it may, his own testimony as to how the amount was computed and arrived at that the bank required defendant to pay shows clearly that there was a continuous, persistent, method adopted which necessarily required defendant to pay more than 8 per cent. interest. There was an agreement to extend the note, and the notations on the back of the note show that the agreement was carried out six successive times. The note was for \$360, and fell due in 90 days. Now Thomas, while he says he does not remember the amounts which were exacted of the defendant in order to obtain the 90-day extensions, does testify that they always calculated interest on the 90-day extensions for 93 or 92 days, and explains this by saying that defendant was charged for the first and last days. While it might be perfectly legitimate to charge for the first and last days where a note is paid, it can be readily seen that where a note is extended

from time to time the lender, by charging interest for the first and last days on every renewal, would get interest twice for the same day, and if the lender in this case sometimes charged for 93 days, it would double the interest on 2 days; and on this particular note, since the interest was calculated and paid seven times, if it was calculated for 1 extra day, the lender would be getting double interest on 6 or 7 days, whereas if it was calculated for 93 days, plaintiff would be doubling that number of days on which it would receive interest, once on the first payment and once in the renewal. While Thomas testifies that the bank only intended to charge defendant 8 per cent., his testimony conclusively shows that it did intend to charge defendant for more days than the money was actually lent. The intent to charge usury will, in such case, be drawn from plaintiff's admitted intentional act, rather than a denial of intent to charge more than the law allows, when confronted on the witness stand with the charge of usury. Thomas, by his own statement, intended to do just what was done, and stated that if there was any mistake made, it was a misconception of what the law permitted him to do, which, of course, is no excuse. It is not a case where the mistake was one of fact on the calculation method.

It is held in *Osborn v. Payne*, 111 Mo. App. loc. cit. 34, 85 S. W. 667, that the law treats the transaction as it finds it under the facts whatever may have been the intention of the parties. The unlawful intent is presumed from the mere fact of intentionally doing what the law forbids. 36 Cyc. 920; 29 Am. & Eng. Enc. Law, 464.

The facts before us show that the excessive amounts were not the result of accidental or inadvertent miscalculations, but an intentional and continuous method, adopted and used during a period of a year and a half.

[3] Neither does the excuse offered by Thomas suffice, that it had been the custom of banks he had been connected with to make the charge as was done in this case. It is held in *Cowgill v. Jones*, 99 Mo. App. loc. cit. 394, 395, 73 S. W. 995, that a custom sometimes makes the law, but a custom in direct conflict with positive law has no such effect.

Respondent cites *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917, and *Kessler v. Kuhnle*, 176 Mo. App. loc. cit. 405, 159 S. W. 768, as authority for holding that the mortgage under these facts was not avoided by the statute. On examination of these cases it will be seen that they have no application whatever to the facts in hand, as those cases deal with contracts containing a provision for compounding interest in violation of section 7185, R. S. 1909. There is no provision in the contract before us for compounding, nor was

there in fact any compounding. The interest charges for the extensions were exacted and paid for the forbearance of the loan, and bring the case clearly within section 7184, R. S. 1909, under which this chattel mortgage, on which this suit rests, must be declared void.

[4] The answer of the defendant contains no demand for a return of the property, and, under the rule announced in *Cable v. Duke*, 208 Mo. loc. cit. 561, 106 S. W. 643, and cases cited, the only judgment that can be rendered in defendant's favor in a replevin suit upon such an answer is for a return of the property, and any damages sustained by reason of the wrongful taking.

The judgment is therefore reversed, and the cause remanded to the circuit court with directions to enter judgment accordingly.

ROBERTSON, P. J., and STURGIS, J., concur.

HAWLEY v. LUSK et al. (No. 1716.)
(Springfield Court of Appeals. Missouri.
April 15, 1916.)

1. MASTER AND SERVANT — 287(4)—INJURY TO SERVANT — SUFFICIENCY OF EVIDENCE — NEGLIGENCE.

In a servant's action for personal injury sustained when carrying a heavy rail with seven other men by reason of a heavy lurch resulting from the negligence of his fellow servants in dropping their part of the weight without warning, evidence held to sustain a directed verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1045, 1060; Dec. Dig. 287(4).]

2. APPEAL AND ERROR — 927(7)—QUESTION OF FACT—INFERENCES.

On appeal from a directed verdict for the defendant, every inference of fact justified by the evidence was to be made in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. 927(7).]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by H. H. Hawley against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for defendants, and plaintiff appeals. Affirmed.

D. H. Kemp, of Monett, Hamlin & Hamlin, of Springfield, and Barrett & Moore, of Ozark, for appellant. W. F. Evans, of St. Louis, Neville & Gorman, of Springfield, W. P. Sullivan, of Billings, S. E. Bronson, of Ozark, and Mann, Todd & Mann, of Springfield, for respondents.

ROBERTSON, P. J. Plaintiff seeks to recover damages for alleged personal injuries. At the close of his testimony a verdict was directed for defendants, and he appeals.

The plaintiff and seven others were carrying a steel rail about 25 feet in length and

weighing about 800 pounds when plaintiff received his injuries. The rail was carried by the use of tongs, two men to each pair of tongs and on opposite sides of the rail. They had raised the rail, plaintiff had taken one step, and was in the act of taking another, when, to quote:

"There was a heavy lurch came upon me, a heavy weight, and I caught a pain in my groin and in my back and in my left side under my heart. I became blind, and it seemed like I was in the act of falling, when some one taken the weight off of me, and I could not see anything for several minutes. Q. What did you do then; how long did it seem until the weight was lifted? A. I could not say; I was in the act of falling when it seemed like some one lifted it off of me. We carried it all right after they lifted weight off me."

He also testified that there were enough men to handle the rail "if it had been carried off right when we picked it up," and also that it was the duty of each to watch for himself and for the other men to see that all were safe; that, when any of them are in a strained condition, if any one turns the load or throws it down, some one is liable to receive an injury of some kind; that he was standing straight when the lurch fell on him; that the ground was level, and there were no holes or obstructions to stumble over; that a man who was opposite him and carried with the same tongs was a larger man than the plaintiff, and at the time he was not in good condition to do a day's work, and was so crippled in one of his legs that in walking he hopped. The only other man on the job when plaintiff received his injuries who testified stated:

"That after we raised up the rail and straightened we was in the act of moving off, when there was something about the rail; I don't know whether you call it a lurch to represent it; it appeared like some one stepped in a hole or kinda stumbled, and it was heavy an instant or so among the rest of us. * * * It just seemed like some one eased up or stepped down, loosened up on his tongs a little, quit carrying."

[1, 2] The charge in the petition is that plaintiff's fellow servants with whom he was carrying the rail "negligently and carelessly and without warning to the plaintiff suddenly dropped their part of the weight of said rail on plaintiff, whose strength was inadequate to the task of sufficiently supporting the weight then thrown on him." The only question for decision in this case is whether or not by making every inference of fact in favor of the plaintiff justified by the evidence there is any substantial proof of negligence. In considering this question it is essential that we appreciate the conditions and situation under which plaintiff was performing his duties. The rail he and his fellow workmen were carrying gave them an average weight of 100 pounds each. In order that the weight should be uniform at all times the movements of his fellow workmen must necessarily have been in complete harmony with his. This we know to be an im-

possibility. We also know that in carrying a heavy load of this character and in this manner the greatest irregularity naturally occurs when raising and steadying for the forward movement, and that not until after these preliminaries have been performed does anything like a uniform movement become possible. In considering what really took place to cause his injuries we find that all plaintiff says is that there was a heavy lurch. Every one who has carried a weight with others knows that this is a thing which should naturally be expected, and which could not be avoided. The other witness who testified for plaintiff stated that there was a lurch; that some one seemed to loosen up on his tongs a little—quit carrying. Such a thing could not be avoided. Plaintiff refers to the crippled condition of the party who was on the tongs with him, but there is no testimony tending to show that such condition was the cause of the accident, nor is there any allegation of negligence on the part of the defendant in employing that man. The phase of the case which most forcibly, however, impresses us, and the one upon which we base our conclusion, is that nothing is shown to have occurred except what might reasonably be expected and anticipated to happen, or rather what was almost sure to occur. Certain it is that no negligence on the part of anyone is shown.

The judgment is affirmed.

FARRINGTON, J., concurs; STURGIS, J., in a separate opinion.

STURGIS, J. (concurring). I concur in affirming this case. The sole ground of plaintiff's cause of action is the alleged negligence of a fellow servant, in that such servant negligently ceased to carry his portion of the load. All of plaintiff's evidence proves nothing but the result, to wit, that there was a sudden increase in the weight of the load plaintiff was carrying; that suddenly he was carrying a heavier weight than previously. That is all he and his witness know about it. The surrounding facts show that this must have been caused, not by any actual increase in the weight being carried, but by reason of one or more of the workmen ceasing to carry his part, thereby throwing the extra weight on his fellow workmen. Plaintiff's evidence, therefore, in proving the result, proves by necessary inference that one or more of the workmen, from some cause, suddenly ceased to carry his part of the load. Of course, it does not matter which one or how many did this, provided the act in so doing was negligent, for all were fellow servants, for whose negligence the master is liable. The only importance to be attached to the fact that neither plaintiff nor his witness knows which one or how many did the act of "letting up" in carrying

is that it shows that plaintiff knows and proves nothing except the result. It would not help his case to prove which one ceased to carry unless his knowledge on that point would establish some fact tending to prove the act to have been negligent. By proving the result of some one's ceasing to carry his part of the load, plaintiff proves the latter fact, but that, without more, does not prove his cause of action, to wit, that this act of the fellow servant was negligent. The all important question is: Why did the fellow servant cease to carry his part of the load? To make a cause of action, the plaintiff must prove a negligent why. He and his witness, not knowing, speculate to some extent on the why. The witness says:

"It appeared like some one stepped in a hole or kinda stumbled, * * * stepped down."

But such fact negatives negligence, as stepping in a hole or stumbling, without more, would excuse the fellow servant; or at least the jury could not be allowed to infer that he stepped in a hole or stumbled, and therefrom infer that such misstep or stumbling was negligence—an inference upon an inference. The expression "It appeared like" the fellow servant "eased up," loosened up his tongs," "quit carrying," merely describes the result as the plaintiff and the witness felt it in the increased weight. Another speculation as to the why is that one fellow servant was a cripple, and not very strong, and "hopped" when he walked. This also negatives negligence on his part; for no one can be held negligent in doing what his physical condition compels him to do. As said, there is no charge of negligence in defendants' hiring an unfit man. Other speculations might be made as that the fellow servant tried to mend his hold. All this means that any negligence is a matter of pure speculation. It may be unfortunate that plaintiff is not able to find out nor prove that the act of the fellow servant was negligent, but, unless defendant is to be held as an insurer against the injuries plaintiff received, he cannot recover without such proof; for, in the absence of such proof, we must take it that no negligence existed.

BOWDEN et al. v. ST. LOUIS & S. F. R. CO.
et al. (No. 1791.)

(Springfield Court of Appeals. Missouri. April 15, 1916.)

1. EVIDENCE ¶5(2)—JUDICIAL NOTICE—ENGINES.

The court will take judicial notice that engines pulling trains emit sparks which can communicate fire to combustible material on the right of way.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ¶5(2).]

2. RAILROADS ¶482(2)—FIRES—EVIDENCE.

Proof that a fire originated after the passage of a train, coupled with the showing that there

was no other way for the fire to have started, warrants an inference that it was started by the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1731, 1732; Dec. Dig. ¶482(2).]

3. RECEIVERS ¶183 — ACTIONS — ANSWER — GENERAL ISSUE.

Where defendant's answer was the general issue, plaintiffs need not prove that defendant was sued as receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 389-396; Dec. Dig. ¶163.]

4. TRIAL ¶75 — OBJECTIONS — FAILURE TO OBJECT.

Where counsel for the defendant receivers testified without objection that the railroad company was then in the hands of a receiver, proof that the receiver had been appointed before the cause of action arose is not objectionable on the ground that the record was the best evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 171-182, 252; Dec. Dig. ¶75.]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by Charles Bowden and another against the St. Louis & San Francisco Railroad Company and James W. Lusk and others, receivers. From a judgment for plaintiffs, defendants appeal. Reversed as to the Railroad Company, affirmed as to the receivers, and remanded for proper judgment.

W. F. Evans, of St. Louis, and W. J. Orr, of Springfield, for appellants. S. A. Cunningham, of Eminence, for respondents.

ROBERTSON, P. J. This case has been here before (189 Mo. App. 148, 175 S. W. 252), and again defendants are appellants. A new trial resulted in another verdict for the plaintiffs, and appellants again urge that there was not sufficient evidence on which to submit the question of the liability of defendants for the origin of the fire to the jury. At this trial several witnesses testified as to a train passing by the scene of the fire, and it is placed at from 4 to 15 minutes before the fire was discovered. They were unable to say what kind of a train it was. They testified that there was a large amount of dry grass and weeds on the right of way, and that the wind was blowing from the track towards the place where the fire started on the right of way and spread to plaintiff's property.

When the case was here before, we reversed the judgment and remanded the cause, remarking that not to do so would place us in conflict with the decisions of the Supreme Court and other Courts of Appeal. We must now affirm the judgment or write an opinion that will conflict with decisions of the other Courts of Appeals. The facts in the case of Wright v. Chicago & Alton Ry. Co., 107 Mo. App. 209, 80 S. W. 927, are almost identical with those developed in the case at bar—surely no stronger—and there a judgment against the defendant road was affirmed. See, also, Hudspeth v. St. Louis &

San Francisco R. Co., 172 Mo. App. 579, 586, 155 S. W. 868.

[1, 2] Fire does not ordinarily originate in dry vegetation out in the open, except it be communicated there by some human intervention. In the case at bar the evidence discloses the recent presence there of the engine pulling the train on defendants' road, and there is no proof of any other medium for setting fire being at that place just before the flames were discovered. Also the direction of the wind and the place of the origin of the fire are facts not to be overlooked. It is a fact of which we take judicial notice that engines pulling trains do emit sparks and do communicate fire to combustible material on the rights of way over which their roads run. If any one has just passed a given point with the means of communicating fire, and immediately thereafter, in a place conditioned favorable for receiving it, a fire is discovered spreading from the point where it is not improbable it would have been set from such means, and no other means was shown to be present, we would naturally conclude that the party passing set the fire. We would also argue that he was the last party there immediately before the fire so far as we know, and that, if he did not set it, he ought to be able to tell who likely did it, and that, if he cannot, he should be held liable. No fixed rule can be laid down to apply in every case, but in this instance we hold that there was substantial evidence tending to prove that defendants' engine was the source of this fire.

[3, 4] The suit is against the railroad company and the receivers. The petition alleges the appointment of the receivers long before the fire occurred, and the judgment is against both of them, as it was when the case was here before. The answer is a general denial. At the trial the plaintiff offered parol testimony of the appointment of the receivers. To some of this defendants objected, because it was not the best evidence. The objection was overruled, and they excepted. According to the rule in *Spelman v. Delano*, 177 Mo. App. 28, 31, 163 S. W. 300, the general issue does not require the plaintiff to prove the character in which the defendants were sued. However, in the case at bar that rule need not be invoked. A witness for plaintiffs, one of the attorneys for defendants, was asked if he knew whether or not the company was then in the hands of the receiver. He answered without objection that it was. He was then asked how long that had been true. The objection was then interposed that the record of the court showing the appointment was the best evidence. After the objection was overruled the witness answered that they were appointed in the spring or summer of 1913. The fire occurred August 18, 1913. The essential part of the inquiry was answered

without objection, and, since the case has proceeded so far without any point being raised as to the appointment of the receivers or their liability for the fire when proof of its origin was made, we should not hold that the admission of this evidence constituted reversible error, and hence hold that there was proof of such facts as render the receivers liable.

[5] Both the company and the receivers cannot be held for the damages in this case, and, since the receivers must respond, the company must be relieved. *Allen v. Railroad*, 184 Mo. App. 492, 170 S. W. 455. When the liability was proven on the part of the receivers, the nonliability of the company was shown, the demurrer to the evidence on its part should have been sustained, and, since it was not, we reverse the judgment as to it and affirm it as to the receivers, and that there may be a proper judgment entered for plaintiffs against the receivers only in favor of the company we remand the cause for that purpose.

FARRINGTON and STURGIS, JJ., concur.

BANK OF RAYMONDVILLE v. NATIONAL SAFE & LOCK CO. (No. 1769.)

(Springfield Court of Appeals. Missouri.
April 15, 1916.)

1. APPEAL AND ERROR ¶966(1)—REVIEW—DENIAL OF CONTINUANCE.

The denial of defendant's request for continuance does not constitute reversible error, unless it was an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3837; Dec. Dig. ¶966(1).]

2. CONTINUANCE ¶20(1)—RIGHT TO—ABUSE OF DISCRETION.

Where defendant had over a month after filing its answer in which to prepare for trial, but failed to take any steps, and a few days before trial begged for a continuance by letters and telegrams, the denial of a continuance requested on the ground that there was a witness whose presence could not be obtained at trial, and that defendant's general counsel had been absent in a foreign jurisdiction, is not an abuse of discretion.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 51, 53; Dec. Dig. ¶20(1).]

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Action by the Bank of Raymondville against the National Safe & Lock Company and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

George H. Billman, of Cleveland, Ohio, and Hiett & Scott, of Houston, Mo., for appellant. Lamar & Lamar and Jas. H. Covert, all of Houston, Mo., for respondent.

FARRINGTON, J. The plaintiff bank recovered a judgment against the John Bauman Safe Company and the National Safe & Lock Company in the circuit court, and the last-mentioned defendant appealed.

The only question for our determination is: Did the circuit court commit reversible error in refusing the appealing defendant a continuance?

The plaintiff filed its petition on June 11, 1915 (and to avoid repetition we remark here that all dates mentioned in this opinion fall within the year 1915), praying for damages by reason of an alleged breach of contract. On June 13th the summons in the suit was served on the appealing defendant's agent in St. Louis, Mo., commanding said defendant to appear in the circuit court of Texas county and answer on the third Monday in August. On July 5th the appellant filed its answer with the clerk of the circuit court of Texas county; said answer being signed by George Billman, the attorney who afterwards sought a continuance. So far as the record shows nothing else transpired between the parties, nor was any move made by the appellant or its attorney until August 11th when Billman sent a telegram to the attorney's for plaintiff requesting a continuance, which was answered by plaintiff's attorneys on the same day advising Billman that plaintiff would insist on a trial. And on August 11th Billman wrote a letter to plaintiff's attorneys asking when the case would be set for trial, and stated that it would be necessary to take some depositions in Cleveland, Ohio, which was the place where appellant's home office was located and the home of its attorney, Billman. On August 16th plaintiff's attorneys wired Billman—which was in answer to a telegram from him—that they would insist on a trial on August 19th, and on the same day wrote Billman a letter to this effect. On that day (August 16th), after receiving the telegram just referred to, Billman wrote a letter begging for a continuance, and on August 18th sent another telegram asking that the trial be postponed. On August 17th Billman wrote to the law firm of Hiett & Scott at Houston, Mo., confirming a telegram he had sent them the evening before employing them in the case and insisting that they secure a continuance of the case. Mr. Scott of the firm of Hiett & Scott made an application for a continuance, merely stating therein what his belief was with reference to the facts set forth in the application from the letter and telegram received from Billman to his firm. The motion for a continuance was denied, and the plaintiff put in its evidence and the court rendered judgment in plaintiff's favor for \$1,030. It may be added that the John Bauman Safe Company, the defendant not appealing, made default, and that the appealing defendant, so far as this record shows, stood on its answer consisting of a general denial and took no part in the trial by cross-examination of witnesses or otherwise. A motion for a new trial was filed in due time, setting forth practically

the same facts that had been presented to the trial court in asking for a continuance, which was overruled.

[1,2] In order for us to hold that the court committed reversible error, we would be required to find that there was an abuse of the judicial discretion in refusing the continuance. See *Gibson v. Insurance Co.*, 181 Mo. App. 302, 168 S. W. 818.

The facts are as hereinbefore detailed, and in our judgment they clearly fail to establish that the appellant showed any diligence whatever in making preparation for trial. More than a month elapsed from the time it filed an answer until it took any step to secure a continuance, and then it was only by telegrams and letters asking plaintiff's attorneys to consent to a continuance. There is nothing in the correspondence between the attorneys from which the appellant can claim that it was misled in any manner. The only excuse offered in the letters—which were exhibited to the trial court—was that the attorney for appellant had to go to Canada, and that there was a witness whose presence could not be secured at the trial, but the application for a continuance did not set up any fact that this witness would testify to.

The cases relied on by appellant for reversal are as follows: *Alt v. Groschlose*, 61 Mo. App. 409, *Rottman Distilling Co. v. Van Frank*, 88 Mo. App. 50, *Handy v. McClellan*, 156 Mo. App. 454, 137 S. W. 280, *Nichols v. Grocer Co.*, 66 Mo. App. 321, and *Barnum v. Adams*, 31 Mo. 532. On examination of these cases it will be seen that the appellate courts found one or the other of these conditions to actually exist: That diligence was shown; or that the party applying for the continuance was surprised; or that there were unavoidable circumstances preventing attendance of material witnesses; or that there had been a misunderstanding between the opposing attorneys; or something that would show oppression on the part of the trial court. There is nothing in the case before us to bring it within the rulings of these cases.

It is clearly held in *Gibson v. Insurance Co.*, 181 Mo. App. 302, 168 S. W. 818, *Rhodes v. Guhman*, 156 Mo. App. 344, 137 S. W. 88, and numerous other cases that the action of the trial court in matters of this kind will not be disturbed where the party applying for a continuance fails to show a diligent effort to be prepared for trial.

The point is we are not moved by this record to say that the circuit court of Texas county abused its discretion, and thereby committed reversible error in refusing to grant a continuance or to later sustain the motion for a new trial.

The judgment is therefore affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

SENACA CO. v. ELLISON. (No. 1774.)

(Springfield Court of Appeals. Missouri. April 15, 1916.)

1. APPEAL AND ERROR ⇐883—PRESENTING QUESTIONS IN LOWER COURT—WAIVER OF OBJECTIONS.

Where all the evidence was received as though an answer had been filed, plaintiff cannot complain that thereafter the court refused to strike out the evidence because of the failure to file an answer, and gave defendant leave to file his answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. ⇐883.]

2. EVIDENCE ⇐460(11)—PAROL EVIDENCE—EXCEPTIONS.

In an action on an unambiguous written order for goods, which stated the purchase price which defendant agreed to pay, where, without proof of any fraud, defendant testified that he only ordered goods to the value of one-fourth the amount stated, to which testimony plaintiff objected, and then excepted to the court's failure to rule on his objection, it was reversible error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2126; Dec. Dig. ⇐460(11).]

3. SALES ⇐23(2)—ORDER—COUNTERMAND.

A buyer can countermand a written order taken subject to the seller's approval at any time before its acceptance by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 45; Dec. Dig. ⇐23(2).]

4. SALES ⇐53(2)—QUESTIONS FOR JURY—COUNTERMAND OF ORDER.

Where the buyer, who signed a written order subject to approval by the seller, mailed a countermand of the order in a properly stamped and addressed envelope, so that in the regular course of the mails it would have reached the seller before the goods were shipped, it would be a question for the jury whether it was received by the seller before the shipment, notwithstanding the seller's testimony that it was not received until thereafter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 148; Dec. Dig. ⇐53(2).]

Appeal from Circuit Court, Douglas County; John T. Moore, Judge.

Action by the Senaca Company against Sam Ellison. Judgment for plaintiff for a part only of the amount claimed, and it appeals. Reversed and remanded.

J. S. Clarke, of Ava, for appellant.

ROBERTSON, P. J. Plaintiff sued to recover \$51.51, and interest. A jury trial resulted in a verdict for \$13, in its favor, and it has appealed.

The suit is based on a written order to plaintiff at Tiffin, Ohio, for certain stock medicines, f. o. b. Tiffin, signed by the defendant. The order was taken by an agent of plaintiff, and states that it was taken subject to the approval of the plaintiff. It is dated April 1, 1911, and the plaintiff claims to have shipped the goods thereby ordered from its office at Tiffin, Ohio, on April 5, 1911. The defendant testified that on the same day the order was signed he wrote on the copy retained by him, and mailed it to the plaintiff, the following: "Please cancel this order

in full and oblige Sam Ellison." The plaintiff admits receiving this, but claims it was not received until the day after the goods were shipped. Under date of April 6, 1911, plaintiff wrote a letter to defendant stating that canceled order was too late to take action on, and that shipment was on its way. The order is unambiguous, and upon its face clearly shows that defendant ordered the goods and agreed to pay the price designated in the contract, \$51.51. All of the evidence was received in the case without objection on the part of the plaintiff as to the pleadings. At the close of all of the testimony plaintiff moved to strike out all evidence on the part of the defendant because there was no answer filed. The trial judge stated: "I marked an answer filed on the record. Let him file the answer." Plaintiff excepted. No answer was then filed.

It is unnecessary for us to discuss the effect of the failure of the defendant to file an answer, as the case must go back to the trial court, further than to say that, if defendant does not file his answer after the case reaches that court, plaintiff will yet be in a position to take advantage of such failure.

[1] The alleged error of the court in refusing to strike out defendant's testimony and in giving defendant leave to file an answer is not subject to review here. It was not error to refuse to strike out the testimony, since it was all received as though an answer had been filed. Neither was there any error committed in allowing one to be filed. The trouble is defendant appears not to have filed his answer, and no objection was made on that account, but plaintiff proceeded to submit its case on the theory that there were issues for a jury, and hence it cannot now be heard to complain. *Gloyd v. Franck*, 248 Mo. 468, 476, 154 S. W. 744; *Everhart v. Bryson*, 244 Mo. 507, 516, 149 S. W. 307.

It is contended by the plaintiff that we should reverse the judgment and remand the cause, with directions to the trial court to enter judgment for the full amount claimed. We cannot go to that extent, owing to the holding in the *Everhart* Case, *supra*. Every instruction requested by plaintiff was given, except one, and no complaint is made in the motion for a new trial of its refusal.

[2] If the court improperly admitted evidence in behalf of defendant substantially affecting the merits of the case, this, if properly objected to at the time, is subject to review here. The only testimony upon which the jury could have returned the verdict for \$13 was that of the defendant. There was no proof of fraud; yet the defendant testified that he ordered only \$13 worth of goods. The plaintiff objected, the court made no ruling, and the plaintiff excepted to the court's failure to rule on the objection. This constituted reversible error.

[3, 4] It may be observed, in view of another trial, that the defendant had the right to

countermand his order before it was accepted by plaintiff (*Allen v. Chouteau*, 102 Mo. 309, 323, 14 S. W. 869), and, if defendant files an answer authorizing it, and offers testimony tending to prove that he placed his countermand in an envelope properly addressed to the plaintiff, stamped and deposited in the United States post office, so that in the usual course of the mail it would have reached plaintiff before the goods were shipped, then it would be for the jury to pass on the question of whether or not the plaintiff so received it, and the instructions should not ignore this defense. *Sills v. Burge*, 141 Mo. App. 148, 154, 124 S. W. 606; *McFarland v. United States Mutual Accident Association*, 124 Mo. 204, 214, 219, 27 S. W. 436; *Phillips v. Mastbrook*, 24 Mo. App. 129, 131; *Ripley National Bank v. Latimer*, 64 Mo. App. 321, 325, 327. The testimony and conduct of the plaintiff, taken together, are not sufficient to justify taking this question from the jury.

The judgment is reversed, and the cause remanded.

FARRINGTON and STURGIS, JJ., concur.

THIEL DETECTIVE SERVICE CO. v. REYNOLDS et al. (No. 14284.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

1. JUSTICES OF THE PEACE ⇐159(3) — APPEALS—RECOGNIZANCE—SUFFICIENCY.

In a suit before a justice of the peace against two as partners and against one of them individually, where the plaintiff had judgment, a bond on recognizance on appeal to the circuit court, signed by the partnership by the individual partner, and also by each of them as partners, and by a surety, reciting that the partners had appealed, and continuing in the statutory form, which was approved by the justice, was sufficient as a recognizance on appeal as to the individual defendant.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 552; Dec. Dig. ⇐159(3).]

2. JUSTICES OF THE PEACE ⇐162(2)—APPEAL—JURISDICTION OF APPELLATE COURT.

The granting of an appeal by a justice of the peace and a filing of the transcript, together with all the papers, in the circuit court, vests that court with jurisdiction of the case.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 605; Dec. Dig. ⇐162(2).]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

"Not to be officially published."

Suit by the Thiel Detective Service Company against George D. Reynolds and George V. Reynolds, copartners, doing business as Reynolds & Reynolds, and George V. Reynolds individually. Judgment in justice's court for plaintiff, and defendants appealed, and from a judgment dismissing the suit for want of prosecution, plaintiff appeals. Affirmed.

Chalres P. Comer and W. W. Herron, both of St. Louis, for appellant. Watts, Gentry & Lee, of St. Louis, for respondents.

NORTONI, J. [1] This suit originated before a justice of the peace, where plaintiff had judgment, and defendants prosecuted an appeal to the circuit court. In the circuit court plaintiff moved a dismissal of the appeal on the grounds that it was improperly perfected, and also because insufficient notice concerning it had been given. The court overruled this motion, and plaintiff declined to further appear in the case. Subsequently the suit was dismissed for want of prosecution because plaintiff declined to appear therein. Plaintiff appeals here, and urges that the court erred in refusing to dismiss the appeal from the justice on its motion because it is said the recognizance is insufficient, but obviously this argument is to be considered only in so far as the recognizance relates to the appeal of defendant George V. Reynolds.

Defendants, George D. Reynolds and George V. Reynolds, were sued as copartners doing business as Reynolds & Reynolds, and George V. Reynolds is made a defendant individually as well. The affidavit for appeal from the justice of the peace is in all respects sufficient, and the bond or recognizance on appeal is in the form prescribed by statute. This recognizance is signed Reynolds & Reynolds, by George V. Reynolds [Seal], also by George V. Reynolds [Seal], also George D. Reynolds [Seal] personally, and also by the Aetna Accident & Liability Company [Seal] as surety thereon.

It is conceded the bond is sufficient in so far as the appeal of Reynolds & Reynolds—that is, George D. Reynolds and George V. Reynolds, copartners—is concerned; but the point made against it is that it does not appear to be a recognizance on appeal as to George V. Reynolds, who was an individual defendant in the cause as well. The bond recites on its face:

"Whereas, said George D. Reynolds and George V. Reynolds have appealed from the judgment of Robert Walker, a justice of the peace of the Fifth district of the city of St. Louis, in an action between the Thiel Detective Service Company, Plaintiff, v. George D. Reynolds, George V. Reynolds, Doing Business as Reynolds & Reynolds, Defendants"

—and then continues in the statutory form. But it appears this bond was signed by George V. Reynolds first in his capacity as a copartner—that is, as follows: Reynolds & Reynolds, by George V. Reynolds—and then a second signature by the same defendant individually. It was approved by the justice, and the papers transmitted to the circuit court as the statute prescribes. Obviously this will suffice; for on its face is manifested an intention on the part of George V. Reynolds to bind himself individually there-

in through affixing his personal signature thereto as well as one of the partners.

[2] But, aside from this, the granting of the appeal by the justice and the filing of the transcript, together with all the papers, in the circuit court, vests that court with jurisdiction of the cause. See *Welsh v. H. & St. J. R. R. Co.*, 55 Mo. App. 599; *Drake v. Gorrell*, 127 Mo. App. 636, 106 S. W. 1080.

The point made against the sufficiency of the notice of appeal is not pressed upon us. At any rate, it is concluded entirely by the ruling in *Reinhart Grocery Co. v. Rust*, 185 Mo. App. 279, 170 S. W. 375.

The judgment should be affirmed.

It is so ordered.

ALLEN, J., concurs. REYNOLDS, P. J., not sitting.

SCHALLER v. LUSK et al. (No. 1671.)

(Springfield Court of Appeals. Missouri. April 15, 1916.)

1. MASTER AND SERVANT \S 265(5)—ACTION FOR INJURY—SAFE PLACE TO WORK—PRESUMPTION AND BURDEN OF PROOF.

In a servant's action for injury from a fall while going to the running board of a locomotive in a shop, brought upon the ground of negligence in not furnishing a safe place to work, the alleged negligence must be proven, and cannot be presumed from the mere fact of the fall.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S § 881, 898, 955; Dec. Dig. \S 265(5).]

2. MASTER AND SERVANT \S 129(5)—ACTION FOR INJURY — NEGLIGENCE — "PROXIMATE CAUSE."

Where a servant's duties required him to go upon a locomotive running board in defendants' shop, and in reaching over a wire attached to the engine his foot caught, causing him to start to fall, and in his fall he caught a loose branch pipe which fell with him, his action for injury, brought on the ground of the master's negligence in not furnishing a safe place to work, the catching of his foot, and not the loose branch pipe, was the "proximate cause" of the injury, that is, the thing which set in motion a train of events that in their natural sequences ought to be expected to produce the result of which the complaint is made.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 261; Dec. Dig. \S 129(5).]

For other definitions, see *Words and Phrases*, First and Second Series, *Proximate Cause*.]

3. MASTER AND SERVANT \S 129(1)—PERSONAL INJURY—SAFE PLACE TO WORK.

It was not the duty of the defendants to protect plaintiff against accidents not caused by them, and, as the place was safe, except for the fall, for which they were not responsible, the safe place to work theory could not avail the plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 257; Dec. Dig. \S 129(1).]

Appeal from Circuit Court, Polk County; O. H. Skinker, Judge.

Action by Frank J. Schaller against Jas. W. Lusk and others, receivers of St. Louis

& San Francisco Railroad Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Rechow & Pufahl, of Bolivar, and Hamlin, Collins & Hamlin, of Springfield, for appellant. John H. Lucas, of Kansas City, and W. W. Wood, of Humansville, for respondents.

ROBERTSON, P. J. Plaintiff sues for personal injuries. At the close of his testimony the trial court directed a verdict in favor of defendants, and he has appealed.

Plaintiff's petition alleges that he was one of defendants' machinists at its shops in Springfield, and that his duties required him to work on the locomotive engines at that place; that it was the duty of defendant to furnish him a reasonably safe place in which to work; that his duties required him to go upon the running board of said engine, and that in proceeding to that point a wire attached to the asbestos on the engine near the cab caught his foot, caused him to start to fall, and in the fall he caught a loose branch pipe, which fell with him to the floor of the shop. The petition then proceeds:

"That the negligence complained of defendants is that they failed to provide plaintiff with a safe place in which to work in this, that the servants and employees of the defendants had loosened the screws and taps which held and attached said branch pipe to the engine, and negligently failed to notify the plaintiff of said fact, or to remove the said branch pipe from the engine after it had been loosened by the removal of said screws and taps, and further negligently failed to remove the wire, which caught his foot and caused him to fall from the asbestos on the side of the engine."

That portion of plaintiff's statement of the case relating to the testimony at the trial is adopted as follows:

"On the 4th day of March, 1915, while in the performance of his duties, he was directed by his foreman to put some brasses on engine No. 716. He understood what that meant; that is, that he was to replace, among other things, valves, boiler checks, injectors, etc., on the engine. A helper was furnished him, and he and his helper at once proceeded to the work as directed by his foreman. The articles mentioned, boiler checks, etc., were to be placed on the outside of the boiler at different places, some up near the front end, and in so doing the work it would be necessary for the plaintiff and his helper to walk along the running board on the side of the engine, and, in order to get onto it they were compelled to go through the cab and out at a little door which opened from the cab to the board. They put their material into the cab and started to go out onto the board. Plaintiff was carrying in his right hand the boiler check, and stepped his left foot out of the door onto the board and started to draw the other foot through, when something caught it, and by reason thereof he started to fall, and in so doing grabbed a pipe which extended along the side of the engine, known as a branch pipe. Having been loosened some two or three days before that by the pipemen, it turned over with plaintiff and threw him off of the running board onto the floor, a distance of about eight feet."

In addition to what is contained in this statement, we notice that plaintiff testified:

"My foot caught in a wire or something. It could not have been anything except a wire."

[1] The testimony, giving it that favorable construction required, presents for our decision whether or not the defendants are liable in this case for the loose condition of the pipe which plaintiff caught in his fall. We say this because plaintiff must, and we think does, concede that there was no negligence on the part of defendants shown which caused him to fall when his foot caught. Concede that his foot caught on a wire; yet there is no evidence that any negligence on the part of defendants was responsible for its presence there. The alleged negligence of defendants must be proven; it cannot be presumed from the mere fact of the fall.

[2, 3] The contentions in behalf of the plaintiff are that the question of proximate cause does not arise where the accident results from two or more causes, for all of which the defendant is responsible; that the question of which of two negligent acts is the proximate cause does not arise when the first concurred with the others to produce the result; that, where two or more proximate causes contribute, each, if negligent, is sufficient to support a recovery, and, where the accident is traced to a defect in the instrumentality or appliance, there proof of the occurrence furnishes proof of negligence. It will readily be observed that to sustain any of said propositions, as applied to this case, there must first be testimony offered tending to prove the alleged negligence of defendant causing the fall, and this we have observed was not done.

The loose branch pipe was not the proximate cause of plaintiff's injury, but it was the catching of his foot that started him on his fall. The thing which sets in motion a train of events that in their natural sequence ought to be expected to produce the result of which complaint is made is the proximate cause (*Holwerson v. St. Louis & Suburban Ry.*, 157 Mo. 216, 231, 57 S. W. 770, 50 L. R. A. 850, and *Glenn v. Metropolitan Street Ry. Co.*, 167 Mo. App. 109, 117, 150 S. W. 1092), and that thing must, of course, be characterized by the negligence of the party against whom complaint is made. It was not the duty of defendants to protect plaintiff against accidents not caused by defendants. Even the safe place to work theory cannot avail plaintiff in this case, because it is not shown that any duty owed him by defendants was violated. The place was safe, except for the fall, and the defendants are not responsible for that, hence the proof fails to show an unsafe place.

The trial court properly directed a verdict for the defendant, and the judgment based thereon should be and is affirmed.

FARRINGTON, J., concurs. STURGIS, J., concurs in result.

CITY OF CHARLESTON v. COKER.
(No. 1738.)

(Springfield Court of Appeals. Missouri.
April 15, 1916.)

1. BREACH OF THE PEACE ⇨1—ORDINANCES
—“NEIGHBORHOOD.”

Where a municipal ordinance made it a misdemeanor for any person to willfully disturb the peace of any neighborhood or person by striking or fighting another, the word “neighborhood” is not confined in its application to a residence district, but includes any locality in the city, and is equivalent to vicinity or adjoining district; hence one who disturbs the peace by fighting in the business section of the city is guilty of violating the ordinance.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

For other definitions, see Words and Phrases, First and Second Series, Neighborhood.]

2. BREACH OF THE PEACE ⇨8—WHAT CONSTITUTES.

In order to justify a conviction under an ordinance making it a misdemeanor for any person to disturb the peace of the neighborhood by fighting, it is not necessary that witnesses who collected to watch the affray, testify that their peace was disturbed, it appearing that the fight occurred on a business street and a crowd assembled.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 6; Dec. Dig. ⇨8.]

3. BREACH OF THE PEACE ⇨11 — INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In a prosecution under an ordinance making it a misdemeanor for any person to willfully disturb the peace by fighting, where the court charged that the jury should consider only accused's conduct and the undisputed evidence showed that when persons assembled accused was striking his antagonist, the latter being down, other instructions cannot be held erroneous as misleading on the ground that the jury might have understood that they could convict, although the fight was provoked by the conduct of the other party.

[Ed. Note.—For other cases, see Breach of the Peace, Dec. Dig. ⇨11.]

4. CRIMINAL LAW ⇨801 — INSTRUCTIONS — RIGHT OF COURT TO GIVE.

The court may give the jury additional proper instructions at any time before their verdict and after the close of the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1947; Dec. Dig. ⇨801.]

5. CRIMINAL LAW ⇨801—TRIAL—INSTRUCTIONS—IMPROPRIETY.

In a prosecution for a breach of the peace by fighting, where, though accused's counsel was unable to show that accused's assailant was the aggressor, he suggested in argument that accused was acting in self-defense, the court could properly give an additional instruction that it did not devolve on the city to show who started the fight, or who was the aggressor, and that if accused acted in self-defense, he had the burden of proving that fact, particularly where counsel were given the privilege of arguing the additional instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1947; Dec. Dig. ⇨801.]

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Jesse Coker was convicted of violating an ordinance of the City of Charleston, and he appeals. Affirmed.

Russell & Joslyn, of Charleston, for appellant. Frank M. See, of Charleston, for respondent.

FARRINGTON, J. On July 24, 1915, at Charleston, Mo., on Commercial street, the appealing defendant exercised his inalienable right to fight, and since then has been trying to adjust the matter with society. P. A. Addy participated in the fight, but not in the trial from which this appeal resulted.

Charleston has an ordinance providing that:

“If any person or persons in this city shall willfully disturb the peace of any neighborhood, * * * or of any person by * * * striking or fighting another * * * he or they shall be deemed guilty of a misdemeanor.”

Defendant was charged with violating that ordinance—that he disturbed the peace of a neighborhood, to wit, the neighborhood in the vicinity of the Sanitary Restaurant on Commercial street, by fighting Addy.

No one testified as to how or why the fight started. Two witnesses who were standing 15 feet away say they heard a woman (thought to have been Addy's wife) screaming, and that they turned around and saw defendant and Addy fighting. One of these witnesses was the owner of the Sanitary Restaurant. The fighters were on the ground, defendant on top, and Addy “was trying to fight, but it looked like he wasn't doing much.” Witness Simpson said he saw defendant “hit a lick or two.” The fight occurred in the morning, or about noon, in front of the Sanitary Restaurant on the main business street, in the immediate vicinity of (at least) the post office and a bakery. One witness was a little over a block away (near the express office and a bank) when he heard of the trouble and he ran to the scene. He testifies that he saw a crowd assemble there “from most every direction.” On cross-examination he admitted that it didn't disturb his peace. Another witness said a crowd gathered—“like any fight, runs up when there is excitement.” If the participants uttered a sound, no witness testified to having heard it.

Defendant asked the court to instruct the jury that the verdict must be in his favor, but this was refused. Defendant did not introduce any evidence, and the record does not disclose that he requested any other instructions. Defendant was convicted by the jury, and his punishment assessed at a fine of \$50.

[1] It is contended, first, that the court erred in overruling defendant's demurrer to the evidence, the argument being that under all the evidence the defendant's conduct did not disturb the peace of a “neighborhood,” or of any person.

Appellant would have us hold that by the word “neighborhood” in the ordinance it was meant to confine the application of the ordinance to a residence district, and this use of

the word "neighborhood" is perhaps the most general. But a glance at any dictionary will show that it has a broader meaning also. In *State v. Fogerson*, 29 Mo. 416, defendant was indicted under the statute for willfully disturbing the peace of a neighborhood. The opinion reveals that the offense was committed on the public square in the town of Lebanon, and the court referred to it as a "neighborhood," and sustained the conviction. In *Coyle v. Railroad*, 27 Mo. App. 584, the court was dealing with a statute prohibiting the bringing, or moving through, the state of diseased cattle, the liability being limited to the disease "communicated to any other animal or cattle in the neighborhood or along the line of such transportation or removal." The court there held to that definition of "neighborhood" which indicated "a place near," "vicinity," "adjoining district." In *State v. Johnson*, 149 Mo. App. 119, 130 S. W. 110, defendant was prosecuted under the statute for willfully disturbing the peace of the neighborhood of the public square at the intersection of South street in the city of Springfield by cursing, etc., and challenging to fight. The state introduced only two witnesses who supported the charge. The court said:

"Neither of these witnesses lived near the public square, and there was no testimony offered to show that any person who lived or was in business in that part of the city, knew anything about the trouble. It was also shown that it was sometime after 6 o'clock, and that the stores were generally closed at that hour." (Italics are ours.)

The court there was clearly recognizing that the public square at the intersection of South street was a "neighborhood." The case of *State v. Hughes*, 82 Mo. loc. cit. 89, is so unlike our case on the facts as to be inapplicable to the point under discussion. We hold that the evidence to the effect that defendant engaged in a fight on Commercial street in Charleston in close proximity to certain business houses mentioned by the witnesses at or about noon on July 24, 1915, under the circumstances detailed, was sufficient to warrant the submission of the case to the jury.

[2] Now the act must be calculated to disturb the peace, or have that effect. In *City of De Soto v. Hunter*, 145 Mo. App. loc. cit. 436, 122 S. W. 1092, the court said:

"A disturbance of the peace being the gravamen of the charge, whether the defendant's conduct was calculated to disturb and did disturb the peace * * * is for the jury to say."

Certainly, where the defendant is engaged in a fight on a business street and a crowd assembles, it is not essential that the witnesses swear that their peace was actually disturbed thereby.

This disturbance did not occur in the evening after closing time for the stores, but at about noon. The fight occurred in front of the Sanitary Restaurant, and the owner of the place saw the fight and was a witness

for the city at the trial, so that the case is not governed by *State v. Johnson*, 149 Mo. App. 119, 130 S. W. 110, as to this question any more than it is as to the question first discussed.

In *State v. Fogerson*, supra, it was objected that the court erred in excluding the testimony of three persons introduced by defendant to prove that they resided on the public square, and were present at the time of the alleged disturbance, and that neither they nor their families were disturbed. The court said:

"This evidence, we think, was properly excluded. It had no tendency to prove the charge in the indictment, namely, that the peace of the neighborhood was disturbed by the defendant's conduct, and this was the matter of inquiry—not whether one or two individuals considered themselves disturbed. That they were not, or may not have been, disturbed by the conduct of the defendant was not necessarily inconsistent with the truth of the charge against him, that the peace of the neighborhood was disturbed. To sustain the charge it is not necessary to prove that every individual composing the community or neighborhood was disturbed, nor could the charge be disproved by the kind of negative evidence offered with respect to two or three persons."

[3] Defendant complains that the second instruction is erroneous in that it might have misled the jury into finding defendant guilty, even though it was Addy's conduct that really disturbed the peace, but cites no authority. In view of the undisputed evidence which we have detailed, together with the fact that the court did in the first instruction make it clear that it was the defendant's conduct the jury was to pass upon by directing that unless the jury found that defendant willfully disturbed the peace of the neighborhood they would acquit him. The jury could not have been misled. See *State v. Fogerson*, 29 Mo. loc. cit. 417, 418; *State v. Miller*, 159 Mo. loc. cit. 121, 60 S. W. 67. Besides, there was no evidence before the jury that Addy did anything that defendant did not do.

[4, 5] After defendant's attorney had made his argument and—quoting from defendant's (appellant's) abstract—"indicated to the jury in his argument that the defendant might have acted in self-defense, the court read instruction No. 5 and gave Mr. Russell the privilege of arguing the same, which he did." Instruction No. 5 was as follows:

"The court instructs the jury that it does not devolve upon the city to show who started the fight or who was the aggressor, and if the defendant acted in self-defense in repelling the assault made upon him, then it devolves upon the defendant to show that he acted in self-defense."

Appellant's attorneys are very severe in their criticism of the conduct of the trial judge in giving this instruction, characterizing the instruction as an answer to an argument of one of the attorneys for the defendant. It may be remarked in behalf of the trial judge that defendant's attorney, according to the abstract prepared and submitted here by the defendant, made a point in his argument that defendant might have acted

in self-defense when there was not a syllable in the entire record to justify such a statement. That the statement was not a mere slip of the tongue is indicated by defendant's cross-examination of witness Simpson where the following appears (being a blending of both question and answer in the abstract—the narrative form): "I don't know whether Addy jumped on Coker or not." Thus did the defendant fail in the only intimation of self-defense.

Defendant does not cite any authority in this connection. It is settled that the court has the right to give the jury additional proper instructions at any time before their verdict. *State v. Furgerson*, 152 Mo. loc. cit. 99, 53 S. W. 427. And, of course, after the close of the argument. *State v. Bickel*, 7 Mo. App. loc. cit. 572; *Joplin Waterworks Co. v. City of Joplin*, 177 Mo. loc. cit. 531, 76 S. W. 960. It is held, also, in *Drumm-Flato Commission Co. v. Gerlach Bank*, 107 Mo. App. 426, 436, 81 S. W. 503, that the trial court may further instruct the jury when made necessary by argument of counsel in their speeches to the jury. After the court gave the instruction complained of, defendant's attorney was permitted by the court to make an argument upon it to the jury. *Clancy v. City of Joplin*, 181 S. W. loc. cit. 122, 123.

Finding no reversible error nor misconduct of any kind on the part of the trial court, the judgment of conviction is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

STATE v. NICOLAY. (No. 1721.)

(Springfield Court of Appeals. Missouri.
April 15, 1916.)

1. INTOXICATING LIQUORS — 155(3)—ILLEGAL PRESCRIPTIONS—NATURE OF OFFENSE—"PRESCRIPTION."

Rev. St. 1909, § 5784, declares that any physician who shall make any prescription to any person for intoxicating liquors to be used other than for medicinal purposes shall be deemed guilty of a misdemeanor. Section 5781 provides the character of prescription which will protect a druggist in making sales of intoxicants in quantities of less than four gallons. A physician who unlawfully issued a prescription for intoxicating liquor wrote the prescription in such a manner that the druggist who filled it was not protected. Held, that nevertheless he was guilty of a violation of section 5784; the word "prescription" as used in the statute meaning a direction of remedy or remedies for a disease and the manner of using them, and not necessarily a valid prescription which would protect the druggist who filled it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 154; Dec. Dig. —155(3). For other definitions, see *Words and Phrases*, First and Second Series, *Prescription*.]

2. INTOXICATING LIQUORS — 134—ALCOHOL.

Alcohol, though not mentioned in Rev. St. 1909, § 7222, which declares that the term "intoxicating liquor" shall be construed to mean

fermented, vinous, and spirituous liquors, is an intoxicating liquor and falls within the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. —134.

For other definitions, see *Words and Phrases*, First and Second Series, *Intoxicating Liquors*.]

Appeal from Circuit Court, Polk County; C. H. Skinker, Judge.

J. W. Nicolay was convicted of crime, and he appeals. Affirmed. Certified to Supreme Court.

Rechow & Pufahl, of Bolivar, for appellant. T. H. Douglas, of Bolivar, for the State.

FARRINGTON, J. Appellant was prosecuted and convicted for a violation of section 5784, R. S. 1909, which provides:

"Any physician, or pretended physician, who shall make or issue any prescription to any person for intoxicating liquors in any quantity, * * * to be used otherwise than for medicinal purposes, * * * or who shall make or issue any prescription contrary to any existing law, shall be deemed guilty of a misdemeanor. * * *"

The indictment charged that J. W. Nicolay on the 25th day of January, 1915, in the county of Polk and state of Missouri, being then and there a physician, did unlawfully make and issue a certain prescription to one Matt Howe for a certain quantity of intoxicating liquor, to wit, one quart of alcohol, which prescription was and is as follows: "for Matt Howe. Alcohol Qt 1. Sig use as directed. Prescribed for medical purpose only. J. W. Nicolay, M. D."—which intoxicating liquor it was then and there known by the said J. W. Nicolay was to be then and there used otherwise than for medicinal purposes, to wit, was to be used and drunk as a beverage, contrary to the form of the statute, etc. Defendant filed a motion to quash the indictment on the ground that it failed to charge the defendant with any offense known to the laws of Missouri, because it purports to set out an exact copy of the pretended prescription, purported to be issued by the defendant, and shows upon its face that no valid or legal prescription was ever issued. The motion was overruled, and the defendant, waiving a jury, was tried before the court with the result stated.

Section 5781, R. S. 1909, among other things, provides what character of prescription will protect a druggist in making sales of intoxicants in quantities of less than four gallons.

[1] Appellant's contention amounts to just this: Because the writer of the indictment chose to set out in the indictment an exact copy of the prescription, and the prescription set out does not, in appellant's judgment, measure up to the prescription described in section 5781 concerning druggists, therefore it is not a good indictment under section 5784 as to physicians and pretended physicians.

In other words, appellant does not say that the indictment is not good as a pleading, but contends: First, that the alleged prescription is not a prescription at all; and, second, that it was not for intoxicating liquor.

The prescription, of course, need not have been copied in the indictment (State v. Anthony, 52 Mo. App. loc. cit. 508; State v. Pomeroy, 163 Mo. App. loc. cit. 290, 147 S. W. 144), and this indictment would have been a good pleading without such copy. In the Anthony Case, the court said:

"Neither do we think that it was necessary to set forth the prescription in *hæc verba*. Its date was given, and also the name of the party for whose benefit it was issued, and it was substantially averred that the prescription was issued to enable the party, to whom it was delivered, to procure intoxicating liquors for other than medical purposes. Nor was it necessary to state in the indictment the kind or quantity of liquor mentioned in the prescription."

Appellant in his reply brief concedes that the indictment need not have contained a copy of the prescription. Appellant says that the pretended prescription copied in the indictment is not a legal prescription because (1) it is not dated, and (2) because it does not state that the intoxicating liquor is prescribed as a necessary remedy—two of the requirements of a prescription so far as a druggist under section 5781 is concerned.

Section 5784, upon which this indictment is based, nowhere says anything about the prescription being dated, or that it shall recite that the intoxicating liquor is prescribed as a necessary remedy. Whether the prescription set out in the indictment is a protection to a druggist is not before this court for decision. Section 5784 reads: "Any physician, or pretended physician, who shall make or issue any prescription to any person." Two physicians may not write prescriptions in identically the same language or follow the same form of expression. If one prescribes quinine, he may write very little; the other in prescribing quinine may write more and in a different form; it is only necessary to let the druggist know what is wanted, and for whom, and that the same is as a remedy. We think that under section 5784, if any physician or pretended physician issues any paper to any person calling for intoxicating liquors in any quantity, so that a druggist could see what was prescribed, and the paper was issued with the necessary intent provided by section 5784, a misdemeanor has been committed. In other words, under section 5784 the physician or pretended physician may follow any form he pleases, he may date it or not as he pleases, and he may or may not state in the prescription that the intoxicating liquor is prescribed as a necessary remedy; but if it is a prescription in the ordinary acceptance of the word, and there was the guilty intent contemplated by that section of the statutes, a conviction will be sustained. Webster defines the word "prescription" as

"A direction of a remedy or remedies for a disease and the manner of using them; a medical recipe; a prescribed remedy."

The prescription here conforms to this definition.

The case of State v. Davis, 129 Mo. App. 129, 108 S. W. 127, is an authority in appellant's favor. The prescription copied in the information in that case shows that it was not issued to any one, and we agree with the statement of the St. Louis Court of Appeals that that so-called prescription was not even good as a written order for intoxicating liquors; and since it was copied in the information, and showed on its face that it was not a prescription even in the ordinary acceptance of the word, we think the appellate court in that case reached the correct result. But we do not agree with that part of the opinion wherein that court also based its conclusion on the proposition that the prescription would not protect a druggist in making a sale thereunder.

That the prescription mentioned in section 5784, R. S. 1909, defining an offense by a physician for fraudulently issuing the same, is not necessarily one conforming in all its particulars to the requirements of a prescription which by statute protects a druggist in selling intoxicating liquors under section 5781, R. S. 1909, is shown by the fact that section 5784 refers to prescriptions issued by "any physician, or pretended physician," while section 5781 restricts the prescriptions to those issued by some "regularly registered and practicing physician." Would a person indicted for violating section 5784 escape conviction by showing that he was not a registered physician, merely because prescriptions issued by a nonregistered physician are no protection to a druggist selling thereunder? Would a druggist indicted under section 5777 for not preserving the prescriptions compounded or dispensed by him as therein required escape conviction by showing that the prescriptions not preserved by him called for intoxicating liquors, but were not dated or did not state that the same was a necessary remedy? We think not.

[2] We have stated that appellant also attacks the prescription on the ground that it was not for intoxicating liquor. This particular contention, so far as we can learn from the record and briefs, makes its first appearance in the reply brief of the appellant. Section 7222, R. S. 1909, cited in support of the contention, appears in the article on "Dramshops" (article 1), of the chapter on "Intoxicating Liquors" (chapter 63), and provides that the term "Intoxicating liquor," as used in this article, shall be construed to mean fermented, vinous, and spirituous liquors, or any composition of which fermented, vinous, or spirituous liquor is a part. Since "alcohol" is not mentioned, appellant concludes that alcohol is not an intoxicating liquor, stating that this had been repeatedly

held by the appellate courts of different states and is generally conceded by the text-writers. The difficulty with the contention is, however, that our own Supreme Court and Courts of Appeals have taken the opposite view. See *State v. Martin*, 230 Mo. 1, 129 S. W. 931; *State v. Wills*, 154 Mo. App. loc. cit. 612, 136 S. W. 25; *State v. Gamma*, 149 Mo. App. loc. cit. 707, 129 S. W. 734. In the case last cited the court, in speaking of the section of the statute above referred to, said:

"Alcohol being of the class of spirituous liquors undoubtedly comes within the definition of this section. * * *"

In *State v. Wills*, supra, this court said:

"But when the term (intoxicating liquor) is defined by statute the courts are bound by the statutory definition, and when the statute includes in the definition of intoxicating liquor 'any composition of which spirituous liquor is a part' (section 3013, R. S. 1899, now section 7222, R. S. 1909), then it is a violation of the law to sell as a beverage any compound containing any alcohol whatever."

We are in conflict with the decision of the St. Louis Court of Appeals in the case of *State v. Davis*, 129 Mo. App. 129, 106 S. W. 127, as to the proposition first discussed in this opinion. As stated, we think that court reached the correct result in that case; but it cannot be denied that the court in reaching its decision clearly held that the definition of "prescription" in the section of the statutes concerning druggists applies to the prescription spoken of in section 5784 concerning physicians and pretended physicians, and to this we most respectfully dissent. Because of the conflict, this cause is certified to the Supreme Court for final determination; the judgment being here affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

WHITSETT et al. v. CITY OF CARTHAGE.
(No. 1623.)

(Springfield Court of Appeals. Missouri. April 15, 1916.)

1. COURTS ⇐231(50) — MISSOURI — SUPREME COURT — JURISDICTION — AMOUNT IN CONTROVERSY.

In a suit to enjoin the levying of assessments for a sewer, where the work was to be done as a unit, and if assessments against plaintiff's property were enjoined the whole work would fail, the amount in controversy is the cost of the sewer, and, being above \$7,500, the Supreme Court has jurisdiction of an appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 659; Dec. Dig. ⇐231(50).]

2. COURTS ⇐231(23) — APPELLATE JURISDICTION — CONSTITUTIONAL QUESTION — PRESENTATION BELOW — NECESSITY.

Where plaintiffs might have invoked their constitutional rights before or at trial, they cannot raise such matters by motion for new trial so as to confer jurisdiction of an appeal on the Supreme Court on the ground that a constitutional question was involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. ⇐231(23).]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by J. M. Whitsett and others against the City of Carthage. From a judgment for defendant, plaintiffs appeal. Transferred to Supreme Court.

Spencer & Grayston, of Joplin, and A. L. Thomas and Shannon & Esterly, all of Carthage, for appellants. Geo. W. Crowder and Allen McReynolds, both of Carthage, for respondent.

STURGIS, J. By this action plaintiffs seek to have the court adjudge and declare void an ordinance of the city of Carthage, duly enacted, providing for the construction of a main or trunk sewer for sanitary and other purposes for the benefit of several sewer districts of said city, and to enjoin the city from contracting for the construction of such sewer and issuing special tax bills against the property of said districts for the payment of the same. Defendant is a city of the third class, and had adopted and was proceeding to construct this sewer under the provisions of sections 9281 to 9298, inclusive, R. S. 1909. The area to be drained by this sewer and laterals connected therewith, constituting the sewer district, is over 800 acres, and comprises the southwestern part of the city. The plaintiffs are landowners whose lands are within the city and within the benefit district as defined by the ordinance in question, and whose land will be liable for special tax bills to be issued thereunder. They own tracts of land varying from 4 or 5 acres to 50 acres, and aggregating about 140 acres. These lands are situated in the extreme southwest part of the city. As grounds for relief the plaintiffs allege that none of said real estate is platted for sale or platted into lots, and same lies remote from the settled portions of the city, and is remote and inaccessible to the sewer sought to be established by said ordinance; that said sewer, if constructed, could not be used by plaintiffs, and would be of no value to the plaintiffs' land; that the lands owned by some of the plaintiffs are wholly unoccupied, and not used for residence purposes by any person, and the lands owned by other plaintiffs are not used or occupied except by the respective owners; that none of said lands are used or occupied as city property, but are used by the several owners for farming and gardening and growing prairie grass; that the growth of the city in the past is not such as to indicate that any of said lands will, within the lifetime of the present generation, be otherwise used or occupied; that much of said land cannot be connected with the proposed sewer without digging a ditch through a bluff and it would cost at least \$1,000 to each owner of such land to connect with such sewer or any lateral that may be constructed thereto; that said ordinance is

oppressive, and if carried out would be destructive of plaintiffs' property; that plaintiffs' said land was fraudulently attempted to be included within such sewer district for the sole purpose of taxing the same and lightening the burdens of those whom it would benefit. Under the view we take of the case it is sufficient to say that plaintiffs' evidence tends to sustain the allegations of the petition; that the lands in question are agricultural rather than urban; that they are not, and will not be, built on as a part of the city for many years, if ever; that the city water system does not extend to such lands, and that the use of such sewer, so far as these lands are concerned, is wholly impracticable if not impossible; that no benefits whatever can or will be conferred on these lands by this sewer. The defendant's evidence tends to show the contrary of most, if not all, these propositions. Such are the issues of fact. The briefs on the merits of the case are largely devoted to the question of whether the city is shown to have acted so arbitrarily and without any regard to plaintiffs' rights in taxing their property solely for the benefit of other portions of the city as to warrant the court in holding the ordinance in question utterly void. The trial court denied plaintiffs any relief and dismissed their bill. They are here asking for a reversal of the decree.

[1] The plaintiffs have challenged the jurisdiction of this court over the appeal by motion to transfer the case to the Supreme Court on the ground that the amount in dispute exceeds our jurisdiction. This insistence is based on the fact that the evidence shows that the cost of building this sewer and the amount of special tax bills to be issued exceed \$25,000. As the relief sought consists in enjoining the doing of this work and the issuing of tax bills to this amount in payment therefor, it is insisted that the amount in controversy is such cost. We think the law is well settled that it is not necessary that the plaintiff sue for a money judgment in order that the case involve and bring in dispute an amount, the determination of which fixes the respective jurisdictions on an appeal. It is sufficient that it be made to appear somewhere in the record that the amount involved on the appeal exceeds \$7,500 in order to vest jurisdiction in the Supreme Court. *Fire Brick Co. v. St. Louis Smelting & Refining Co.*, 48 Mo. App. 634; *Gartside v. Gartside*, 42 Mo. App. 513; *Id.*, 113 Mo. 348, 20 S. W. 669.

It will hardly do to say that the right involved here, to wit, the building of this sewer and the issuing of tax bills in payment, had no monetary value. If it has any value at all, such value must be as much as the sewer will cost. It is true that the plaintiffs are only interested individually in defeating the amount of taxes which each will be called on to pay, and in this respect they have no

joint interest. Their right, however, to maintain this suit jointly is not questioned. The property owned by the plaintiffs represents, in the aggregate, about one-fifth of the total taxable property of the sewer district. The sewer or benefit district is defined by the ordinance, and is a unit. All the land therein is made liable for its proportional cost. Should the lands of these plaintiffs be relieved of paying their part of the cost, the sewer district is destroyed, and the sewer cannot be built. The burdens which, under the ordinance, are to be borne by these landowners cannot be shifted to other landowners, and their burdens thereby increased. That can be accomplished only by annulling or abandoning the present ordinance and sewer district and the formation of another on different lines by new proceedings. The plaintiffs by this appeal present to the appellate court the decision of the question of declaring this ordinance and the sewer district formed thereby null and void and the granting of a perpetual restraining order as to building any sewer by and for this district and the issuing of any tax bills in payment thereof. Under the authorities this appears to bring into controversy an amount exceeding our jurisdiction. In the recent case of *State ex rel. Light & Power Co. v. Reynolds*, 256 Mo. 710, 718, 165 S. W. 801, 803, the court held that:

"If from the whole record the amount in dispute, or the monetary value of the right lost, is within the jurisdiction of this court, then the appeal lies here rather than elsewhere."

That was a case by quo warranto to oust the relator corporation of its charter and right to do business in this state. It was there held that the value of the right involved, the life or death of the corporation, was to be measured by the value of its property and the business being done by it, and where it appeared that, if plaintiff succeeded, the defendant would lose a right exceeding the value of \$7,500 the appeal must go to the Supreme Court. The court cited the case of *Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782, to the effect that:

"In a suit for an injunction the value of the object sought to be gained by the bill and not the amount of plaintiff's damages is the value of the matter in dispute."

In *State ex rel. v. Reynolds*, 245 Mo. 698, 703, 151 S. W. 85, 86, the court said:

"The amount in dispute by which the jurisdiction of the appellate court is fixed (in some cases maybe, but) in all cases is not necessarily determined by the amount of the judgment appealed from, nor by the amount claimed in the petition or counterclaims, but is determined by the amount that actually remains in dispute between the parties, on the appeal, and subject to the determination by the appellate court of the legal questions raised by the record."

In *Fire Brick Co. v. St. L. Smelting & Ref. Co.*, 48 Mo. App. 634, the court used this language:

"When the object of the suit is not to obtain a money judgment but other relief (in this case an injunction), the amount involved must be determined by the value in money of the relief to the plaintiff, or of the loss to the defendant should the relief be granted, and vice versa should the relief be denied. If either is necessarily in excess of the sum within the appellate jurisdiction of this court, then the Supreme Court has exclusive cognizance of the appeal."

See, also, *Craton v. Huntzinger*, 177 S. W. 816; *Bowles v. Troll*, 262 Mo. 377, 171 S. W. 326; *Walker v. Ozark Cooperage Co.*, 179 S. W. 948.

The plaintiffs on this appeal are seeking, as the principal part of their relief, and if successful will accomplish, not only the restraining of the issuance of special tax bills against their own property, but the issuance of any and all special tax bills for the building of this sewer under and by virtue of this ordinance and by the sewer district as now constituted. The special tax bills, if issued, will equal the cost of the sewer, and amount to at least \$25,000. Any number of interested taxpayers may maintain an injunction to restrain the making of public improvements, whatever may be the cost thereof, if not authorized by law, when the same involves the expenditure of money collected, or to be collected, by means of taxation, general or special, and as incidental thereto restrain the collection of such taxes. *Gaston v. Lamkin*, 115 Mo. 20, 21 S. W. 1100. The amount in dispute in such cases seems obviously to be the value of the improvements as determining the amount of taxes to be raised.

[2] The plaintiffs also asked a transfer of this appeal on the ground that a constitutional question is involved. Such constitutional question seems, however, to have been raised for the first time by the motion for new trial. Since there is no reason why plaintiffs should not have invoked their constitutional rights, if any were being invaded, before or at the trial, their attempt to inject such question into this case came too late, and no such question is involved. *Speer v. Railroad*, 264 Mo. 265, 174 S. W. 881; *Lohmeyer v. Cordage Co.*, 214 Mo. 696, 113 S. W. 1108; *Hartzler v. Metropolitan St. Ry. Co.*, 218 Mo. 562, 117 S. W. 1124.

On account of the crowded docket of the Supreme Court and the necessary delay caused by transferring an appeal to that court, we do so reluctantly. Yet as that court must be the final arbiter of all such questions, we should and do resolve our doubts as to our jurisdiction in favor of a transfer of the case to that court.

This cause will therefore be transferred to the Supreme Court.

ROBERTSON, P. J., and FARRINGTON, J., concur.

STATE v. BROWN. (No. 1787.)

(Springfield Court of Appeals. Missouri.
April 15, 1916.)

1. CRIMINAL LAW \S 1090(11)—APPEAL—NECESSITY OF BILL OF EXCEPTIONS.

Such matters as occur at the trial of a criminal case must be made part of the record by bill of exceptions the same as in civil cases. [Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2820, 2928, 3204; Dec. Dig. \S 1090(11).]

2. INDICTMENT AND INFORMATION \S 189(2)—CONVICTION OF LESSER DEGREE OF OFFENSE.

An information for felonious assault will support a conviction of common assault.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. \S 585, 589; Dec. Dig. \S 189(2).]

Error to Circuit Court, Howell County; W. N. Evans, Judge.

Alma Brown was convicted of assault, and brings error. Affirmed.

FARRINGTON, J. Appellant was prosecuted and convicted in the circuit court of Howell county. The charge in the information was that of felonious assault with an umbrella. The jury found the defendant guilty of common assault, and assessed her punishment at imprisonment in the county jail for a period of six months.

[1] Only the record proper is before us for review. There is no bill of exceptions contained among the papers constituting the return of the circuit clerk of Howell county to the writ. It is true the instructions are set out, but, even though there were a bill of exceptions before us, no error in the instructions would be available to appellant, because no exceptions appear to have been preserved. However, such matters as occur at the trial of a criminal case must be made a part of the record by bill of exceptions the same as in civil cases. *State v. Page*, 212 Mo. loc. cit. 236, 110 S. W. 1067; *Kelley's Crim. Law and Practice* (3d Ed.) p. 382.

[2] The information properly charges an offense under our laws. The record shows the presence and participation of the defendant in the trial, the fact that defendant was arraigned and pleaded not guilty before a jury of 12 qualified jurors properly impaneled, sworn and charged, and that the verdict is good on its face, assessing a punishment permitted by the common assault statute. Section 4484, R. S. 1909. And it is settled that an information for felonious assault will support a conviction of common assault. *State v. Grimes*, 29 Mo. App. loc. cit. 472; *State v. Wilson*, 128 Mo. App. 302, 103 S. W. 110.

Finding no error, the judgment of conviction is affirmed. The case is remanded to the circuit court of Howell county, and the defendant is ordered to appear before said court on the first day of its next regular

term, to be held at West Plains, Mo., to the end that the judgment of conviction be fully executed.

ROBERTSON, P. J., and STURGIS, J.,
concur.

WONDERLY v. LITTLE & HAYS INV. CO.
et al. (No. 14274.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

1. TRIAL \Leftrightarrow 109—**NONSUIT—ADMISSIONS BY COUNSEL.**

Where statements of plaintiff's counsel in opening his case amount to admissions of fact the existence of which precludes a recovery, the court is justified in granting a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 91, 270, 367, 388, 395; Dec. Dig. \Leftrightarrow 109.]

2. COMPROMISE AND SETTLEMENT \Leftrightarrow 16(1)—**OPERATION AND EFFECT—CONCLUSIVENESS.**

Where plaintiff entered into a partnership arrangement with the defendants for the purchase of corporate stock on their joint account and later, upon hearing that the corporation was insolvent, demanded an accounting with the defendants and that the defendants take and pay for one-half the stock, the account purporting on its face to be a final settlement and distinctly affirming the original transaction, being unimpeached, precludes an action for damages for fraud in the original transaction.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 54-58, 62-65; Dec. Dig. \Leftrightarrow 16(1).]

3. COMPROMISE AND SETTLEMENT \Leftrightarrow 6(1) — **CONSIDERATION.**

Where the original agreement for the purchase of stock did not operate to make the defendants liable to plaintiff for one-half of the purchase price of the stock, by paying it in the settlement of the partnership transaction they did what they were not bound to do, and such payment constituted a sufficient consideration for the settlement of all claims arising out of the transaction.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 35, 42, 44-49; Dec. Dig. \Leftrightarrow 6(1).]

Error to St. Louis Circuit Court; Dan'l D. Fisher, Judge.

"Not to be officially published."

Action by Charles P. Wonderly against Little & Hays Investment Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 186 Mo. App. 75, 171 S. W. 504.

Christy M. Farrar and Vital W. Garesche, both of St. Louis, for plaintiff in error. Franklin Ferriss and Henry T. Ferriss, both of St. Louis, for defendants in error.

ALLEN, J. This is an action to recover damages alleged to have been sustained by plaintiff by reason of false and fraudulent representations charged to have been made to plaintiff by defendants in and about a transaction relating to the purchase of certain corporate stock. The suit was instituted against the Little & Hays Investment Company and William C. Little. The latter died

during the pendency of the litigation, and the cause has been revived against the administrator, Alden H. Little. This is the second suit prosecuted by plaintiff on the same demand, plaintiff having suffered a nonsuit in the prior action. When the cause came on for trial in the circuit court, and after the impaneling of the jury and the making of an opening statement by counsel for plaintiff, the court, on motion of defendant's counsel, again forced plaintiff to a nonsuit; and after unsuccessfully moving to set the same aside, plaintiff appealed to this court.

The amended petition alleges that the original defendants were engaged in the business of buying and selling stocks, bonds, and other securities in the city of St. Louis; and that plaintiff is the owner of 50 shares of the preferred stock of a Missouri corporation known as the Tennent Shoe Company, of the value of \$100 each, which the defendants sold to plaintiff on or about February 24, 1905. And it is alleged that at the time of the purchase of such stock by plaintiff defendants were the owners of at least 100 shares of this stock and, being desirous of selling the same, offered the stock to plaintiff and "induced him to enter into a partnership arrangement with the defendants by which the defendants were to purchase said one hundred shares of stock for the joint account of the plaintiff and defendants, and the plaintiff and defendants were to be charged equally with the purchase of said stock for the joint account of himself and the defendants, the stock to be sold out at such price as might be agreed upon between the plaintiff and defendants, and any and all profit or loss on the same was to be equally divided between the plaintiff and defendants, and that the plaintiff was to be allowed interest at 6 per cent. on the amount due from time to time."

It is alleged that prior to entering into this "partnership arrangement," and as an inducement to plaintiff to enter into the same, defendants falsely represented that they were acting as brokers for the sale of this stock, and that they proposed the partnership arrangement because they considered the stock a good investment and wanted to acquire some of it themselves; but that defendants were then in truth the owners of the stock, for which they had paid less than par value, but concealed this from plaintiff and fraudulently pretended to purchase the same. And it is further alleged that to induce plaintiff to enter into the partnership arrangement, defendants exhibited a certain statement of the Tennent Shoe Company showing its assets and liabilities, and knowingly made certain false representations concerning the same and respecting the financial condition of said Tennent Shoe Company.

And it is averred that "shortly prior to

January 18, 1906, it became generally known that the Tennent Shoe Company was insolvent and its stock worthless, and in the light thereof plaintiff asked the defendants to wind up and pay him what they owed under the aforesaid partnership arrangement for money advanced by him," and that on or about January 18, 1906, the defendants, after taking into account interest due and dividends received upon the stock, owed plaintiff \$4,928.34 for moneys advanced for defendants under the partnership arrangement, as security for which plaintiff held 50 shares of the stock; and that the partnership arrangement was thereupon terminated, defendants taking 50 shares of the stock, and plaintiff 50 shares thereof, defendants paying to plaintiff the sum of \$4,928.34, and plaintiff giving the defendants the following receipt, viz.:

"Jan. 18, 1906."

"Charles P. Wonderly in Account with Little & Hays Investment Co. and Charles P. Wonderly,

Dr.

1905.

Feb. 14. 100 Tennent Shoe Pfd.
at 100 \$10,000.00

1906.

Jan. 18. Interest to date, 6%.... 558.67
\$10,558.67

Cr.

1905.

March 1. Div. 100 Tennent Pfd... \$ 175.00
June 1. Div. 100 Tennent Pfd... 175.00
Sept. 1. Div. 100 Tennent Pfd... 175.00
Dec. 1. Div. 100 Tennent Pfd... 175.00

1906.

Jan. 18. 50 shares taken up by
Charles P. Wonderly.. 4,928.33
Jan. 18. 50 shares taken up by
Little & Hays..... 4,928.34
\$10,000.00

"E. & O. E. Jan. 18, 1906. Received \$4,928.34 in settlement of above account.

"Charles P. Wonderly."

(The last total stated in the above account, to wit, \$10,000 is evidently a typographical error and should be \$10,558.67.)

And it is alleged that at the time of the alleged representations by defendants, and at all times thereafter, the stock was worthless, and that plaintiff was damaged in the sum of \$5,000, for which he prays judgment.

The separate answers of the defendants specifically deny the facts alleged to constitute the fraud charged, and, among other things, allege that prior to the partnership arrangement plaintiff personally investigated the financial condition of the Tennent Shoe Company and agreed to purchase 100 shares of its stock on condition that his son be employed by that company, and that the agreement ultimately made between plaintiff and defendants came about by reason of plaintiff's expressed desire to reduce his actual purchase to 50 shares but nevertheless appear as the owner of 100 shares on the books of the company. And defendants set up that

the settlement of January 18, 1906, was made with full knowledge of the facts, and constitutes a complete settlement and discharge of all claims and demands of plaintiff in the premises.

The reply denies that plaintiff "made any settlement of the claim set forth in his petition, and that there was any consideration therefor"; and denies that the settlement was made with knowledge of the facts, averring that plaintiff thereafter discovered the fraud alleged.

After the impaneling of the jury, plaintiff's counsel made an opening statement of the facts relied upon to support the allegations of the petition. And after defendant had moved for judgment on the petition and opening statement, plaintiff's counsel was allowed to make a further statement. From these statements it appears that the representations relied upon consisted of oral representations said to have been made by William C. Little, now deceased, in a conversation had between him and plaintiff, though it is said that one Hays, an officer of defendant corporation, was present. Relative to the settlement it was stated that on or about January 18, 1906, "or within a week after the newspaper articles came out concerning the bad showing of the Tennent Shoe Company and the fact that they appeared to be insolvent, Wonderly went down to Little & Hays' office and asked that the \$5,000 which he had advanced for their joint account be turned over to him and that they take back the 50 shares of stock which he held for their joint account," and that the settlement mentioned in the petition was the settlement that was obtained at that time; that plaintiff "later felt that he was entitled to damages for the 50 shares which he still held, on account of the fraudulent representations in this statement."

The court, having heard arguments on defendant's motion, and having considered the same, ordered that the motion be sustained; and thereupon plaintiff took his nonsuit. The record discloses that the court placed its rulings upon the ground that the settlement between plaintiff and defendants set up in the petition and referred to by counsel in his opening statement, precluded a recovery by plaintiff in this action.

[1, 2] Plaintiff insists the law does not sanction the course pursued by the trial court in forcing plaintiff to a nonsuit without giving him an opportunity to introduce his evidence. But we cannot accede to this. Where statements of plaintiff's counsel, in opening his case, amount to admissions of facts the existence of which precludes a recovery, the court is justified in refusing to permit the case to proceed further. See Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; Tootle v. Buckingham, 190 Mo. 183, 88 S. W. 619; Ashurst v. Lohefner, 170 Mo. App. 327, 156 S. W. 805. It

is true that in *Russ v. Railway*, 112 Mo. 45, 20 S. W. 472, it is said that:

"Statements made by an attorney at the opening of the trial, as to what he expects to prove, do not amount to admissions. They bind no one."

And see *Fillingham v. Transit Co.*, 102 Mo. App. loc. cit. 579, 77 S. W. 314; *Wasmer v. Railroad*, 166 Mo. App. loc. cit. 218, 148 S. W. 155. But under the later decisions of the Supreme Court cited above it is clear that statements of counsel as to the facts relied upon to establish the plaintiff's case, which show that a recovery cannot be had in the action, may be treated as admissions against plaintiff's interest; and that the court may accept such facts as conceded, and act thereupon. It may be otherwise where the statements are not of such character as to make it proper to give them the force of admissions. But if counsel, as here, is accorded full opportunity to state and does state the facts relied upon, and they are such as to preclude a recovery, why should the court go through the formality of having evidence introduced to establish such conceded facts?

In the case before us the petition avers and the statement of counsel shows that a settlement of the partnership account was had after plaintiff had learned of the alleged insolvency of the Tennent Shoe Company. If it be true that defendants, about a year prior thereto, made false representations of facts relative to the value of the stock in question, plaintiff must have known this when he made the settlement, or at any rate was in possession of such facts as to put him on inquiry. He pleads that it had become generally known that the shoe company was insolvent and the stock worthless, and that "in the light thereof" he demanded that defendants wind up the partnership arrangement and pay him what they owed him for money advanced thereunder. This was done, defendants paying plaintiff \$4,928.34 in settlement of the partnership account. That this settlement, standing as it does unimpeached, precludes a recovery in this action, we think cannot be doubted.

Plaintiff had advanced \$10,000 for the purchase of this stock on the joint account. When he came to settle with defendants he might have repudiated the entire transaction and brought suit for the whole amount of his loss, if the allegations of his petition be true. If he had a claim for damages for fraud in the transaction that was the time to assert it. This he did not do, but demanded that the account between him and defendants be settled by defendants "taking up" one-half of the stock, paying therefor \$4,928.34. And to this form of settlement defendants acceded, and paid the amount demanded.

Plaintiff in error urges that it was competent for him to adduce evidence to show

that the claim now asserted was not intended to be included within this settlement, and that this was a question for the jury. The authorities relied upon by plaintiff in error do not, in our judgment, sustain his position; for the settlement shows upon its face that it was intended to be a complete settlement of the partnership transaction. The account pleaded distinctly affirms the original transaction, reckons with the items of debit and credit between the parties, and states a balance due from defendants to plaintiff, the receipt of which plaintiff acknowledges in settlement of the account.

[3] But it is argued that the amount thus paid by defendants was, in any event, due and owing to plaintiff, and that there was no consideration for the settlement and release of the claim in suit. But this position we regard as untenable under the admitted facts. The original agreement, counted upon, did not operate to make defendants liable to plaintiff for one-half of the purchase price of the stock (with interest, and less accrued dividends) on demand. And when defendants acceded to plaintiff's demand, and paid the aforesaid sum in settlement of the partnership transaction, they did that which they were not then bound to do; and such payment constituted a sufficient consideration for the settlement of any and all claims of plaintiff arising out of the transaction in question.

We need not refer to other questions discussed in the briefs.

It is our opinion that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

STATE v. GRAHAM. (No. 1596.)
(Springfield Court of Appeals, Missouri. April 15, 1916.)

1. CRIMINAL LAW §1004—RIGHT OF APPEAL—WAIVER OF OBJECTIONS.

The right of appeal in a criminal case is statutory, and is not governed by stipulations of counsel.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §1004.]

2. CRIMINAL LAW §1131(7)—APPEAL—DISMISSAL.

Where an appeal has been dismissed because of insufficiency of the record to confer jurisdiction, it will not be reinstated where the time for supplying defects in the record has passed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §2985; Dec. Dig. §1131(7).]

3. CRIMINAL LAW §1131(7) — APPEAL — DOCKETS—NOTICE.

An attorney is not excused by the failure to receive a copy of the printed docket from knowing or ascertaining the day when his case is set.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §2985; Dec. Dig. §1131(7).]

Appeal from Circuit Court, Wayne County; E. M. Dearing, Judge.

B. C. Graham was convicted of an offense, and appeals. Appeal dismissed, and defendant moves to reinstate. Motion denied.

V. V. Ing, of Greenville, for appellant.

PER CURIAM. It appears that the defendant was convicted of some offense, the character of which is not shown by the papers before us, and sentenced to pay a fine of \$300.

All that was filed in this court by the defendant in an attempt to perfect an appeal is a certified copy of the judgment and order granting an appeal. This was filed with the clerk of this court on June 15, 1915, and the case was docketed in accordance with section 2079, R. S. 1909, for the October term following. At the October term a certificate of the trial judge was filed by the attorney for the appellant, as provided by law, stating that the court stenographer was unable to complete the transcript of the evidence in time for the cause to be submitted at our October term, and we thereupon continued the cause to our March term, 1916; the case being docketed for submission on the 21st day of March, 1916. The case was docketed in accordance with the provisions of section 2079, and when reached on the docket and called, it appearing that nothing had been filed except a certified copy of the judgment, in which we observe no defect, and order granting an appeal, the cause was dismissed.

We held in the case of *State v. Faith*, 180 Mo. App. 484, 166 S. W. 649, that the "short-form" method of appeal is not available in criminal cases; the law requiring a perfect transcript of the record and proceedings of the trial court. Subsequent to the rendition of that decision the Supreme Court, in *State v. Connors*, 258 Mo. 330, 167 S. W. 429, expressly affirmed the correctness of this ruling.

The attorney for the appellant now files a motion asking that we set aside our order of dismissal and reinstate the case, and the prosecuting attorney, representing the respondent, agrees that this motion may be sustained.

[1, 2] The right of appeal is statutory, and is not to be governed by stipulations of counsel. The law prescribes the manner in which jurisdiction may be conferred on this court and the time within which the necessary steps to invoke our jurisdiction must be taken. Those steps have not been taken at all in this case; and, were we to reinstate the case, we would have nothing before us save the "short-form" transcript, which under the authorities hereinbefore cited confers no jurisdiction in a criminal case, and the time for bringing the case here on a full transcript has long since expired. It would therefore be useless for us to sustain the motion filed.

[3] In this connection it may be well to call attention to the fact that the statute fixes the time cases are to be docketed, and attorneys must know that, when a cause is appealed in time to make it returnable to a certain term of the appellate court, it will be docketed in this court for hearing at the return term.

It is suggested in support of the motion filed that the attorney for the appellant did not receive a copy of the printed docket showing when this case was set for argument. Even though counsel failed through some mistake or miscarriage to receive a copy of the printed docket from the clerk of this court, this would not relieve him of the duty of knowing that his case would be on our docket for submission at the return term of his case; and especially is this true where the attorney knows that the cause has been continued at a former term of this court. It is the duty of an attorney to know the things the law requires him to know about his litigation in the appellate court, and, as he must know from the statute that his case has been docketed, at least 40 days before the beginning of the term, he will be required to ascertain the day on which his case is set, even though, as claimed in this motion, he failed to receive a copy of our docket.

The motion to set aside the order of dismissal is denied.

MERRILL v. JOHNSON. (No. 1689.)

(Springfield Court of Appeals. Missouri. April 15, 1916.)

1. APPEAL AND ERROR ⇄581(3) — RECORD — BILL OF EXCEPTIONS.

Where neither the record nor abstract of bill of exceptions show the trial judge signed the bill, the defect is fatal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2579, 2580, 2601; Dec. Dig. ⇄581(3).]

2. BILLS AND NOTES ⇄489(7) — ACTION — PLEADING—VARIANCE.

A defense alleging a verbal agreement that the note sued on was merely conditional held defeated by testimony of defendant that the agreement was reduced to writing, with defendant's admission that the written agreement was changed after the other party had signed it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1641; Dec. Dig. ⇄489(7).]

3. APPEAL AND ERROR ⇄582(2) — ABSTRACTS OF RECORD—SETTING OUT DOCUMENTS.

Under the terms of rule 15 of the Courts of Appeal (181 S. W. vi), the admissibility of documentary evidence not set out in full in the abstract will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2583; Dec. Dig. ⇄582(2).]

Appeal from Circuit Court, Camden County; C. H. Skinner, Judge.

Action by Frank E. Merrill against M. V. Johnson. From a judgment for plaintiff, defendant appeals. Affirmed.

C. L. Morgan, of Richland, for appellant.
S. C. Roach, of Linn Creek, and Barney Reed,
of Ulman, for respondent.

FARRINGTON, J. [1] The abstract furnished on this appeal is so defective that we could not from its contents intelligently pass upon the law or the merits of this case as tried in the circuit court. There is no entry showing when the petition was filed, and the same is true as to the answer. There is nothing in the printed abstract before us, either in the record proper or in what we assume in the abstract of the bill of exceptions, to show that the trial judge ever signed the bill. This is fatal, under the rule announced in *Langstaff v. City of Webster Groves*, 246 Mo. loc. cit. 225, 151 S. W. 456, and is enough to dispose of the appeal.

[2] From the evidence before us we gather that the suit is by Frank E. Merrill, the indorsee of a note given by the defendant to Charles E. Miller, on the note. The defendant claims that she went with Miller, the payee, in her own conveyance to a farmhouse that she was in charge of, and stayed there with him over night; that while there he ravished her; that the next morning she, in company with him, drove back to her home; that on the way she left the conveyance and went into a farmhouse to telephone (as she says) for an officer; that she did not get one, and came back to the conveyance, and drove on with Miller to her home. She did not tell the people at the house where she stopped to telephone that she had been ravished by Miller the night before. She went to town and procured the services of one Warren, who (she says) went out to find an officer to arrest Miller, but who failed to find one. She then considered herself damaged in the sum of \$500, and proceeded to fix up the matter with Miller in the form of a land deal. She became the purchaser of Miller's farm, and testifies that he valued it at about \$2,000, and that there was a first mortgage securing a note for \$487 against the place. The rape and land deal were fixed up in this way: In consideration of getting the farm she gave Miller \$1,000 in cash and the note for \$500 which is sued on herein. There being a note for \$487 secured by a first mortgage on the place, this practically corresponds with the value Miller placed on the farm. According to her version, it was understood between them that, if he (Miller) paid off the note secured by the first mortgage (for \$487), then she was to pay this \$500 note in suit, but that, if she had to pay off the \$487 note secured by the first mortgage, Miller was to return to her the \$500 note. She testified that she paid off the \$487 note, and that Miller refused to return the \$500 note, and she therefore claims that the consideration for the note in suit has wholly failed. Her answer alleges that the above-mentioned agreement

was verbal, but on the witness stand she testified positively that it was a written agreement between herself and Miller, signed by both, and she produced a paper or papers purporting to evidence such agreement. The court excluded the written agreement, and no offer of the contents appears, nor is any copy preserved in the evidence before us. Granting that her answer pleaded a good defense, her own testimony defeated that defense, as it shows that the agreement she pleads as a defense was verbal, while she testifies that the agreement was reduced to writing; and she also admits that this written agreement, which Miller had signed, was changed after Miller's signature was affixed thereto.

[3] We find, also, that there was introduced in evidence by the plaintiff the warranty deed from Miller to the defendant, which contained a clause as to the \$487 first mortgage note and evidence bearing upon the question tendered by defendant's answer. The only reference in the printed abstract to this warranty deed is the following:

"Plaintiff then offered to read in evidence the deed from Charles E. Miller to M. V. Johnson, the defendant. Defendant objected to the reading of the deed for the reason it could not throw any light on the transaction. The court overruled the objection. Defendant then and there excepted to the action of the court in overruling the objection."

The court's action in refusing defendant's instruction, and giving the instruction which was given of its own motion, amounted to a demurrer to defendant's evidence as a defense to this action. Before we can say error was committed, there must be a substantial compliance with our rule 15 (181 S. W. vi). The warranty deed was objected to as inadmissible and its construction called in question.

There is no merit in the defense to this action. The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J.,
concur.

FERGUSON v. COMFORT et al. (No. 12687.)

(St. Louis Court of Appeals. Missouri. April 4, 1916. Rehearing Denied April 18, 1916.)

1. REPLEVIN \S 10—WHO SUBJECT—POSSESSION OF PROPERTY.

Replevin cannot be maintained against a party not in possession of the property when suit is instituted.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 69-82; Dec. Dig. \S 10.]

2. PLEADING \S 36(1)—ADMISSIONS—EFFECT. Ordinarily one is bound by the allegations of his pleading.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 81, 84, 85; Dec. Dig. \S 36(1).]

3. PLEADING **§36(2)—ADMISSIONS—EFFECT.**

An action in replevin is *sui generis*, so that the allegation as to the value of the property, while evidence, is not conclusive as to the value, since Rev. St. 1909, § 2637, requires the value to be stated in the affidavit, and is required merely for the purpose of fixing the replevin or forthcoming bond.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. **§36(2).**]

4. REPLEVIN **§106 — ALTERNATE JUDGMENT—VALUE—TIME OF DETERMINATION.**

In a replevin action, the value, which is not the real issue and is assessed only for the purposes of an alternate judgment, is to be assessed as of the date of the trial.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 416-423; Dec. Dig. **§106.**]

5. PLEADING **§36(2) — CONCLUSIVENESS — STATEMENT OF VALUE IN REPLEVIN.**

Under Rev. St. 1909, § 2647, providing that if the plaintiff in replevin fails to prosecute his suit diligently the jury shall assess the value of the property taken, it is evidently contemplated that the plaintiff's statement as to the value of the property shall not be conclusive where evidence of the real value is produced, and the plaintiff should not be made to suffer for inadvertent mistake in stating the value.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. **§36(2).**]

6. PLEADING **§36(2) — CONCLUSIVENESS — STATEMENT OF VALUE IN REPLEVIN.**

Plaintiff in replevin, who has erroneously alleged the value of the property, should be permitted to testify as to the circumstances under which the affidavit was made and to explain that the value stated was the original purchase price.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. **§36(2).**]

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; Geo. O. Hitchcock, Judge.

"To be officially published."

Replevin by Ella M. Fergusson against Charles D. Comfort and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Zachritz & Zachritz and Harmon J. Bliss, all of St. Louis, for appellant. Wm. F. Smith and Henry Higginbotham, both of St. Louis, for respondents.

ALLEN, J. This is an action in replevin. The trial below resulted in a verdict and judgment in favor of the defendants, and plaintiff brought the case here by appeal. We transferred the cause to the Supreme Court upon the theory that the amount in dispute on appeal was beyond our jurisdiction. See *Ferguson v. Comfort*, 159 Mo. App. 30, 139 S. W. 218. But the Supreme Court held otherwise and retransferred it to this court. See *Ferguson v. Comfort*, 264 Mo. 274, 174 S. W. 411.

In May, 1907, one Charles D. Comfort, one of the defendants herein, recovered a judgment against one John W. Baker and another in the circuit court of the city of St. Louis, for the sum of \$5,132.25 and costs. Execution, issued upon this judgment, was plac-

ed in the hands of defendant Nolte, then sheriff of the city of St. Louis, and by him levied upon certain household property located upon the premises occupied by Baker and his wife, Ella M. Baker, in the city of St. Louis. Thereupon, and prior to the removal of the property from the premises aforesaid, Ella M. Baker, the plaintiff herein—who has since married one Fergusson—filed with defendant Nolte, as sheriff, a third party claim to the property so levied upon, averring the value thereof to be \$6,000. Thereupon Comfort, the execution creditor, gave an indemnifying bond in the sum of \$12,000, as provided by law; and the defendant sheriff was proceeding to execute the writ in his hands when plaintiff instituted this action in replevin. Upon the execution and delivery by plaintiff of a replevin bond to the coroner, that officer took possession of the property under the writ of replevin and delivered the possession thereof to plaintiff. The property was never, in fact, removed from plaintiff's premises.

Both in her petition and in her affidavit annexed thereto, plaintiff stated that the property was of the value of \$6,000. The separate answers of defendants Nolte and Comfort admit this to be the value thereof.

Upon the trial plaintiff undertook to testify as to the circumstances under which she signed the affidavit annexed to the petition, but this testimony was excluded. Witnesses for plaintiff, however, were permitted to give testimony relative to the value of the property from which it appeared that the value thereof at the time of the trial was about \$1,450.

In submitting the cause to the jury, the court refused certain instructions requested by plaintiff and gave three instructions offered by defendants. The first of these directed a verdict for defendant Comfort. The second virtually directed a verdict for defendant Nolte, for it told the jury that if they found that prior to the institution of this action plaintiff filed with the defendant sheriff the third party claim shown in evidence, and thereupon the sheriff took from defendant Comfort the indemnifying bond read in evidence, then plaintiff could not recover.

The third instruction for defendant told the jury, in substance, that if they found a verdict for defendants to assess in favor of defendant Nolte, and state in the verdict, the present value of the property and the damages, if any, sustained by said defendant by reason of the taking and detention. And the instruction told the jury that it was admitted by the pleadings that the value of the property at the time of the institution of the suit was \$6,000, and that if the jury found that any depreciation in the value thereof had occurred between the date of the seizure and the day of trial then, in as-

sessing its present value, to deduct the amount of such depreciation from \$6,000; but that in such case the amount of the depreciation, if any, should be included in the damages, if any, that the jury might find to have been sustained by defendant Nolte by reason of the taking and detention; but that if the jury found that the property had suffered no depreciation between the time of the seizure and the trial, then to assess the present value thereof at \$6,000, and the damages for the taking and detention at one cent.

Under these instructions, the jury returned a verdict for defendants for the possession of the property, assessing the value thereof at \$6,000, with one cent damages for the taking and detention thereof.

[1] The action could not be maintained against Comfort, who was not in possession of the property at the time of the institution of the suit. And plaintiff's learned counsel concede that having elected to proceed under the "Sheriffs and Marshals Act," applicable to the city of St. Louis (see Rev. Stat. 1899, pp. 2550-2553), and having filed her third party claim thereunder, and an indemnifying bond having been duly given by the execution creditor, plaintiff could not maintain an action of replevin against the sheriff for possession of the property; that her remedy was upon the indemnifying bond (see *Dodd v. Thomas*, 69 Mo. 364; *Railroad Company v. Castello*, 30 Mo. 124); and that the court committed no error in instructing the jury accordingly. However, plaintiff complains of the action of the trial court in instructing the jury to the effect that the value of the property as stated in the petition and affidavit was conclusive upon the plaintiff. This is the important question involved in the appeal.

[2, 3] It is true, as respondent asserts, that one is ordinarily bound by the allegations of his pleading. See *Railroad v. Iron Works Co.*, 117 Mo. App. loc. cit. 164, 94 S. W. 726, and cases cited. But the action of replevin is sui generis, and the application of this rule to the present case may well be doubted. There is ample authority for holding that in any event the allegation of value in a petition in an action of replevin is to be regarded as a mere matter of form in pleading (see *Bailey v. Ellis*, 21 Ark. 488; *Hawkins v. Johnson*, 3 Black [Ind.] 46; 18 Enc. Pl. & Pr. 541; *Wells on Replevin* [2d Ed.] § 680); though in some jurisdictions the allegation of value appears to be held material (see 34 Cyc. pp. 1472, 1473). Our statute requires the value to be stated in the affidavit. Section 2637, Rev. Stat. 1909. This serves to fix the amount of the replevin or the forthcoming bond, and is a necessary element of the affidavit. But we take it that it is not material that the petition allege the value. While this by no means concludes the matter before us, we are constrained to hold

that the value stated in both the affidavit and petition herein should not be regarded as conclusive on the question of the value of the property at the time of the trial.

[4] It is undoubtedly the law in this state that the value—which is not the real issue in this action, and is assessed only for the purposes of an alternate judgment—is to be assessed as of the date of the trial. See *Richey v. Burnes*, 83 Mo. 362; *Hinchey v. Koch*, 42 Mo. App. 230; *Kendall Boot & Shoe Co. v. Bain*, 46 Mo. App. loc. cit. 595, 596; *Jennings v. Sparkman*, 48 Mo. App. loc. cit. 252; *Chemical Co. v. Nickells*, 66 Mo. App. loc. cit. 686; *Bradley v. Campbell*, 132 Mo. App. loc. cit. 80, 111 S. W. 514.

[5] The value stated in the affidavit and petition is at most an admission of the value at the time of the institution of the suit. It is true that if—as appears to have been conceded on the trial of this cause—there is no appreciable depreciation in the property between the time of the seizure and the day of trial, it may seem proper to give full effect to such admission to fix the value at the time of trial. But we think that to give effect to the intent and spirit of the statute, and secure a just and fair alternative judgment thereunder, nothing short of an unequivocal admission of the value at the time of the trial should be permitted to take the place of an actual assessment by the jury which the statute contemplates (see section 2647, Rev. Stat. 1909), where evidence of such value is produced, or preclude the consideration of such evidence by the jury. While the statute requires the value to be stated in the affidavit, it is not for the purpose of the assessment, and we do not believe that the statute contemplates that the plaintiff shall at his peril determine, in advance, and with precision, the value for all purposes in the case. False swearing is not to be encouraged, and it is not amiss to penalize one willfully guilty of such offense; but it does not follow that a party should be made to suffer for an inadvertent mistake or error, committed perhaps in the haste of instituting a replevin suit.

[6] Plaintiff offered to show that the value stated corresponded to the original purchase price of the property, and sought to show the circumstances under which the affidavit was made; but this was excluded. It would be an extremely harsh, and it seems to us unreasonable, rule of law which would preclude her from showing the true facts, and of offering explanation of the circumstances attending the making of the affidavit.

That the statements of the affidavit and petition constitute admissions by plaintiff respecting the value for the jury's consideration cannot be doubted; but we think that they should not be held to be conclusive, where evidence adduced shows a different value at the time of the trial.

Under our statute, it has been held to be

competent for the jury to find the value from the sworn statement of plaintiff, making allowance for depreciation, if any, and that the plaintiff cannot complain that the jury thus accepted the value placed by him upon the property, as the basis of their assessment. See *Schultz v. Hickman*, 27 Mo. App. 21. In *Chemical Co. v. Nickells*, 68 Mo. App. 678, the property had been removed from the state, and no evidence of its present value was obtainable; and it was held proper to accept the value stated by plaintiff in the affidavit.

In *Edwards v. Eveler*, 84 Mo. App. 405, the value of certain grain was alleged by plaintiff and admitted by the answer. It appears that no evidence was adduced as to the value thereof at the time of the trial. In affirming an alternate judgment for defendant based upon such alleged value, the court said that the pleadings were conclusive as to value. But this, we think, need not be taken as an adjudication of the question before us, for it was said in a case, unlike this, wherein nothing appeared as to value beyond that stated in the affidavit and appearing in the pleading, as being the value at the institution of the suit. Under the circumstances, the plaintiff could not well be heard to complain that the value thus stated was accepted as the basis of the judgment. *Schultz v. Hickman*, *supra*. To the extent that the language of the opinion goes further than this it may be regarded as obiter dicta.

There is a lack of harmony in the adjudications in other jurisdictions touching the matter in hand. To review the cases at length would be a useless task. There is much authority to support the view that a plaintiff, in a case such as this, is not concluded by the sworn value stated by him for the purpose of obtaining the writ. See *Briggs v. Wiswell*, 56 N. H. 319; *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675; *Bailey v. Ellis*, 21 Ark. 488; *Chicago, etc., R. Co. v. Packet Co.*, 38 Iowa, 377; *Gilroy v. Everson-Hickok Co. et al.*, 118 App. Div. 733, 103 N. Y. Supp. 620, affirmed in 190 N. Y. 551, 83 N. E. 1125; *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521; *Susquehanna Boom Co. v. Finney*, 58 Pa. 200; 34 Cyc. 1494, 1498; 24 Am. & Eng. Enc. 526.

In *Briggs v. Wiswell*, *supra*, 56 N. H. loc. cit. 321, 322, it is said:

"The form of the writ of replevin, as prescribed in Gen. Stats. 411 (chapter 203, § 18),

requires the plaintiff to allege the value of the goods to be replevined, and is in this respect unlike the form in use in Massachusetts. *Litchman v. Potter*, 116 Mass. 371. The allegation is undoubtedly competent evidence upon the trial as an admission of value by the plaintiff, but I see no reason why it should be held to be conclusive as against him. What weight shall be given to the admission is a question for the jury under all the circumstances under which it was made. If there should be any facts tending to explain the circumstances under which it was made, it would only be reasonable that the plaintiff should have the opportunity to lay them before the jury. Often, when he sues out his writ, he may not have the means of fixing the value of the property. It is not in his possession, but in that of the defendant. He may never have seen it, or, in the haste that frequently necessarily is incident to the instituting of a suit, it may be impossible for him to state the value with entire exactness. I think therefore it would be unreasonable to hold that he should be precluded from laying any evidence before the jury upon the question of value, because he may have been led, for reasons that turn out not to be well grounded, to set the value in his writ higher than it actually is."

"The recitals by the plaintiff in his affidavit for the issuance of the writ of replevin, or in the replevin bond, are evidence in favor of the defendant as to the value of the property; but they are not conclusive so as to preclude the plaintiff from showing that the property is of less value, and a fortiori do not conclude the defendant from showing that the property is of greater value." 24 Am. & Eng. Enc. 526.

As portraying the contrary view, see *Washington Ice Co. v. Webster*, 62 Me. loc. cit. 363, 16 Am. Rep. 462; *Capital Lumbering Co. v. Learned*, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792; *Butts v. Woods*, 4 N. M. (Gild.) 343, 16 Pac. 617. In *Weyerhaeuser v. Foster*, 60 Minn. 223, 61 N. W. 1129, it is held that the value fixed by the plaintiff in his affidavit and bond is conclusive upon him "save in exceptional cases."

We are of the opinion that the jury should have been allowed to consider the evidence adduced touching the value of the property at the time of the trial, and that it was error to instruct the jury that the value was conclusively admitted by the pleadings. This conclusion necessitates a reversal of the judgment, and we deem it unnecessary to discuss at this time other questions presented in the briefs.

The judgment is reversed, and the cause remanded.

NORTONI, J., concurs. REYNOLDS, P. J., dissents.

MEMORANDUM DECISIONS

ADAMS v. CITY OF FT. SMITH (two cases). (Supreme Court of Arkansas. Oct. 4, 1915.) Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

PER CURIAM. Appeal dismissed for failure of appellant to comply with the condition prescribed by statute in misdemeanor cases.

BAKER v. TROWBRIDGE. (Supreme Court of Arkansas. Nov. 1, 1915.) Appeal from Benton Chancery Court; T. H. Humphreys, Chancellor.

PER CURIAM. Affirmed under rule 7 (120 S. W. v.).

BEAKLEY et al. v. MOORE. (Supreme Court of Arkansas. July 12, 1915.) Appeal from Circuit Court, Lawrence County, Western District; R. E. Jeffrey, Judge.

PER CURIAM. Affirmed on appellee's motion under rule 7 (120 S. W. v.).

BOWEN v. WILLIAMS. (Supreme Court of Arkansas. Dec. 20, 1915.) Appeal from Mississippi Chancery Court, Osceola District; Chas. D. Frierson, Chancellor.

PER CURIAM. Affirmed under rule 7 (120 S. W. v.).

BRANSTETTER et al. v. BRANSTETTER et al. (Supreme Court of Arkansas. April 3, 1916.) Appeal from Arkansas Chancery Court, Southern District; John M. Elliott, Chancellor.

PER CURIAM. Appeal dismissed on appellee's motion, on the ground that if the decree was final the time for appeal had expired before the same was granted by the clerk, and if it was not final the appeal was premature. See, also, 170 S. W. 989.

BRICKEY et al. v. CONTINENTAL GIN CO. (Supreme Court of Arkansas. April 5, 1915.) Appeal from Circuit Court, Conway County; Hugh Basham, Judge.

PER CURIAM. Appeal dismissed on appellants' motion.

BROWN v. GOULD. (Supreme Court of Arkansas. Jan. 10, 1916.) Appeal from Benton Chancery Court; Wm. A. Falconer, Chancellor.

PER CURIAM. Appeal dismissed on appellee's motion, on the ground that appellant waived the right of appeal by accepting benefits under the decree appealed from.

BRYANT et al. v. BUTTERFIELD. (Supreme Court of Arkansas. Feb. 14, 1916.) Appeal from Circuit Court, Garland County; J. T. Cowling, Judge.

PER CURIAM. Affirmed on appellee's motion for noncompliance by appellant with rule 9.

CADWELL v. ESTES et al. (Supreme Court of Arkansas. Oct. 4, 1915.) Appeal from Sebastian Chancery Court, Ft. Smith District; Wm. A. Falconer, Chancellor.

PER CURIAM. Appeal dismissed on the trustee's motion, for noncompliance by appellant with rule 9.

CAMPBELL v. STATE. (Supreme Court of Arkansas. Nov. 15, 1915.) Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

PER CURIAM. Appeal dismissed on appellant's motion.

CHICAGO, R. I. & P. RY. CO. v. HOBBS. (Supreme Court of Arkansas. March 6, 1916.) Appeal from Circuit Court, Yell County, Danville District; M. L. Davis, Judge.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

CHICAGO, R. I. & P. RY. CO. v. MARCH-AND. (Supreme Court of Arkansas. Sept. 27, 1915.) Appeal from Circuit Court, Lonoke County; Thomas C. Trimble, Judge.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

COLEMAN-YOUNT LUMBER CO. v. BROWNFIELD. (Supreme Court of Arkansas. Nov. 11, 1915.) Appeal from Logan Chancery Court, Southern District; Wm. A. Falconer, Chancellor.

PER CURIAM. Affirmed on appellee's motion for insufficient compliance by appellant with rule 9 in the matter of the abstract of the record.

COOPER et al. v. MAYBERRY. (Supreme Court of Arkansas. Dec. 6, 1915.) Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance by appellants with rule 9.

COX v. ORR et al. (Supreme Court of Arkansas. Oct. 4, 1915.) Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

PER CURIAM. Appeal dismissed on motion of the appellees, for failure of appellant to obtain an appeal within one year from date of judgment.

CURTIS et al. v. BENSON. (Supreme Court of Arkansas. March 6, 1916.) Appeal from Circuit Court, Franklin County, Ozark District; James Cochran, Judge.

PER CURIAM. Appeal dismissed on appellants' motion.

DOLLINS v. STATE. (Supreme Court of Arkansas. June 21, 1915.) Appeal from Circuit Court, Clay County, Western District; W. J. Driver, Judge.

PER CURIAM. Appeal dismissed on appellee's motion, for failure of appellant to perfect his appeal within the time allowed by law.

DOYLE-KIDD DRY GOODS CO. v. ABBOTT et al. (Supreme Court of Arkansas. July 12, 1915.) Appeal from Pike Chancery Court; James D. Shaver, Chancellor.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

DUNOAN et al. v. WHITE SEWING MACHINE CO. (Supreme Court of Arkansas.

Feb. 21, 1916.) Appeal from Circuit Court, Poinsett County; W. J. Driver, Judge.

PER CURIAM. Appeal dismissed on appellee's motion, because same was not perfected within the time required by statute.

EDWARDS et al. v. EQUITABLE POWDER MFG. CO. (Supreme Court of Arkansas. Jan. 31, 1916.) Appeal from Circuit Court, Sebastian County, Ft. Smith District; Paul Little, Judge.

PER CURIAM. Affirmed under rule 7 (120 S. W. v.).

EDWARDS et al. v. WEBER IMPLEMENT & AUTO CO. (Supreme Court of Arkansas. Dec. 20, 1915.) Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

FT. SMITH DIST. OF SEBASTIAN COUNTY v. LITTLE. (Supreme Court of Arkansas. Dec. 13, 1915.) Appeal from Circuit Court, Sebastian County; T. S. Osborne, Special Judge.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

GAGE v. WOOD. (Supreme Court of Arkansas. March 13, 1916.) Appeal from Circuit Court, Greene County; W. J. Driver, Judge.

PER CURIAM. Appeal dismissed on appellant's motion.

GREEN et al. v. ST. LOUIS SOUTHWESTERN RY. CO. (Supreme Court of Arkansas. Nov. 1, 1915.) Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

PER CURIAM. Settled and appeal dismissed by consent.

HALL v. RUTHERFORD. (Supreme Court of Arkansas. Oct. 25, 1915.) Appeal from Garland Chancery Court; A. Curl, Chancellor.

PER CURIAM. Affirmed on appellee's motion for failure of appellant to comply with rule 9.

HAY LAND & LUMBER CO. v. ROCK ISLAND & D. RY. CO. (Supreme Court of Arkansas. Jan. 3, 1916.) Appeal from Yell Chancery Court, Dardanelle District; Jordan Sellers, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with appellant with rule 9.

J. H. HAMLEN & SON CO. v. CRENshaw et al. (Supreme Court of Arkansas. March 27, 1916.) Appeal from Circuit Court, Grant County; W. H. Evans, Judge.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

KEOK FURNITURE CO. v. SEAWELL. (Supreme Court of Arkansas. March 6, 1916.) Writ of Prohibition from Circuit Court, Boone County; Gus Seawell, Special Judge.

PER CURIAM. Dismissed on motion of the petitioner.

KLAPP v. STATE. (Supreme Court of Arkansas. April 5, 1915.) Appeal from Circuit

Court, Craighead County, Jonesboro District; W. J. Driver, Judge.

PER CURIAM. Appeal dismissed on appellee's motion, for failure of the appellant to comply with the condition of the statute in misdemeanor cases.

LITTLE ROCK ICE CO. v. OLSEN. (Supreme Court of Arkansas. Feb. 7, 1916.) Appeal from Circuit Court, Pulaski County, Second Division; Guy Fulk, Judge.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

McGILL et al. v. GRAYSONIA-McLEOD LUMBER CO. et al. (Supreme Court of Arkansas. Feb. 7, 1916.) Appeal from Clark Chancery Court; James D. Shaver, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

MARQUESS v. CLAYBORNE. (Supreme Court of Arkansas. March 20, 1916.) Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

PER CURIAM. Appeal dismissed on appellee's motion for noncompliance by appellant with rule 9.

MIDDLETON v. HESTER. (Supreme Court of Arkansas. Nov. 29, 1915.) Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

PER CURIAM. Affirmed on appellee's motion for noncompliance by appellant with rule 9.

MORRIS v. FRIEND. (No. 245.) (Supreme Court of Arkansas. March 13, 1916.) Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge. Action by R. W. Friend against Maggie Morris. From a judgment for plaintiff, defendant appeals. Affirmed. J. W. Rhodes, Jr., and W. J. Lamb, both of Osceola, for appellant. J. T. Coston, of Osceola, for appellee.

KIRBY, J. This is the second appeal of this case, a statement of which appears in *Morris v. Friend*, 173 S. W. 199. The judgment was reversed and the cause remanded for a new trial because of the court's failure to give appellant's requested instruction numbered 2, telling the jury that they could not find for the plaintiff, even though they found from a preponderance of the evidence that the defendant was the sole owner of Morris & Co., unless they found that her husband, L. A. Morris, was authorized by her, the defendant, to sign her name to the note sued on. Upon the trial anew virtually the same testimony was introduced, with the exception that appellant did not testify. The issue appears to have been submitted to the jury upon correct instructions, and the testimony is sufficient to sustain the verdict. Affirmed.

OHLENDORF v. TURNER. (Supreme Court of Arkansas. Feb. 7, 1916.) Appeal from Mississippi Chancery Court; Chas. D. Frierson, Chancellor.

PER CURIAM. Submission set aside and appeal dismissed on appellant's motion.

ROBINSON v. CITIZENS' NATIONAL LIFE INS. CO. (Supreme Court of Arkansas. Oct. 25, 1915.) Appeal from Circuit Court, Mississippi County, Chickasawba District; J. F. Gautney, Judge.

PER CURIAM. Appeal dismissed for non-compliance by appellant with rule 9.

ST. LOUIS, I. M. & S. RY. CO. v. HAMP-
TON. (Supreme Court of Arkansas. Oct. 11,
1915.) Appeal from Circuit Court, Hempstead
County; George E. Haynie, Judge.

PER CURIAM. Settled and appeal dismissed
on appellant's motion.

ST. LOUIS, I. M. & S. RY. CO. et al. v.
JACKS BAYOU DRAINAGE DIST. (Supreme
Court of Arkansas. Feb. 28, 1916.) Appeal
from Circuit Court, Lonoke County; G.
W. Emerson, Special Judge.

PER CURIAM. Appeal dismissed on appel-
lee's motion, because same was not perfected
within the time required by statute.

ST. LOUIS, I. M. & S. RY. CO. v. OLIVER.
(Supreme Court of Arkansas. Feb. 28, 1916.)
Appeal from Circuit Court, White County; J.
M. Jackson, Judge.

PER CURIAM. Appeal dismissed on appel-
lee's motion, because same was not perfected
within the time required by statute.

ST. LOUIS, I. M. & S. RY. CO. v. ROAD
IMP. DIST. NO. 1, POPE COUNTY. (Supreme
Court of Arkansas. Feb. 7, 1916.) Appeal
from Circuit Court, Pope County; M. L.
Davis, Judge.

PER CURIAM. Appeal dismissed on appel-
lant's motion.

ST. LOUIS SOUTHWESTERN RY. CO. v.
WATTS. (Supreme Court of Arkansas. June
7, 1915.) Appeal from Circuit Court, Cleve-
land County; Turner Butler, Judge.

PER CURIAM. Settled and appeal dis-
missed.

SANDS et al. v. BROWN. (Supreme Court
of Arkansas. Nov. 8, 1915.) Appeal from Cir-
cuit Court, Searcy County; Geo. W. Reed,
Judge.

PER CURIAM. Appeal dismissed for non-
compliance by appellants with rule 9.

SIMONSON v. LEWIS. (Supreme Court of
Arkansas. Jan. 3, 1916.) Appeal from Circuit
Court, Mississippi County, Osceola District; W.
J. Driver, Judge.

PER CURIAM. Appeal dismissed for non-
compliance with rule 9.

SOUTHERN LUMBER CO. v. DAILY.
(Supreme Court of Arkansas. Oct. 11, 1915.)
Appeal from Circuit Court, Bradley County;
Turner Butler, Judge.

PER CURIAM. Submission set aside and
appeal dismissed, the controversy having been
settled by the parties.

SOUTHERN LUMBER CO. v. LOWE et al.
(Supreme Court of Arkansas. May 17, 1915.)
Appeal from Circuit Court, Bradley County;
H. W. Wells, Judge.

PER CURIAM. Submission set aside and
appeal dismissed by consent.

SOUTHERN TRUST CO. v. FARRELL
LUMBER CO. (Supreme Court of Arkansas.

Jan. 10, 1916.) Appeal from Pulaski Chancery
Court; Jordan Sellers, Chancellor.

PER CURIAM. Appeal dismissed on appel-
lant's motion.

STARR v. CITY OF FT. SMITH. (Supreme
Court of Arkansas. April 5, 1915.) Appeal
from Circuit Court, Sebastian County,
Ft. Smith District; Paul Little, Judge.

PER CURIAM. Settled and appeal dis-
missed.

STATE ex rel. DAVIS v. FISHER. (Supreme
Court of Arkansas. Jan. 3, 1916.) Cer-
tiorari to Circuit Court, White County; J. M.
Jackson, Judge.

PER CURIAM. Judgment admitting re-
spondent to bail affirmed.

SUTHERLAND v. STATE. (Supreme Court
of Arkansas. Jan. 17, 1916.) Appeal from Cir-
cuit Court, Madison County; J. S. Maples,
Judge.

PER CURIAM. Appeal dismissed, appellant
having been pardoned.

TALLEY v. STATE. (Supreme Court of
Arkansas. Sept. 27, 1915.) Appeal from Cir-
cuit Court, Benton County; Joseph W. Maples,
Judge.

PER CURIAM. Appeal dismissed, appellant
having been pardoned.

THRASH-LICK PRINTING CO. v. UNI-
TYPE CO. (Supreme Court of Arkansas. Dec.
6, 1915.) Appeal from Circuit Court, Sebastian
County; Paul Little, Judge.

PER CURIAM. Affirmed under rule 7 (120
S. W. v.).

TURNHAM et al. v. STATE. (Supreme
Court of Arkansas. Nov. 22, 1915.) Appeal
from Circuit Court, Mississippi County, Osceola
District; W. J. Driver, Judge.

PER CURIAM. Appeal dismissed for failure
to comply with the condition of that statute in
misdemeanor cases.

UNITED STATES STONE CO. v. STATE.
(Supreme Court of Arkansas. Dec. 13, 1915.)
Appeal from Circuit Court, Franklin County,
Ozark District; James Cochran, Judge.

PER CURIAM. Affirmed for noncompliance
with rule 10.

WESTERN UNION TELEGRAPH CO. v.
FORGASON et al. (Supreme Court of Arkan-
sas. June 21, 1915.) Appeal from Circuit
Court, Cleburne County; George W. Reed,
Judge.

PER CURIAM. Settled and appeal dis-
missed.

WM. J. LEMP CO. v. HOT SPRINGS
COMMISSION CO. (Supreme Court of Arkan-
sas. Nov. 29, 1915.) Appeal from Circuit
Court, Garland County; Scott Wood, Judge.

PER CURIAM. Settled and appeal dismiss-
ed by consent.

CRISS v. STATE. (No. 4025.) (Court of Criminal Appeals of Texas. April 5, 1916.) Appeal from Johnson County Court; B. Jay Jackson, Judge. Will Criss was convicted of selling intoxicating liquor in prohibition territory, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of selling intoxicating liquor in prohibition territory. No statement of facts accompanies the record, nor does the record contain any bills of exception. Under such circumstances, the motion for a new trial contains no ground we can review. The judgment is affirmed.

CRISS v. STATE. (No. 4026.) (Court of Criminal Appeals of Texas. April 5, 1916.) Appeal from Johnson County Court; B. Jay Jackson, Judge. Will Criss was convicted of vagrancy, and he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. From a conviction for vagrancy, this appeal is prosecuted, without a statement of facts or bills of exception. There is nothing raised which can be reviewed. The judgment is affirmed.

McELREE v. STATE. (No. 4006.) (Court of Criminal Appeals of Texas. March 29, 1916.) Appeal from Nacogdoches County Court; J. F. Perritte, Judge. Will McElree was convicted of making an illegal sale of intoxicating liquor in prohibition territory, and

he appeals. Affirmed. C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an appeal from a misdemeanor conviction for making an illegal sale of intoxicating liquor in prohibition territory. There is no bill of exceptions, nor statement of facts, and nothing raised which can be reviewed in the absence of these. The judgment is affirmed.

WAPLES et al. v. MARRAST. (No. 7267.) (Court of Civil Appeals of Texas. Galveston. May 18, 1916.) Appeal from District Court, Galveston County; Robt. G. Street, Judge. Petition for mandamus by E. K. Marrast against Paul Waples and others, composing the Democratic State Executive Committee. The writ was awarded, and respondents appeal. On the answers of the Supreme Court to certified questions (184 S. W. 180), reversed, and judgment rendered for defendants. Cecil H. Smith, of Sherman, Walter Collins, of Hillsboro, and James B. Stubbs, of Galveston, for appellants. John W. Campbell, Chas. H. Theobald, Walter E. Cranford, and Marion J. Levy, all of Galveston, for appellee.

PLEASANTS, C. J. The controlling questions in this case were certified by us to the Supreme Court. The answers of the Supreme Court to the questions certified, as shown by the opinion of that court rendered on March 23, 1916, requires that the judgment of the court below be reversed, and judgment here rendered for appellant; and it has been so ordered. Reversed and rendered.

END OF CASES IN VOL. 184

*

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
Prior Reporter Volume Index-Digests

ABANDONMENT.

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Husband and Wife, ⚡902-913.

ABATEMENT AND REVIVAL.

See Criminal Law, ⚡279; Election of Remedies; Intoxicating Liquors, ⚡260; Pleading, ⚡111.

II. ANOTHER ACTION PENDING.

⚡8(4) (Tenn.) A bill to set aside a decree in a former case as a cloud on complainant's title to real estate would not be abated by the pendency of a suit filed by the defendant against complainant in an attempt to deraign title to the land claimed by defendant under the same decree.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

⚡15 (Mo.App.) Although pendency of an action in the federal court on the same cause will defeat a second action in the state court, it is sufficient to prevent abatement if the suit in federal court is terminated by nonsuit or dismissal before trial of the plea in abatement.—*Martin v. Richmond Oil Co.*, 184 S. W. 127.

Although voluntary dismissal in vacation with payment of costs is not conclusive against the defendant in the absence of court order thereon, it authorizes plaintiff to bring another action on the same cause.—*Id.*

The retention of authority over a voluntary dismissal and the provisions of Rev. St. 1909, § 1979, requiring payment of accrued costs on vacation dismissal by plaintiff, being for the protection of the court officers, failure to pay the costs does not invalidate the dismissal so as to abate a subsequent suit on the same cause.—*Id.*

The abatement of a subsequent suit on the ground of pendency of another action between the same parties on the same cause being required only to prevent vexatious, unnecessary, and oppressive litigation, the court may, in its discretion, overrule such plea in abatement, where it is only technically pending, but is dismissed in so far as plaintiff is concerned.—*Id.*

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ACCOUNT, ACTION ON.

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ACCOUNT STATED.

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⚡6(2) (Mo.App.) Where an account is transmitted by mail or messenger to a party who re-

ceives and retains it for an unreasonable time and without objection, the law implies an agreement to pay on his part, resulting in an account stated.—Niehaus v. Gillanders, 184 S. W. 949.

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I. GROUNDS AND CONDITIONS PRECEDENT.

¶1 (Tex.Civ.App.) "Cause of action" is right claimed or wrong suffered by plaintiff and corresponding duty or delict of defendant.—Baker v. Gulf, O. & S. F. Ry. Co., 184 S. W. 257.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

¶40 (Tenn.) The common-law and the statutory causes of action for personal injury on railroad crossings may be joined in the same case.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

¶47 (Ky.) Civ. Code Prac. § 83, providing for the joinder of actions on contracts growing out of the same transaction, does not authorize the joinder of actions on contract and tort.—Little v. Consolidation Coal Co., 184 S. W. 873.

¶47 (Tex.Civ.App.) An action in contract against the sureties on a school contractor's bond can be joined with an action in tort against the trustees for failing to require a sufficient bond.—Kerbow v. Wooldridge, 184 S. W. 746.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

¶69 (Tex.Civ.App.) Where B. sues C. to cancel two notes, and C. then sues B. in another court, on one of the notes, and obtains default judgment, pending review of such judgment, B.'s suit should be stayed.—Cattlemen's Trust Co. v. Blasingame, 184 S. W. 574.

ADEQUATE REMEDY AT LAW.

See Injunction, ¶16, 17.

ADJOINING LANDOWNERS.

See Boundaries.

ADJUDICATION.

See Judgment.

ADMINISTRATION.

See Executors and Administrators.

ADMISSIONS.

See Criminal Law, ¶406, 407; Evidence, ¶208-265; Pleading, ¶127, 177; Prohibition, ¶24, 25.

ADOPTION.

¶23 (Mo.) Under Rev. St. 1909, §§ 332, 1871, issue of adopted child takes by descent from the adoptive parents.—Bernero v. Goodwin, 184 S. W. 74.

ADULTERY.

¶7 (Tex.Cr.App.) An indictment for adultery need not allege the name of the accused's spouse, and, if alleged, it may be treated as surplusage.—Simmons v. State, 184 S. W. 226.

¶10 (Tex.Cr.App.) The state need not prove that the alleged adulterer's spouse was actually living at the time of the offense charged, but

from proof that he was alive within one year prior thereto the rebuttable presumption that he still lived arises.—Simmons v. State, 184 S. W. 226.

ADVANCEMENTS.

See Descent and Distribution, ¶115.

ADVERSE POSSESSION.

See Easements, ¶3, 8; Limitation of Actions; Property; Quieting Title, ¶35; Trespass to Try Title, ¶7; Vendor and Purchaser, ¶239.

I. NATURE AND REQUISITES.

(C) Visible and Notorious Possession.

¶31 (Ky.) Under Ky. St. § 2546, concerning notice to city authorities of one claiming adversely to the city where plaintiff's grantor fenced a dedicated street for 15 years without notifying the city authorities, plaintiff's title cannot be sustained on the theory of adverse holding.—City of Henderson v. Yeaman, 184 S. W. 878.

(E) Duration and Continuity of Possession.

¶41 (Ky.) In an action to quiet title of land claimed by defendant city as a dedicated street, if not a street at the time of appropriation the right to claim by adverse possession will be controlled by Ky. St. § 2505, providing that actions to recover real property must be brought within 15 years.—City of Henderson v. Yeaman, 184 S. W. 878.

¶57 (Tex.Civ.App.) Where plaintiffs claimed title to land by adverse possession under a certain grant and the jury found that that grant did not include the lands sued for, the question of sufficiency of time to establish title by limitations was immaterial.—Crosby v. Stevens, 184 S. W. 705.

(F) Hostile Character of Possession.

¶71(3) (Tex.Civ.App.) The three-year statute of limitations was not available where the portion claimed had been disposed of by the assignee of a survey prior to the execution of the bond for title to the one under whom the adverse party claimed.—Diffie v. White, 184 S. W. 1065.

¶82 (Tex.Civ.App.) That a grantee took possession and held for himself and his grantor does not show possession under color of title where the grantee's conveyance was not recorded.—Sweeten v. Taylor, 184 S. W. 693.

Where there was a delay of over three months in recording a deed, the grantee's possession was not under color of title within the five-year statute of limitations.—Id.

II. OPERATION AND EFFECT.

(B) Title or Right Acquired.

¶106(1) (Tex.Civ.App.) A limitation title when it matures is as good as any other title.—Heard v. Bowen, 184 S. W. 234.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶114(1) (Tex.Civ.App.) In action to recover land on title by adverse claim and occupancy, evidence held to support verdict for plaintiffs.—Houston Oil Co. of Texas v. Jones, 184 S. W. 611.

AFFIDAVITS.

See Attachment, ¶125; Continuance, ¶46; Depositions; Replevin, ¶27; Trial, ¶344.

AGENCY.

See Principal and Agent.

AGREEMENT.

See Contracts.

AGRICULTURE.

See Waters and Water Courses, ¶254.

ALCOHOL.

See Intoxicating Liquors, ¶134.

ALIBI.

See Criminal Law, ¶775.

ALIMONY.

See Divorce, ¶215-286.

ALLOWANCE.

See Executors and Administrators, ¶182.

ALTERATION OF INSTRUMENTS.

See Bills and Notes, ¶378; Principal and Surety, ¶39, 100, 101; Reformation of Instruments.

¶9 (Tex.Civ.App.) Where a note was attached without line or perforation to a conditional contract of sale, its subsequent detachment and negotiation was an alteration avoiding the note in the hands of an innocent purchaser for value.—Spencer v. Triplett, 184 S. W. 712.

¶9 (Tex.Civ.App.) Where the plaintiff's assignor and defendant, parties to a contract or order with a note attached, intended and understood that the note was not to be detached, its detachment for the purpose of negotiations was a material "alteration" of the note.—Landon v. Halcomb, 184 S. W. 1098.

¶23 (Mo.) Where a deed of trust recited that \$30,000 was the purchase money of the lands conveyed in trust, indorsement of payment upon the note evidencing such indebtedness, so as to void the instrument for alteration, did not extinguish the original indebtedness for which the note was given.—Bobb v. Taylor, 184 S. W. 1028.

¶27(3) (Tex.Civ.App.) The burden is on one offering an altered or mutilated writing to explain its condition before it is admissible in evidence.—Kerbow v. Wooldridge, 184 S. W. 746.

¶29 (Tex.Civ.App.) Evidence held to show that interlineations in a contract were made by the defendant, who denied it, and were of date concurrent with the contract.—Lester v. Hutson, 184 S. W. 268.

AMBIGUITIES.

See Evidence, ¶450, 452.

AMENDMENT.

See Appeal and Error, ¶655, 1041; Elections, ¶288; Pleading, ¶245, 267; Process, ¶164; Railroads, ¶19; Removal of Causes; Statutes, ¶230.

AMOUNT IN CONTROVERSY.

See Appeal and Error, ¶58; Courts, ¶120-122, 231; Justices of the Peace, ¶44.

ANIMALS.

See Evidence, ¶13; Master and Servant, ¶238; Railroads, ¶407-446.

¶26(5) (Ky.) An agister having a personal judgment and a lien for the keeping of stock, if holding it as agent for the commissioner to sell, might turn it over to the commissioner, and, if holding it as an individual and unable to keep it, might apply to the court to make other provision for its keep.—Barker v. Illinois Surety Co., 184 S. W. 377.

¶33 (Ark.) Where defendant's mules, while stabled in plaintiff's barn, carried disease to plaintiff's horses, defendants were not liable un-

less they knew, or were charged with knowledge, of the condition of the mules.—M. C. Brown & Co. v. Bennett, 184 S. W. 35.

ANNEXATION.

See Drains, ¶15.

ANSWER.

See Pleading, ¶127.

ANTI-TRUST LAW.

See Monopolies.

APPEAL AND ERROR.

See Certiorari; Courts, ¶202, 231; Criminal Law, ¶1004-1184.

For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

¶14(4) (Ark.) Under Kirby's Dig. § 1225, touching cross-appeals, a defendant's appeal from the portion of a decree relating to his controversy with M., which was separate from the controversy between plaintiffs and M., did not enable plaintiffs to bring up their case by cross-appeal.—Shapard v. Mixon, 184 S. W. 399.

III. DECISIONS REVIEWABLE.**(C) Amount or Value in Controversy.**

¶58 (Tex.Civ.App.) The Court of Civil Appeals has jurisdiction on appeal from a judgment of the county court in an action begun before a justice of the peace to recover \$95 and general relief under which interest exceeding \$5 could be awarded.—International & G. N. Ry. Co. v. Perkins, 184 S. W. 725.

The Court of Civil Appeals has jurisdiction of an appeal from a county court judgment on appeal from the justice of the peace in an action for a sum and interest which would amount to more than \$100, though plaintiff waived a portion of interest.—Id.

(D) Finality of Determination.

¶79 (1) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1997, there is no appealable final judgment in an action against several defendants until it is finally disposed of as to all of them.—Gulf, C. & S. F. Ry. Co. v. Atlantic Fruit Distributors, 184 S. W. 294.

Where an action against two defendants and a cross-action against a railway were tried together, there can be no appeal from a judgment against the railway until final judgment was rendered as to both defendants.—Id.

¶79(2) (Tex.Civ.App.) From the order of dismissal of plaintiff's suit as to part of defendants and the judgment after trial against defendant N., held, as regards there being a final judgment, giving the appellate court jurisdiction, that dismissal as to all but N. was plainly and necessarily implied.—Nunez v. McElroy, 184 S. W. 531.

¶80(1) (Tex.Civ. App.) Relative to the judgment disposing of all the subject-matter, giving the appellate court jurisdiction, amendment of the petition reducing the land claimed of itself eliminates all other lands.—Nunez v. McElroy, 184 S. W. 531.

The cross-action of defendant for the land sued for by plaintiff is by necessary implication disposed of and adjudicated against him by the judgment for plaintiff therefor.—Id.

Disposition of any cross-action pleaded by defendants as to whom he dismissed his suit is essential to finality of the decree or judgment.—Id.

There is an implied disposition, by discontinu-

ance or dismissal, of the the other defendants' cross-action, in the order that plaintiff's suit was dismissed as to them, "and that this cause stand for trial with M. as plaintiff, and N. as defendant."—Id.

Whether dismissal of the cross-action of defendants, as to whom plaintiff dismissed his suit, was rightful, is immaterial, relatively to there having been a disposition of the issue, making the judgment final, and so giving the appellate court jurisdiction.—Id.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

⇨171(1) (Mo.) In action on bond of contractor, where the sole issue made was the sufficiency of the architect's certificates to justify payment, the sufficiency of petition to state cause of action was not open on appeal.—*Southern Real Estate & Financial Co. v. Bankers' Surety Co.*, 184 S. W. 1030.

⇨173(1) (Mo.App.) In action on contractor's bond for material furnished to contractor for city work, defendant's failure to plead subletting of part of work in violation of contract estopped defendant from insisting upon such ground on appeal.—*City of St. Louis v. McCully Const. Co.*, 184 S. W. 939.

(B) Objections and Motions, and Rulings Thereon.

⇨185(1) (Mo.) Question of jurisdiction may be raised for first time on appeal; Rev. St. 1909, §§ 1848, 1850, 1851, 2081, not being applicable.—*John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 184 S. W. 467.

⇨185(1) (Tex.Civ.App.) The jurisdiction of the justice of the peace over a claim for attached property can be questioned by assignment of error to the judgment of the county court on appeal from a justice of the peace.—*Fuller Hanna & Co. v. Rogers*, 184 S. W. 322.

⇨188 (Tex.Civ.App.) Sufficiency of service will not be considered on appeal where not raised in the motion to set aside a default nor in the answer.—*Miller v. First State Bank & Trust Co. of Santa Anna*, 184 S. W. 614.

⇨193(1) (Mo.) Under Rev. St. 1909, § 2119, in an action on the bond of a building contractor, failure of the petition to sufficiently state that payments to the contractor were made upon architect's certificates should be raised by the surety by demurrer, otherwise it was not open on appeal.—*Southern Real Estate & Financial Co. v. Bankers' Surety Co.*, 184 S. W. 1030.

⇨193(9) (Mo.) Where the petition states no cause of action, the point may be raised in the Supreme Court for the first time.—*Wolf v. Harris*, 184 S. W. 1139.

⇨196(Mo.) A party cannot, on appeal, avail himself of error in overruling his motion to strike an amended petition from the files as constituting a departure, where he waived such error by answering to the merits and going to trial.—*Schroeder v. Edwards*, 184 S. W. 108.

⇨199 (Ky.) Under Civ. Code Prac. §§ 516, 517, and section 518, subsec. 3, an appeal from premature submission of the case would be dismissed, where the appellants had not attempted to correct the clerical misprision in the court below before appealing.—*Jones v. Hazard Dean Coal Co.*, 184 S. W. 1131.

⇨204(1) (Mo.App.) Objection to evidence not made during the trial will not be considered on appeal.—*Perry v. Reed*, 184 S. W. 902.

⇨209(4) (Ark.) Objection to lack of proof of title cannot be made for the first time upon appeal.—*Yazoo & M. V. R. Co. v. Solomon*, 184 S. W. 418.

⇨215(1) (Ark.) In servant's action, the employer, which desired that an instruction on safe place to work should contain the qualification of the doctrine of assumed risk, should have objected to the instruction below.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 456.

⇨216(1) (Tex.Civ.App.) Where an instruction is erroneous, appellant need not request a correct charge, but under the statutes the party aggrieved need only except, pointing out the defects and reserve objection by proper bill of exceptions.—*Kansas City, M. & O. Ry. Co. v. Russell*, 184 S. W. 299.

⇨216(1) (Tex.Civ.App.) In the appellate court defendant could not complain of an omission from an instruction, in the absence of a requested instruction thereon.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⇨216(2) (Tex.Civ.App.) Where the court properly submitted a question of fact to the jury, a party who requested no instructions supplying omissions in the charge given and made no objections cannot complain of such omissions on appeal.—*Heard v. Bowen*, 184 S. W. 234.

⇨218(1) (Tex.Civ.App.) Where a party failed, on rendition of a verdict by 11 jurors, to object to their failure to sign the verdict, it could not, for the first time on appeal, complain thereof, if it was error.—*Crosby v. Stevens*, 184 S. W. 705.

⇨231(5) (Mo.App.) Where there was merely a general objection to testimony defendant could not complain on appeal that the testimony was hearsay.—*Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.*, 184 S. W. 915.

⇨236(2) (Tex.Civ.App.) If plaintiff desired to amend his motion against a sheriff before the court sustained defendant's demurrer thereto, he should have requested court's permission to amend, and upon refusal should have reserved a bill of exception.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

⇨237(6) (Tex.Civ.App.) To predicate error on the refusal to set aside a finding of the jury, there must be a motion to set aside.—*Houston, E. & W. T. Ry. Co. v. Hooper*, 184 S. W. 347.

⇨237(6) (Tex.Civ.App.) In the absence of a motion to set aside the jury's findings, an assignment of error based on the insufficiency of the evidence to support them will not be considered.—*Texas & N. O. R. Co. v. Weems*, 184 S. W. 1103.

(C) Exceptions.

⇨273(5) (Tex.Civ.App.) Where an instruction embodies several propositions of law, some of which are accurate and not subject to objection, a general exception is insufficient to raise the propriety of a particular portion of the instruction.—*Lester v. Hutson*, 184 S. W. 268.

(D) Motions for New Trial.

⇨282 (Tex.Civ.App.) Where a case is tried without a jury, motion for new trial is not prerequisite to perfection of appeal.—*Rockdale Mercantile Co. v. Brown Shoe Co.*, 184 S. W. 281.

⇨294(1) (Tex.Civ.App.) Where a party desires review of the judge's conclusion, he should call attention to alleged insufficiency of evidence in a motion for new trial.—*North American Ins. Co. v. Jenkins*, 184 S. W. 307.

⇨301 (Mo.App.) Where a motion for new trial does not suggest that testimony has been improperly excluded, that question cannot be considered on appeal.—*Perry v. Reed*, 184 S. W. 902.

⇨301 (Tex.Civ.App.) Objection to description in power of attorney offered in evidence, not presented in motion for new trial, cannot be considered on appeal.—*Kepler v. Texas Lumber Mfg. Co.*, 184 S. W. 853.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

§338(2) (Ark.) Act Feb. 27, 1915 (Laws 1915, p. 205), amending Kirby's Dig. § 1199, touching the time for appeals, by shortening it from 12 to 6 months, fixes 6 months after the passing of the statute as the full limit for all appeals, but does not apply to judgments rendered before it went into effect, where the unexpired time under the old statute is less than 6 months.—Shapard v. Mixon, 184 S. W. 399.

(D) Writ of Error, Citation, or Notice.

§407(1) (Tex.Civ.App.) A court of Civil Appeals has no jurisdiction to entertain a writ of error, unless citation has been legally served on the defendant in error or service accepted.—Webster v. International & G. N. Ry. Co., 184 S. W. 295.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§485(1) (Ky.) The effect of a supersedeas is to preserve the status in quo pending the appeal; it is not retroactive, and does not undo what has already been done, and destroys no rights acquired by the judgment, but merely suspends those rights.—Barker v. Illinois Surety Co., 184 S. W. 377.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§493 (Tex.Civ.App.) Where the record contains no citation showing due service or an appearance by defendant, judgment by default will be reversed on appeal, though the judgment contains a recital that defendant was duly served.—Gilles v. Miners' Bank of Cartersville, Mo., 184 S. W. 284.

§499(4) (Tex.Civ.App.) Where the bills of exception did not show that the court's attention was called to objections to charges or requests offered, before the main charge was submitted, assignments based thereon will not be considered.—Heard v. Bowen, 184 S. W. 294.

§499(4) (Tex.Civ.App.) An assignment of error in giving a peremptory instruction will not be considered where the record fails to show that an objection was made and exception reserved in the trial court, as required by the statute.—Donaldson v. McElroy, 184 S. W. 1100.

(B) Scope and Contents of Record.

§518(1) (Ky.) To obtain a review of a ruling refusing the filing of a pleading tendered, the pleading must be made part of the record either by order of court or bill of exceptions.—Houston v. Commonwealth, 184 S. W. 388.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§544(1) (Tex.Civ.App.) The court on appeal cannot say that the conclusion reached by the trial judge was erroneous in the absence of a statement of facts.—North American Ins. Co. v. Jenkins, 184 S. W. 307.

§547(1) (Tex.Civ.App.) Error cannot be predicated on the refusal of the court to submit requested issues, not made subject to proper assignment of error, nor accompanied by proper bills of exception, showing timely and proper application to the court for the submission of the requested issues.—Crosby v. Stevens, 184 S. W. 705.

§548(4) (Tex.Civ.App.) The action of the court, upon motion to strike out evidence, should be presented by bills of exception in order to be reviewed.—Crews v. Powers, 184 S. W. 363.

§548(5) (Tex.Civ.App.) To take advantage on appeal of the wrongful admission of evidence over objection, a bill of exceptions, duly approved by the trial court, must have been preserved.—Texas & P. Ry. Co. v. Baker, 184 S. W. 664.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§562 (Tex.Civ.App.) In an action for non-delivery of a telegram, the company cannot on appeal question its liability on the ground of a stipulation limiting liability for an unrepeatable message, where such provision did not appear in the statement of facts.—Western Union Telegraph Co. v. Bailey, 184 S. W. 519.

§569(2) (Tex.Civ.App.) An instrument called a "statement of facts," not signed by counsel for plaintiff or approved by the court, cannot be regarded.—North American Ins. Co. v. Jenkins, 184 S. W. 307.

(E) Abstracts of Record.

§581(3) (Mo.App.) Where neither the record nor abstract of bill of exceptions show the trial judge signed the bill, the defect is fatal.—Merrill v. Johnson, 184 S. W. 1191.

§582(2) (Mo.App.) Under the terms of rule 15 of Courts of Appeal (181 S. W. vi) the admissibility of documentary evidence not set out in full in the abstract will not be reviewed.—Merrill v. Johnson, 184 S. W. 1191.

(F) Making, Form, and Requisites of Transcript or Return.

§596 (Tex.Civ.App.) The requirement of Rev. St. arts. 2109, 2110, as to the transcript on appeal, cannot be supplied by the recitation in the judgment.—Palomas Land & Cattle Co. v. Good, 184 S. W. 805.

§608(1) (Tex.Civ.App.) Under Rev. St. arts. 2109, 2110, transcript on appeal from default judgment against sureties on replevin bond held not to show the facts necessary to authorize the judgment, and hence to make no case on appeal.—Palomas Land & Cattle Co. v. Good, 184 S. W. 805.

(I) Defects, Objections, Amendment, and Correction.

§655(1) (Tex.Civ.App.) Appellee's motion, to strike a paper filed in the Court of Civil Appeals, purporting to be the conclusions of fact and of law of the trial court, but not made a part of the transcript, will be granted.—Hester v. Baskin, 184 S. W. 726.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§662(4) (Tex.Civ.App.) Statement of facts prepared by court, counsel having failed to agree, cannot be called in question as not stating facts proven on trial.—Keppler v. Texas Lumber Mfg. Co., 184 S. W. 853.

§664(4) (Tex.Civ.App.) Where bill of exceptions attacking refusal to allow witness to testify was contradicted by statement of facts which showed that witness did answer, statement will control.—Missouri, K. & T. Ry. Co. of Texas v. Washburn, 184 S. W. 580.

§685 (Mo.App.) In the absence of a counter abstract, the Court of Appeals must accept that of appellant, though if a counter abstract had been presented by respondent, and not agreed to by appellant, under the statute the Court of Appeals must send for the bill of exceptions.—McKenzie Carpet Co. v. Leflier, 184 S. W. 905.

(K) Questions Presented for Review.

§671(7) (Mo.App.) Though on appeal defendant carrier relied on an alleged provision in the bill of lading, no effect can be given the provision where it did not appear in the abstract.—

Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co., 184 S. W. 915.

—690(1) (Tex.Civ.App.) A bill of exceptions to the exclusion of evidence, reciting merely what the evidence would have been, is insufficient, where it fails to show the materiality of the testimony, which is apparently unconnected with the issues.—Lester v. Hutson, 184 S. W. 268.

—692(1) (Tex.Civ.App.) Assignments to sustaining of objections to questions on direct examination will not be considered where the bills of exceptions do not show the testimony to be elicited.—Yeatts v. St. Louis Southwestern Ry. Co. of Texas, 184 S. W. 636.

The rule that bills of exceptions must show the testimony expected to be elicited does not apply to questions on cross-examination or to motion to strike testimony.—Id.

—708 (Tex.Civ.App.) The Court of Civil Appeals cannot consider facts stated in the motion for rehearing, but not shown by the record.—Kerbow v. Wooldridge, 184 S. W. 746.

(L) Matters Not Apparent of Record.

—715(2) (Tex.Civ.App.) By direct provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 1593, the Court of Civil Appeals has power to ascertain by affidavit or otherwise such matters of fact as may be necessary to the proper exercise of its jurisdiction.—Webster v. International & G. N. Ry. Co., 184 S. W. 295.

XI. ASSIGNMENT OF ERRORS.

—719(8) (Tex.Civ.App.) Where no attack was made on findings establishing right of recovery and the evidence tended strongly to support the findings, they will be adopted as facts, and plaintiff's judgment affirmed in absence of error of law.—Missouri, K. & T. Ry. Co. of Texas v. Washburn, 184 S. W. 580.

—728(1) (Tex.Civ.App.) An assignment of error to exclusion of testimony too vague to show what testimony was excluded cannot be considered on appeal.—Clebume Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

—736 (Tex.Civ.App.) Assignment of error held not entitled to consideration, where presenting two separate and unrelated questions.—Peck v. Murphy & Bolanz, 184 S. W. 542.

—739 (Tex.Civ.App.) Grouping four requested peremptory charges in one assignment, held not objectionable.—Missouri, K. & T. Ry. Co. of Texas v. Washburn, 184 S. W. 580.

—742(1) (Tex.Civ.App.) Where a proposition under an assignment of error is insufficient, the court, on appeal cannot reframe it to make it fit the record, in order to properly present the issue.—Lester v. Hutson, 184 S. W. 268.

—742(1) (Tex.Civ.App.) Assignment of error not including statement of proceedings sufficient to explain and support the contention made, as required by rule 31 for Courts of Civil Appeals (142 S. W. xiii) held not entitled to consideration.—Peck v. Murphy & Bolanz, 184 S. W. 542.

Assignment of error not supported by any statement, as required by rule 31 for Courts of Civil Appeals (142 S. W. xiii), was not entitled to consideration.—Id.

—742(1) (Tex.Civ.App.) Under the rules and by statute, the court cannot consider assignments of error not accompanied by a statement of substantial matter more references to pages in the record being insufficient.—Foster Lumber Co. v. Rodgers, 184 S. W. 761.

—742(4) (Tex.Civ.App.) A statement following an assignment of error complaining of the admission of particular evidence is not germane where the evidence mentioned in the statement is not the same as that specified in the assignment.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

—742(5) (Tex.Civ.App.) An assignment based on the charge on the ground that there was no

evidence to support it, need not be considered, where the statement did not set out the evidence.—Heard v. Bowen, 184 S. W. 234.

—742(5) (Tex.Civ.App.) An assignment complaining of refusal to submit an issue cannot be considered on appeal, where the statement merely set forth that there was abundant evidence to establish appellant's contention.—St. Louis Southwestern Ry. Co. of Texas v. Rutherford, 184 S. W. 700.

—743(1) (Tex.Civ.App.) Where statements under assignments of error made no reference to the portion of the transcript containing a record of the error complained of, such assignments could not be considered not being briefed as required by the rules of the Courts of Civil Appeals.—Texas Grain & Elevator Co. v. Dyer, 184 S. W. 1049.

Under Acts 33d Leg. c. 136, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), and rules 30, 31, for the Courts of Civil Appeals (142 S. W. xiii), where the statement under an assignment of error based on the failure to submit the case upon special issues made no reference to the record, except the expression "(See defendants' bill of exception, No. 3)," such assignment was insufficient and could not be considered.—Id.

XII. BRIEFS.

—759 (Tex.Civ.App.) Under rule 29 for the Courts of Civil Appeals (142 S. W. xii), requiring assignments of error to be copied in appellant's brief, an assignment, reconstructed from two or three assignments of error in the motion for new trial, will not be considered.—Progressive Oil Co. v. Crawford, 184 S. W. 728.

—761 (Mo.) Under rule 15 (169 S. W. ix), requiring all briefs to be printed and to contain, apart from arguments and discussion of authority, a statement of the points relied on, a statement in the brief that portions of the answer stricken out were material, and that such action was error, could not be considered.—Schroeder v. Edwards, 184 S. W. 106.

—762 (Mo.) A point raised for the first time in a reply brief is too late.—Orchard v. Missouri Lumber & Mining Co., 184 S. W. 1138.

—768 (Tex.Civ.App.) By express provision of Court of Civil Appeals rule 41 (142 S. W. xiv), whatever of the statements in appellant's brief is not contested will be considered as acquiesced in.—Mutual Film Corp. v. Morris & Daniel, 184 S. W. 1060.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

—782 (Mo.) Appeal from order vacating appointment of receiver of private bank will not be dismissed on ground that order appointing receiver entered after petition in bankruptcy against bank owner was not within authority of circuit court, in view of Rev. St. 1909, §§ 1081-1083.—State ex rel. Barker v. Sage, 184 S. W. 984, 992.

—787 (Tex.Civ.App.) Want of prosecution held ground for dismissal of appeal in absence of fundamental error in the trial of the cause.—Anderson v. Engler, 184 S. W. 306.

XV. HEARING AND REHEARING.

—818 (Mo.) An order of the Court of Appeals, made the last day of a term, continuing all motions in cases ruled on on that day to the next term, retains jurisdiction over the case in which no motion for rehearing had been determined.—State ex rel. Logan v. Ellison, 184 S. W. 963.

XVI. REVIEW.

(A) Scope and Extent in General.

—837(7) (Tex.Civ.App.) Where error is assigned to the refusal of a new trial because the jury received material communications, the exact character of which was unknown to the appellants, the court, on appeal, could not re-

view the order, since review would necessarily be based on speculation.—*Crosby v. Stevens*, 184 S. W. 705.

⚡837(12) (Mo.) The Supreme Court can consider on appeal evidence in the record erroneously stricken by the trial court.—*Bajohr v. Bajohr*, 184 S. W. 76.

⚡843(2) (Tex.Civ.App.) Where a judgment must be reversed in any event, an appellate court will not itself undertake to estimate the amount of excess damages in the judgment.—*Donada v. Power*, 184 S. W. 793.

⚡854(4) (Mo.App.) The Court of Appeals cannot uphold the exclusion of evidence because obnoxious to an objection not made below.—*McKenzie Carpet Co. v. Leflier*, 184 S. W. 905.

⚡856(2) (Tenn.) The action of the trial court in erroneously excluding evidence will not be upheld because the court can see that it is incompetent on some other ground than that on which the objection was made; as incompetency not objected to is waived.—*Middle Tennessee R. Co. v. McMillan*, 184 S. W. 20.

(C) Parties Entitled to Allege Error.

⚡879 (Tex.Civ.App.) A judgment against several will not be disturbed as regards those defendants who did not appeal.—*Sweeten v. Taylor*, 184 S. W. 693.

⚡880(3) (Tex.Civ.App.) A decree against a defendant who did not appeal will not be disturbed on the appeal of the other defendants not interested in that particular.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

⚡882(8) (Tex.Civ.App.) In an action for libel, defendant cannot complain of error in permitting plaintiff to testify to a fact, where defendant introduced in evidence a newspaper published by it stating substantially the same facts.—*Houston Chronicle Pub. Co. v. Quinn*, 184 S. W. 669.

⚡882(8) (Tex.Civ.App.) Defendant, who had proved the contents of a letter of its witness before it was offered by plaintiff to show witness' bias toward plaintiff, could not complain of its admission on the ground of its irrelevancy.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 782.

⚡882(9) (Tex.Civ.App.) Where plaintiff on cross-examination of impeaching witnesses elicited testimony as to particular incidents, he cannot complain that the witnesses on redirect examination were permitted to give the details.—*Yeatts v. St. Louis Southwestern Ry. Co. of Texas*, 184 S. W. 636.

⚡882(12) (Tex.Civ.App.) One is precluded from urging error in a charge which is almost a literal copy of a special charge asked by him.—*Donada v. Power*, 184 S. W. 793.

⚡883 (Mo.App.) Where all the evidence was received as though an answer had been filed, plaintiff cannot complain that thereafter the court refused to strike out the evidence because of the failure to file an answer and gave defendant leave to file his answer.—*Senaca Co. v. Ellison*, 184 S. W. 1177.

(E) Presumptions.

⚡907(2) (Ark.) Where the evidence in a suit in the chancery court was not preserved by bill of exceptions or otherwise the Supreme Court on appeal must presume that if any evidence could have been offered which would have supported the decree rendered, such evidence was in fact heard.—*Hicks v. Hicks*, 184 S. W. 416.

⚡907(3) (Tex.Civ.App.) Where there is no statement of facts in the record, it must be presumed that the evidence justified the verdict.—*Missouri, K. & T. Ry. Co. of Texas v. Elias*, 184 S. W. 312.

⚡927(5) (Mo.App.) In ruling on defendant's demurrer to the evidence, the appellate court

must draw every legitimate inference in favor of plaintiff which evidentiary facts and circumstances will permit.—*Kennish v. Safford*, 184 S. W. 923.

⚡927(7) (Mo.App.) On appeal from a directed verdict for the defendant, every inference of fact justified by the evidence was to be made in favor of plaintiff.—*Hawley v. Lusk*, 184 S. W. 1173.

⚡930(2) (Tex.Civ.App.) It will be presumed on appeal that the jury followed instructions as to what they must find before finding verdict against defendant.—*Cattleman's Trust Co. v. Blasingame*, 184 S. W. 574.

⚡931(3) (Tex.Civ.App.) Where no findings of fact were filed in trial court, appellate court must assume that all issues of fact were resolved in favor of appellee.—*Corbin v. Booker*, 184 S. W. 696.

⚡933(1) (Tex.Civ.App.) Although during a trial the trial judge was taken sick, but there is no admission in the bill of exceptions or proof that he was too ill intelligently to pass upon a motion for new trial, it will be presumed that he was not.—*Crosby v. Stevens*, 184 S. W. 705.

⚡933(5) (Tex.Civ.App.) Where on appeal from a judgment overruling a motion for a new trial, the record shows no testimony taken as to facts not supported by affidavits accompanying the motion, it will be presumed that the court was correct in overruling the motion.—*Crosby v. Stevens*, 184 S. W. 705.

⚡934(1) (Tex.Civ.App.) On appeal every reasonable intendment will be indulged to support the judgment below.—*Texas & N. O. R. Co. v. Marshall & Marshall*, 184 S. W. 643.

⚡934(2) (Tex.Civ.App.) While statement of facts might be consulted to sustain judgment where issue had not been submitted to jury, it cannot be done where the issue was submitted.—*Indiana Co-op. Canal Co. v. Gray*, 184 S. W. 242.

⚡934(2) (Tex.Civ.App.) By direct provision of *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1985, where the case is submitted on special issues, an issue, not submitted and not requested by a party, must be deemed to have been found so as to support the judgment, if there was evidence to sustain such a finding.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

⚡934(2) (Tex.Civ.App.) In view of *Rev. St. art. 1985*, where there was sufficient evidence to show the negligence relied on was the proximate cause, judgment will be upheld though jury did not so find and judgment recited it was based solely on their findings.—*Postex Cotton Mill Co. v. McCamy*, 184 S. W. 569.

⚡934(2) (Tex.Civ.App.) Every reasonable presumption must be indulged in favor of the judgment rendered, and a special verdict should be liberally construed in order to sustain it.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

(F) Discretion of Lower Court.

⚡960(1) (Tex. Civ. App.) The action of the court in sustaining a demurrer to a motion without argument and refusal to allow argument as to exceptions to a special answer will not be reviewed, unless abuse of discretion is shown.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

⚡966(1) (Mo.App.) The denial of defendant's request for continuance does not constitute reversible error, unless it was an abuse of discretion.—*Bank of Raymondville v. National Safe & Lock Co.*, 184 S. W. 1176.

⚡979(5) (Mo.App.) The act of the trial court in setting aside a verdict for excess of damages will not be reviewed on appeal, unless abuse of discretion appears.—*State ex rel. O'Donnell v. Boepple*, 184 S. W. 1166.

(G) Questions of Fact, Verdicts, and Findings.

⇒994(2) (Tex.Civ.App.) Credibility of witnesses giving testimony supporting plaintiff's allegations held for the jury, and not for the appellate court.—Galveston, H. & S. A. Ry. Co. v. Moses, 184 S. W. 327.

⇒1001(1) (Tex.Civ.App.) Where there is evidence in support of the verdict, it will not be disturbed on appeal.—Zavala Land & Water Co. v. Tolbert, 184 S. W. 523.

⇒1001(1) (Tex.Civ.App.) In action to recover land on title by adverse claim and occupancy, jury's finding of ten years' continuous possession will not be disturbed on appeal, where supported by competent testimony.—Houston Oil Co. of Texas v. Jones, 184 S. W. 611.

⇒1002 (Tex.Civ.App.) It is not the province of the court on appeal to resolve a conflict in the evidence as to a question of fact.—Crosby v. Stevens, 184 S. W. 705.

⇒1002 (Tex.Civ.App.) A verdict on conflicting evidence will not be disturbed.—Newman v. Davis, 184 S. W. 1078.

⇒1003 (Tex.Civ.App.) On appeal a verdict cannot be disturbed because against the greater preponderance of the evidence.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

⇒1004(1) (Ky.) A verdict finding the profits of a business in an amount flagrantly against the weight of evidence, will be reversed.—Wickliffe Mfg. Co. v. Wilson, 184 S. W. 386.

⇒1004(1) (Tex.Civ.App.) A finding will not be disturbed as excessive, unless the record discloses that the jury abused its authority or was unduly influenced, and the amount is clearly excessive.—Foster Lumber Co. v. Rodgers, 184 S. W. 761.

⇒1008(1) (Mo.) Where the claim of intervenor to land sought to be partitioned was submitted to the court without a jury and without instructions, the court's conclusion is binding on appeal.—Kille v. Gooch, 184 S. W. 1158.

⇒1008(1) (Tex.Civ.App.) A finding involved in a judgment must be treated with as much deference as if made by the jury.—Texas & N. O. R. Co. v. Weems, 184 S. W. 1103.

⇒1009(1) (Ark.) The findings of the chancellor are to be accepted unless against the preponderance of the evidence.—Union State Bank of Shawnee, Okl., v. First Nat. Bank of Huntsville, Ark., 184 S. W. 411.

⇒1009(3) (Ky.) A finding of the chancellor will not be disturbed on appeal where the proof is contradictory and the mind is left in doubt.—Fields v. Couch, 184 S. W. 894.

⇒1009(4) (Ark.) The chancellor's findings of fact will not be disturbed on appeal unless they are against the preponderance of the evidence.—Fisher v. Rice Growers' Bank, 184 S. W. 36.

⇒1009(4) (Mo.) Even where the findings of the chancellor are slightly against the weight of the evidence, they will not be disturbed on appeal except for plain error.—Hunnell v. Zinn, 184 S. W. 1154.

⇒1010(1) (Mo.) In a trial without a jury, a general finding will be approved if it can be upheld on any substantial ground.—Orchard v. Missouri Lumber & Mining Co., 184 S. W. 1138.

⇒1010(1) (Mo.App.) Where a case is tried by the court without a jury, and no instructions are asked or given, the judgment rendered will not be disturbed, if supported by substantial evidence and consistent with any tenable theory of law.—Sears v. Krekel, 184 S. W. 911.

⇒1010(1) (Tex.Civ.App.) The fact that the evidence will sustain a finding contrary to that of the trial court affords the appellate court no sufficient reason for interfering with the finding below, provided the evidence will also sustain it.—Carter v. Smith, 184 S. W. 244.

⇒1010(1) (Tex.Civ.App.) There being evidence tending strongly to support the finding that a transaction was a sale, and not a consignment of goods, that issue is not open on appeal.—Mayfield Co. v. Harlan & Harlan, 184 S. W. 313.

⇒1010(1) (Tex.Civ.App.) Findings of fact supported by sufficient evidence would not be disturbed on appeal.—Crews v. Powers, 184 S. W. 363.

⇒1011(1) (Mo.App.) A finding by the trial court on conflicting evidence that a materialman unintentionally failed to enter a credit due the contractor is conclusive on appeal.—Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co., 184 S. W. 952.

⇒1015(4) (Mo.App.) Where the trial court set aside a verdict for excess of damages, the appellate court will not reinstate it and order a remittitur, as that would invade the province of the jury.—State ex rel. O'Donnell v. Boepple, 184 S. W. 1166.

⇒1022(2) (Mo.App.) In subcontractor's action on contractor's penal bond, referee's finding in report approved by circuit court that admissions in letters of defendant's president were made during joint liability of principal and surety, supported by substantial evidence, could not be disturbed.—City of St. Louis v. McCully Const. Co., 184 S. W. 939.

(H) Harmless Error.

⇒1029 (Mo.App.) Where the appellant's own evidence discloses that he has no cause of action, errors assigned are of no consequence.—Smith v. Rose, 184 S. W. 910.

⇒1029 (Tex.Civ.App.) Court's consideration of matter not covered by bill of exceptions held not to injure appellee where judgment was reversible on other grounds.—Lockney State Bank v. Bolin, 184 S. W. 553.

⇒1031(6) (Mo.App.) Where the court after reading an instruction to the jury corrected it, but refused to read it to them, the error cannot be presumed to have been cured by the jury reading the corrected instruction after retiring.—Murphy v. Foster, 184 S. W. 929.

⇒1033(4) (Tex.Civ.App.) Refusal of peremptory instruction as to act of negligence on which jury found favorably to defendant was not injurious to defendant.—Houston, E. & W. T. Ry. Co. v. Hooper, 184 S. W. 347.

⇒1033(5) (Tex.Civ.App.) Where the court might properly have instructed the jury that plaintiffs' holding was adverse, defendants cannot complain of an instruction on that issue; the jury having found that plaintiffs' holding was adverse and that they had acquired a prescriptive way.—Heard v. Bowen, 184 S. W. 234.

⇒1033(5) (Tex.Civ.App.) In an action for injuries to a shipment, giving of charges, declaring that under enumerated circumstances verdict should be for shipper, but not declaring failure of proof would require verdict for carrier, was not error to plaintiff's injury.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

⇒1033(9) (Ark.) A decree, giving appellees less than they were entitled to, was not erroneous as to appellant.—Shapard v. Mixon, 184 S. W. 399.

⇒1033(9) (Tex.Civ.App.) Where the damages awarded did not exceed those actually sustained by plaintiff as shown by other evidence, held, that defendant could not complain that the jury in assessing the value of the land failed to base it on any specific evidence of value.—Zavala Land & Water Co. v. Tolbert, 184 S. W. 523.

⇒1036(3) (Tex.Civ.App.) In suit on a note, where the judgment, under the circumstances, was binding on a bank not a party, error of the court in declining to continue the case to

make the bank a party was immaterial.—*Finley v. Wakefield*, 184 S. W. 755.

⇒1039(13) (Tex.Civ.App.) Error in admitting an altered contract under a pleading of the original contract *held* harmless.—*Karbow v. Wooldrige*, 184 S. W. 746.

⇒1040(10) (Tex.Civ.App.) Overruling special exception to petition in trespass to try title for failure to set out chain of title was not prejudicial, where parties agreed at trial upon common source of title.—*Keppler v. Texas Lumber Mfg. Co.*, 184 S. W. 353.

⇒1041(1) (Tex.Civ.App.) Where an original cross-bill, with the trial amendments permitted to be filed, contained all material allegations in an offered amendment, an erroneous ruling of the trial court refusing to permit the amendment was harmless.—*Vaden v. Buck*, 184 S. W. 313.

⇒1045(3) (Tex.Civ.App.) Overruling of challenge compelling plaintiff to exhaust peremptory challenges *held* not prejudicial where it did not appear that he was required to accept an objectionable juror.—*Lockney State Bank v. Bolin*, 184 S. W. 553.

⇒1046(5) (Ark.) Where it was in dispute whether corporation's treasurer had authority to bind it, court's remark concerning effect of contract signed by him *held* highly prejudicial.—*Roe Rice & Land Co. v. Strobhart*, 184 S. W. 461.

⇒1048(6) (Tex.Civ.App.) Cross-examination of witness based on contradictory testimony of another witness, while not approved, because presenting the testimony of the impeaching witness to the jury twice, once by deposition, and once orally, *held* not so prejudicial as to warrant a reversal.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

⇒1050(1) (Ky.) Error in admitting evidence outside the record to show service of summons is harmless in view of Civ. Code Prac. § 756, where the defendant was in court at the hearing.—*Ramey v. Francis, Day & Co.*, 184 S. W. 380.

⇒1050(1) (Mo.App.) In action on policy of burglary insurance, error of court in ruling that plaintiff had right to prove contents of his safe including uninsured property was harmless unless the jury were to incorporate its value in their verdict.—*Gueringer v. Fidelity & Deposit Co. of Maryland*, 184 S. W. 936.

⇒1050(1) (Tex.Civ.App.) Testimony that land depreciated \$2 per acre by being burned, not based on sales of burned land but on witness' opinion upon the estimated value of the grass, was harmless, where the witness qualified to give an opinion of the value of the grass destroyed which he estimated at \$2 per acre.—*Et. Worth & D. C. Ry. Co. v. Hapgood*, 184 S. W. 1075.

⇒1050(2) (Mo.App.) In a suit against a city for injuries due to a defect in a walk, introduction of an ordinance requiring a sidewalk on another street was harmless error.—*Proctor v. City of Poplar Bluff*, 184 S. W. 123.

⇒1051(1) (Tex.Civ.App.) Where there was abundant other evidence to establish plaintiff's construction of an equivocal expression in a contract for the sale of land, the erroneous admission of evidence of declaration by an agent was harmless.—*Zavala Land & Water Co. v. Tolbert*, 184 S. W. 523.

⇒1051(1) (Tex.Civ.App.) Admitting evidence of witness on former trial where on second trial witness was physically unable to testify, *held* harmless error, where there was abundant evidence supporting finding aside from his testimony and no indication of intention to impeach.—*Houston Oil Co. of Texas v. Jones*, 184 S. W. 611.

⇒1052(5) (Ark.) Where the jury awarded a much less amount, erroneous admission of evi-

dence of a price offered for a horse that died was harmless.—*M. C. Brown & Co. v. Bennett*, 184 S. W. 35.

⇒1056(2) (Tex.Civ.App.) Exclusion of testimony as to transactions of party interested with deceased, and as to the existence of agreement between such parties, *held* harmless, where its admission would not have benefited the defendant, who sought to introduce it.—*Lester v. Hutson*, 184 S. W. 268.

⇒1056(4) (Tenn.) In statutory action for wrongful killing of plaintiff's husband on defendant's crossing, exclusion of his admissions as to his negligence and inattention, in view of their bearing upon the question of damages, *held* prejudicial error.—*Middle Tennessee R. Co. v. McMillan*, 184 S. W. 20.

⇒1058(1) (Tex.Civ.App.) In suit for damages to shipment of cattle, refusal to admit record made by inspector at market was not error, where the inspector testified to the same facts from memory.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⇒1058(2) (Tex.Civ.App.) Error in excluding testimony as to the apparent sickness or health of a person *held* cured by subsequent testimony of the same witness in answer to a similar question.—*Yeatts v. St. Louis Southwestern Ry. Co. of Texas*, 184 S. W. 636.

⇒1058(2) (Tex.Civ.App.) The exclusion of testimony already given by witnesses is harmless.—*Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 1070.

⇒1060(1) (Mo.App.) In an action of forcible entry and detainer, the opening statement by counsel that he heard an attorney advise plaintiff as to the validity of his title, and that plaintiff relied thereon, was prejudicial.—*Underwood v. City of Caruthersville*, 184 S. W. 486.

⇒1060(1) (Mo.App.) In an action against a city for injuries on a defective sidewalk, where evidence that others had stumbled was admitted without objection and gone into by both sides, reference thereto by plaintiff's counsel in discussing whether plaintiff exercised ordinary care was not reversible error.—*Hawkins v. City of Independence*, 184 S. W. 927.

⇒1060(3) (Tex.Civ.App.) In action to recover land under adverse claim and occupancy, allowing plaintiff's counsel to state to jury that statute of limitations was suspended during alleged break in continuity of possession *held* harmless error.—*Houston Oil Co. of Texas v. Jones*, 184 S. W. 611.

⇒1062(1) (Tex.Civ.App.) In suit against a railroad for a death, refusal to submit special issue *held* harmless.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

⇒1062(1) (Tex.Civ.App.) In salesman's action for compensation under an oral contract, error, if any, in presentation of the issues omitting reference to the terms of the written contract pleaded by defendant *held* harmless, where the jury were asked whether plaintiff had an oral or written contract.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

⇒1062(2) (Tex.Civ.App.) Where jury found plaintiff's wife was not negligent in failing to supply herself with suitable clothing for the trip on which she contracted cold from poorly heated car, refusal to submit question whether plaintiff supplied his wife with sufficient clothing *held* harmless.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 184 S. W. 700.

⇒1062(5) (Tex.Civ.App.) In a suit against a railroad for a death, error in submitting the issue whether the injuries received by decedent when riding in the road's box car contributed to cause his death after he fell from a wagon, *held* to furnish no ground for reversal of judgment for plaintiffs.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

⇒1064(1) (Mo.App.) Where it does not appear that appellant's rights were prejudiced by an instruction, it is not error.—*Gardiner v. McPike*, 184 S. W. 956.

⇒1064(1) (Tex.) In passenger's action for conductor's threatening language, erroneous instruction that attempting to avoid paying fare on train was penal, and conductor might so state in courteous manner, *held* prejudicial.—*Carpenter v. Trinity & B. V. Ry. Co.*, 184 S. W. 186.

⇒1064(1) (Tex.Civ.App.) In an action against a railroad for injuries to plaintiff's wife, a negro, passenger in a coach for blacks, when assaulted by a white passenger therein, error in an instruction as to the road's duty under the separate coach law *held* harmless.—*Texas & P. Ry. Co. v. Baker*, 184 S. W. 664.

⇒1064(1) (Tex.Civ.App.) In suit for damages to a shipment of cattle, instruction repeating all the issues of negligence already submitted in preceding instructions gave undue emphasis to these issues, harmful to defendant.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⇒1064(1) (Tex.Civ.App.) In an action for failure to deliver cotton seed, instruction, if erroneous, as placing burden upon defendant to show by a preponderance of evidence that he did not make the contract of sale, *held* not reversible error.—*Stafford v. Patterson & Nelson*, 184 S. W. 1095.

⇒1064(2) (Tex. Civ. App.) Charge assuming that there was no evidence that deceased had died of heart disease under conditions making it a partial defense to life policy *held* harmless, where testimony was not sufficient to support finding in insurer's favor on that issue.—*First Texas State Ins. Co. v. Bell*, 184 S. W. 277.

⇒1066 (Mo.App.) Instruction in pedestrian's action for injuries caused by defective sidewalk *held* harmless error, though permitting finding not warranted by evidence, where it did require finding of dangerous condition and knowledge thereof.—*Proctor v. City of Poplar Bluff*, 184 S. W. 123.

⇒1066 (Tex.Civ.App.) In view of plaintiff's evidence, *held*, that an instruction which did not require the jury to find that the defendant failed to stop the car a reasonable length of time for passengers to alight was prejudicial error.—*San Antonio Traction Co. v. Cox*, 184 S. W. 722.

⇒1067 (Ark.) In garnishment against the purchaser of timber from defendant, defendant having admitted indebtedness for work, but denied the purchase of timber, refusal of garnishee's requested instruction that if he did not purchase the timber, he was liable only for the amount admitted, *held* prejudicial error.—*Weatherly v. Stane*, 184 S. W. 41.

⇒1067 (Tex.Civ.App.) Error cannot be predicated on the refusal to instruct against liability of the defendant if the contract terminated on a certain date and was not renewed, where the evidence conclusively established that the contract was renewed.—*Lester v. Hutson*, 184 S. W. 268.

⇒1067 (Tex.Civ.App.) Refusal of special charge was not error, where it assembled same facts submitted by question for special finding.—*Houston, E. & W. T. Ry. Co. v. Hooper*, 184 S. W. 347.

⇒1068(4) (Ky.) The erroneous giving of an instruction allowing punitive damages is not prejudicial error, where the record clearly shows no such damages were allowed.—*Perks v. McCracken*, 184 S. W. 891.

⇒1068(5) (Tex.Civ.App.) Where in an action for injuries to animals the jury could not have found as they did, unless they had found against defendant's contention embodied in a refused charge that it was not liable if its employes were not at the scene, an assignment to the

refusal was not sustainable.—*International & G. N. Ry. Co. v. Vogel*, 184 S. W. 229.

⇒1068(5) (Tex.Civ.App.) Where the jury found that the whole of land claimed by the wife as exempt from the husband's creditors had been paid for with her separate funds, it was not prejudicial error to refuse to submit the issue of the proportion paid by the wife.—*Amend v. Jahns*, 184 S. W. 729.

⇒1069(1) (Tex.Civ.App.) Where the case is one calling for a peremptory instruction in favor of appellee, error in respect to misconduct of a juror is harmless.—*Pridgen v. Cook*, 184 S. W. 713.

⇒1070(2) (Tex.Civ.App.) Where the judgment may be sufficiently supported by three unassailed special findings of the jury, a fourth finding, though it might be erroneous, is not fundamental error and does not require reversal.—*Lone Star Ins. Union v. Brannan*, 184 S. W. 691.

⇒1072 (Tex.Civ.App.) Error in striking out and refusing to consider appellant's motion for new trial was harmless, where the case went off on demurrers to appellant's petition or motion and no motion for a new trial was essential to review on appeal.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

(I) Error Waived in Appellate Court.

⇒1079 (Tex.Civ.App.) The excessiveness of an award of damages for nondelivery of a telegram cannot be considered on appeal, where the appellant's brief did not present that assignment in proper manner.—*Western Union Telegraph Co. v. Bailey*, 184 S. W. 519.

(K) Subsequent Appeals.

⇒1096(1) (Mo.) On appeal from an order denying new trial, after entry of judgment in obedience to the mandate of the appellate court specifically requiring a certain judgment to be entered, the only question for review is whether the mandate was complied with.—*Meyer v. Bobb*, 184 S. W. 105.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

⇒1126 (Tex.Civ.App.) Where no appeal is perfected against a defendant, a judgment in its favor will be affirmed upon motion.—*Foster Lumber Co. v. Rodgers*, 184 S. W. 761.

⇒1132 (Tex.Civ.App.) A judgment of the county court on appeal from a justice court's judgment, adding a penalty and items in excess of the amount within the jurisdiction of the justice court, was invalid; but it could be reformed and affirmed on appeal to the Court of Civil Appeals.—*North American Ins. Co. v. Jenkins*, 184 S. W. 307.

(C) Modification.

⇒1151(2) (Tex.Civ.App.) Error in allowing damages barred by a statute of limitations may be corrected by an appellate court without remanding the case.—*Donada v. Power*, 184 S. W. 793.

(D) Reversal.

⇒1170(1) (Tex.Civ.App.) Though another was improperly joined as defendant, yet judgment having been rendered against defendant alone, and plaintiff not having appealed therefrom improper joinder was not ground for reversal under rule 62a (149 S. W. x), it being presumed the verdict was warranted there being no statement of facts.—*Missouri, K. & T. Ry. Co. of Texas v. Elias*, 184 S. W. 312.

⇒1170(3) (Mo.) Under Rev. St. 1909, § 1850, the Supreme Court must disregard failure of petition to state that consideration of building contract involved was to be paid in installments, etc., the sole issue made being the sufficiency of the architect's certificates to justify payment.

—Southern Real Estate & Financial Co. v. Bankers' Surety Co., 184 S. W. 1030.

⇨1170(9) (Tex.Civ.App.) Under rule 62a of the Court of Civil Appeals (149 S. W. x), where it was apparent from an injured servant's testimony that he had assumed the risk, judgment for his employer could not be reversed for error in submitting a special charge calling for a general verdict; the case having been submitted on special issues.—Worden v. Kroeger, 184 S. W. 583.

⇨1170(9) (Tex.Civ.App.) Under rule 62a of the Courts of Civil Appeals (149 S. W. x), prohibiting reversal for harmless error, in a suit for conversion, met by a plea of privilege, technical error in a charge placing the burden of proof respecting such plea on the defendants held not to warrant reversal.—Carver Bros. v. Merrett, 184 S. W. 741.

⇨1170(10) (Tex.Civ.App.) Under Court of Civil Appeals rule 62a (149 S. W. x), error in submitting issue does not warrant reversal, where, eliminating findings on such issue, there remained findings which entitled appellee to judgment rendered.—Houston, E. & W. T. Ry. Co. v. Hooper, 184 S. W. 347.

⇨1172(3) (Tex.Civ.App.) Where plaintiff who appealed did not complain that he was denied a lien but objected to district court's dismissal of his suit which was for less than \$500, held that, under rule 62a for Courts of Civil Appeals (149 S. W. x), that portion of the judgment denying lien will not be disturbed, though a new trial be granted as to dismissal.—Earl v. Baker, 184 S. W. 297.

⇨1173(1) (Tex.Civ.App.) On reversal of judgment in favor of original defendant and rendition of judgment for plaintiff on plaintiff's appeal, new trial held to be granted as between such defendant and other defendants against whom it asked judgment.—Mosier Safe Co. v. Atascosa County, 184 S. W. 324.

⇨1173(1) (Tex.Civ.App.) Where nonappealing defendant was sued only as member of firm, held, that reversal of judgment against the firm required a reversal of the judgment against him.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⇨1173(2) (Tex.Civ.App.) Reversal of judgment against appealing defendants held not to require reversal of judgment against nonappealing defendants on separate and distinct causes of action.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⇨1175(5) (Tex.Civ.App.) Where apparently plaintiffs' only available witnesses testified fully, without showing a necessary fact, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1626, the cause will not be remanded for new trial, on reversal, but judgment will be rendered.—Mutual Film Corp. v. Morris & Daniel, 184 S. W. 1060.

⇨1177(1) (Mo.App.) Where the question of sufficiency of possession of the plaintiff in forcible entry and detainer cannot be disposed of on appeal as a matter of law, the case, on reversal, will be remanded.—Underwood v. City of Caruthersville, 184 S. W. 486.

⇨1178(6) (Mo.) Where all issues but one were conclusively and properly determined on the trial or on the appeal, a judgment remanding for new trial should confine trial to such single issue, and would be modified if it failed to do so.—Schroeder v. Edwards, 184 S. W. 108.

⇨1178(6) (Tex.Civ.App.) In trespass to try title, where there was no proof of the exact amount that plaintiffs would lose by the judgment and the court could not determine the amount of recovery for breach of warranty to plaintiffs, the case, as between plaintiffs and their warrantor, would be remanded for a trial of issue of damages.—Diffe v. White, 184 S. W. 1065.

(E) Rendition, Form, and Entry of Judgment.

⇨1185 (Tex.Civ.App.) If the trial court's judgment was not final, the Court of Civil Appeals did not acquire jurisdiction, and its judgment of affirmance is a nullity, and should be set aside.—Nunez v. McElroy, 184 S. W. 531. Motion to set aside a judgment of affirmance, on the ground that the trial court's judgment was not final, and that therefore the appellate court never acquired jurisdiction, may be made at a subsequent term.—Id.

(F) Mandate and Proceedings in Lower Court.

⇨1195(1) (Ark.) In contractor's action to enforce warrants against drainage district, held, that disposition on former appeal did not preclude inquiry into validity of the contract first raised on the retrial.—Morgan Engineering Co. v. Cache River Drainage Dist., 184 S. W. 57.

The law of a former appeal is binding and is the law of the case where the testimony on a second trial is substantially the same as on the first trial.—Id.

⇨1198 (Mo.) Where a case is remanded to the trial court, with specific directions to enter a certain judgment, the trial court has no discretion, but must comply with the mandate.—Meyer v. Bobb, 184 S. W. 105.

(G) Jurisdiction and Proceedings of Appellate Court After Remand.

⇨1217 (Mo.) An order of the Court of Appeals continuing motions in cases decided the last day of the term does not retain jurisdiction over a case in which the motion for rehearing was denied on that day.—State ex rel. Logan v. Ellison, 184 S. W. 963.

⇨1221 (Tex.Civ.App.) Under Rev. St. 1911, art. 1626, Court of Civil Appeals will, on motion, correct judgment reversing judgment of county court, reversing judgment in justice court for plaintiff, so as to include judgment against sureties on bond on appeal from justice court.—Ribble v. Roberts, 184 S. W. 278.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⇨1227 (Ky.) Sureties on appeal bond will be released from the necessity of satisfying an affirmed judgment by the act of the obligee done with fraudulent intent or effect to prevent them from exonerating themselves from the property of the principal judgment debtor.—Barker v. Illinois Surety Co., 184 S. W. 377.

The right of surety company on supersedeas bond executed by a debtor against whom plaintiff had obtained judgment for keeping of stock to the benefit of the plaintiff's valid lien on the stock accrued when the appeal bond was executed.—Id.

Surety on supersedeas bond restraining sale on judgment against its principal for the keeping of stock upon the unauthorized return of the stock to its principal depriving it of the right to enforce the judgment lien held entirely discharged.—Id.

⇨1234(5) (Tex.Civ.App.) Where supersedeas bond for appeal from judgment foreclosing chattel mortgage was conditioned to perform judgment of Court of Civil Appeals, and judgment was affirmed, sureties are liable only for costs.—Ferrell-Michael Abstract & Title Co. v. McCormac, 184 S. W. 1081.

APPEARANCE.

See Bastards, ⇨44; Justices of the Peace, ⇨84.

APPLIANCES.

See Master and Servant, ⇨101-129.

APPLICATION.

See Criminal Law, **§**184, 187; Payment, **§**39.

APPOINTMENT.

See Executors and Administrators, **§**13, 29; Guardian and Ward, **§**13; Judges, **§**6, 16, 18.

ARBITRATION AND AWARD.**III. AWARD.**

§63 (Ky.) If arbitrators do not go beyond terms of submission, mistake of judgment as to law or facts, if conclusions are honestly arrived at, is not ground for setting aside decision.—*Reager's Adm'x v. Pennsylvania Co.*, 184 S. W. 395.

Admission of illegal evidence by arbitrators is not ground for impeaching award unless decision would have been different but for improper evidence.—*Id.*

Gross mistake as to law or fact constituting evidence of misconduct or undue partiality is ground for impeachment of award.—*Id.*

§64 (Ky.) Fraud, corruption, or misconduct of arbitrators or fraud by party in securing award will vitiate decision.—*Reager's Adm'x v. Pennsylvania Co.*, 184 S. W. 395.

§78 (Ky.) Before court can set aside award evidence supporting impeachment must be clear and strong.—*Reager's Adm'x v. Pennsylvania Co.*, 184 S. W. 395.

ARCHITECTS.

See Contracts, **§**287.

ARGUMENT OF COUNSEL.

See Appeal and Error, **§**1080; Criminal Law, **§**1087; Trial, **§**109-133.

ARREST.

See Bail.

ARSON.

§37(1) (Tex.Cr.App.) In a prosecution for arson, evidence held not to show that defendant was in a different city when his building was burned.—*Kline v. State*, 184 S. W. 819.

ARTISANS.

See Chattel Mortgages, **§**138; Liens, **§**5.

ASSAULT AND BATTERY.

See Carriers, **§**284; Indictment and Information, **§**189.

II. CRIMINAL RESPONSIBILITY.**(B) Prosecution and Punishment.**

§91 (Ky.) Evidence that the female fled after defendant kissed her and put his hand on her person warrants the conclusion that his advances were without her consent, and so constituted an assault.—*Stark v. Commonwealth*, 184 S. W. 875.

ASSIGNMENT OF ERRORS.

See Appeal and Error, **§**719-743.

ASSIGNMENTS.

See Bills and Notes, **§**209, 318; Fraudulent Conveyances; Judgment, **§**846, 847; Landlord and Tenant, **§**76; Usury, **§**129; Venue, **§**27.

IV. ACTIONS.

§138 (Mo.App.) Evidence as to an assignment to plaintiff held sufficient as against a demurrer to the evidence on the ground that plaintiff was

not the real party in interest.—*Smith v. Becker*, 184 S. W. 943.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSOCIATIONS.

See Building and Loan Associations.

ASSUMPSIT, ACTION OF.

See Brokers, **§**78.

ASSUMPTION OF RISK.

See Master and Servant, **§**204-226, 288, 295.

ATTACHMENT.

See Execution; Exemptions; Garnishment; Homestead; Justices of the Peace, **§**41; Sequestration.

III. PROCEEDINGS TO PROCURE.**(B) Affidavits.**

§125 (Tex.Civ.App.) Failure to swear to an affidavit for attachment against a nonresident will not render the judgment foreclosing the attachment lien void.—*Heater v. Baskin*, 184 S. W. 726.

Failure to make affidavit for attachment will not defeat the court's jurisdiction as to a nonresident where the writ is issued and levied on his property.—*Id.*

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§232 (Tex.Civ.App.) Falsity of allegations in attachment affidavit held not to entitle defendant to abatement of the writ, though they might entitle him to damages on the bond.—*Ford v. Johnston*, 184 S. W. 303.

ATTORNEY AND CLIENT.

See Continuance, **§**20; Counties, **§**113; Criminal Law, **§**1087; Justices of the Peace, **§**84; Trial, **§**109-133.

II. RETAINER AND AUTHORITY.

§72 (Mo.App.) When an attorney who has appeared of record for a party litigant makes an offer of judgment, his authority to do so is presumed, prima facie at least, and the burden of showing his want of authority rests on the party who questions it.—*Parr v. Chicago, B. & Q. R. Co.*, 184 S. W. 1169.

§85 (Mo.App.) Action of attorney for defendant railroad in signing a written offer to allow judgment in a certain sum was not the release or compromise of a claim or cause of action in his hands for enforcement.—*Parr v. Chicago, B. & Q. R. Co.*, 184 S. W. 1169.

An attorney of record in a cause has implied authority to confess judgment for his client, and hence the attorney for defendant might sign an offer to confess judgment for a certain amount, as authorized by Rev. St. 1909, **§** 1965.—*Id.*

§101(1) (Mo.App.) Action of attorney for defendant railroad in signing a written offer to allow judgment in a certain sum was not the release or compromise of a claim or cause of action in his hands for enforcement.—*Parr v. Chicago, B. & Q. R. Co.*, 184 S. W. 1169.

IV. COMPENSATION AND LIEN OF ATTORNEY.**(A) Fees and Other Remuneration.**

§148(3) (Ark.) Provision of Act Cong. March 4, 1915, **§** 4, making appropriation for payment of a claim previously allowed by the Court of Claims, limiting attorney's fees to 20

per cent., held controlling, notwithstanding contract for a third of the amount allowed, the contract creating no debt till appropriation.—*Ralston v. Dunaway*, 184 S. W. 425.

⚡150 (Tex.Civ.App.) Where defendant settled with injured person, such person's attorneys, who were to have one-half the sum collected, held entitled to recover from the defendant only one-half the amount paid client and her doctor.—*Texas & N. O. R. Co. v. Marshall & Marshall*, 184 S. W. 643.

ATTRACTIVE NUISANCES.

See Negligence, ⚡39.

AUTHENTICATION.

See Evidence, ⚡379.

AUTHORITY.

See Brokers, ⚡44.

AUTOMOBILES.

See Master and Servant, ⚡301.

AWARD.

See Arbitration and Award.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

⚡64 (Tex.Cr.App.) Under Code Cr. Proc. 1911, arts. 901-904, where one convicted of perjury and appealing enters into a recognizance at the next term after the term at which convicted, and is allowed to go at large, his appeal should not be dismissed because he was allowed to go at large without bail.—*Laird v. State*, 184 S. W. 810.

BAILMENT.

See Depositaries; Embezzlement; Pledges.

BANKRUPTCY.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) Jurisdiction and Course of Procedure in General.

⚡20(1) (Mo.) Circuit court has right to administer assets of private bank in receivership proceedings notwithstanding bankruptcy proceedings against proprietor.—*State ex rel. Barker v. Sage*, 184 S. W. 984, 992.

BANKS AND BANKING.

See Bills and Notes, ⚡497, 525; Depositaries, ⚡6, 8; Garnishment, ⚡38.

I. CONTROL AND REGULATION IN GENERAL.

⚡2 (Mo.) Under Rev. St. 1909, § 1116, defining private bankers, section 1117, relating to organization of private banks, and Const. art. 12, § 2, defining corporation, a private bank is a corporation or quasi corporation whose assets are distinct from those of owner.—*State ex rel. Barker v. Sage*, 184 S. W. 984, 992.

⚡3 (Mo.) Legislature has power to enact statutes for incorporation of general banking companies and organization of private banks, to declare their status, and prescribe terms on which they may do business.—*State ex rel. Barker v. Sage*, 184 S. W. 984, 992.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(C) Stockholders.

⚡47(2) (Ark.) Under Kirby's Dig. § 1990, no demand on an insolvent bank is necessary to fix the stockholder's liability for public funds deposited therein.—*Johnson v. Wallace*, 184 S. W. 835.

(D) Officers and Agents.

⚡51 (Mo.App.) Rev. St. 1909, § 1112, allowing bank directors to remove a cashier, is part of the contract employing a cashier for a year.—*Wells v. National Surety Co.*, 184 S. W. 474.

(E) Insolvency and Dissolution.

⚡64 (Tex.Civ.App.) Where 7 of 15 directors of bank authorized conveyance of land to another who advanced money to discharge indebtedness of bank's former president, subsequent president, who was liquidating officer, could not under Rev. St. 1911, art. 378, lender demanding payment, bind bank by a note given to obtain funds to make payment.—*Rodgers v. Central Bank & Trust Co.*, 184 S. W. 620.

Where the assets of a bank are being liquidated, the liquidating officer, though its president, is not entitled to execute notes of the bank to take up former indebtedness.—*Id.*

⚡80(4) (Mo.) Under Rev. St. 1909, §§ 1087, 1089, 1091, 1118, 1119, assets of private bank are to be applied first to payment of claims against bank, and second, to payment of individual creditors of proprietor.—*State ex rel. Barker v. Sage*, 184 S. W. 984, 992.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

⚡116(1) (Ark.) Knowledge by the president of an insurance company and bank of defenses against a certificate of deposit assigned to the bank is not imputed to the bank, where the president acted solely for the insurance company.—*Union State Bank of Shawnee, Okl., v. First Nat. Bank of Huntsville, Ark.*, 184 S. W. 411.

BAR.

See Judgment, ⚡568-589.

BASTARDS.

III. PROCEEDINGS UNDER BASTARDY LAWS.

⚡36 (Ky.) Under Ky. St. §§ 167-169, allowing the mother of a bastard born in the state to proceed against the father in the county of the birth, proceedings by her in another county are void, and the courts have no jurisdiction therein.—*Commonwealth v. Adkins*, 184 S. W. 872.

⚡44 (Ky.) In a bastardy proceeding brought in the wrong county, a general appearance by defendant before making objection to the jurisdiction does not waive the objection that the court has no jurisdiction of the subject-matter, under Civ. Code Proc. §§ 92, 118.—*Commonwealth v. Adkins*, 184 S. W. 372.

IV. PROPERTY.

⚡104 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2473, providing that bastards can inherit from and through their mother, bastards of the same mother may inherit from each other.—*Yates v. Craddock*, 184 S. W. 276.

BATTERY.

See Assault and Battery.

BAWDY HOUSE.

See Disorderly House.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Statutes, ¶113.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, ¶400; Evidence, ¶158.

BIAS.

See Jury, ¶97; Witnesses, ¶374.

BILL OF LADING.

See Carriers, ¶58.

BILLS AND NOTES.

See Action, ¶69; Alteration of Instruments, ¶9, 23; Corporations, ¶414, 462; Garnishment, ¶38; Justices of the Peace, ¶91; Payment, ¶17, 66.

II. CONSTRUCTION AND OPERATION.

¶129(1) (Tex.Civ.App.) Where the maturity of a note rests at the election of the holder, until such election is exercised the debt will not be considered due.—Cofer v. Beverly, 184 S. W. 608.

¶129(2) (Tex.Civ.App.) Where the failure to pay an installment of a debt ipso facto matures the whole debt, it is not the rule that by accepting payment of overdue installments or extending time upon an installment the creditor waives the default.—Cofer v. Beverly, 184 S. W. 608.

Agreement by holder of note for extension of time for payment of installment of interest *held* to estop him and his assignee from declaring the entire note due, under its provisions, for failure to pay the installment when due.—Id.

Where a mortgagor makes an honest, but unsuccessful, effort to find the mortgagee and to tender him his interest and is prevented from ascertaining the owner of the note, the courts have the power to release the mortgagor from the effect of nonpayment, which would otherwise mature the whole debt.—Id.

IV. NEGOTIABILITY AND TRANSFER.

(C) Transfer Without Indorsement.

¶209 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 582, verbal assignment of a note entitled assignee to sue thereon.—Ford v. Johnston, 184 S. W. 303.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

¶237 (Ark.) As between the original parties to a note, the maker may set up as a defense that he signed it for accommodation merely.—Fisher v. Rice Growers' Bank, 184 S. W. 36.

¶238 (Mo.App.) An indorser or accommodation of the payee for use as collateral security without consideration is not liable to the original payee.—Cox v. Heagy, 184 S. W. 495.

Although an indorser for the accommodation of the payee may owe the payee some amount, he is not liable on the note which he indorses in the absence of specific agreement that his indorsement shall be a consideration for the other debt.—Id.

Under Rev. St. 1909, § 10000, defining an accommodation party, an indorser for accommodation of the payee only is not liable on the note, although the principal owes the payee money.—Id.

In the absence of specific agreement, the fact that an accommodation indorser for the payee owes money to the payee, is insufficient to make him liable on the accommodation paper.—Id.

If an indorser signed upon the representation and with the understanding that he was only

an indorser for accommodation of the payee, it was immaterial whether the party securing his signature was authorized to make such representations by the payee; the question being whether the representations were made.—Id.

(B) Indorsement for Transfer.

¶267 (Mo.App.) The contract of an indorser of a negotiable instrument is separate and distinct from the contract expressed by the note itself.—Davis v. McColl, 184 S. W. 920.

(C) Assignment or Sale.

¶318 (Tex.Civ.App.) Where the holder of a vendor's lien note exercised his option to declare the whole debt due for failure to pay an interest installment, an agreement by such holder after declaring the note due to extend the time for payment of interest bound his assignee.—Cofer v. Beverly, 184 S. W. 608.

(D) Bona Fide Purchasers.

¶344 (Tex.Civ.App.) Purchaser of vendor's lien note, in possession of facts which would have led him to knowledge that the holder had agreed with the makers for an extension of time for payment of an installment of interest, stood in the holder's shoes as to his right to precipitate maturity of the whole debt for failure to pay the installment when due.—Cofer v. Beverly, 184 S. W. 608.

¶357 (Tex.Civ.App.) Bank to which notes are indorsed as collateral security for valuable consideration without notice is holder for value.—Yantis v. Jones, 184 S. W. 572.

¶358 (Tex.Civ.App.) Valid antecedent debt is valuable consideration for transfer of note as collateral security.—Yantis v. Jones, 184 S. W. 572.

¶365(2) (Tex.Civ.App.) The owner of a note, who allowed it to be taken in the name of a third person and permitted such third person to exercise dominion, is estopped from setting up his rights as against one who in good faith without notice took the note after maturity.—Western Nat. Bank of Hereford v. Laughlin, 184 S. W. 1101.

¶375 (Tex.Civ.App.) Where consideration of note of buyer of capital stock of a corporation was illegal under the constitutional and statutory provisions as to the sale of capital stock on credit, the note was void, and its payment could not be enforced by innocent purchaser for value.—Republic Trust Co. v. Taylor, 184 S. W. 772.

Under Const. art. 12, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, notes given for capital stock of corporation sold and delivered on credit *held* void and unenforceable by bona fide purchaser.—Id.

¶378 (Tex.Civ.App.) Where a note was attached without line or perforation to a conditional contract of sale, its subsequent detachment and negotiation was an alteration avoiding the note in the hands of an innocent purchaser for value.—Spencer v. Tripplett, 184 S. W. 712.

¶378 (Tex.Civ.App.) A material alteration of a note precludes any claim on the part of the holder to protection as an innocent purchaser for value without notice.—Landon v. Halcomb, 184 S. W. 1098.

VIII. ACTIONS.

¶445 (Tex.Civ.App.) Sale of note, given to secure advancement of price of land, by the assignee of the original payee, with the understanding that the suit instituted by the assignee should be dismissed, and its dismissal, did not annul the assignee's election to declare the note due for nonpayment of interest, or estop the buyer from such election.—Finley v. Wakefield, 184 S. W. 755.

⚡452(1) (Tex.Civ.App.) The legal and equitable owner and holder of a note by indorsement and assignment from the assignee of the original payee, for valuable consideration, could sue the makers, though he purchased for spite.—Finley v. Wakefield, 184 S. W. 755.

⚡489(7) (Mo.App.) A defense alleging a verbal agreement that the note sued on was merely conditional *held* defeated by testimony of defendant that the agreement was reduced to writing, with defendant's admission that the written agreement was changed after the other party had signed it.—Merrill v. Johnson, 184 S. W. 1191.

⚡497(2) (Ark.) The burden is on the bank issuing a negotiable certificate of deposit to show that a purchaser before maturity for full value had knowledge of the defenses.—Union State Bank of Shawnee, Okl., v. First Nat. Bank of Huntsville, Ark., 184 S. W. 411.

⚡520 (Tex.Civ.App.) Evidence in a suit on a note detached from a written contract or order executed by defendant and plaintiff's assignor, *held* to sustain finding that contract or order had been obtained from defendant for fraudulent purpose of realizing on it by transfer to third party.—Landon v. Halcomb, 184 S. W. 1098.

⚡525 (Ark.) Evidence *held* not to show that the purchaser before maturity for value of a negotiable certificate of deposit had knowledge of any defense against it.—Union State Bank of Shawnee, Okl., v. First Nat. Bank of Huntsville, Ark., 184 S. W. 411.

⚡525 (Tex.Civ.App.) Evidence in a suit on a note *held* to sustain a finding that plaintiff was not an innocent purchaser before maturity for value without notice of any defense thereto.—Landon v. Halcomb, 184 S. W. 1098.

In a suit on a note, the issue of the plaintiff's bad faith in the purchase of the note, like the issue of his assignor's fraud in obtaining the note, could be established by circumstantial evidence.—*Id.*

⚡527(1) (Ky.) In action on \$500 note executed by defendant to plaintiff's assignor, subject to two credits of \$60 each, in which defendant pleaded two additional payments of \$120 each, verdict for plaintiff *held* against the weight of the evidence.—Keeton v. Booth, 184 S. W. 370.

⚡538(1) (Mo.App.) In an action against an indorser for accommodation of the payee, it is error to instruct substantially that if either of the principals owed the payee anything the payee might recover from the defendant.—Cox v. Heagy, 184 S. W. 495.

⚡540 (Tex.Civ.App.) Where plaintiff sought to recover on note as payee and alleged and proved that apparent payee was his agent and named as such by mistake, contention that judgment was erroneous for failure to prove transfer for value *held* untenable.—Ford v. Johnston, 184 S. W. 303.

BOARD OF HEALTH.

See Health, ⚡6.

BONA FIDE PURCHASERS.

See Bills and Notes, ⚡344-378; Fraudulent Conveyances, ⚡199; Vendor and Purchaser, ⚡228-239.

BONDS.

See Appeal and Error, ⚡1227, 1234; Bail; Counties, ⚡98, 101; Injunction, ⚡148; Insane Persons, ⚡51; Municipal Corporations, ⚡245; Principal and Surety; Sheriffs and Constables, ⚡159.

BOOKS.

See Insurance, ⚡335.

BOUNDARIES.

See Municipal Corporations, ⚡42; Public Lands, ⚡177.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

⚡36(3) (Tex.Civ.App.) Recently made maps and plats of lands are of no value in determining a boundary existing 60 years before, such boundary being the bank of a river shown to have shifted since the grant.—Crosby v. Stevens, 184 S. W. 705.

BREACH OF THE PEACE.

See Disturbance of Public Assemblage.

⚡1 (Mo.App.) Where municipal ordinance made it a misdemeanor for any person to disturb the peace of a neighborhood by fighting, the term "neighborhood" includes any locality in the city, and one disturbing the peace by fighting in the business district is guilty.—City of Charleston v. Coker, 184 S. W. 1181.

⚡8 (Mo.App.) Where a fight occurred on a business street and a crowd assembled, witnesses of the combat need not testify that their peace was disturbed to warrant conviction under ordinance making it a misdemeanor for any person to disturb peace by fighting.—City of Charleston v. Coker, 184 S. W. 1181.

⚡11 (Mo.App.) In a prosecution for disturbing the peace by fighting, *held* that, in view of other instructions and the evidence, accused could not complain that an instruction misled the jury into believing that they might convict, though accused did not provoke the fight.—City of Charleston v. Coker, 184 S. W. 1181.

BRIDGES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⚡20(2) (Ark.) Warrants for building a bridge cannot be canceled because the contract for the construction of the bridge was not let at public auction as required by statute, where it was constructed for an amount within the appropriation, and was accepted and used by the county.—Izard County v. Vincennes Bridge Co., 184 S. W. 87.

BRIEFS.

See Appeal and Error, ⚡759-768.

BROKERS.

See Embezzlement, ⚡5, 14, 38; Evidence, ⚡460; Judgment, ⚡256.

II. EMPLOYMENT AND AUTHORITY.

⚡18 (Ark.) A furniture manufacturer cannot object that a broker who negotiated sales between the manufacturer and merchants on commission employed subagents to solicit business for him.—Tomlinson Chair Mfg. Co. v. Jop-pa Mattress Co., 184 S. W. 32.

IV. COMPENSATION AND LIEN.

⚡44 (Mo.App.) Where plaintiff broker, after several weeks' effort, failed to interest his proposed purchaser at specified prices, and his authority was revoked, that defendant thereafter sold directly to such purchaser for a less price did not render him liable for commission.—Good v. Robinson, 184 S. W. 955.

⚡48 (Tex.Civ.App.) Where a landowner availed himself of contracts procured by plaintiff broker and did not cancel the broker's contract for nonperformance, he cannot defeat recovery of commissions on the ground that the broker did not comply with all terms of the contract.—Denton v. Holbert, 184 S. W. 251.

§55(1) (Tex.Civ.App.) Where a broker employed to sell lands in Arizona carried on a selling campaign in person for over a year and then turned the matter over to subagents, the broker is not estopped to claim compensation; the owner after objections acquiescing.—Denton v. Holbert, 184 S. W. 251.

§55(1) (Tex.Civ.App.) Broker, who produced prospective purchaser to whom property was sold by active efforts of another broker, is not entitled to commission.—Griffith v. Shofner, 184 S. W. 340.

§65(1) (Tex.Civ.App.) Where defendant, who was disposing of a large tract of land located in Texas, admitted that he made no objections to plaintiff broker's handling other Texas lands, the broker's right to compensation for sales made cannot be defeated on that ground.—Denton v. Holbert, 184 S. W. 251.

V. ACTIONS FOR COMPENSATION.

§78 (Tex.Civ.App.) Landowners, who engaged to pay realty brokers a commission for effecting a sale in notes received for the land, but who, after receiving such notes, sold them to a third person, held liable in assumption to the brokers for their commission in money.—Patterson v. Kirkpatrick, 184 S. W. 739.

§86(2) (Tex.Civ.App.) In a suit for compensation for sales of land, evidence held not to show that defendant discharged the broker or his subagent, but that defendant recognized the continuing agency of such persons.—Denton v. Holbert, 184 S. W. 251.

In an action by a broker for compensation for sales of land effected through subagents, evidence held insufficient to show that the original contract was terminated before the sales were made.—Id.

§86(3) (Tex.Civ.App.) Evidence held to warrant a finding that the broker substantially performed his agreement.—Denton v. Holbert, 184 S. W. 251.

§86(4) (Tex.Civ.App.) In an action by a broker for commissions for sales effected through subagents, evidence held to show that the sales were not made by defendant directly through the subagents, but that he recognized such agents as being agents for the broker.—Denton v. Holbert, 184 S. W. 251.

§86(8) (Ark.) Evidence held sufficient to sustain a verdict finding a custom which entitled defendant to set off a discount claimed by him on sales made on commission.—Tomlinson Chair Mfg. Co. v. Jop-pa Mattress Co., 184 S. W. 32.

§88(10) (Mo.App.) Where a broker suing for commissions claimed to have dealt with only one of the purchasers, C. and B., an instruction that he could not recover unless he caused C. and B. to go on the land was error, as amounting to a peremptory instruction.—Murphy v. Foster, 184 S. W. 929.

§89 (Tex.Civ.App.) Brokers, who contracted with landowners to sell for a commission payable in the purchase-money notes if such were taken, to whom the landowners, after sale on credit, tendered the commission in notes, which were refused, were not entitled to recover a money judgment for commission.—Patterson v. Kirkpatrick, 184 S. W. 739.

BUILDING AND LOAN ASSOCIATIONS.

§26 (Tex.Civ.App.) Plaintiff, whose application for defendant's loan contract stated that he had examined its plans, read a printed copy of the contract and understood its provisions, and that he did not rely upon any statements of the agent, could not rescind for the agent's representations.—National Equitable Soc. of Belton v. Carpenter, 184 S. W. 585.

Plaintiff, not prevented by any fraud of agent of defendant loan society from reading application for a loan contract before signing, could

not claim ignorance of contents of application.—Id.

§26 (Tex.Civ.App.) Suit to rescind contract with loan society and to recover the money paid under it, could not be maintained where it could not be said that plaintiff was actually misled by the statement of the society's agent into accepting the contract as written.—National Equitable Soc. of Belton v. Camp, 184 S. W. 589.

§26 (Tex.Civ.App.) Plaintiff, if entitled to reject the contract of defendant loan society when tendered, because it materially differed from what its agent said it would be, was required to act promptly upon a discovery of the fraud.—National Equitable Soc. of Belton v. Dunnington, 184 S. W. 590.

§41(7) (Tex.Civ.App.) In suit against a loan society for breach of the loan contract actually made as explained by its agent, plaintiff held not entitled to judgment, where he did not prove damages.—National Equitable Soc. of Belton v. Carpenter, 184 S. W. 585.

BUILDING CONTRACTS.

See Damages, §85; Principal and Surety, §59, 117.

BUILDING REGULATIONS.

See Municipal Corporations, §601.

BULK SALES.

See Fraudulent Conveyances, §47, 182, 318, 322.

BURGLARY.

See Criminal Law, §364, 721; Indictment and Information, §147, 191.

II. PROSECUTION AND PUNISHMENT.

§25 (Ky.) Under Ky. St. § 1164, punishing shopbreaking, an indictment not alleging an entry by defendant is sufficient.—Henry v. Commonwealth, 184 S. W. 870.

BURGLARY INSURANCE.

See Insurance, §332½, 335.

CANCELLATION OF INSTRUMENTS.

See Reformation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§4 (Tenn.) Equity has the power to cancel a void instrument, whether its character as such appears from the face of the instrument or otherwise.—Stearns Coal & Lumber Co. v. Patton, 184 S. W. 855.

§4 (Tex.Civ.App.) Instrument will not be set aside for mistake of one of the parties unless superinduced by fraud of other.—Yantis v. Jones, 184 S. W. 572.

II. PROCEEDINGS AND RELIEF.

§45 (Ark.) In suits to cancel notes and mortgages on the ground that they had been made to defendant merely for accommodation and without consideration, it devolved upon plaintiffs to show such alleged facts by a preponderance of evidence.—Fisher v. Rice Growers' Bank, 184 S. W. 36.

§47 (Ark.) In suits against bank to cancel notes and mortgages alleged to have been made to defendant solely for its accommodation and without any consideration, evidence held to sustain a decree for defendant.—Fisher v. Rice Growers' Bank, 184 S. W. 36.

§59 (Ark.) In a suit to cancel warranty deed alleged to have been obtained from the grantor when he was without mental capacity to execute it and to set aside transfer of personal property, the court was not warranted in decreeing a

reformation of the instruments.—*Boyd v. Boyd*, 184 S. W. 838.

CARRIERS.

See Commerce, ¶8, 33, 62; Courts, ¶97; Evidence, ¶450, 474, 481, 542; Negligence, ¶96; Pleading, ¶127; Principal and Agent, ¶101; Railroads, ¶285; Receivers, ¶188; Trial, ¶229, 251-253.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

¶2 (Tex.Civ.App.) Rev. St. 1911, art. 6670, as to transportation and delivery of passengers, freight or cars, destined to point on connecting railroad, held constitutional.—*Quanah, A. & P. Ry. Co. v. Warren*, 184 S. W. 232.

¶20(6) (Tex.Civ.App.) Under Rev. St. 1911, art. 6670, subds. 1, 2, and article 6671, penalty for delay in delivery to connecting carrier, held to accrue though Railroad Commission has made no regulation, but governed by subdivision 1.—*Quanah, A. & P. Ry. Co. v. Warren*, 184 S. W. 232.

Under Rev. St. 1911, arts. 6670, 6671, party held entitled to recover penalty for railroad's delay in delivering shipment to connecting carrier, delay constituting discrimination.—Id.

Where plaintiff alleged that refusal to deliver shipment to connecting carrier was in violation of Rev. St. 1911, art. 6670, and order of Railroad Commission, failure to show such order held fatal.—Id.

Under Rev. St. 1911, arts. 6670, 6671, carrier held liable for damages and penalty for delaying or refusing delivery to connecting carrier, though shipment is not a through shipment.—Id.

Under Rev. St. 1911, arts. 6670, 6671, Railroad Commission held without power to prescribe damages recoverable for failure to deliver shipment without delay to connecting carrier.—Id.

¶22 (Tex.) Acts 30th Leg. c. 42, §§ 1, 3, 6, relating to use of free passage on railroad, construed in light of Pen. Code 1911, art. 9 (Vernon's Ann. Pen. Code 1916, art. 9), on offenses punishable, held not to make it an offense to attempt to ride free without attempt to use pass.—*Carpenter v. Trinity & B. V. Ry. Co.*, 184 S. W. 186.

II. CARRIAGE OF GOODS.

(A) Delivery to Carrier.

¶44 (Tex.Civ.App.) A carrier is liable for the consequences of its breach of contract to furnish cars within a shorter time than required by statute, though the result of inability due to an unusual demand for cars.—*Texas & N. O. R. Co. v. Weems*, 184 S. W. 1103.

¶45 (Tex.Civ.App.) Damages for carrier's breach of contract to furnish cars on private tracks held not limited to cost of hauling property to depot, where cars could not have been obtained there.—*Texas & N. O. R. Co. v. Weems*, 184 S. W. 1103.

Plaintiff, alleging that "on or about" June 14th he demanded and defendant refused to furnish cars, proof that it was on that day of July is not a variance.—Id.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

¶58 (Tex.Civ.App.) Where a bank purchased a seller's bill of lading with draft attached, but on refusal of the buyer to accept the goods, the seller gave its check to the bank for the amount of the draft, held on the evidence, that at the time of a levy on the goods as the property of the seller the title was in such seller.—*Collin*

County Nat. Bank v. Satterwhite, 184 S. W. 838.

(C) Custody and Control of Goods.

¶76 (Ark.) Where a contract of sale allows the vendee and consignee to refuse the goods if not in good condition on arrival, the consignor's title is not divested by delivery to the carrier, and he may sue the carrier for injury to such goods.—*Yazoo & M. V. R. Co. v. Solomon*, 184 S. W. 418.

(F) Loss of or Injury to Goods.

¶132 (Tex.Civ.App.) Where a shipper expressly alleged that the goods were in good condition when delivered to the carrier, it has the burden of proving that fact.—*Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 1070.

¶133 (Tex.Civ.App.) In an action for injuries to peanuts which plaintiff claimed resulted from unventilated car, evidence that green peanuts, if confined before sufficiently dry, would necessarily be damaged is admissible.—*Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 1070.

¶135 (Mo.App.) In an action for damages for failure to deliver sugar, evidence held to show that the carrier knew that it had been resold or was to be resold, and so was liable for consequential damages as loss of profits on resale.—*Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.*, 184 S. W. 915.

¶137 (Tex.Civ.App.) A charge that shipper had burden of proof in an action for injuries to a shipment held not objectionable on theory that where carrier receives shipment in good condition, it is bound to excuse injury.—*Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 1070.

(H) Limitation of Liability.

¶154 (Mo.App.) Under Interstate Commerce Act 1887, §§ 2, 3, an interstate carrier may fix a reduced rate limiting its liability, and such limitations are valid if the rates be open to all.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S. W. 149.

¶165 (Mo.App.) A recital in a contract that a reduced rate was charged in consideration of a limited valuation prima facie establishes that fact.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S. W. 149.

(I) Connecting Carriers.

¶174 (Tex.Civ.App.) In the absence of a special contract or course of business, an initial carrier, or an intermediate connecting carrier, is bound only to safely carry and deliver the shipment to the next carrier.—*Quanah, A. & P. Ry. Co. v. Warren*, 184 S. W. 232.

¶185(3) (Tex.Civ.App.) Receipt of initial carrier for shipment of goods destined to point on line of connecting railroad held not to show that the shipment was a through shipment within Rev. St. 1911, art. 731.—*Quanah, A. & P. Ry. Co. v. Warren*, 184 S. W. 232.

Under Rev. St. 1911, art. 731, relative to liability of carriers of through shipment, there must be more than the mere receipt and transportation of goods to show a contract for through shipment.—Id.

¶187 (Tex.Civ.App.) Finding that a steamship company was not liable for damages to shipment due to hurricane, under Act Cong. Feb. 13, 1893, § 3, held to prevent a recovery against a connecting railroad carrier.—*Texas & P. Ry. Co. v. Erambert*, 184 S. W. 274.

III. CARRIAGE OF LIVE STOCK.

¶205 (Ky.) Ambiguity in a contract for the shipment of live stock in designating the consignee, or in not clearly showing who they are,

or the place of destination, should be construed most favorably to the shipper.—*Cincinnati, N. O. & T. P. Ry. Co. v. Luke*, 184 S. W. 1132.

☞207(2) (Tex.Civ.App.) An interstate shipment of live stock may be made on an oral contract.—*Kansas City, M. & O. Ry. Co. v. Hansard*, 184 S. W. 329.

☞212 (Ky.) Railroad transporting cattle from Kentucky consigned to a Chicago firm of cattle brokers in care of a Cincinnati firm held under duty to deliver to the Cincinnati firm in such city.—*Cincinnati, N. O. & T. P. Ry. Co. v. Luke*, 184 S. W. 1132.

☞218(1) (Mo.App.) A stipulation between carrier and shipper of live stock in interstate commerce limiting the time for bringing suit for injury thereto is valid under the federal rule.—*Howard v. Chicago, R. I. & P. Ry. Co.*, 184 S. W. 906.

☞218(1) (Tex.Civ.App.) Provision in written contract for carriage of live stock that suit for injury be brought within 91 days is not unreasonable or invalid.—*Kansas City, M. & O. Ry. Co. v. Hansard*, 184 S. W. 329.

☞218(3) (Ky.) A reasonable stipulation in reference to presenting a claim for damages under a contract for the carriage of live stock is valid and enforceable.—*Cincinnati, N. O. & T. P. Ry. Co. v. Luke*, 184 S. W. 1132.

☞218(5) (Tex.Civ.App.) Stipulation in contract for carriage of live stock that suit for damages must be brought within 91 days is not binding if there was no consideration therefor, and where a binding oral contract had been previously made, the subsequent written contract would be without consideration.—*Kansas City, M. & O. Ry. Co. v. Hansard*, 184 S. W. 329.

☞218(6) (Ky.) Stipulation in bill of lading covering shipment of live stock requiring shipper to give prompt notice of damages held not to cover damages through the railroad's breach of agreement to accord the shipper the privilege of taking the cattle off at a city en route.—*Cincinnati, N. O. & T. P. Ry. Co. v. Luke*, 184 S. W. 1132.

☞227(3) (Tex.Civ.App.) In a suit for damages to shipment of cattle, proof of injury from their inherent propensities would be admissible under its general denial of negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

☞228(1) (Tex.Civ.App.) In action for damages to shipment of live stock, carrier has burden of proving that the stipulation in a written contract as to time within which shipper must give notice of injury was reasonable.—*Kansas City, M. & O. Ry. Co. v. Hansard*, 184 S. W. 329.

☞230(12) (Tex.Civ.App.) In an action against a railroad for damage to a shipment of live stock instruction authorizing double recovery was erroneous.—*Kansas City, M. & O. Ry. Co. v. Russell*, 184 S. W. 299.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

☞235 (Ark.) A railroad built by a logging company to haul timber to its mill, on which it occasionally hauled material to others and never carried passengers except gratuitously and under a stipulation exempting from liability, was not a "common carrier" of passengers.—*Dodson v. Clark County Lumber Co.*, 184 S. W. 417.

(C) Performance of Contract of Transportation.

☞271 (Ark.) Carrier, notifying adult passenger, of apparent ordinary intelligence, of arrival at a junction where it was necessary to change for point on line of connecting carrier, held not liable in damages for carrying passenger beyond junction.—*St. Louis, I. M. & S. Ry. Co. v. Needham*, 184 S. W. 47.

☞278(1) (Ark.) In action for damages from defendant's negligent failure to notify plaintiff of necessity for changing cars at a junction, evidence held to make defendant's announcement of the junction and the necessity for change a question for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Needham*, 184 S. W. 47.

(D) Personal Injuries.

☞280(1) (Ky.) It is a carrier's duty to provide for its passengers a reasonably safe platform and approaches to its trains.—*Cumberland R. Co. v. Hemphill*, 184 S. W. 883.

☞280(4) (Mo.) If the elevator shaft doors causing the injury were operated in the usual and customary way that this and other similar elevators and doors were operated held not necessarily to relieve defendant from liability.—*Howard v. Scarritt Estate Co.*, 184 S. W. 1144.

☞283(2) (Tex. Civ. App.) Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 6753, a railroad is not relieved of liability for the consequences to a passenger of its conductor's failure to separate white and negro passengers.—*Texas & P. Ry. Co. v. Baker*, 184 S. W. 664.

A railroad whose servants knew, or by the exercise of due care might have known, that a white person was in a coach for blacks, in violation of the separate coach law, and did not remove him, was liable for injuries to plaintiff's wife, a negro, inflicted by such white person.—*Id.*

☞284(1) (Tex.Civ.App.) A railroad whose white passenger assaulted plaintiff's negro wife was not liable therefor, aside from the separate coach law, unless the road should have reasonably foreseen, in time to have prevented the assault, that the white person would commit it.—*Texas & P. Ry. Co. v. Baker*, 184 S. W. 664.

☞290(1) (Tex.Civ.App.) That plaintiff did not inform the carrier or its servants of the delicate condition of his wife will not preclude recovery for injuries resulting to her from cold contracted through an insufficiently heated car.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 184 S. W. 700.

☞303(5) (Tex.Civ.App.) In an action for injuries while alighting from a street car, defendant was not liable if the car stopped for a reasonable time, and its servants did not know, or have reason to know, that the plaintiff had not alighted.—*San Antonio Traction Co. v. Cox*, 184 S. W. 722.

☞305(2) (Ky.) To recover for injuries from a carrier's failure to provide a reasonably safe platform it must be shown that such failure was the proximate cause of the injury.—*Cumberland R. Co. v. Hemphill*, 184 S. W. 883.

In action for personal injury, plaintiff, who showed that the "creeling" of his foot as he was about to board defendant's train was the proximate cause of his fall and consequent injury, and failed to show that the "creeling" was due to defendant's negligence, was not entitled to recover.—*Id.*

☞307(4) (Ark.) Stipulation signed by plaintiff in consideration of his gratuitous carriage on defendant's logging railroad held binding on him, so that defendant was not liable for injury to him from a derailment due to its negligence.—*Dodson v. Clark County Lumber Co.*, 184 S. W. 417.

☞314(2) (Tex.Civ.App.) Allegations of negligence in passenger's action for injuries held specific, and not general.—*Dowdy v. Southern Traction Co.*, 184 S. W. 687.

☞315(3) (Tex.Civ.App.) Where the passenger alleged specific acts of negligence and failed to prove them, he could not invoke the maxim "*res ipsa loquitur*," based on the happening of an accident, but was required to prove the specific negligence alleged.—*Dowdy v. Southern Traction Co.*, 184 S. W. 687.

☞318(4) (Tex.Civ.App.) In a suit against a railroad for death of a shipper riding with his

goods, evidence *held* sufficient to authorize finding that the negligence of the road's servants in making a flying switch with the car in which decedent rode, and the injuries received by him, proximately contributed to his death.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

—318(11) (Tex.Civ.App.) In action for injuries to passenger, evidence *held* to authorize finding that insufficiency of light was producing or proximate cause of injury.—*Houston, E. & W. T. Ry. Co. v. Hooper*, 184 S. W. 347.

—320(1) (Tex.Civ.App.) In action for injuries to passenger, where there is evidence to sustain allegation of one of the acts of negligence alleged, peremptory instruction was properly refused.—*Houston, E. & W. T. Ry. Co. v. Hooper*, 184 S. W. 347.

—320(11) (Tex.Civ.App.) In an action for injuries to plaintiff's wife resulting from cold contracted in an insufficiently heated car, evidence *held* insufficient to raise the question whether the carrier's servants would have heated the car had they been informed of the wife's delicate condition.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 184 S. W. 700.

—321(4) (Tex.Civ.App.) In an action under the separate coach law for injuries to a negro assaulted by a white passenger in a coach for blacks, instructions authorizing a finding against the road if its servants knew that a white passenger was in the negro coach *held* not erroneous on account of testimony.—*Texas & P. Ry. Co. v. Baker*, 184 S. W. 664.

(E) Contributory Negligence of Person Injured.

—330 (Tex.Civ.App.) Though there was fuel and a stove in the car in which plaintiff and his wife were riding, plaintiff's failure to build a fire, the car becoming cold, is not contributory negligence precluding recovery for injuries to his wife from cold.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 184 S. W. 700.

CATTLE GUARDS.

See Railroads, —362.

CERTIFICATE.

See Contracts, —287; Corporations, —99; Depositions; Insurance, —546.

CERTIFICATES OF DEPOSIT.

See Bills and Notes, —497, 525; Garnishment, —38.

CERTIORARI.

I. NATURE AND GROUNDS.

—17 (Tex.Civ.App.) The Court of Appeals cannot issue certiorari to correct the return as made by the constable showing the value of the property attached in order to make it conform to his intentions.—*Fuller, Hanna & Co. v. Rogers*, 184 S. W. 322.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Criminal Law, —122-137.

CHARACTER.

See Witnesses, —344-360.

CHARGE.

To jury, see Trial, —191-199.

CHARTER.

See Railroads, —19.

CHATTEL MORTGAGES.

See Reformation of Instruments, —13.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

—22 (Tex.Civ.App.) A chattel mortgage to secure future advances is valid and binding on the parties.—*Law Sprinkle Mercantile Co. v. Hause*, 184 S. W. 737.

(B) Form and Contents of Instruments.

—47 (Tex.Civ.App.) A description in a chattel mortgage *held* sufficiently definite to warrant foreclosure; parol evidence being admissible.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

II. FILING, RECORDING, AND REGISTRATION.

(A) Original.

—92 (Ark.) An unrecorded chattel mortgage is good between the parties thereto.—*Judkins v. State*, 184 S. W. 407.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

—138(1) (Ark.) Artisan's lien created by Acta 1911, p. 298, § 1, *held* prior to a recorded chattel mortgage on the property repaired, if the work was necessary to conduct of business.—*Gardner v. First Nat. Bank of De Queen*, 184 S. W. 51.

—138(1) (Tex.Civ.App.) Despite Rev. St. 1911, art. 3744, mortgagee, who made advances after part of the mortgaged property was sold under execution, has priority over the purchaser at execution sale, though at time of purchase the other property was sufficient to have discharged debt.—*Law Sprinkle Mercantile Co. v. Hause*, 184 S. W. 737.

—144 (Ark.) An officer in possession of property under a levy of execution acquired a lien superior to the lien acquired under a chattel mortgage recorded after the levy.—*McCabe v. Lee*, 184 S. W. 448.

—150(2) (Ark.) Under Kirby's Digest, § 5395, the recording of a chattel mortgage in a county other than that of the mortgagor's residence is insufficient to constitute notice to third parties.—*Judkins v. State*, 184 S. W. 407.

V. RIGHTS AND REMEDIES OF CREDITORS.

—186 (Tex.Civ.App.) A reservation of title to a stock of goods to secure the purchase price, though declared a mortgage by Rev. St. 1911, art. 5654, is not within article 3970, declaring void a mortgage on a stock of goods.—*Mayfield Co. v. Harlan & Harlan*, 184 S. W. 313.

Under Rev. St. 1911, art. 5654, declaring an unregistered reservation of title to chattels to secure the purchase price void as to creditor, the seller, retaking, can hold them against non-lien creditors.—*Id.*

—186 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 3970, making void mortgages on stocks of goods exposed to daily sale where possession is retained by the mortgagor, does not apply where the goods mortgaged are segregated from the stock and possession delivered to the mortgagees.—*Krower v. Martin*, 184 S. W. 511.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(A) Rights and Liabilities of Parties.

—219 (Mo.App.) Rev. St. 1909, § 2863, does not prevent a mortgagee from waiving his rights under a chattel mortgage by consenting to a

sale or exchange of the chattel.—*Rogers v. Davis*, 184 S. W. 151.

↪229(2) (Tex.Civ.App.) In action for converting mortgaged cotton, answer alleging that selling price was paid plaintiff, and that plaintiff was paid market value, less cost of picking, *held* to state a meritorious defense.—*Miller v. First State Bank & Trust Co. of Santa Anna*, 184 S. W. 614.

IX. FORECLOSURE.

↪274 (Tex.Civ.App.) Where maker gave chattel mortgage to surety, and transferred property to a corporation organized to take over his business, limitations did not run in favor of the corporation, by reason of its holding property, against the right of payee of note to enforce mortgage.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

CHEAT.

See False Pretenses; Fraud.

CHILDREN.

See Adoption; Bastards; Divorce, ↪308; Guardian and Ward; Infants; Negligence, ↪85.

CHOSE IN ACTION.

See Assignments.

CITATION.

See Appeal and Error, ↪407.

CITIES.

See Municipal Corporations.

CLAIMS.

See Banks and Banking, ↪80; Counties, ↪206; Execution, ↪182; Executors and Administrators, ↪234; Mechanics' Liens, ↪157.

CLASS LEGISLATION.

See Constitutional Law, ↪208.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL ATTACK.

See Judgment, ↪494-501, 818; Judicial Sales; Justices of the Peace, ↪129.

COLLATERAL SECURITY.

See Bills and Notes, ↪357, 358; Pledges.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLOR OF TITLE.

See Adverse Possession.

COMBINATIONS.

See Conspiracy; Monopolies.

COMMERCE.

See Carriers; Master and Servant, ↪250½.

I. POWER TO REGULATE IN GENERAL.

↪8 (Mo.App.) Under the Interstate Commerce Act and the Carmack Amendment, the federal laws are exclusive for the determination of controversies arising out of interstate commerce.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S. W. 149.

The provision of the Carmack Amendment that the holder of a bill of lading issued for inter-

state carriage should not be deprived of any right of action or remedy he had under the existing laws does not indicate that the federal law is not exclusive; that provision referring only to existing federal laws.—*Id.*

↪10 (Tex.Civ.App.) Until Congress has acted and passed laws regulating the recovery for breach of a contract for the delivery of an interstate telegram, the state courts are warranted in following their own laws.—*Western Union Telegraph Co. v. Bailey*, 184 S. W. 519.

II. SUBJECTS OF REGULATION.

↪16 (Tex.Civ.App.) Contract between Texas mercantile corporation and Illinois advertising corporation for furnishing of advertising cuts and type *held* interstate commerce, and not subject to Texas Anti-Trust Laws.—*Bogata Mercantile Co. v. Outcault Advertising Co.*, 184 S. W. 883.

↪27 (Tex.Civ.App.) Where, at the time of shipment, a destination within the state only was contemplated the state statutes control the railroad's liability for injury to a servant while engaged in such transportation.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

↪33 (Mo.App.) Where the point of shipment of live stock and the point of destination were both in Missouri, but the course of transportation was through both Missouri and Kansas, the cars containing the stock passing over the tracks of other railroads, the shipment was interstate.—*Howard v. Chicago, R. I. & P. Ry. Co.*, 184 S. W. 908.

↪33 (Tex.Civ.App.) A shipment of coal, billed to a point in another state, from which, although without reloading or unloading, it was then billed to a point within such state, was not interstate as to the second shipment.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

↪40(1) (Tex.) Contract for sale of patterns by New York fashion company to Texas buyer, *held* violative of the Texas Anti-Trust Act, the goods having lost their character as interstate commerce.—*Segal v. McCall Co.*, 184 S. W. 188.

↪40(1) (Tex.Civ.App.) Contract of resident of Texas with Illinois medical company for purchase of goods at wholesale prices for resale *held* not enforceable, though dealing with merchandise in interstate commerce, in view of provisions of the contract, operative after arrival of the goods in Texas, violative of the Texas Anti-Trust Act (Rev. St. 1911, arts. 7796, 7798).—*W. T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S. W. 549.

III. MEANS AND METHODS OF REGULATION.

↪59 (Tex.Civ.App.) Where telegraph company negligently failed to deliver message originating in state where damages for mental anguish could be recovered, court of forum in allowing recovery of such damages did not place burden on interstate commerce contrary to Const. U. S. art. 1, § 8, subd. 3.—*Western Union Telegraph Co. v. Bailey*, 184 S. W. 519.

↪62 (Tex.Civ.App.) Neither the railroad nor the conductor has, under Rev. St. 1911, arts. 6746, 6748-6750, and 6753, the right to compel an interstate negro passenger to leave the coach in which he was riding and go into another, though equal in point of comfort and convenience.—*State v. Galveston, H. & S. A. Ry. Co.*, 184 S. W. 227.

COMMERCIAL PAPER.

See Bills and Notes.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Action, ↪40.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ¶266-276.

COMPARATIVE NEGLIGENCE.

See Negligence, ¶101.

COMPENSATION.

See Attorney and Client, ¶148, 150; Brokers, ¶44-89; Death, ¶88; Eminent Domain, ¶71; Master and Servant, ¶78, 82; Principal and Agent, ¶89.

COMPETENCY.

See Evidence, ¶148; Jury, ¶67; Witnesses, ¶48-159.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Arbitration and Award; Attorney and Client, ¶101; Payment.

¶6(1) (Mo.App.) Where partnership agreement for the purchase of stock did not make the defendants liable to the plaintiff for one-half the purchase price, a payment of this sum held a sufficient consideration for the settlement of all claims arising out of the transaction.—Wonderly v. Little & Hays Inv. Co., 184 S. W. 1188.

¶16(1) (Mo.App.) Where plaintiff entered into a partnership arrangement with the defendants to buy corporate stock and later upon the insolvency of the corporation had an accounting with the defendants which purported on its face to be a final settlement, an action for damages for fraud in the original transaction was precluded.—Wonderly v. Little & Hays Inv. Co., 184 S. W. 1188.

COMPUTATION.

See Limitation of Actions, ¶45-180; Usury, ¶50.

CONCLUSIVENESS.

See Appeal and Error, ¶662-665, 1008; Evidence, ¶265, 383; Judgment, ¶645-747; Pleading, ¶36; Wills, ¶423.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, ¶450-479.

CONDITIONS.

See Deeds, ¶155.

CONFESSION.

See Criminal Law, ¶519-537.

CONFLICT OF LAWS.

See Master and Servant, ¶250½; Telegraphs and Telephones, ¶27.

CONNECTING CARRIERS.

See Carriers, ¶174-187.

CONSIDERATION.

See Carriers, ¶154; Compromise and Settlement; Contracts, ¶52-126; Evidence, ¶419; Fraudulent Conveyances, ¶95.

CONSOLIDATION.

See Railroads, ¶143; Schools and School Districts, ¶33.

CONSPIRACY.

See Monopolies.

I. CIVIL LIABILITY.

(A) Acts Constituting Conspiracy and Liability Therefor.

¶13 (Mo.App.) If a conspiracy exists, a party who joins at any stage becomes a party to, and answerable for, all acts done by each and all of the conspirators before or afterwards in furtherance of the common design.—Kennish v. Safford, 184 S. W. 923.

(B) Actions.

¶19 (Mo.App.) Evidence, in an action against defendant on the ground that they had conspired to defraud plaintiff by representing that the security offered for his loan was good, held to sustain a verdict for plaintiff for the amount of the loan.—Kennish v. Safford, 184 S. W. 923.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

See Courts, ¶231.

For validity of statutes relating to particular subjects, see also the various specific topics.

Special or local laws, see Statutes, ¶90.

Subjects and titles of statutes, see Statutes, ¶109-122.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶12 (Ky.) In construing amendments to a constitution such amendments are to be treated as having the same effect as a codicil to a will.—Gatton v. Fiscal Court of Daviess County, 184 S. W. 1.

¶26 (Mo.) The Legislature may pass any statute (federal questions aside) not forbidden by the Constitution.—Williams v. United States Express Co., 184 S. W. 1146.

¶35 (Tex.Civ.App.) Where a power is expressly given by the Constitution and the mode of exercise is prescribed, such mode is exclusive.—Aldridge v. Hamlin, 184 S. W. 602.

¶42 (Tex.Civ.App.) Property owners cannot restrain a city from constructing a sidewalk in front of their premises on property which is part of the public thoroughfare because of the unconstitutionality of the statute under which the city is proceeding.—Riley v. Town of Trenton, 184 S. W. 344.

¶48 (Mo.) A statute should be so construed, if possible, as to make it valid under all constitutional provisions.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

¶63(2) (Tex.Civ.App.) Rev. St. 1911, art. 1016, is not a delegation of legislative power, or a violation of Const. art. 11, § 4, requiring a general law for incorporation of a city any more than is article 1034 requiring an election for incorporation.—Riley v. Town of Trenton, 184 S. W. 344.

(B) Judicial Powers and Functions.

¶70(1) (Ark.) Where act establishing a drainage district was void for want of a definite

description of the boundaries, the court could not substitute different words and figures to effect the supposed legislative purpose, as the description is a legislative, and not a judicial, function.—*Morgan Engineering Co. v. Cache River Drainage Dist.*, 184 S. W. 57.

—70(3) (Tex. Cr. App.) The wisdom of a statute was for the Legislature, and not for the courts.—*Gay v. State*, 184 S. W. 200.

VI. VESTED RIGHTS.

—102(2) (Mo. App.) Notwithstanding the payment of part of the salary of a fireman into a fund under Rev. St. 1906, § 9888, part of the Firemen's Pension Act, it remains a public fund, and the payer of such sums has no vested right therein which cannot be taken away by subsequent legislation.—*State ex rel. King v. Board of Trustees of Firemen's Pension Fund of Kansas City*, 184 S. W. 929.

—107 (Mo.) Rev. St. 1909, § 1892, forbidding suit to foreclose mortgage after barring of the debt, does not impair the vested rights of parties to mortgages or deeds of trust executed before the act was passed, provided the obligations secured by them were not barred at the time of its enactment.—*Bobb v. Taylor*, 184 S. W. 1028.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

—205(6) (Tenn.) Pub. Acts 1905, c. 480, § 12, concerning fraternal beneficiary associations, does not violate Const. art. 11, § 8, as discriminating in favor of certificate holders under the act as against certificate holders of other beneficiary associations and ordinary life companies.—*Hamilton Nat. Bank v. Amster*, 184 S. W. 5.

—208(13) (Tenn.) Pub. Acts 1905, c. 480, § 12, and section 32, concerning fraternal beneficiary associations, do not violate Const. art. 1, § 8, and article 11, § 8, as class legislation, since it grants the same privileges to all associations falling within the terms of the act.—*Hamilton Nat. Bank v. Amster*, 184 S. W. 5.

XI. DUE PROCESS OF LAW.

—278(1) (Mo.) A statute based on the valid exercise of the police power does not deprive a person of his property without due process of law, contrary to Const. art. 2, § 30, or Const. U. S. Amend. 14, § 1.—*Carson v. Missouri, K. & T. Ry. Co.*, 184 S. W. 1039.

—290(1) (Ark.) Acts 1913, p. 512, repealing Acts 1911, p. 1245, purporting to establish a drainage district, but invalid for want of definite description of boundaries, held not to cure defective description, as to do so would take property of owners without due process of law and without compensation.—*Morgan Engineering Co. v. Cache River Drainage Dist.*, 184 S. W. 57.

—296(1) (Tenn.) Pub. Acts 1905, c. 480, § 12, concerning fraternal beneficiary associations, does not violate Const. art. 1, § 8, as discriminating in favor of certificate holders under the act as against certificate holders of other beneficiary associations and ordinary life companies.—*Hamilton Nat. Bank v. Amster*, 184 S. W. 5.

—309(2) (Mo.) The provision of the drainage district act for notice to the owners by publication only is not a denial of due process of law contrary to the state or federal Constitution.—*Elsberry Drainage Dist. v. Harris*, 184 S. W. 89.

—309(3) (Mo.) Rev. St. 1909, § 7042, as to service on superintendent of insurance, held not to deny due process of law, in violation of Const. U. S. Amend. 14, § 1, and Const. Mo. art. 2, § 30.—*Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia*, 184 S. W. 990.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

—327 (Ky.) Provision of Const. Bill of Rights, § 14, that every person have remedy for injury, cannot be invoked on mandamus to compel a judge to render decision on demurrer, unless it clearly appears that there has been such an unreasonable or arbitrary failure or refusal on his part to act as to amount to denial of justice.—*J. B. B. Coal Co. v. Halbert*, 184 S. W. 1116.

—328 (Ky.) Provision of Const. Bill of Rights, § 14, that courts shall be open, cannot be invoked on mandamus to compel a judge to render decision on demurrer, unless it clearly appears that there has been such an unreasonable or arbitrary failure or refusal on his part to act as to amount to denial of justice.—*J. B. B. Coal Co. v. Halbert*, 184 S. W. 1116.

CONSTRUCTION.

See Bills and Notes, —129; Constitutional Law, —12; Contracts, —147, 170; Deeds, —93-155; Insurance, —146; Mortgages, —125-151; Principal and Surety, —59; Sales, —69-88; Statutes, —194-276; Vendor and Purchaser, —75-81; Wills, —439-707.

CONTEST.

See Elections, —275-305.

CONTINGENT FEES.

See Attorney and Client, —148, 150.

CONTINUANCE.

See Appeal and Error, —966; Criminal Law, —686-699, 1151.

—20(1) (Mo. App.) Where defendant had over a month after filing answer to prepare for trial, denial of a continuance on the ground that the attendance of a witness could not be procured and that defendant's general counsel had been compelled to leave the country temporarily is not an abuse of discretion.—*Bank of Raymondville v. National Safe & Lock Co.*, 184 S. W. 1176.

—22 (Tex. Civ. App.) As the appellate court may consider the evidence in reviewing denial of a continuance, held, that denial of continuance for absence of witnesses, whom evidence at trial disclosed were not conversant with facts they were expected to prove, was not error.—*Hazelrigg v. Naranjo*, 184 S. W. 316.

—22 (Tex. Civ. App.) The denial of continuance requested to obtain evidence to sustain defense held not an abuse of the trial court's discretion.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

—23 (Tex. Civ. App.) In an action for the price of horses, where it was not shown that cattle transactions between the parties were material, the denial of a continuance for absence of witnesses who could testify as to such transactions was not error.—*Hazelrigg v. Naranjo*, 184 S. W. 316.

—26(1) (Tex.) Denial of continuance to procure absent witness was not abuse of discretion, where application did not show evidence could not be obtained from other source and case was tried when set.—*Barnhart v. Kansas City, M. & O. Ry. Co. of Texas*, 184 S. W. 176.

—46(4) (Tex. Civ. App.) A mere statement of a conclusion as to what would be proven by an absent witness is not a compliance with the statute entitling a party to a continuance to procure such witness.—*Hazelrigg v. Naranjo*, 184 S. W. 316.

CONTRACTS.

See Account Stated; Action, —47; Alteration of Instruments; Assignments; Bills and Notes; Cancellation of Instruments; Carriers, —207, 271, 278; Chattel Mortgages;

Compromise and Settlement; Contribution; Corporations, **§**31, 78, 462-487; Counties, **§**113, 124; Covenants; Damages, **§**62, 189; Depositaries; Evidence, **§**397, 399; Executors and Administrators, **§**135; Frauds, Statute of; Guaranty; Insurance, **§**130, 146, 719; Landlord and Tenant, **§**22; Liens; Limitation of Actions, **§**24, 27; Logs and Logging, **§**3; Master and Servant, **§**100; Mechanics' Liens; Mortgages; Municipal Corporations, **§**245; Novation; Payment; Pledges; Principal and Agent; Principal and Surety; Reformation of Instruments; Sales; Schools and School Districts, **§**80-86; Specific Performance; Stipulations; Subrogation; Usury; Vendor and Purchaser; Witnesses, **§**144.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§10(4) (Tex.Civ.App.) The contract is unilateral, and so terminable at will, where defendant agrees to furnish, but plaintiffs do not agree to take, for a specified time.—*Mutual Film Corp. v. Morris & Daniel*, 184 S. W. 1060.

(B) Parties, Proposals, and Acceptance.

§22(1) (Tex.Civ.App.) Countermanding of order for advertising cuts and type after acceptance, whereby contract was completed, held not to relieve party of consequences of its breach of contract.—*Bogata Mercantile Co. v. Outcault Advertising Co.*, 184 S. W. 333.

§28(3) (Tex.Civ.App.) Evidence held to fail to show that plaintiffs agreed to take the films for a specified period, as defendant agreed to furnish them, so as to prevent the contract being unilateral.—*Mutual Film Corp. v. Morris & Daniel*, 184 S. W. 1060.

(D) Consideration.

§52 (Mo.App.) Where plaintiff purchased land from the defendant's grantee, relying on the defendant's oral promise to pay special taxes constituting a lien on the property, there was a sufficient consideration, although defendant received nothing for his promise, as a detriment resulted to plaintiff.—*Sears v. Krekel*, 184 S. W. 911.

(F) Legality of Object and of Consideration.

§103 (Tex.Civ.App.) When an act is prohibited by fundamental law or by statute as a means for protecting the public from fraud in contracts or to promote public policy, all contracts in violation thereof are void.—*Republic Trust Co. v. Taylor*, 184 S. W. 772.

§108(2) (Mo.App.) Contract by which plaintiff agreed to act as palmist, astrologer, and clairvoyant, and as such to induce her patrons to buy mining stock of defendant, was illegal and contrary to public policy, so as to prevent recovery by plaintiff of commissions thereunder.—*Smith v. Rose*, 184 S. W. 910.

§126 (Ark.) Where independent counsel engaged by the county to recover moneys paid judge under an invalid law lobbied through Legislature a bill to secure payment by the state, he was not entitled to compensation or to reimbursement for sums expended; the contract being against public policy.—*Buchanan v. Farmer*, 184 S. W. 33.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§147(2) (Tex.Civ.App.) Contracts are to be construed in accordance with intention of parties ascertained from writing itself when meaning is clear.—*Corbin v. Booker*, 184 S. W. 696.

§170(1) (Tex.Civ.App.) Practical interpretation by parties of contract of doubtful meaning

is entitled to great, if not controlling, influence.—*Corbin v. Booker*, 184 S. W. 696.

V. PERFORMANCE OR BREACH.

§287(2) (Mo.) Architect's certificates, in the absence of fraud or mistake, are conclusive upon all parties, including surety, whether right or wrong.—*Southern Real Estate & Financial Co. v. Bankers' Surety Co.*, 184 S. W. 1030.

§312(2) (Tex.Civ.App.) Contract to furnish advertising service, giving defendant exclusive right to use of such service, held not broken by furnishing a different advertising service to another party.—*Bogata Mercantile Co. v. Outcault Advertising Co.*, 184 S. W. 333.

VI. ACTIONS FOR BREACH.

§324 (Mo.App.) Where plaintiff purchased land from the defendant's grantee in reliance upon defendant's oral promise to pay special taxes constituting a lien, this agreement was sufficient to support an action; plaintiff not being confined to his remedy on the warranty in his deed.—*Sears v. Krekel*, 184 S. W. 911.

§350(1) (Tex.Civ.App.) In an action by a contractor against owner, evidence held to support finding that it could not be told what portion of the material used by defendant in completing the building and included in the architect's certificate was used in making unauthorized changes in the work done by the contractor, and what portion was used in completing the building according to the contract.—*Kaufman v. Christian-Wathen Lumber Co.*, 184 S. W. 1045.

Evidence held to show that the amount of labor necessary to complete a building according to contract was the difference between the total amount paid for labor by the owner in completing the building and that paid for changes in the work not in accordance with the plans and specifications.—*Id.*

CONTRADICTION.

See Witnesses, **§**398, 406.

CONTRIBUTORY NEGLIGENCE.

See Negligence, **§**82-101.

CONTRIBUTION.

§4 (Ark.) Where several parties are equally liable for the same debt or bound to the discharge of an obligation, and one is compelled to pay the whole of it, he may have contribution against the others and obtain payment from their respective shares, which right is also recognized by Kirby's Dig. § 7926.—*Thorsen v. Poe*, 184 S. W. 427.

CONVEYANCES.

See Assignments; Chattel Mortgages; Deeds; Fraudulent Conveyances; Husband and Wife, **§**266; Logs and Logging; Mortgages.

CORPORATIONS.

See Banks and Banking; Bills and Notes, **§**375; Building and Loan Associations; Carriers; Criminal Law, **§**400; Election of Remedies, **§**15; Evidence, **§**158; Insurance; Municipal Corporations; Principal and Surety, **§**7; Railroads; Statutes, **§**113; Street Railroads; Telegraphs and Telephones.

I. INCORPORATION AND ORGANIZATION.

§6 (Mo.) Const. art. 12, § 1, held to recognize validity of corporate charters, where the corporation was organized and the contemplated charter powers exercised.—*State ex rel. Wabash Ry. Co. v. Roach*, 184 S. W. 969.

II. CORPORATE EXISTENCE AND FRANCHISE.

☞31 (Mo.) The charter of a corporation is its contract with the state.—State ex rel. Wash Ry. Co. v. Beach, 184 S. W. 969.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

☞78 (Tex.Civ.App.) A corporation is not bound under a subscription to its stock to issue a certificate of stock until the subscription is fully paid.—Commonwealth Bonding & Casualty Ins. Co. v. Hill, 184 S. W. 247.

On the corporation's acceptance of a subscription to its stock with the indorsement of secured notes to it the subscriber became liable thereon.—Id.

☞80(10) (Tex.Civ.App.) Where a subscriber to stock, induced thereto by misrepresentations, after discovering the facts renewed the note given for the price, he waived the fraud and acquiesced therein, and could not have cancellation of the note.—Cattlemen's Trust Co. of Ft. Worth v. Pruett, 184 S. W. 716.

In suit by a subscriber to stock, induced thereto by misrepresentations as to par value, to cancel the note given for the price, evidence held to show conclusively that plaintiff, when he renewed the original note, knew the untruth of the representations, and had consulted with his attorneys.—Id.

☞80(12) (Tex.Civ.App.) In a suit by a subscriber to stock to cancel the note representing the purchase price, whether the party who negotiated the stock subscription contract with plaintiff represented that he was offering the stock at par value, and that such value was \$20 a share, held for the jury.—Cattlemen's Trust Co. of Ft. Worth v. Pruett, 184 S. W. 716.

☞89(2) (Tex.Civ.App.) A call for a subscription to stock in a corporation is not necessary when the contract of subscription contains the promise to pay the amount subscribed at a specified date.—Commonwealth Bonding & Casualty Ins. Co. v. Hill, 184 S. W. 247.

☞92 (Tex.Civ.App.) Notes given as part of the subscription to stock of a corporation are not void, and may be enforced and collected as valid obligations.—Commonwealth Bonding & Casualty Ins. Co. v. Hill, 184 S. W. 247.

(C) Issue of Certificates.

☞99(1) (Tex.Civ.App.) Under Const. art. 12, § 6, and in view of Rev. St. 1911, art. 1170, subscription to stock of corporation to be organized, accompanied by subscription notes secured by deed of trust on land, without delivery of the stock, held not an issue of stock, and hence not illegal or void.—Commonwealth Bonding & Casualty Ins. Co. v. Hill, 184 S. W. 247.

☞99(1) (Tex.Civ.App.) Making of certificate of stock by banking corporation in name of subscriber who gave only a note, and its retention until the note should be paid, meanwhile apportioning dividends to the subscriber, etc., held not violative of Const. art. 12, § 6, or Rev. St. 1911, art. 1146, prohibiting issuance of stock except for money paid, labor done, or property received.—Cattlemen's Trust Co. of Ft. Worth v. Pruett, 184 S. W. 716.

☞99(1) (Tex.Civ.App.) Under Const. art. 12, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1146, subscriber to capital stock of corporation on credit, accompanied by issuance and delivery of stock, held not liable on his notes given in payment therefor.—Republic Trust Co. v. Taylor, 184 S. W. 772.

☞99(1) (Tex.Civ.App.) Where notes for corporate stock were received and then renewed, held that the stock issued being invalid under Const. art. 12, § 6, the notes should be canceled.—Commonwealth Bonding & Casualty Ins. Co. v. Holthfield, 184 S. W. 776.

(D) Transfer of Shares.

☞123(2) (Mo.App.) A written contract transferring mining stock held to be a pledge, and not a conditional sale with option to repurchase.—Smith v. Becker, 184 S. W. 943.

The fact that a contract transferring corporate stock to secure a loan contained no express promise for the repayment does not prevent it from being a pledge.—Id.

Where the testimony of the transferee of corporate stock shows that the title was not to pass to him until the expiration of the time for the repayment of the money loaned, the contract is a pledge, and not a conditional sale.—Id.

In a contract transferring corporate stock to secure a loan, a provision that if the loan was not repaid when due, all interest in the property should pass to the lender, does not make the transaction a sale instead of a pledge.—Id.

☞123(16) (Mo.App.) Where a pledgee of corporate stock without a foreclosure sale had the stock transferred to his own name on the books of the corporation, the pledgor, having no adequate remedy at law, may sue in equity to be declared owner of stock.—Smith v. Becker, 184 S. W. 943.

☞123(23) (Mo.App.) A pledgee who neglected to foreclose the pledge of corporate stock cannot urge laches as a defense to the pledgor's right to redeem.—Smith v. Becker, 184 S. W. 943.

V. MEMBERS AND STOCKHOLDERS.

(D) Liability for Corporate Debts and Acts.

☞232(2) (Mo.) The services of an agent who lent his credit to a corporation for the purpose of securing short time loans, receiving approximately one-half of the capital stock therefor, and was never required to make good the loans, could not be, as against general creditors, accepted as payment for the stock in his name.—Schroeder v. Edwards, 184 S. W. 108.

☞240(1) (Mo.) One who aids in a transaction by which another party secures stock for services in excess of the value of such services, cannot be heard to deny that such stock was fully paid, though he might lend money to the corporation, but he is estopped by his acquiescence, to make such claim.—Schroeder v. Edwards, 184 S. W. 108.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

☞370(3) (Tex.Civ.App.) A corporation is not restricted to the actual wording of its charter, but has implied powers reasonably necessary or usually incident to its business.—Coppard v. Farmers' & Merchants' State Bank, 184 S. W. 551.

☞388(2) (Tex.Civ.App.) Defendant, a Texas corporation empowered to do a guaranty business, held not estopped from urging the ultra vires character of an indemnity contract entered into with plaintiff, another Texas guaranty company, through receiving compensation under the contract.—Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co., 184 S. W. 238.

(B) Representation of Corporation by Officers and Agents.

☞411 (Mo.App.) Cashier of lumber company, whose duty it was to receive money paid on account and execute receipts, had apparent authority, as to a contractor for a building and the owner, to apply the contractor's payment in part to reduce his account for material on the owner's job.—Julius Seidel Lumber Co. v. Weaver, 184 S. W. 484.

☞414(2) (Tex.Civ.App.) Where a note was executed by the president of the defendant corporation within the apparent scope of his au-

thority, it was immaterial on the liability of the corporation how the money was to be used.

—Coppard v. Farmers' & Merchants' State Bank, 184 S. W. 551.

⚡426(1) (Tex.Civ.App.) An act, ultra vires, though not void, may be ratified either by acquiescence of those charged with management of the corporation or by affirmative ratification.

—Coppard v. Farmers' & Merchants' State Bank, 184 S. W. 551.

⚡426(10) (Tex.Civ.App.) Where a loan from plaintiff bank was credited to defendant corporation and used to purchase collateral notes for its benefit, it could not escape liability on the ground that it was the independent act of an officer.—Coppard v. Farmers' & Merchants' State Bank, 184 S. W. 551.

⚡433(1) (Ark.) Evidence held to make questions for jury as to whether corporation's treasurer had express or implied authority to bind it by an apparent contract of sale and whether it was within the apparent scope of his authority.—Roe Rice & Land Co. v. Strobbart, 184 S. W. 481.

(D) Contracts and Indebtedness.

⚡482 (Tex.Civ.App.) The mere fact that the buyer of notes was a mercantile corporation would not make ultra vires its act in buying such notes from which it might largely profit.—Coppard v. Farmers' & Merchants' State Bank, 184 S. W. 551.

⚡484(2) (Tex.Civ.App.) A corporation organized under Rev. St. 1911, art. 4928, and authorized to guarantee contracts, has no authority to enter into contracts of indemnity.—Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co., 184 S. W. 238.

A corporation authorized by law to enter into contracts of guaranty cannot justify the making of indemnity contracts on the theory that they fall within its implied powers, and such a contract is ultra vires.—Id.

⚡487(1) (Tex.Civ.App.) It is not every ultra vires act of a corporation that is void.—Coppard v. Farmers' & Merchants' State Bank, 184 S. W. 551.

(F) Civil Actions.

⚡500 (Mo.) Rev. St. 1909, § 1766, relating to process against corporations, in so far as it authorizes personal judgment on extraterritorial service, is void.—John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co., 184 S. W. 487.

⚡505 (Tex.Civ.App.) A private corporation has the right to maintain an action in its own name.—Rockdale Mercantile Co. v. Brown Shoe Co., 184 S. W. 281.

⚡507(3) (Mo.) Under Rev. St. 1909, §§ 1770, 1777, 1778, service on president of Missouri corporation in another state is insufficient to give jurisdiction.—John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co., 184 S. W. 487.

Rev. St. 1909, § 1778, authorizing personal service on defendant residing or being without state, does not apply to Missouri corporation with no office or officers in state.—Id.

⚡507(13) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1890 a citation against a corporation showing service only upon the company by name is insufficient.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⚡514(1) (Tex.Civ.App.) The petition, in an action by a private corporation, need not state the name of any officer of the corporation.—Rockdale Mercantile Co. v. Brown Shoe Co., 184 S. W. 281.

XII. FOREIGN CORPORATIONS.

⚡636 (Mo.) A state, save where it has previously granted the right, can stop any foreign

corporation at the state line.—State ex rel Wabash Ry. Co. v. Roach, 184 S. W. 969.

⚡642(1) (Mo.App.) Foreign corporation held within Rev. St. 1909, §§ 3037-3041, to be doing business in the state in supplying performers for a Chautauqua course and managing entertainment, so no action can be brought on contracts in connection therewith, corporation not having complied with law.—Wichita Film & Supply Co. v. Yale, 184 S. W. 119.

⚡661(2) (Mo.) In action by Arizona corporation on insurance policy on property in Colorado, failure to procure license to do business and pay necessary fees held not to deprive it of right to sue on a policy, where it did procure such license before suit.—Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia, 184 S. W. 990.

CORROBORATION.

See Criminal Law, ⚡534; Witnesses, ⚡318.

COSTS.

See Costs, ⚡295; Covenants, ⚡182; Mandamus, ⚡57.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⚡42(2) (Mo.App.) Plaintiff could not, by wholly ignoring an offer to confess judgment, pursuant to Rev. St. 1909, § 1965, thereby frustrate the object of the statute as to the taxation of costs after the making of the offer.—Parr v. Chicago, B. & Q. R. Co., 184 S. W. 1169.

Under Rev. St. 1909, § 1965, the written offer to allow plaintiff to take judgment for a certain sum, signed by defendant by its attorney of record, held sufficient.—Id.

VI. TAXATION.

⚡198 (Mo.App.) Under Rev. St. 1909, § 1965, held, that it was not necessary for defendant to specify in its motion the items of cost which had accrued subsequent to its service of an offer to confess judgment.—Parr v. Chicago, B. & Q. R. Co., 184 S. W. 1169.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚡260(3) (Tex. Civ. App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1629, and Court of Appeals rule 43 (142 S. W. xiv), plaintiff in error not appearing, and a case of delay being suggested, and appearing from the record, judgment will be affirmed, with 10 per cent. damages.—First Texas State Ins. Co. v. Pipe, 184 S. W. 278.

IX. IN CRIMINAL PROSECUTIONS.

⚡294 (Tenn.) Under Shannon's Code, §§ 7619-7622, the state is liable for the maintenance in a county jail of one convicted of felony, whose sentence is commuted from imprisonment in the state penitentiary.—Davidson v. Gibson County, 184 S. W. 29.

Under Shannon's Code, §§ 7619-7622, state held liable for maintenance in county jail used both as jail and workhouse of one convicted of felony whose sentence has been commuted from imprisonment in the state penitentiary.—Id.

⚡295 (Tenn.) Misdemeanants, or felons under commutation of sentence, confined in a county jail under the jailer's care, if they are state prisoners, must be supported by the state, as between it and the county.—Davidson v. Gibson County, 184 S. W. 29.

Under Shannon's Code, §§ 7620-7622, and Workhouse Act, county held liable for maintenance in its county workhouse under a superintendent of state prisoners held to hard labor on commutation of sentence.—Id.

COTENANCY.

See Tenancy in Common.

COUNTERFEITING.

See Forgery.

COUNTERMAND.

See Sales, ¶23.

COUNTIES.

See Health, ¶6; Public Lands, ¶61; Statutes, ¶120.

II. GOVERNMENT AND OFFICERS.**(D) Officers and Agents.**

¶98(1) (Tex.Civ.App.) Under Sp. Laws 1903, c. 25, § 1, making county commissioners of San Augustine county ex officio road commissioners, county commissioner and sureties on bond as such are not liable for sums coming into his hands for road purposes.—Polk v. Roebuck, 184 S. W. 513.

¶98(1) (Tex.Civ.App.) Under Sp. Acts 28th Leg. c. 25 (Special Road Law for San Augustine County) § 1, sureties on official bond of a county commissioner held not responsible for his illegal drawing or receiving money from the county as ex officio road commissioner.—Slaughter v. Knight, 184 S. W. 539.

¶101(6) (Tex.Civ.App.) Under Rev. St. 1895, art. 1535, petition against county commissioner for amounts collected for services to county in which he could not be interested, failing to show that they were collected other than for real owners, did not state cause of action.—Polk v. Roebuck, 184 S. W. 513.

Petition against county commissioner for amounts collected for services held not to show liability of sureties on official bond.—Id.

In petition against county commissioner for sums collected by county, a paragraph for money had and received does not state a cause of action where remaining paragraphs are insufficient.—Id.

¶101(6) (Tex.Civ.App.) In suit by the treasurer of San Augustine county, the petition, alleging an action against a county commissioner, with his sureties, for the unlawful collection of moneys as such does not warrant recovery against him individually for defaults committed by him as ex officio road commissioner under the special road law for the county (Sp. Acts 28th Leg. c. 25).—Slaughter v. Knight, 184 S. W. 539.

In suit by treasurer of San Augustine county against a county commissioner and his sureties to recover moneys illegally collected, petition, alleging that an account for roadwork was approved, warrant issued, delivered to defendant, and paid by treasurer's check, held insufficient.—Id.

III. PROPERTY, CONTRACTS, AND LIABILITIES.**(B) Contracts.**

¶113(1) (Tex.Civ.App.) The commissioners' court has charge of the business affairs of the county, and it alone has authority to make contracts binding upon the county.—Germo Mfg. Co. v. Coleman County, 184 S. W. 1063.

¶113(5) (Ark.) While Kirby's Dig. § 6392, does not prevent a county from securing independent legal assistance, it could not engage counsel to prosecute claim against a circuit judge for salary paid under an invalid law; the prosecuting attorney merely claiming suit was unnecessary.—Buchanan v. Farmer, 184 S. W. 33.

¶113(6) (Ark.) Under Kirby's Dig. §§ 1012, 1024, the making of a separate allowance by a county court to a party denominated associate commissioner of public buildings in the order appointing him, there being already one commissioner to supervise the erection of a new

courthouse, held void.—Isard County v. Williamson, 184 S. W. 420.

¶113(6) (Tex.Civ.App.) The commissioners' court may act through an agent appointed by them, and a sheriff not appointed by them to purchase for the county was not their agent by virtue of his office.—Germo Mfg. Co. v. Coleman County, 184 S. W. 1063.

¶124(2) (Tex.Civ.App.) A county, through the only agency by which it can act, that is, its commissioners' court, may ratify the act of one assuming without authority to be its agent, but the sheriff's use of disinfectants purchased by him without authority, over the protest of the court, was not a ratification.—Germo Mfg. Co. v. Coleman County, 184 S. W. 1063.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

¶151 (Ky.) Under Const. §§ 157, 157a, 158, indebtedness for road purposes may be incurred on election upon ratification by a majority of the electors of a county.—Gatton v. Fiscal Court of Daviess County, 184 S. W. 1.

¶151 (Ky.) Under Const. § 157a, highway bonds may be issued and ratified by a majority of those voting at an election for issuance.—Armstrong v. Fiscal Court of Carter County, 184 S. W. 4.

¶151 (Ky.) Under Const. § 157a, an indebtedness for road purposes may be created by a majority of the voters of a county who participate in an election on that subject.—Cleary v. Pieper, 184 S. W. 4.

¶169 (Ark.) A proceeding under Kirby's Dig. § 1175, authorizing the county court to call in outstanding warrants to redeem, cancel, or reclassify them, is a direct, and not a collateral, attack on the order issuing the warrants.—Isard County v. Vincennes Bridge Co., 184 S. W. 67.

V. CLAIMS AGAINST COUNTY.

¶206(1) (Tex.Civ.App.) Under Rev. St. 1895, art. 1537, decisions of commissioners' court relating to settlement of accounts against county are conclusive, and not subject to collateral attack, if court has jurisdiction, but not otherwise.—Polk v. Roebuck, 184 S. W. 513.

¶206(1) (Tex.Civ.App.) Under Const. art. 5, § 8, and in view of Vernon's Sayles' Ann. Civ. St. 1914, art. 6866, judgment of commissioners' court of San Augustine county, illegally allowing amounts to a county commissioner in connection with roadwork and ordering illegal warrants therefor, held void and subject to collateral attack.—Slaughter v. Knight, 184 S. W. 539.

¶206(2) (Ark.) The county court may not review former judgments for mere errors in allowance of claims where the allowance was not illegal or procured by fraud.—Isard County v. Vincennes Bridge Co., 184 S. W. 67.

COUNTY BOARDS.

See Counties, ¶118.

COUNTY COURTS.

See Courts, ¶33, 36, 64; Elections, ¶275.

COURTS.

See Abatement and Revival, ¶15; Appeal and Error, ¶185, 493, 782, 1217; Bankruptcy; Elections, ¶275; Executors and Administrators, ¶13; Guardian and Ward, ¶81; Judges; Judgment, ¶342, 494, 495, 818; Justices of the Peace; Mandamus, ¶57; Mortgages, ¶125; Prohibition; Removal of Causes; Trial, ¶191-199.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§38 (Tex.Civ.App.) Under Const. art. 5, § 3, the district court does not lose jurisdiction of an action brought in good faith to foreclose a lien on land because it develops on trial there is no lien and the amount involved is less than \$500.—*Earl v. Baker*, 184 S. W. 297.

§33 (Ark.) Under Kirby's Dig. §§ 209-214, a probate court which specifically enforces a decedent's executory contract to convey land is exercising a special power, not according to the course of the common law, so that its jurisdiction must appear on the face of the record.—*Oliver v. Routh*, 184 S. W. 843.

§33 (Mo.) The grounds of the jurisdiction of county courts, confined to the authority given them by statute, must appear affirmatively on the face of their records.—*Ramsey v. Huck*, 184 S. W. 966.

§35 (Mo.App.) Where the record of a court of general jurisdiction is silent about a matter necessary to confer jurisdiction, the existence of such matter will be presumed.—*State v. Fulton*, 184 S. W. 938.

§36 (Mo.App.) The county court, though a court of limited statutory jurisdiction, held to stand on the footing of a court of general jurisdiction as to matters exclusively within its jurisdiction.—*State v. Fulton*, 184 S. W. 938.

In the absence of a showing to the contrary, the court must presume that the county court had jurisdiction at a special term to make an order for the publication of the result of a local option election.—*Id.*

§36 (Tex.Civ.App.) Probate courts are courts of general jurisdiction in probate matters, and all presumptions in favor of their jurisdiction in such matters will be indulged.—*Reeves v. Fuqua*, 184 S. W. 682.

§37(1) (Mo.) Question of jurisdiction is open at any state of case, may be considered by the court sua sponte.—*John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 184 S. W. 467.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

§64(2) (Mo.App.) Under Rev. St. 1909, § 4088, the power to call a special term of the county court is left exclusively with the judges of the court.—*State v. Fulton*, 184 S. W. 938.

§64(5) (Ky.) Under Ky. St. § 964, an objection that the special term of the circuit court at which defendant was tried was ordered at another special term is immaterial where the notice of the term was posted.—*Frey v. Commonwealth*, 184 S. W. 899.

§64(6) (Mo.App.) Under Rev. St. 1909, § 4088, the county court at special term held authorized to make any order for the publication of notice of the result of a local option election.—*State v. Fulton*, 184 S. W. 938.

(C) Rules of Court and Conduct of Business.

§85(2) (Mo.) The Supreme Court will not construe a rule of a Court of Appeals, except perhaps in a case where it might become absolutely necessary.—*State ex rel. Logan v. Ellison*, 184 S. W. 963.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§91(1) (Mo.App.) Under the Constitution it is the duty of Courts of Appeals to follow the last previous decision of the Supreme Court on any question of law or equity.—*American Mfg. Co. v. Alt*, 184 S. W. 1167.

§97(5) (Mo.App.) In suit for damage to an interstate shipment of live stock, it is the duty of the Court of Appeals to apply the law relative to a stipulation as to the time of suit as interpreted by the Supreme Court of the United States.—*Howard v. Chicago, R. I. & P. Ry. Co.*, 184 S. W. 906.

§114 (Mo.App.) Where the court amended its record nunc pro tunc, using a memorandum filed by the judge at the time of setting aside the verdict, the order was invalid.—*Brown v. Connecticut Fire Ins. Co. of Hartford, Conn.*, 184 S. W. 122.

§114 (Mo.App.) A regular judge of the St. Louis court of criminal correction cannot, after the time for appealing has elapsed, alter nunc pro tunc an entry showing the appointment of a special judge, so as to show that the parties consented to his appointment.—*Ex parte Fish*, 184 S. W. 479.

§117 (Mo.App.) The record of a court imports absolute verity.—*Ex parte Fish*, 184 S. W. 479.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) Grounds of Jurisdiction in General.

§120 (Tex.Civ.App.) District court had no jurisdiction of county treasurer's suit against a county commissioner to recover \$120 unlawfully collected; the amount being below its jurisdiction.—*Slaughter v. Knight*, 184 S. W. 539.

§121(1) (Tex.Civ.App.) In an action where the district court had jurisdiction it may allow under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1848, one asserting a laborer's lien against defendant's property which was less than the jurisdictional amount to become a party.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

§121(6) (Tex.Civ.App.) Where the amount in controversy in a suit to cancel two notes is enough to give jurisdiction, the court is not deprived thereof by elimination of one of the notes by default judgment thereon in a subsequent action.—*Cattlemen's Trust Co. v. Blasingame*, 184 S. W. 574.

§122 (Tex.Civ.App.) It is not the evidence, but the pleadings, which determine whether the amount in controversy is within the jurisdiction of a court.—*Texas & N. O. R. Co. v. Marshall & Marshall*, 184 S. W. 643.

V. COURTS OF PROBATE JURISDICTION.

§202(5) (Ark.) Under Kirby's Dig. § 1348, as amended by Acts 1909, p. 956, relating to appeals to the circuit court from final orders, etc., of probate court, and sections 1349, 1356, relating to bonds, a bond is not required as a prerequisite to an appeal, except where appellant desires a supersedeas.—*Himes v. Sharp*, 184 S. W. 431.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

§207(5) (Mo.) Under Const. art. 6, § 3, the Supreme Court may issue a writ of prohibition in the exercise of its supervisory control over any inferior tribunal, as the circuit court.—*Ramsey v. Huck*, 184 S. W. 966.

Under Const. art. 6, § 12, and Const. Amend. 1884, § 5, the Supreme Court has jurisdiction to issue a writ of prohibition to prevent the circuit court from entertaining jurisdiction of an appeal from the county court in a proceeding to contest the right to the office of justice of the peace.—*Id.*

Appellate jurisdiction of a contest of the right to the office of justice of the peace is not a prerequisite to the right of the Supreme Court to issue the writ of prohibition to prevent the

circuit court from entertaining jurisdiction of an appeal from the county court in such contest.—Id.

⇨209(2) (Mo.) Issues of law are raised in the Supreme Court, in an original proceeding in prohibition, either by a demurrer of respondent to the petition or by a motion to quash the writ.—*State ex rel. Powers v. Rassiour*, 184 S. W. 116.

In an action for prohibition in the Supreme Court, where the petition prayed relief because respondent judge was attempting to enforce his judgment pending motion for a new trial, which he denied, no evidence being offered, and no facts agreed upon, the question of the legal right of the judge to do the things charged became moot, and no judgment could be rendered.—Id.

(B) Courts of Particular States.

⇨231(2) (Mo.) Petition for recovery of \$5,000 and to enforce oral agreement of decedent to adopt plaintiff and make her his legal heir held within the jurisdiction of the Kansas City Court of Appeals, and to present no question within the appellate jurisdiction of the Supreme Court as defined by Constitution.—*Buck v. Meyer*, 184 S. W. 977.

⇨231(6) (Mo.) The contention that the interpretation of a contract by a trial court was in violation of certain constitutional provisions does not raise a constitutional question giving the Supreme Court jurisdiction.—*Donoho v. Missouri Pac. Ry. Co.*, 184 S. W. 1149.

⇨231(6) (Mo.) Supreme Court has power to construe constitutional and statutory provisions applicable to private banks and bankers, and to decide to whom assets belong and priority of rights thereto.—*State ex rel. Barker v. Sage*, 184 S. W. 984, 992.

⇨231(6) (Mo.) The objection that Rev. St. 1909, § 3150, is class legislation contrary to Const. art. 4, § 53, raises no substantial constitutional question giving the Supreme Court jurisdiction of an appeal.—*Carson v. Missouri, K. & T. Ry. Co.*, 184 S. W. 1039.

⇨231(6) (Mo.) Courts of Appeals may not construe the Constitution or declare a statute unconstitutional.—*Williams v. United States Express Co.*, 184 S. W. 1146.

⇨231(13) (Mo.) Merely erroneous withholding evidence from or submitting it to a jury is not such infringement of the constitutional right to jury trial as to give the Supreme Court jurisdiction in a case.—*Garey v. Jackson*, 184 S. W. 979.

⇨231(22) (Mo.) Where statutes, the validity of which is not questioned, govern a case, it is not appealable to the Supreme Court as involving a constitutional question.—*Williams v. United States Express Co.*, 184 S. W. 1146.

⇨231(23) (Mo.) A constitutional question, not raised by appellant, but by which respondent secured a new trial in the court below, does not give the Supreme Court jurisdiction of a case not otherwise within its appellate jurisdiction.—*Williams v. United States Express Co.*, 184 S. W. 1146.

⇨231(23) (Mo.) A constitutional question giving the Supreme Court jurisdiction may be raised by objection to the refusal of a court to give instructions asked.—*Donoho v. Missouri Pac. Ry. Co.*, 184 S. W. 1149.

⇨231(23) (Mo.App.) Where plaintiffs might have invoked their constitutional rights before or at trial, they cannot raise such matters by motion for new trial so as to confer jurisdiction of an appeal on the Supreme Court on the ground that a constitutional question was involved.—*Whitsett v. City of Carthage*, 184 S. W. 1185.

⇨231(50) (Mo.App.) In a suit to enjoin assessments for the construction of a sewer where the work was to be done as a unit, the amount in controversy is the cost of the sewer, and, being above \$7,500, the Supreme Court has juris-

diction.—*Whitsett v. City of Carthage*, 184 S. W. 1185.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

⇨472(4) (Ark.) The probate court has exclusive jurisdiction to sell lands of minors for reinvestment, and a sale made under the order of a court of chancery is void, and the infants may thereafter recover the property.—*Duncan v. Liddle*, 184 S. W. 413.

⇨480(3) (Tex.Civ.App.) Under Rev. St. art. 4633, temporary injunction to restrain sale of horses, etc., levied on under an execution, was returnable to the county court of the county in which the judgment was obtained.—*Marshall v. Spiller*, 184 S. W. 285.

⇨487(1) (Mo.) The Supreme Court will not scrutinize too closely, to detect a noncompliance with its rules, the abstract of the record in a case transferred on account of a constitutional question by a Court of Appeals.—*Wolf v. Harris*, 184 S. W. 1139.

⇨487(3) (Mo.) Under Const. Amend. 1884, § 6, an order certifying a case to the Supreme Court, entered after the expiration of the term at which the Court of Appeals decided the case, is unauthorized.—*State ex rel. Logan v. Ellison*, 184 S. W. 963.

COVENANTS.

See Contracts, ⇨324; Judgment, ⇨712; Landlord and Tenant, ⇨104; Limitation of Actions, ⇨47; Logs and Logging, ⇨3.

III. PERFORMANCE OR BREACH.

⇨96(2) (Ark.) Where owner of undivided seven-twelfths of land subject to a dowress' life estate in two-twelfths conveyed an undivided five-twelfths by deed with full covenants of warranty, there was no breach of the warranty, as there were other lands of the grantor on which the dower interest could take effect.—*Allen-West Commission Co. v. Harshaw*, 184 S. W. 436.

⇨102(1) (Mo.App.) A grantee in a warranty deed need not submit to eviction before purchasing an outstanding title to protect himself against a loss morally certain to happen, but must act in good faith towards his grantor.—*Githens v. Barnhill*, 184 S. W. 145.

IV. ACTIONS FOR BREACH.

⇨108(1) (Mo.App.) Is an action for breach of warranty, defendants' knowledge of the fraud of their grantor at a partition sale held immaterial.—*Githens v. Barnhill*, 184 S. W. 145.

⇨118 (Mo.App.) The burden is on plaintiffs in an action for breach of warranty to prove the setting aside of the sale in partition under which their grantors claimed.—*Githens v. Barnhill*, 184 S. W. 145.

⇨132(1) (Mo.App.) Instructions permitting recovery for costs and expenses, including attorney's fees and plaintiff's personal expenses, in a suit to defend title, are not error, where the actual judgment recovered thereunder is but sufficient to cover the original purchase price paid, with interest from the accrual of the cause of action.—*Gardiner v. McPike*, 184 S. W. 956.

⇨135 (Mo.App.) An instruction asked by defendant that he is not liable for lack of title to lands not in the section warranted is properly refused, where his warranty was of a certain acreage described by metes and bounds, and lack of title to a part of that so described was in issue.—*Gardiner v. McPike*, 184 S. W. 956.

COVERTURE.

See Husband and Wife; Limitation of Actions, ⇨78.

CREDIBILITY.

See Witnesses \S 318-406.

CREDITORS.

See Bankruptcy; Chattel Mortgages, \S 186;
Fraudulent Conveyances; Subrogation.

CREDITORS' SUIT.

See Fraudulent Conveyances, \S 220-322.

CRIMINAL LAW.

See Abduction; Adultery; Arson; Assault and Battery; Bail; Bastards, \S 36, 44; Breach of the Peace; Burglary; Costs, \S 294, 295; Disorderly House; Disturbance of Public Assemblage; Embezzlement; False Pretenses; Forgery; Game; Grand Jury; Homicide; Husband and Wife, \S 302-318; Indictment and Information; Intoxicating Liquors; Jury, \S 29; Larceny; Malicious Prosecution, \S 24; Poisons; Rape; Seduction; Statutes, \S 118; Weapons.

1. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

\S 21 (Ky.) Where an act is declared unlawful by statute, criminal intent may be imputed to a person voluntarily doing the act.—Goodman v. Commonwealth, 184 S. W. 876.

V. VENUE.**(A) Place of Bringing Prosecution.**

\S 112(1) (Ky.) Under Ky. St. \S 2569b, subsec. 2, making it an offense to deliver liquor in prohibition territory knowing the required statement of personal use is false, the circuit court of the county in which delivery is made has jurisdiction to try one accused of violation.—Goodman v. Commonwealth, 184 S. W. 876.

(B) Change of Venue.

\S 122 (Tex. Cr. App.) One seeking a change of venue should present, where possible, all of his grounds therefor in one application, although a second application cannot be denied where the evidence adduced on the hearing of the first showed probable grounds for the second.—Howard v. State, 184 S. W. 505.

\S 134(2) (Tex. Cr. App.) Where on hearing on the first application for change of venue the evidence disclosed that one of the two compurgators was wholly incredible under oath, it could not be said that overruling the second application for change on the affidavits of the same persons was error, under Code Cr. Proc. 1911, art. 628.—Howard v. State, 184 S. W. 505.

\S 137 (Tex. Cr. App.) While the court must have before it the evidence to show that one making affidavit for change of venue was wholly incredible, it is sufficient if that evidence was adduced on hearing on a former motion for a change of venue.—Howard v. State, 184 S. W. 505.

VII. FORMER JEOPARDY.

\S 177 (Mo.) Where the state filed an amended information, and after accused was put on trial, but before verdict, court stopped proceedings, quashing amended information, he was not in jeopardy within Const. art. 2, \S 23, under the original information under which he was later tried and convicted.—State v. McWilliams, 184 S. W. 96.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

\S 279 (Tenn.) An objection to an indictment for misconduct of the prosecuting attorney is

waived, where the plea in abatement was not filed until after the first continuance and did not give sufficient reason for the delay.—Gill v. State, 184 S. W. 864.

X. EVIDENCE.**(A) Judicial Notice, Presumptions, and Burden of Proof.**

\S 304(9) (Ky.) The courts will take judicial notice of an act of the Legislature incorporating a fraternal order.—Swann v. Commonwealth, 184 S. W. 868.

\S 304(20) (Ky.) The court will take judicial notice that grape wine is an intoxicating liquor.—Frey v. Commonwealth, 184 S. W. 896, 899.

\S 315 (Ky.) Evidence that local option was adopted by the voters in a county nearly 30 years before is admissible to show that local option is still in force, where there is no evidence of a subsequent vote.—Frey v. Commonwealth, 184 S. W. 896.

\S 315 (Ky.) Evidence that the voters of the county adopted local option nearly thirty years before is admissible in the absence of proof of a subsequent election.—Frey v. Commonwealth, 184 S. W. 899.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

\S 364(6) (Tex. Cr. App.) A statement made by one accused of burglary, while imprisoned, more than a month after the offense charged, is not a part of the res gestæ.—Howard v. State, 184 S. W. 505.

(C) Other Offenses, and Character of Accused.

\S 372(5) (Mo.) In a prosecution for larceny of an automobile, evidence of theft of other automobiles in furtherance of a conspiracy between defendant and two others that they should steal automobiles and bring them to defendant to be sold was admissible as part of a common scheme or plan.—State v. Othick, 184 S. W. 106.

\S 372(12) (Tex. Cr. App.) In a prosecution for passing a forged check, extraneous checks or vouchers should not be admitted, in the absence of proof that they were forgeries and that defendant was connected therewith.—Carrell v. State, 184 S. W. 190.

(E) Best and Secondary and Demonstrative Evidence.

\S 400(6) (Ky.) Proof of incorporation may be made by parol evidence.—Swann v. Commonwealth, 184 S. W. 868.

\S 400(7) (Tex. Cr. App.) While an agent cannot testify as to the contents of his contract, he may testify that he did make a contract of employment with the principal.—Meredith v. State, 184 S. W. 204.

(F) Admissions, Declarations, and Hearsay.

\S 406(4) (Tex. Cr. App.) The admission of a grand juror's testimony as to what the accused testified to before the grand jury when subpoenaed and required to answer, without being informed of her privilege, is erroneous.—Simmons v. State, 184 S. W. 226.

\S 407(2) (Tex. Cr. App.) It is permissible for the state to introduce conversations with the defendant while not under arrest relative to the crime for which he is on trial and prove statements made to him calling for a denial, and that he made no denial or made a qualified admission.—Burkhalter v. State, 184 S. W. 221.

\S 419, 420(4) (Tex. Cr. App.) In trial for murder, ex-sheriff's testimony that a witness who had been investigating with him had found a gun at the residence of one other than the defendant and had brought it to him, saying that

it was the gun that killed deceased, *held inadmissible*.—Burkhalter v. State, 184 S. W. 221.

(G) Acts and Declarations of Conspirators and Codefendants.

⇨426 (Tex.Cr.App.) While the accused may show that another committed the offense charged, he cannot produce statements of a codefendant made to other persons showing that he was innocent, since Code Cr. Proc. 1911, art. 791, specifically declares that persons charged as principals cannot be introduced as witnesses one for another.—Howard v. State, 184 S. W. 505.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

⇨440 (Tex.Cr.App.) Where in a rape case the parents of prosecutrix testified she was born one year after their marriage, the record of the marriage licenses, being properly proven, is admissible to establish prosecutrix's age.—Taylor v. State, 184 S. W. 224.

⇨447 (Tex.Cr.App.) Where a contract of employment is in writing and specifically stipulates the amount of commissions to be paid, oral testimony as to the amount of commissions is inadmissible.—Meredith v. State, 184 S. W. 204.

(I) Opinion Evidence.

⇨448(12) (Tex.Cr.App.) Witnesses should not be permitted to testify that defendant was told "a great many things damaging to him" as bearing on his failure to deny such charges.—Burkhalter v. State, 184 S. W. 221.

(J) Testimony of Accomplices and Codefendants.

⇨507(1) (Ky.) One not shown to have participated in the homicide is not an accomplice whose testimony must be corroborated under Cr. Code Prac. § 241, though he was jointly indicted as a conspirator.—Nicoll v. Commonwealth, 184 S. W. 386.

⇨507½ (Tex.Cr.App.) In a prosecution for hog theft, evidence *held* insufficient to make a state's witness a particeps criminis as principal, or accomplice.—Jemison v. State, 184 S. W. 807.

(K) Confessions.

⇨519(4) (Ark.) That accused was a prisoner and made a confession to officers who had him in custody does not render his confession inadmissible.—Shufflin v. State, 184 S. W. 454.

⇨534(2) (Ark.) Where cattle were found according to directions given in accused's extrajudicial confession, there was sufficient corroboration of the confession to warrant conviction under Kirby's Dig. § 2385.—Shufflin v. State, 184 S. W. 454.

⇨537 (Ark.) Where, pursuant to accused's statements contained in an extrajudicial confession, the stolen cattle were found, evidence concerning accused's statements as to location of cattle is admissible, though the confession was not voluntary.—Shufflin v. State, 184 S. W. 454.

(M) Weight and Sufficiency.

⇨553 (Ark.) The jury in a prosecution for rape is not required to accept testimony of a witness in toto, or reject it, but it must accept such portions as it believes, and discard the remainder.—Rose v. State, 184 S. W. 60.

XI. TIME OF TRIAL AND CONTINUANCE.

⇨573 (Ky.) Const. U. S. Amend. 6, does not prevent the dismissal of an indictment over the objection of accused.—Commonwealth v. Davis, 184 S. W. 1121.

⇨588 (Mo.) A motion for a continuance is addressed to the sound discretion of the trial court.—State v. McWilliams, 184 S. W. 96.

⇨595(9) (Tex.Cr.App.) A continuance to obtain the testimony of accused's wife, who would have testified that on the day of the offense he and she spent the day with third persons, *held* improperly denied.—Taylor v. State, 184 S. W. 224.

⇨598(3) (Mo.) Accused *held* not entitled to a continuance to obtain the testimony of an absent witness, where he had been in correspondence with her and sent her money to attend trial; it appearing that he knew of the materiality of her testimony and could have taken her deposition.—State v. McWilliams, 184 S. W. 96.

⇨598(3) (Tex.Cr.App.) One seeking continuance for want of a witness must, in order to show diligence in securing a deposition, show that he placed the interrogatories in the hands of an officer authorized to take depositions.—Murrell v. State, 184 S. W. 831.

⇨609 (Mo.) No intendments are to be indulged in favor of an application for a continuance for absent witnesses.—State v. McWilliams, 184 S. W. 96.

XII. TRIAL.

(A) Preliminary Proceedings.

⇨622(1) (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 727, where two defendants accused of the same crime each filed motions that the other be first tried, it is within the discretion of the court to order the trial of one to precede the other.—Howard v. State, 184 S. W. 505.

(E) Arguments and Conduct of Counsel.

⇨721(3) (Tex.Cr.App.) A remark of the prosecuting attorney, in a prosecution for burglary, that the accused on his arrest failed to explain his possession of stolen goods, is not a comment on his failure to testify.—Howard v. State, 184 S. W. 505.

⇨721(6) (Tex.Cr.App.) Argument of district attorney asking why there was no evidence that defendants did not kill the hog *held* a direct allusion to defendants' failure to testify.—Jemison v. State, 184 S. W. 807.

⇨726 (Ark.) Where defendant's attorney argued that there was no evidence that the prosecutrix was returned to an orphan's home on account of abuse by defendant's family it was not prejudicial for the state's attorney to argue that he could have shown that fact but for defendant's objections; that being provoked.—Rose v. State, 184 S. W. 60.

(F) Province of Court and Jury in General.

⇨741(1) (Ky.) Where there was much evidence tending to show accused was guilty of the crime charged, his motion for peremptory instruction is properly denied.—Swann v. Commonwealth, 184 S. W. 868.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⇨770(2) (Ky.) It is the duty of the court to instruct the jury upon every phase which is represented by the evidence.—Curtis v. Commonwealth, 184 S. W. 1105.

⇨770(2) (Mo.App.) Defendant's evidence bearing on an issue being substantial, he is entitled to have given his instruction properly defining the issue.—State v. Widner, 184 S. W. 909.

⇨770(2) (Tex.Cr.App.) Where defendant's evidence tended to show that another who had had several fights with deceased and bore ill will toward him was in the neighborhood of the killing, the refusal to affirmatively charge upon such defensive matter was error, notwithstanding charges negatively presenting it.—Burkhalter v. State, 184 S. W. 221.

⇨775(2) (Tex.Cr.App.) In a trial for homicide, where defendant admitted that he was within 250 yards of the scene of the homicide, at the time of its commission, the issue of an alibi should be fully presented by the charge

and made applicable to the evidence.—*Burkhalter v. State*, 184 S. W. 221.

—781(5) (Ark.) Where it was contended that accused's confession was not voluntary, *held*, that the court, having received it and other evidence on the matter, properly charged the jury to disregard confession if result of intimidation or inducement.—*Shufflin v. State*, 184 S. W. 454.

—784(1) (Tex. Cr. App.) Where defendant's connection with a forged instrument was to be deduced from circumstances, the court improperly refused to give an instruction on circumstantial evidence.—*Carrell v. State*, 184 S. W. 190.

—789(1) (Tex. Cr. App.) An instruction *held* to clearly apply the rule of reasonable doubt in favor of accused.—*Murrell v. State*, 184 S. W. 831.

—792(2) (Tex. Cr. App.) Under Pen. Code 1911, arts. 74, 75, 78, declaring the law of principals, when the evidence shows any one of the conditions named, the court must charge and apply the law of principals.—*Lake v. State*, 184 S. W. 213.

—801 (Mo. App.) The court may give the jury additional proper instructions at any time before their verdict and after the close of the argument.—*City of Charleston v. Coker*, 184 S. W. 1181.

In a prosecution for breach of the peace by fighting, where there was no evidence that accused's assailant was the aggressor, court might give additional instruction that accused had the burden of proving that he acted in self-defense his counsel having advanced that claim in argument.—*Id.*

—814(7) (Ky.) An instruction authorizing conviction on a finding of guilt within 12 months prior to the issuance of the warrant, charging a certain date, *held* not error, under Civ. Code Prac. § 129.—*Frey v. Commonwealth*, 184 S. W. 896.

—814(15) (Ky.) Failure to charge that one accomplice cannot corroborate another is not erroneous, where only one accomplice testified.—*Nicoll v. Commonwealth*, 184 S. W. 386.

(H) Requests for Instructions.

—829(1) (Mo.) Where the instructions given cover the case, further instructions may be refused.—*State v. McWilliams*, 184 S. W. 96.

(J) Custody, Conduct, and Deliberations of Jury.

—857(3) (Tex. Cr. App.) That the jury, in violation of Code Cr. Proc. 1911, art. 790, considered accused's failure to take the stand necessitates reversal.—*Stone v. State*, 184 S. W. 193.

(K) Verdict.

—883 (Mo. App.) Under Rev. St. 1909, § 4901, a finding that defendant charged with larceny was guilty of embezzlement without a finding that he was not guilty of larceny is insufficient.—*State v. Rosefelt*, 184 S. W. 904.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

—945(2) (Tex. Cr. App.) Refusal of new trial in prosecution for theft of hog *held* erroneous in view of affidavits of three persons that subsequent to trial they had seen the hog alleged to have been killed and stolen running at large.—*Leonard v. State*, 184 S. W. 225.

—954(5) (Mo.) An assignment of error in a motion for new trial that the court erred in giving improper instructions *held* insufficient as too indefinite and not applying to the facts shown by the record.—*State v. Othick*, 184 S. W. 106.

—956(10) (Tex. Cr. App.) Evidence *held* insufficient to show that one accused of cattle

theft was tried by an impartial jury.—*Duncan v. State*, 184 S. W. 195.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

—1004 (Mo. App.) The right of appeal is statutory, and is not to be governed by stipulations of counsel.—*State v. Graham*, 184 S. W. 1190.

—1023(8) (Ky.) Under Cr. Code Prac. § 337, the Court of Appeals can review an order, denying the commonwealth's attorney's motion to dismiss an indictment for felony.—*Commonwealth v. Davis*, 184 S. W. 1121.

—1024(7) (Ark.) Under Const. art. 7, § 4, Kirby's Dig. §§ 2584, 2803, the state cannot appeal from an order granting a new trial to one convicted of felony.—*State v. Walker*, 184 S. W. 38.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

—1037(1) (Ky.) Improper argument of the prosecuting attorney, to which objection was first raised on motion for new trial, cannot be considered on appeal.—*Frey v. Commonwealth*, 184 S. W. 896.

—1064(3) (Ky.) Failure to make refusal of a continuance a ground of the motion for new trial is a waiver of the error.—*Frey v. Commonwealth*, 184 S. W. 896.

—1064 (7) (Ky.) Alleged errors in the instructions will not be considered unless relied on as a ground for a new trial.—*Polk v. Commonwealth*, 184 S. W. 1127.

(D) Record and Proceedings Not in Record.

—1090(1) (Tex. Cr. App.) Where there was nothing in a motion for new trial that could be considered in the absence of the testimony, and neither a statement of fact nor a bill of exceptions was in the record, there was nothing to review on appeal.—*Large v. State*, 184 S. W. 197.

—1090(1) (Tex. Cr. App.) Without a statement of facts or bills of exceptions, no question is presented for review.—*Rosboro v. State*, 184 S. W. 197.

—1090(1) (Tex. Cr. App.) In the absence of statement of facts or bill of exceptions, no question is raised for review on appeal in a criminal case.—*Wells v. State*, 184 S. W. 509.

—1090(1) (Tex. Cr. App.) In the absence of statement of facts and bills of exception, nothing is presented for review.—*Rogers v. State*, 184 S. W. 830.

—1090(11) (Mo. App.) Such matters as occur at the trial of a criminal case must be made part of the record by bill of exceptions the same as in civil cases.—*State v. Brown*, 184 S. W. 1187.

—1090(13) (Ky.) Improper argument of the prosecuting attorney, not made part of the record by bill of exceptions, cannot be considered on appeal.—*Frey v. Commonwealth*, 184 S. W. 896.

—1090(14) (Ky.) Where there is no bill of exceptions and no order making the instructions part of the record, they cannot be considered.—*Henry v. Commonwealth*, 184 S. W. 870.

—1090(16) (Tex. Cr. App.) Questions raised in a motion for a new trial cannot be reviewed where the record contains no statement of facts or bills of exceptions.—*Curry v. State*, 184 S. W. 510.

—1092(7) (Tex. Cr. App.) Where accused was convicted at a term of county court lasting more than 8 weeks, bills of exception not filed within 90 days after overruling motion for new trial and sentence cannot be considered.—*Pettigrew v. State*, 184 S. W. 508.

⌚1095 (Tex.Cr.App.) Where one appealing from a conviction of misdemeanor did not file his statement until 85 days after adjournment of the term of the county court, and the bills of exception merely showed they were approved within the time allowed by law for filing, the state's motion to strike the statement and bills must be sustained.—Cantrell v. State, 184 S. W. 225.

⌚1099(7) (Tex.Cr.App.) A statement of facts in the county court must be filed within 20 days after its adjournment, preceded by an order entered of record, and hence a statement filed 26 days or more after adjournment would not be considered, notwithstanding an order entered of recording allowing 30 days after adjournment.—Carroll v. State, 184 S. W. 508.

⌚1102 (Tex.Cr.App.) Where one, appealing from a conviction of misdemeanor did not file his statement until 85 days after adjournment of the term of the county court and the bills of exception merely showed they were approved within the time allowed by law for filing, the state's motion to strike the statement and bills must be sustained.—Cantrell v. State, 184 S. W. 225.

⌚1102 (Tex.Cr.App.) Where accused was convicted in county court at a term lasting more than 8 weeks, the statement of facts, which was not filed within 90 days after the motion for a new trial was overruled and sentence pronounced, must be stricken, not being filed within time.—Pettigrew v. State, 184 S. W. 508.

⌚1122(5) (Ky.) Where there is no bill of exceptions and no order making the instructions a part of the record, they cannot be considered.—Henry v. Commonwealth, 184 S. W. 870.

⌚1124(3) (Tex.Cr.App.) Where no statement of evidence accompanies record, and record contains no bill of exceptions to admissibility of testimony, no question presented in motion for new trial can be reviewed.—Austin v. State, 184 S. W. 192.

⌚1128(1) (Tex.Cr.App.) A record in criminal proceedings cannot be varied or qualified by matters occurring after the adjournment of court.—Murrell v. State, 184 S. W. 881.

(F) Dismissal, Hearing, and Rehearing.

⌚1131(7) (Mo.App.) Where an appeal has been dismissed because of insufficiency of the record to confer jurisdiction, it will not be reinstated where the time for supplying defects in the record has passed.—State v. Graham, 184 S. W. 1190.

An attorney is not excused by the failure to receive a copy of the printed docket from knowing or ascertaining the day when his case is set.—Id.

(G) Review.

⌚1137(2) (Ark.) Where defendant's attorney argued that there was no evidence that the prosecutrix was returned to an orphan's home on account of abuse by defendant's family, it was not prejudicial for the state's attorney to argue that he could have shown that fact but for defendant's objections; that being provoked, and, if erroneous, was invited, and not ground for reversal.—Rose v. State, 184 S. W. 60.

⌚1144(6) (Tex.Cr.App.) In the absence of record showing to the contrary, it must be presumed that evidence introduced on application for change of venue tending to show prejudice against the defendant was wholly insufficient, where the court overruled the motion.—Howard v. State, 184 S. W. 505.

⌚1151 (Mo.) Where no abuse is shown, the trial court's exercise of its discretion in denying a continuance will not be reviewed on appeal.—State v. McWilliams, 184 S. W. 96.

⌚1158(1) (Tex.Cr.App.) The court, on appeal from a conviction of cattle theft, is not authorized by law to pass on the question of

insufficiency of evidence.—Duncan v. State, 184 S. W. 195.

⌚1159(2) (Ark.) Weight of testimony in a prosecution for rape is for the jury.—Rose v. State, 184 S. W. 60.

⌚1159(4) (Ark.) The credibility of witnesses in a prosecution for rape is for the jury.—Rose v. State, 184 S. W. 60.

⌚1166½(1) (Tex. Cr. App.) In a criminal prosecution, where accused was not given the minimum penalty, the action of the court in directing that during argument accused's wife should not sit beside him, and ordering removal of accused's young child, held prejudicial.—Odell v. State, 184 S. W. 208.

⌚1167(6) (Ky.) Surplusage in an indictment which required the state to prove an act additional to those necessary to sustain a conviction is not prejudicial to defendant.—Frey v. Commonwealth, 184 S. W. 899.

⌚1169(3) (Mo.) Erroneous admission of evidence to admitted facts is harmless.—State v. McWilliams, 184 S. W. 96.

⌚1169(6) (Tex.Cr.App.) In a prosecution for arson, error in admitting evidence, prejudicial to defendant, held harmless where the jury assessed the lowest penalty.—Kline v. State, 184 S. W. 819.

⌚1172(7) (Ky.) Error in an instruction requiring the jury to find an act by defendant in addition to those necessary to convict is not prejudicial to defendant.—Frey v. Commonwealth, 184 S. W. 899.

⌚1173(2) (Tex.Cr.App.) Where defendant's evidence tended to show that another who had had several fights with deceased had borne ill will toward him was in the neighborhood of the killing, the refusal to affirmatively charge upon such defensive matter was reversible error, notwithstanding charges negatively presenting it.—Burkhalter v. State, 184 S. W. 221.

(H) Determination and Disposition of Cause.

⌚1184 (Tex.Cr.App.) The sentence, not conforming to the indeterminate sentence law, but being for a definite term, will be reformed.—Chandler v. State, 184 S. W. 192.

CROPS.

See Frauds, Statute of, ⌚72; Mortgages, ⌚133, 546; Partition, ⌚106.

CROSS-EXAMINATION.

See Witnesses, ⌚358.

CURATIVE ACTS.

See Schools and School Districts, ⌚33.

CURTESY.

See Dower.

CUSTOMS AND USAGES.

See Railroads, ⌚356.

DAMAGES.

See Appeal and Error, ⌚1004; Carriers, ⌚135; Costs, ⌚260; Covenants, ⌚132; Death, ⌚99; Fraud, ⌚59, 60; Insurance, ⌚602; Libel and Slander, ⌚120, 121; Municipal Corporations, ⌚379; New Trial, ⌚76; Replevin, ⌚77; Telegraphs and Telephones, ⌚68; Waters and Water Courses, ⌚178.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(B) Aggravation, Mitigation, and Reduction of Loss.

⚡62(1) (Mo.App.) The buyer of a motion picture theater, induced thereto by the misrepresentations of the seller, after he operates long enough to discover that loss is certain, must stop under his duty to mitigate damages.—*Harmon v. Dickerson*, 184 S. W. 139.

⚡62(3) (Ark.) Owner of property adjoining highway was required to do whatever was reasonably necessary to protect his property from injury from surface water consequent upon construction of railroad embankment, and if he did not do so could not claim full damages.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

⚡62(4) (Mo.App.) Boarding house keeper, who failed to make good a defective heating apparatus installed for her, as she might have done before suffering any appreciable damage, could recover on her counterclaim against the contractors for the work no damage beyond the cost of bringing the installation up to standard.—*Niehaus v. Gillanders*, 184 S. W. 949.

IV. LIQUIDATED DAMAGES AND PENALTIES.

⚡78(2) (Tex.Civ.App.) The expressions, "he agrees to forfeit the sum of one thousand dollars * * * this note, to the extent of the amount herein mentioned, represents a forfeiture put up," and "said note being a forfeit put up," mean something different than the word "penalty."—*Reinhardt v. Borders*, 184 S. W. 791.

⚡78(6) (Tex.Civ.App.) Buyers of hotel, upon seller's failure to convey good title, could recover on seller's note reciting that it represented a forfeiture, the mortgage securing it providing that it was a forfeiture put up to guarantee delivery of title, the intention of the parties having been to stipulate damages.—*Reinhardt v. Borders*, 184 S. W. 791.

⚡79(1) (Tex.Civ.App.) Where no approximation can be made between actual and stipulated damages, the latter must control.—*Reinhardt v. Borders*, 184 S. W. 791.

⚡85 (Tex.Civ.App.) Where the owner on June 16th wrote the contractor, who had abandoned, that, if he did not go to work by June 19th, the owner would complete the house, which notice had no effect, the owner waiting till September, such owner could not recover stipulated damages for delay in completion after June 19th.—*Kaufman v. Christian-Wathen Lumber Co.*, 184 S. W. 1045.

Where a building contractor abandoned work, causing delay in construction, the owner was entitled to recover the stipulated damages for delay in absence of a showing that the stipulated sum was a penalty or was disproportioned to the actual damage sustained.—*Id.*

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

⚡112 (Ark.) Where the purchaser of timber from land cuts it in good faith, believing himself to be the owner, whereas a subsequent purchaser of the land, without notice of such sale of the timber, is the true owner, the measure of damages for the cutting is not the enhanced value of the product, but the value of the standing timber.—*Bunch v. Pittman*, 184 S. W. 850.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚡132(4) (Ark.) Where an injury resulted in hernia, verdict of \$1,500 held not excessive.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 456.

⚡132(5) (Mo.App.) In an action against a city for injuries through a fall on a sidewalk by a woman of 33, who was caused to miscarry, verdict for \$2,500 held not excessive.—*Hawkins v. City of Independence*, 184 S. W. 927.

⚡132(5) (Tex.Civ.App.) An award of \$1,700 for injuries to plaintiff's wife resulting from cold contracted in an unheated car held not excessive, where it affected her menstruation and general health.—*St. Louis Southwestern Ry. Co. of Texas v. Rutherford*, 184 S. W. 700.

⚡132(7) (Mo.App.) In a section hand's action for injuries resulting in broken ankle, bruises, etc., when the flat car on which he rode was derailed, verdict for \$7,500 held not excessive.—*Anderson v. St. Louis & S. F. R. Co.*, 184 S. W. 481.

⚡134(3) (Tex.Civ.App.) An award of \$800 in favor of a boy whose arm was broken held not excessive, there being evidence of suffering and permanent injury, though it did not appear his earning capacity after reaching majority would be diminished.—*International & G. N. Ry. Co. v. Logan*, 184 S. W. 301.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

⚡158(1) (Mo.App.) Injuries naturally and ordinarily, though not necessarily, resulting from those alleged, may be shown under the general allegation.—*Proctor v. City of Poplar Bluff*, 184 S. W. 123.

⚡158(7) (Mo.App.) Where the petition alleged the acts as to where and how plaintiff's limb was fractured, and that she had used crutches, and that her injury was permanent, testimony as to the shrinkage of the limb was admissible.—*Proctor v. City of Poplar Bluff*, 184 S. W. 123.

(B) Evidence.

⚡163(1) (Tex.Civ.App.) Damages, which must be actual or liquidated, are presumed to flow from a breach of contract.—*Reinhardt v. Borders*, 184 S. W. 791.

⚡163(2) (Tex.Civ.App.) Contract to furnish advertising matter held a contract of hire, and the damages, prima facie, the amount agreed to be paid, throwing on defendant the burden of proving that they might have been mitigated.—*Bogata Mercantile Co. v. Outcault Advertising Co.*, 184 S. W. 333.

⚡189 (Tex.Civ.App.) Where plaintiff testified that he lost a certain sum on account of defendant's refusal to perform their contract, and defendant failed to show on cross-examination the basis on which such sum was figured, plaintiff's testimony was a sufficient basis for judgment for the amount testified to, especially where it was a mere mathematical computation.—*Bain v. Polasek*, 184 S. W. 279.

⚡189 (Tex.Civ.App.) In an action by a contractor for a house against the owners for a balance, evidence held sufficient to support finding that there was no proof that the building could have been rented from the time it was contracted to be finished until it was actually finished.—*Kaufman v. Christian-Wathen Lumber Co.*, 184 S. W. 1045.

(C) Proceedings for Assessment.

⚡208(2) (Mo.App.) In an action against a city for injuries through a fall on a defective sidewalk, injury to plaintiff's head as an element of damage held for the jury under the evidence.—*Hawkins v. City of Independence*, 184 S. W. 927.

⚡210(2) (Mo.App.) In an action for fraud committed by the seller of a motion picture theater, instruction as to damages should limit the damages recoverable to the total amount claimed in the petition.—*Harmon v. Dickerson*, 184 S. W. 139.

Instruction in such action should limit the

special damages alleged to have been suffered in plaintiff's efforts to operate the show to the amount claimed in the petition.—*Id.*

—214 (Tex.Civ.App.) An instruction precluding recovery of any damages if plaintiff could have diminished them is error.—*Donada v. Power*, 184 S. W. 793.

—218 (Mo.App.) In suit on an account stated for installing heating apparatus in which defendant counterclaimed for defective performance, an instruction on damages under defendant's counterclaims held erroneous as too general.—*Niehaus v. Gillanders*, 184 S. W. 949.

DEATH.

See Limitation of Actions, —83; Negligence, —101; Partnership —247, 258.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

—10 (Tenn.) The right of action under Shannon's Code, § 1574, subsecs. 2, 3, and 4, and sections 1575 and 1576, for injury from accident or collision on a railroad crossing, is that of the deceased.—*Middle Tennessee R. Co. v. McMillan*, 184 S. W. 20.

—17 (Tex.Civ.App.) Where the injuries sustained by a shipper of goods, while riding therein in a box car, as a result of the road's negligence, were the efficient cause of his death, together with injuries subsequently received by him from a fall off his wagon, the damages caused by each accident not being separable, the road was liable for the death.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

—18(2) (Tex.Civ.App.) Where a son contributed money at times to the support of his father, the irregularity of such contributions will not prevent the father from recovering damages for the son's wrongful death.—*San Antonio & A. P. Ry. Co. v. Blair*, 184 S. W. 566.

—21 (Mo.) Where a teamster was run down by a street car and ultimately died from injuries, held that, where he instituted action before death and it was revived by his administratrix, judgment against her was not, under Rev. St. 1909, §§ 5425, 5438, a bar to an action by deceased's minor child for the death.—*Downs v. United Rys. Co. of St. Louis*, 184 S. W. 995.

(E) Damages, Forfeiture, or Fine.

—88 (Tex.Civ.App.) In an action by a wife for the wrongful death of her husband, she can only recover her pecuniary loss and cannot recover for loss of care and attention.—*San Antonio & A. P. Ry. Co. v. Blair*, 184 S. W. 566.

—99(1) (Tex.Civ.App.) An award of \$25,000 on account of the death of a railroad employé 27 years of age, earning \$130 a month, held not excessive.—*San Antonio & A. P. Ry. Co. v. Blair*, 184 S. W. 566.

—99(5) (Tex.Civ.App.) In a suit for death of a 40 year old railroad switchman by his 81 year old mother, whom he had promised to support, verdict for \$500 held not excessive.—*Texas & P. Ry. Co. v. Griffin*, 184 S. W. 305.

—99(5) (Tex.Civ.App.) In an action by surviving parents for death of their 22 year old son, verdict for \$3,500 held excessive, and remittitur of \$2,400 called for.—*Gulf, C. & S. F. Ry. Co. v. Hicks*, 184 S. W. 1100.

(F) Trial, Judgment, and Review.

—103(2) (Tex.Civ.App.) In suit against a railroad for death of a shipper, riding with his goods, the question of the proximate cause or causes of the death held for the jury under the evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

—104(6) (Mo.App.) In an action for death on a railroad track under Rev. St. 1909, § 5425, an instruction which directed an award of not less than \$2,000 nor more than \$10,000, according to the age and earning capacity of deceased, as

well as the circumstances and the degree of negligence or culpability of defendant, was proper.—*Foster v. West*, 184 S. W. 165.

In an action for the death on a railroad track under Rev. St. 1909, § 5425, where there was evidence that the deceased was an able-bodied man, other than his defect in hearing, sufficient to warrant compensatory damages, an instruction limiting recovery to \$2,000 as a penalty was properly refused.—*Id.*

DEBTOR AND CREDITOR.

See Bankruptcy; Fraudulent Conveyances.

DECEDENTS.

See Executors and Administrators.

DECEIT.

See Fraud.

DECLARATIONS.

See Criminal Law, —426; Evidence, —268-271.

DEDICATION.

I. NATURE AND REQUISITES.

—16(1) (Mo.App.) A public street becomes such by dedication by the owner, as by deed plat, or an equivalent.—*Duckworth v. City of Springfield*, 184 S. W. 476.

—19(1) (Ark.) A dedication of streets or alleys across a tract of land is not established merely by proof of making and recording a plat showing such ways, where the lands remained inclosed by the original owner.—*Balmat v. City of Argenta*, 184 S. W. 445.

—19(2) (Ark.) There was no express or implied dedication to the public use of alleys indicated on a plat acknowledged and filed for record by the owners of the lands with a statement reserving to the owners or residents of the tract the right to use and to close.—*Balmat v. City of Argenta*, 184 S. W. 445.

—31 (Ark.) Implied dedication by conveyances of lots with reference to unrecorded plat becomes effective without acceptance by the city.—*Brookfield v. Block*, 184 S. W. 449.

II. OPERATION AND EFFECT.

—63(2) (Ky.) The fact that a city did not take physical control or improve a street dedicated as a public way, or that it was not used by the public, will not work an abandonment without some affirmative act.—*City of Henderson v. Yeaman*, 184 S. W. 878.

—65 (Ark.) Where plaintiff conveyed part of a platted section to M. in 1883, and in 1890 executed a dedication deed to the city by the terms of which all streets and alleys laid off on the plat were to revert to the grantor when no longer used as such, she could not recover a strip of land laid off as an alley, the dedication having become effective on the conveyance to M.—*Brookfield v. Block*, 184 S. W. 449.

DEEDS.

See Covenants; Estoppel, —35; Evidence, —450, 452, 460, 596; Fraudulent Conveyances; Mortgages; Reformation of Instruments.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

—25 (Tex.Civ.App.) Whether a deed is a quitclaim or not depends upon the intent of the parties appearing from the face of the instrument, the use of the word "quitclaim" not being absolutely decisive.—*Pridgen v. Cook*, 184 S. W. 713.

If it appears from the language of a deed that

it was intended to convey the land itself, rather than such title as the grantor had, it is not a quitclaim deed.—*Id.*

(B) Form and Contents of Instruments.

⚡38(1) (Tex.Civ.App.) A deed of land would not be treated as void for want of a sufficient description, unless so defective that the land could not be located by inspecting the deed and resorting to the muniments or evidences to which it expressly or impliedly refers.—*Diffie v. White*, 184 S. W. 1065.

The office of the description in a deed is not to identify the land, but to furnish means of identification.—*Id.*

⚡38(2) (Tex.Civ.App.) A deed of 420 acres out of the northeast part of a designated survey lying in the form of a square and containing 836 acres, in connection with the field notes, its form and area, held sufficient as to description.—*Diffie v. White*, 184 S. W. 1065.

⚡41 (Tex.Civ.App.) A deed, expressly referring to the land as a part of a designated survey, made it proper to resort to the field notes of that survey to ascertain its location, form, and area.—*Diffie v. White*, 184 S. W. 1065.

(D) Delivery.

⚡56(6) (Mo.) To effectuate a deed there must be delivery with the design of parting with title to the property, which must take place during the life of the grantor.—*Wren v. Sturgeon*, 184 S. W. 1036.

⚡58(1) (Ark.) Where grantors exchanging land delivered their deed to a third person, but subject to their further direction, and the third person delivered the deed without the grantors' consent, such grantors could have the deed canceled as a cloud on their title.—*Moore v. Moye*, 184 S. W. 63.

(E) Validity.

⚡68(1½) (Ark.) To invalidate a deed on the ground of the grantor's mental incapacity, it must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grows and to prevent his understanding of the nature and consequences of his act.—*Beaty v. Swift*, 184 S. W. 442.

⚡68(1½) (Ark.) Where one, although not positively non compos or insane, is yet so weak of mind as to be unable to guard against imposition or to resist importunity or undue influence, his deed and sale of personal property under such circumstances, will be set aside.—*Boyd v. Boyd*, 184 S. W. 838.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚡93 (Tex.Civ.App.) The intention of the grantor must be gathered from the language used.—*Diffie v. White*, 184 S. W. 1065.

⚡109 (Ark.) In suit by representatives of a decedent to cancel warranty deed and transfer of personal property, defendant's evidence held not to show the grantor's intention of vesting an absolute title thereto in grantor's wife, but to show an intent to convey a life estate to her with remainder over.—*Boyd v. Boyd*, 184 S. W. 838.

⚡109 (Tex.Civ.App.) The terms of the deed, the adequacy of the price or other circumstances, are admissible to show whether the purchaser bought the land or merely the chance of title.—*Pridgen v. Cook*, 184 S. W. 713.

(B) Property Conveyed.

⚡114(5) (Tex.Civ.App.) Description in deed, conveying 420 acres out of northeast portion or part of survey, containing 836 acres after northwest and southwest corners, amounting to 433

acres, had been conveyed, held to convey a square conforming to the north and east boundary lines of the survey.—*Diffie v. White*, 184 S. W. 1065.

(C) Estates and Interests Created.

⚡120 (Tex.Civ.App.) A deed conveying "just such title as was received from the said trustees" by a certain deed held to bind the grantor to convey the same character of title as that possessed by the trustees.—*Pridgen v. Cook*, 184 S. W. 713.

(E) Conditions and Restrictions.

⚡155 (Tex.Civ.App.) Deed conveying land to town trustees for purpose of building academy held not to make application of proceeds of sale to such purpose, a condition precedent to the vesting of title in the trustees.—*Joyce v. City of Mt. Vernon*, 184 S. W. 626.

IV. PLEADING AND EVIDENCE.

⚡196(1) (Ark.) A deed and transfer of personal property executed by a grantor greatly weakened by the ravages of disease, and who had been kept alive by drugs, should be scrutinized with the greatest care, and the grantee has the burden of proving its validity.—*Boyd v. Boyd*, 184 S. W. 838.

⚡208(2) (Mo.) Evidence held insufficient to show delivery of a deed in favor of defendant which at the time of his death was found in a stamped envelope amongst the private papers of the deceased grantor.—*Wren v. Sturgeon*, 184 S. W. 1036.

⚡208(5) (Ark.) Evidence held to sustain finding that plaintiffs placed their deed in a third person's hands only for a special purpose.—*Moore v. Moye*, 184 S. W. 63.

⚡211(1) (Ark.) Evidence held to show that defendant, executing a deed to life estate in land, was possessed of sufficient mental capacity to make a valid deed.—*Beaty v. Swift*, 184 S. W. 442.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, ⚡143-173, 568.

DELAY.

See Telegraphs and Telephones, ⚡38.

DELEGATION OF POWER.

See Constitutional Law, ⚡63.

DELIVERY.

See Bills and Notes, ⚡209; Carriers, ⚡44, 45, 184, 212; Deeds, ⚡56, 58, 208; Sales, ⚡170.

DEMAND.

See Banks and Banking, ⚡47.

DEMURRER.

See Indictment and Information, ⚡147, 150; Pleading, ⚡193-218; Trial, ⚡156.

DEPOSITARIES.

See Subrogation, ⚡21.

⚡6 (Ark.) Acts 1913, p. 504; did not repeal Kirby's Dig. § 1990, authorizing the tax collector to deposit public funds in any incorporated bank.—*Johnson v. Wallace*, 184 S. W. 835.

⚡8 (Ark.) The tax collector has no preference over other creditors for public funds deposited in an insolvent bank under Kirby's Dig. § 1990.—*Wallace v. Davis*, 184 S. W. 834.

DEPOSITIONS.

§73 (Ark.) Certificate of officer who took depositions held not in compliance with Kirby's Dig. § 3185, providing what it shall state.—*Breysacher v. State*, 184 S. W. 433.

DEPOSITS.

See Depositaries.

DESCENT AND DISTRIBUTION.

See Adoption, §23; Bastards, §104; Dowry; Election of Remedies, §3; Executors and Administrators; Wills.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**(A) Heirs and Next of Kin.**

§30 (Tex.Civ.App.) By express provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 2461, one dying intestate without surviving spouse or children, her lands descend half to parents and half to sisters and brothers.—*Yates v. Craddock*, 184 S. W. 276.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTES.**(B) Advancements.**

§115 (Mo.) The payment by a father or husband for land deeded to a child or wife is prima facie presumed a gift or advancement.—*Hunnell v. Zinn*, 184 S. W. 1154.

DESCRIPTION.

See Chattel Mortgages, §47; Deeds, §38, 41; Mortgages, §133; Names, §16; Reformation of Instruments, §13; Wills, §558.

DESERTION.

See Divorce, §138.

DETINUE.

See Replevin.

DILIGENCE.

See Continuance, §26; Criminal Law, §598.

DISCHARGE.

See Compromise and Settlement; Guaranty, §61; Principal and Surety, §97-117.

DISCOVERED PERIL.

See Railroads, §390.

DISCRETION OF COURT.

See Appeal and Error, §960-979; Criminal Law, §586, 1151.

DISEASE.

See Animals §33.

DISFRANCHISEMENT.

See Elections, §94.

DISMISSAL AND NONSUIT.

See Abatement and Revival, §15; Appeal and Error, §80, 782, 787; Criminal Law, §1131; Indictment and Information, §144; Limitation of Actions, §130; Prohibition, §24.

I. VOLUNTARY.

§19(3) (Tex.Civ.App.) Plaintiff's dismissal of his suit as to certain defendants did not affect any cross-action pleaded by them.—*Nunes v. McElroy*, 184 S. W. 531.

§42 (Mo.App.) Dismissal in vacation by plaintiff on payment of costs, as provided by Rev. St. 1909, § 1979, and voluntary nonsuit, the absolute right to which is given by section 1980, apply only to plaintiff's cause of action, and cannot dispose of the fixed rights of the defendant.—*Martin v. Richmond Oil Co.*, 184 S. W. 127.

§43(2) (Mo.App.) Dismissal of a case in vacation, with or without payment of costs, or even in term, is in the breast of the court until the end of the concurrent or succeeding term, and may be confirmed or set aside or opened up for cause, to permit proper proceeding thereon, although, if made at plaintiff's instance, it operates as an estoppel against him.—*Martin v. Richmond Oil Co.*, 184 S. W. 127.

DISORDERLY CONDUCT.

See Breach of the Peace; Disturbance of Public Assemblance.

DISORDERLY HOUSE.

§16 (Tex.Cr.App.) Testimony as to the reputation of the house held admissible, though the witness could not limit his knowledge to the time after defendant began working there.—*Davis v. State*, 184 S. W. 510.

§17 (Tex.Cr.App.) In a prosecution for aiding in keeping a house of prostitution, evidence held sufficient to sustain a conviction.—*Davis v. State*, 184 S. W. 510.

DISSOLUTION.

See Banks and Banking, §64, 80.

DISTRIBUTION.

See Descent and Distribution; Fraudulent Conveyances, §318.

DISTRICT AND PROSECUTING ATTORNEYS.

See Indictment and Information, §144.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

See Indictment and Information, §110, 125.

§11 (Mo.App.) Evidence held to sustain conviction of disquieting and disturbing assembly met for literary, social, and religious purposes.—*State v. Williams*, 184 S. W. 478.

DITCHES.

See Drains.

DIVERSION.

See Waters and Water Courses, §78.

DIVORCE.

See Witnesses, §64.

II. GROUNDS.

§37(19) (Mo.App.) After refusal of divorce to both husband and wife, if wife made bona fide offers to return and live with husband, which he refused, he became wrongful absentee.—*Holschbach v. Holschbach*, 184 S. W. 156.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(D) Evidence.**

§133(3) (Mo.App.) Evidence held to sustain findings that wife had offered in good faith to return and live with husband, which he had refused authorizing divorce.—*Holschbach v. Holschbach*, 184 S. W. 155.

(G) Appeal.

⇒182 (Ky.) Under Civ. Code Prac. § 424, and Ky. St. § 2121, empowering the circuit court to grant the wife maintenance during the pendency of the action, the circuit court has power to grant maintenance pending appeal.—*Pemberton v. Pemberton*, 184 S. W. 378.

⇒184(1) (Mo.App.) On appeal in suit for divorce, court may consider all evidence offered as being before it.—*Holschbach v. Holschbach*, 184 S. W. 155.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

⇒215 (Ky.) In a suit for divorce and alimony, where the wife is without means of support, maintenance in the sum of \$80 per month pending an appeal is not excessive.—*Pemberton v. Pemberton*, 184 S. W. 378.

⇒238 (Ky.) In a divorce suit, the fact that the plaintiff had reprimanded defendant for drinking will not deprive her of alimony.—*Pemberton v. Pemberton*, 184 S. W. 378.

⇒240(5) (Ky.) In a divorce suit, where the family consisted of plaintiff, defendant and defendant's infant son by a former marriage, and defendant had a net estate of \$22,000 with an expectancy of equal value, and plaintiff had no property, an allowance of \$5,000 as alimony was not excessive.—*Pemberton v. Pemberton*, 184 S. W. 378.

⇒281 (Ky.) In an action for divorce and alimony, by agreeing to dispense with proof and let the chancellor determine the amount of the plaintiff's attorney's fee, defendant's counsel did not waive right to appeal from the chancellor's decision.—*Pemberton v. Pemberton*, 184 S. W. 378.

⇒286 (Ky.) Although there is no power to reverse a decree of divorce, the appellate court may consider the evidence to determine whether alimony was properly awarded.—*Pemberton v. Pemberton*, 184 S. W. 378.

VI. CUSTODY AND SUPPORT OF CHILDREN.

⇒308 (Tex.Civ.App.) While in granting a divorce the court may make necessary orders concerning the custody of the children, it cannot thereafter set apart for the maintenance of the children portions of the community property apportioned between the spouses.—*Gully v. Gully*, 184 S. W. 555.

In a statutory proceeding for divorce, the court has no power to make incidental decrees against the spouses in personam for payment of a monthly stipend for future support of minor children of the marriage.—*Id.*

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

⇒324 (Tex.Civ.App.) In view of Rev. St. 1911, arts. 4068, 4069, 4634, both parents after divorce are liable to maintain children of the marriage.—*Gully v. Gully*, 184 S. W. 555.

Where a husband and wife were divorced, their property partitioned, and the custody of the children awarded to the wife, she, having maintained the minor children, is entitled to recover from her former husband one-half the cost of such maintenance.—*Id.*

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Criminal Law, ⇒440, 447; Evidence, ⇒358-388; Trial, ⇒89.

DOMICILE.

See Elections, ⇒72, 78; Taxation, ⇒254.

⇒4(1) (Tenn.) The rule that a domicile once fixed remains until another is acquired does not apply to a change from a domicile of choice to that of origin, in which case the domicile of origin is acquired the moment the other is given up.—*Denny v. Sumner County*, 184 S. W. 14.

⇒4(2) (Tenn.) To constitute a change of domicile of choice, there must be actual residence in the new place, with intention to abandon the old and to acquire the new one.—*Denny v. Sumner County*, 184 S. W. 14.

The mere intention to acquire a new domicile avails nothing, and an actual removal, though not merely temporary, is insufficient without concurrent intent.—*Id.*

⇒5 (Tenn.) The law will, from facts and circumstances, fix a legal residence for one, unless he voluntarily fixes it himself.—*Denny v. Sumner County*, 184 S. W. 14.

DONATIONS.

See Gifts.

DOWER.

See Subrogation, ⇒41.

III. RIGHTS AND REMEDIES OF WIDOW.

⇒91 (Ark.) Owner of undivided seven-twelfths of lands, incumbered by an unassigned dower interest which when assigned would have been a life estate in an undivided two-twelfths, who conveyed an undivided five-twelfths by deed with full covenants of warranty, held to hold her remaining interest subject to the dower incumbrance.—*Allen-West Commission Co. v. Harshaw*, 184 S. W. 436.

DRAINS.

See Constitutional Law, ⇒70; Eminent Domain, ⇒71; Evidence, ⇒25.

I. ESTABLISHMENT AND MAINTENANCE.

⇒2(1) (Ark.) Acts 1911, p. 1245, § 1, establishing a drainage and levee district, held void for want of a definite description of the boundaries of the district.—*Morgan Engineering Co. v. Cache River Drainage Dist.*, 184 S. W. 57.

Acts 1913, p. 512, repealing Acts 1911, p. 1245, purporting to establish a drainage district but invalid for want of definite description of boundaries, held not to cure defective description.—*Id.*

⇒2(1) (Mo.) The provision of the drainage district act for notice to the owners by publication only, held valid.—*Elsberry Drainage Dist. v. Harris*, 184 S. W. 89.

⇒15 (Mo.) All conditions precedent to the right of a drainage district to place a burden upon private property must be complied with.—*Elsberry Drainage Dist. v. Harris*, 184 S. W. 89.

A drainage district cannot under Rev. St. 1909, §§ 5496-5541, or Act March 24, 1913 (Laws 1913, p. 237) § 9, annex land which will not receive any benefit from the district.—*Id.*

A drainage district cannot annex lands of objecting owners for the purpose of private profit realized from the reclamation of other lands annexed.—*Id.*

Under Act March 24, 1913 (Laws 1913, p. 242) § 17, the interest of a drainage district engineer in sales of land recommended to be annexed may be considered in determining whether the motive for annexation is private property.—*Id.*

⇒20 (Ark.) Treasurer of drainage district created by Sp. Acts 1911, p. 544, and whose du-

ties were defined by sections 4, 11, 17, 22, and 24, *held* authorized to sue for money belonging to the district and deposited in defendant bank by plaintiff's predecessor.—*Sallee v. Bank of Corning*, 184 S. W. 44.

Treasurer of drainage district, notwithstanding check for district's funds was not signed by former treasurer as treasurer, nor made to him as treasurer, might maintain action against former treasurer and the bank holding the amount to recover it as funds of the district.—*Id.*

Complaint, in suit by treasurer of drainage district to recover its funds from former treasurer and defendant bank, *held* to sufficiently allege that the former treasurer deposited the fund in the bank and that it was still on deposit to the credit of the district.—*Id.*

II. ASSESSMENTS AND SPECIAL TAXES.

—68 (Mo.) Drainage districts cannot exercise the right of taxation to aid purely private enterprises.—*Elsberry Drainage Dist. v. Harris*, 184 S. W. 89.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGS.

See Poisons.

DUE PROCESS OF LAW.

See Constitutional Law, —278-309.

DUPLICITY.

See Indictment and Information, —125.

EASEMENTS.

See Dedication; Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

—3(2) (Tex.Civ.App.) Though plaintiffs' property was separated from a right of way by an alley, they may, having held the way adversely, claim it as a prescriptive easement appurtenant to their lands.—*Heard v. Bowen*, 184 S. W. 234.

—8(2, 3) (Tex.Civ.App.) Where a verbal way over land is granted, possession under such grant is adverse; the verbal grant being void under the statute of frauds.—*Heard v. Bowen*, 184 S. W. 234.

—18(1) (Tex.Civ.App.) Laws 1884 (Gammel's Laws Tex., vol. 9, pp. 600-602), providing for a right of way across land surrounding the land of another, *held* not to apply to plaintiff's tract bounded on three sides by a river and on a fourth by land of defendant.—*Anderson v. Engler*, 184 S. W. 309.

—36(2) (Tex.Civ.App.) Where parol evidence showing a verbal gift of a right of way is not admissible to establish an easement, it is admissible to show that one using such easement did so adversely.—*Heard v. Bowen*, 184 S. W. 234.

—36(8) (Tex.Civ.App.) Evidence *held* sufficient to show that plaintiffs acquired an easement or prescriptive right of way over defendants' property by adverse possession.—*Heard v. Bowen*, 184 S. W. 234.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

—61(9) (Tex.Civ.App.) Evidence, in an action to restrain closing an alley or way used by plaintiffs in reaching part of their residence premises, *held* to make a case of probable right in plaintiffs to the relief sought.—*Miles v. Bodenheim*, 184 S. W. 633.

EJECTMENT.

See Trespass to Try Title.

I. RIGHT OF ACTION AND DEFENSES.

—9(3) (Ark.) A plaintiff in ejectment must recover on the strength of his own title.—*Brookfield v. Block*, 184 S. W. 449.

ELECTION OF REMEDIES.

—1 (Tenn.) An "election" differs from an "estoppel in pais" in that it need not be acted upon by the other party to his detriment.—*Phillips v. Rooker*, 184 S. W. 12.

—3(1) (Mo.) The remedies of requiring property to be brought into hotchpotch and establishing a resulting trust for other heirs are inconsistent.—*Hunnell v. Zinn*, 184 S. W. 1154.

—7(1) (Tenn.) An election of remedies is the adoption, by an unequivocal act, of one of two existing alternative remedial rights, inconsistent and not reconcilable with each other, the effect of which is to preclude a resort to the other.—*Phillips v. Rooker*, 184 S. W. 12.

—15 (Mo.App.) Actions for conversion of pledged corporate stock, based on defendant's misrepresentation that he had sold the stock, are not an election to treat it as converted which prevents a suit to recover the stock.—*Smith v. Becker*, 184 S. W. 943.

—15 (Tenn.) Plaintiffs, in taking a decree against defendants B. and C., who, as agents of defendant company, had assumed a contract for timber rights made by the defendant R., had made an election, and could not later proceed against the principal.—*Phillips v. Rooker*, 184 S. W. 12.

ELECTIONS.

See Counties, —151; Evidence, —317.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

—21 (Tex.) The Presidential Primary Act, applying only to political parties polling 50,000 votes for Governor, is not invalid because it applies at present to only the Democratic party.—*Waples v. Marrast*, 184 S. W. 180.

IV. QUALIFICATIONS OF VOTERS.

—72 (Tex.Civ.App.) Where one whose ballot was rejected owned a farm in county and intended to return there whenever he could find some one who would live with and care for him, ownership of the farm did not constitute a residence, as he actually was in another county.—*Aldridge v. Hamlin*, 184 S. W. 602.

A voter who managed a business in Texas but took his meals in a town across the state line in New Mexico, *held* resident of Texas where he slept and kept his effects in that state.—*Id.*

That a voter, who had resided in the county and state for a sufficient length of time, intended ultimately to return to a distant state, does not deprive him from acquiring a legal residence and the right to vote.—*Id.*

—73 (Tex.Civ.App.) That a voter voted at a school election in another state and paid poll taxes there, *held* not to preclude him from voting in the county of his residence.—*Aldridge v. Hamlin*, 184 S. W. 602.

That a resident of a county, in discharge of his duties with a railroad company, temporarily removed, *held* not to deprive him of his residence in the county and of his right to vote where he retained his family home.—*Id.*

That one owned a farm in the county and resided there, temporarily removed during season of drought, but returned, does not deprive him of his residence in the county and he may vote therein.—*Id.*

That a voter temporarily removed from the county but intended to return and resume business, does not, where he retained his home in

the county, work a loss of residence, depriving him of the right to vote.—Id.

Where a voter waiting to get a house in Texas removed to adjacent New Mexico town, his temporary residence, etc., will not, it appearing that he returned, deprive him of his right to vote in Texas.—Id.

§83 (Tex.Civ.App.) Where an elector on the 1st day of January, 1912, was subject to payment of a poll tax and failed to pay the same, his vote at an election October 18, 1913, is properly rejected.—Aldridge v. Hamlin, 184 S. W. 602.

§94 (Tex.Civ.App.) Where a voter had been convicted of felony and his sentence suspended under Acts 32d Leg. c. 44, which was held unconstitutional, the suspension was void, and the voter was not qualified; not having been pardoned.—Aldridge v. Hamlin, 184 S. W. 602.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§120 (Tex.) That the Presidential Primary Act is impracticable, unworkable if literally observed, and deficient for failing to provide for the legal number of presidential electors does not render it unconstitutional.—Waples v. Marrast, 184 S. W. 180.

The Presidential Primary Act, providing that the expenses of the election shall be paid out of the county treasury, held violative of Const. art. 8, § 3, providing that taxes shall be levied for public purposes only.—Id.

§126(1) (Tex.) The Legislature has authority to require the holding of a primary election by the parties of the state to enable their members to vote for party nominees for state or national elective offices, or for delegates to party conventions.—Waples v. Marrast, 184 S. W. 180.

VIII. CONDUCT OF ELECTION.

§234 (Tex.Civ.App.) Where from practical considerations a voter had changed his mind as to his vote on the question of change of the county seat, his vote will not be rejected because of subsequent attempts to coerce him to vote as he did.—Aldridge v. Hamlin, 184 S. W. 602.

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

§237 (Ky.) In the absence of some statutory requirement to the contrary, the result of an election is determined by the majority of the electors.—Gatton v. Fiscal Court of Daviess County, 184 S. W. 1.

§238 (Ky.) As in case of a tie for the office of school trustee there is vacancy, the county superintendent may, under Ky. St. § 4436, as amended in 1898 (Laws 1898, c. 44), fill the vacancy, so the tie cannot be determined by lot, in accordance with section 1596a, which applies to ordinary elections.—Combs v. Brewer, 184 S. W. 892.

Where there is a tie vote for the office of school trustee, there is a vacancy within Ky. St. § 4436 as amended in 1898 (Laws 1898, c. 44), authorizing the county superintendent to fill vacancies.—Id.

X. CONTESTS.

§275 (Mo.) Under Const. art. 8, § 9, and Rev. St. 1909, §§ 5924, 7872, county courts have power to hear and determine contested elections to the office of justice of the peace.—Ramsey v. Huck, 184 S. W. 966.

§280 (Mo.) Service of notice of contest of an election to the office of justice of the peace, as required by Rev. St. 1909, § 5924, providing that notice shall be served 15 days before the term at which the election is to be contested, by delivering a copy thereof to the contestee, etc., is jurisdictional.—Ramsey v. Huck, 184 S. W. 966.

§288 (Mo.) An amendment may be made to a notice of contest of an election only where the court has obtained jurisdiction of the contest by proper notice to the contestee as directed by Rev. St. 1909, § 5924.—Ramsey v. Huck, 184 S. W. 966.

§291 (Ky.) One attacking the qualifications of a voter has the burden of proof.—Combs v. Brewer, 184 S. W. 892.

§295(1) (Ky.) In a contest over the election of a public school trustee, the court's finding that a voter was not disqualified, as being unable to read and write, held warranted by the evidence.—Combs v. Brewer, 184 S. W. 892.

In a contest over election of a school trustee, evidence held to warrant a finding that a voter was of legal age.—Id.

§295(1) (Tex.Civ.App.) Where vote of two Mexicans was questioned, testimony that the precinct in which they lived was sparsely settled, that no other Mexicans lived there and that such persons had not resided there for sufficient time to vote, is admissible and will support a finding rejecting their ballots.—Aldridge v. Hamlin, 184 S. W. 602.

In an election contest, evidence held sufficient to warrant the rejection of a voter's ballot on the ground that he resided in another state.—Id.

In an election contest, evidence held sufficient to sustain a finding that a challenged voter had a residence in the county and was entitled to vote.—Id.

In an election contest where a voter's ballot was questioned, evidence held sufficient to sustain a finding that he had acquired residence in the county.—Id.

§300 (Tex.Civ.App.) In an election contest, the question whether a voter had resided in the county for a sufficient length of time to vote, held a question of fact.—Aldridge v. Hamlin, 184 S. W. 602.

§305(1) (Mo.) Where the county court was without jurisdiction over a contest of an election to the office of justice of the peace on account of the contestant's failure to serve notice of contest, the circuit court acquired no jurisdiction on appeal.—Ramsey v. Huck, 184 S. W. 966.

ELECTORS.

See Carriers, §280; Negligence, §32, 45, 96.

EMBANKMENTS.

See Waters and Water Courses, §178, 179.

EMBEZZLEMENT.

See Criminal Law, §883; Indictment and Information, §61, 110; Statutes, §118.

§5 (Mo.) That defendant, concealing from his principal that he had received the proceeds of a loan effected for the principal, used the money for his own benefit, held to show a felonious intent.—State v. McWilliams, 184 S. W. 96.

§11(1) (Ky.) Where the treasurer of a fraternal order was not authorized to disburse any moneys, but only to deposit same upon collection, no settlement is necessary before he can be convicted of embezzlement; it appearing that he did not deposit all funds collected.—Swann v. Commonwealth, 184 S. W. 868.

§14 (Mo.) A real estate broker who applied for a loan for the benefit of a landowner held the agent of the landowner, and not of the loan company, and so his fraudulent conversion of the proceeds was embezzlement.—State v. McWilliams, 184 S. W. 96.

Where a landowner for whom accused applied and obtained a loan directed that the funds be transmitted to accused, the latter was charged with the duty of accounting to the landowner,

and his appropriation of the funds was embezzlement.—Id.

☞14 (Tex.Cr.App.) An insurance agent receives premiums under his employment, and may not appropriate them to his own use, so that failure of the applicant to sign a new application as required would not affect his guilt in appropriating the premiums.—Meredith v. State, 184 S. W. 204.

☞22 (Tex.Cr.App.) Although an insurance agent accused of embezzling premiums could have retained 40 per cent. thereof, had the policy been issued, that would not reduce the crime from felony to misdemeanor, where the policy was not in fact issued.—Meredith v. State, 184 S. W. 204.

☞27 (Mo.) Rev. St. 1909, § 4550, held to create two offenses, one the actual embezzlement, and the other the fraudulent conversion of property with intent to embezzle; hence an information charging an actual embezzlement need not aver intent.—State v. McWilliams, 184 S. W. 96.

☞30 (Tex.Cr.App.) In a prosecution under Pen. Code 1911, art. 691, making an insurance agent who collects premiums and converts them guilty of larceny, it is not necessary to allege the ownership of the money.—Meredith v. State, 184 S. W. 204.

While indictment for larceny by embezzlement from corporation must allege that the defrauded party was a corporation, it is not necessary to allege that other corporations interested were such.—Id.

☞35 (Mo.App.) A charge of larceny or embezzlement of lawful money of the United States is not sustained by proof of the larceny or embezzlement of a check.—State v. Rosefalt, 184 S. W. 904.

☞38 (Mo.) Evidence that defendant, who was authorized to receive the money, did not apply it in discharging prior liens or as directed, but converted it to his own use, is admissible.—State v. McWilliams, 184 S. W. 96.

Where accused, after securing a loan for a landowner, converted the proceeds, evidence as to his relations before or after with the loan company is immaterial.—Id.

☞38 (Tex.Cr.App.) In a prosecution for larceny by embezzling insurance premiums, the contract under which the accused was working for the insurance company was admissible; its terms being binding upon him.—Meredith v. State, 184 S. W. 204.

Where one accused of having embezzled insurance premiums testified that he had received a premium and had paid it to no one, it was not error to admit testimony of his superior that he had not received it or permitted accused to appropriate it.—Id.

☞41 (Mo.) Where defendant received moneys for his principal and deposited them in a bank to his own credit, the manner in which the money was drawn out or applied to defendant's own use is immaterial on the question of his embezzlement.—State v. McWilliams, 184 S. W. 96.

☞42 (Tex.Cr.App.) Where one accused of larceny by embezzlement testified that he told the applicant that his application had been canceled and he would have to see the state agent to get the premium, the state agent could testify that the applicant called and did receive the premiums.—Meredith v. State, 184 S. W. 204.

☞47 (Tex.Cr.App.) Where an agent accused of embezzling insurance premiums withheld them after refusal to issue a policy, although he was entitled to 40 per cent. thereof if the policy were issued, the question of joint ownership of the premium was properly withheld from the jury.—Meredith v. State, 184 S. W. 204.

☞48(2) (Tex.Cr.App.) In a prosecution for embezzlement of insurance premiums, where the agent testified that he had received them and had paid them to no one but had spent the money, an instruction as to good faith in retaining

the money was properly refused.—Meredith v. State, 184 S. W. 204.

☞48(4) (Ky.) In a prosecution for embezzlement by a treasurer of a fraternal order, an instruction that he was guilty, though he subsequently offered to make a settlement and restitution, held warranted under the evidence.—Swann v. Commonwealth, 184 S. W. 868.

EMINENT DOMAIN.

See Municipal Corporations, ☞279, 379.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

☞2(1) (Ark.) Railroad whose occupancy of public highway for tracks was permissive, and whose embankment caused damage to adjacent owner from surface water, held liable therefor, under the constitutional guaranty that private property shall not be taken for public use without due compensation.—Louisville, N. O. & T. R. Co. v. Jackson, 184 S. W. 450.

☞2(1) (Mo.) A statute based on the valid exercise of the police power does not take private property for private use contrary to Const. art. 2, § 30.—Carson v. Missouri, K. & T. Ry. Co., 184 S. W. 1039.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

☞71 (Ark.) Acts 1913, p. 512, repealing Acts 1911, p. 1245, purporting to establish a drainage district but invalid for want of definite description of boundaries, held not to cure defective description, as to do so would take property of owners without compensation.—Morgan Engineering Co. v. Cache River Drainage Dist., 184 S. W. 57.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

☞243(2) (Tex.Civ.App.) That a railroad company condemned lands will not under Rev. St. 1911, art. 6518, prevent the landowner from enjoining unlawful diversion of a water course though land taken was to be used for new channel.—McAmis v. Gulf, C. & S. F. Ry. Co., 184 S. W. 331.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ☞347; Negligence, ☞101.

EMPLOYERS' LIABILITY INSURANCE.

See Insurance, ☞183, 435, 598.

ENCROACHMENT.

See Constitutional Law, ☞70.

ENTRY, WRIT OF.

See Ejectment.

EPIDEMIC.

See Schools and School Districts, ☞153.

EQUITABLE DEFENSES.

See Quieting Title, ☞15.

EQUITABLE ESTOPPEL

See Estoppel, ☞58-94.

EQUITY.

See Appeal and Error, ¶1008; Cancellation of Instruments; Courts, ¶472; Fraudulent Conveyances; Injunction; Limitation of Actions, ¶88; Judgment, ¶408-443; Partition; Quieting Title, ¶15; Receivers; Reformation of Instruments; Sequestration; Specific Performance; Trusts; Usury, ¶86.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.**(C) Principles and Maxims of Equity.**

¶65(3) (Mo.) Irrespective of the doctrine of res adjudicata, equity will not aid one who has sought the same relief in separate actions on grounds so inconsistent as to evince a lack of candor and clean hands.—Ogden v. Auer, 184 S. W. 72.

¶66 (Ark.) Under the maxim as to doing equity, where on defendants' prayer the court found that plaintiff's absolute deed was a mortgage, they cannot defeat recovery on mortgage debt by limitations.—Williams v. Prioleau, 184 S. W. 847.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Remainders; Tenancy in Common; Wills.

ESTOPPEL

See Appeal and Error, ¶882, 883; Corporations, ¶388; Criminal Law, ¶1137; Executors and Administrators, ¶114; Insurance, ¶664, 755; Mechanics' Liens, ¶216; Tender, ¶15.

II. BY DEED.**(B) Estates and Rights Subsequently Acquired.**

¶35 (Mo.) A warranty deed recorded before the granting of a patent from the government to the grantor passed the after-acquired title as against the grantee of a warranty deed by the same grantor after the patent was recorded.—Organ v. Bunnell, 184 S. W. 102.

III. EQUITABLE ESTOPPEL.**(A) Nature and Essentials in General.**

¶58 (Tenn.) In an action to remove a cloud, defendant, purchasing before the decree alleged to be a cloud was entered and not on the faith thereof, could not set up estoppel, as he must have been put in a worse attitude before estoppel could arise.—Stearns Coal & Lumber Co. v. Patton, 184 S. W. 855.

(B) Grounds of Estoppel.

¶68(4) (Ark.) A defense that purchaser under a trust deed had acquired the rice delivered to defendant by plaintiff's tenant, *held* not to estop defendant from relying on a sale of the rice by plaintiff to that purchaser.—Stuttgart Rice Mill Co. v. Reinsch, 184 S. W. 836.

¶91(1) (Ark.) Where court of chancery without authority sold lands of infants for reinvestment, *held*, that, it not appearing infants received entire proceeds of second lands, with knowledge of their rights to the first, they were not estopped from recovering.—Duncan v. Liddle, 184 S. W. 413.

¶94(1) (Ky.) Owner of land is not estopped because he failed to notify plaintiff of his title, where he only heard that one who purchased a decedent's land at judicial sale was about to sell such land, it appearing that the land in controversy was not included in the sale.—Fields v. Couch, 184 S. W. 894.

EVICITION.

See Covenants, ¶102.

EVIDENCE

See Criminal Law, ¶804-553; Depositions; Trial, ¶252; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Trial, ¶89-85.

I. JUDICIAL NOTICE.

¶5(2) (Mo.App.) The court will take judicial notice that engines pulling trains emit sparks which can communicate fire to combustible material on the right of way.—Bowden v. St. Louis & S. F. R. Co., 184 S. W. 1174.

¶8 (Mo.) The courts may take judicial notice that a street car running at 10 to 15 miles an hour can be stopped in less than 250 feet, that being a matter familiar to all urban residents.—Downs v. United Rys. Co. of St. Louis, 184 S. W. 995.

¶13 (Ky.) The kicking propensity of the mule is a matter of common knowledge.—Consolidation Coal Co. v. Pratt, 184 S. W. 369.

¶25(2) (Mo.) In proceedings to annex lands to a drainage district, the court will not take judicial notice of proceedings of the district not relating to its incorporation.—Elsberry Drainage Dist. v. Harris, 184 S. W. 89.

¶35 (Mo.) Courts of Missouri do not notice judicially statutory laws of another state.—Schroeder v. Edwards, 184 S. W. 108.

II. PRESUMPTIONS.

¶53 (Tex.Civ.App.) A "presumption of fact" is a probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other, being always to be drawn by the jury.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

¶54 (Tex.Civ.App.) Circumstances establishing that a person was killed by a train at a public crossing through the negligence of the railroad's servants must be shown by direct evidence and cannot be inferred from other circumstances.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

¶75 (Mo.App.) The jury can infer from defendant's failure to introduce evidence that its messenger boy was not in the discharge of his duties when he injured plaintiff's wife that such was not the fact.—Phillips v. Western Union Telegraph Co., 184 S. W. 958.

¶75 (Tex.Civ.App.) A party's failure to produce evidence or testimony raises a presumption that it was not favorable to him.—Hazelrigg v. Naranjo, 184 S. W. 316.

¶75 (Tex.Civ.App.) The failure of a party to produce evidence within his control raises the presumption that if produced it would operate against him.—Landon v. Halcomb, 184 S. W. 1098.

¶77(5) (Tex.Civ.App.) Where the defendant master had in his employ at the time of trial servants who witnessed the fatal accident, but failed to produce them, it will be presumed that their evidence was not favorable to the master.—San Antonio & A. P. Ry. Co. v. Blair, 184 S. W. 566.

¶80(1) (Tex.Civ.App.) The laws of a sister state will in the absence of evidence be presumed to be the same as the laws of the forum.—Western Union Telegraph Co. v. Bailey, 184 S. W. 519.

⇒83(1) (Tex.Civ.App.) The presumption is that the officer charged with issuing a permit to a foreign corporation on its filing of an affidavit showing its deposit of \$100,000 with the state treasurer did his duty.—Commonwealth Bonding & Casualty Ins. Co. v. Hill, 184 S. W. 247.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(C) Similar Facts and Transactions.

⇒138 (Tex.Civ.App.) In action on note claimed to have been forged by G., evidence as to G.'s forgery of checks held inadmissible without further evidence to show that it was part of a system or design.—Lockney State Bank v. Bolin, 184 S. W. 553.

⇒142(4) (Tex.Civ.App.) It is improper, in a suit for damages to grass, to allow a witness to testify that the grass "was above an average for Clay county," over the objection that it is improper to describe the grass by comparison with other grass, the quality of which is foreign to any issue in the suit.—Ft. Worth & D. C. Ry. Co. v. Hapgood, 184 S. W. 1075.

In an action for damages to land, it is not error to exclude evidence of the leasing value of adjoining land where it is not proved that the grass on such land is of as good quality as the grass on plaintiff's land.—Id.

(E) Competency.

⇒148 (Tex.Civ.App.) Testimony of a witness that a conversation between buyer and seller, whom he could not positively identify, when the contract was claimed to have been made, was substantially as testified to by the seller, held improperly excluded.—Stafford v. Patterson & Nelson, 184 S. W. 1096.

V. BEST AND SECONDARY EVIDENCE.

⇒158(26) (Tex.Civ.App.) The issuance of the stock of the corporation to its subscriber should be established by the stock itself, which should be produced as the best evidence, and parol evidence as to the issuance of such stock is inadmissible.—Commonwealth Bonding & Casualty Ins. Co. v. Hill, 184 S. W. 247.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

⇒208(2) (Ark.) A petition by a widow and all her children, claiming other property as the homestead, is admissible in an action by a child of full age to set aside a sale of other land as an admission against interest and to contradict testimony.—Russell v. Suddoth, 184 S. W. 842.

(C) By Grantors, Former Owners, or Privies.

⇒236(1) (Tenn.) The statutory right of action for injury from accident or collision on railroad crossing being the right of the deceased, his admissions would be competent as against his widow and administratrix or those succeeding to the right of action.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

(D) By Agents or Other Representatives.

⇒248(1) (Mo.App.) In suit against a county collector of revenue for conversion of a wife's carriage, defendant's testimony that the carriage was never assessed as the property of the wife, but that her husband included it in his assessment list and paid the taxes thereon, was inadmissible.—Strother v. McFarland, 184 S. W. 488.

(E) Proof and Effect.

⇒265(1) (Tex.Civ.App.) There is no rule which prevents a party from denying testimony of admissions alleged to have been made by him.—Lester v. Hutson, 184 S. W. 268.

⇒265(18) (Tex.Civ.App.) Admissions of a party as to a transaction are specially valuable in evidence.—Lester v. Hutson, 184 S. W. 268.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⇒268 (Tenn.) In a statutory action for wrongful killing of plaintiff's husband, his admissions as to his negligence and inattention, made when he was fatally injured and was suffering great pain, were not inadmissible on the ground of his stupified or partially conscious condition.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

⇒269(2) (Ark.) Declarations of defendant's grantor since deceased as to how he expected to dispose of his property at his death, and as to his intention that his wife should have a life estate therein with remainder to his son and grandson, were competent to impeach the validity of his warranty deed to the wife.—Boyd v. Boyd, 184 S. W. 838.

⇒271(1) (Tex.Civ.App.) Where letter from G. concerning note which defendant claimed G. forged was introduced by defendant, his subsequent statements to G. that he never signed the note and knew nothing about it held self-serving and incompetent.—Lockney State Bank v. Bolin, 184 S. W. 553.

In action on note claimed to have been forged, admission of notice from bank as to maturity and testimony that defendant in conversation with cashier denied signing the note held error.—Id.

IX. HEARSAY.

⇒317(1) (Mo.App.) In a wife's suit for conversion of her carriage, testimony of defendant as to the husband's statements not made in the presence of plaintiff held inadmissible as hearsay.—Strother v. McFarland, 184 S. W. 483.

⇒317(2) (Ky.) Evidence of statements by an elector at a school election that she could not read and write are mere hearsay, and furnish no basis for holding her unqualified to vote for trustee.—Combs v. Brewer, 184 S. W. 892.

⇒317(5) (Tex.Civ.App.) In action to restrain the obstruction of an alley, testimony of a plaintiff as to statement of his grantor selling premises that alley would be kept open held not inadmissible as hearsay.—Miles v. Bodenheimer, 184 S. W. 633.

X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

⇒358 (Tex.Civ.App.) In suit by the buyer of lands for false representations of the seller's agent as to the quantity, a map furnished the buyer by the agent held admissible.—Vaden v. Buck, 184 S. W. 318.

(D) Production, Authentication, and Effect.

⇒379 (Tex.Civ.App.) Alleged plat of town site based on survey not made from sufficient data or copied from another plat, the authenticity of which was not shown and the absence of which was not accounted for, held inadmissible.—Joyce v. City of Mt. Vernon, 184 S. W. 626.

Copy of plat not shown to be original or correct plat of town site or not to be producible, held not admissible, except to show that land had been laid off into lots.—Id.

⇒383(7) (Mo.) Under Rev. St. 1909, § 2858, recitals in trustee's deed are prima facie evidence as to compliance with statute, relating to foreclosure of deeds of trust, and so, where not contradicted, are a sufficient showing of compliance.—Hassler v. Mercantile Bank of Louisiana, Mo., 184 S. W. 978.

XL. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

↪397(1) (Ky.) Parol evidence is not admissible to vary or contradict the express terms of a written instrument unless its execution was procured by fraud or mistake.—*Scott v. Spurr*, 184 S. W. 866.

↪397(2) (Tex.Civ.App.) Where a writing is couched in such terms as to be plain and without any uncertainty as to the object or extent of the agreement, it is conclusively presumed that the whole agreement was reduced to writing.—*James v. Doss*, 184 S. W. 623.

↪399 (Tex. Civ. App.) Where, in action against county, defendant pleaded minutes of commissioners' court showing written contract in supplemental petition to which no plea of fraud or mistake was filed, parol evidence that there was no contract *held* inadmissible.—*Mosler Safe Co. v. Atascosa County*, 184 S. W. 324.

↪419(2) (Tex.Civ.App.) In suit by the original vendor of land against the purchaser and the latter's grantee whose deed recited that he bought "subject" to the vendor's lien notes, the testimony of the purchaser that his grantee assumed the debt as part consideration was not inadmissible as varying the deed.—*Ballard v. Fountain Bros.*, 184 S. W. 289.

Oral testimony is admissible to explain or add to the consideration recited in a deed.—*Id.*

(C) Separate or Subsequent Oral Agreement.

↪441(1) (Tex.Civ.App.) The rule that where there is a verbal contract and part of it is reduced to writing, parol evidence may be offered to show that which was not contained in the writing, applies only when it is collateral, and relates to a subject distinct from that to which the written contract applies.—*James v. Doss*, 184 S. W. 623.

(D) Construction or Application of Language of Written Instrument.

↪448 (Tex.Civ.App.) Where language of instrument is ambiguous, intention of parties must be obtained by proof aliunde.—*Corbin v. Booker*, 184 S. W. 696.

↪450(3) (Tex.Civ.App.) Where there is no conflict in the terms of the description of a deed, and it fits one tract of land and no other, there is no "latent ambiguity" admitting extrinsic evidence.—*Diffie v. White*, 184 S. W. 1065.

↪450(4) (Tex.Civ.App.) Under assignment of lease and option to purchase requiring assignor to proceed at once to establish boundaries within three years from April 20, 1910, it cannot be determined whether he must proceed at once or within three-year period.—*Corbin v. Booker*, 184 S. W. 696.

↪450(5) (Ky.) Where ambiguity or uncertainty in a contract for the shipment of live stock exists as to who are the consignees or what the place of destination, oral evidence is admissible to explain it.—*Cincinnati, N. O. & T. P. Ry. Co. v. Luke*, 184 S. W. 1132.

↪450(8) (Tex.Civ.App.) Where a contract for the sale of land contained an equivocal expression, evidence of declaration made by the second agent of the vendor is admissible, where, until he signed the contract, it was not binding, though signed by another agent.—*Zavala Land & Water Co. v. Tolbert*, 184 S. W. 523.

↪452 (Tex.Civ.App.) A "latent ambiguity" arises when a deed expresses more than one method for identifying the lines or corners of a grant, and which do not harmonize when applied to the ground, or when the description is such that it may without contradicting or ig-

noring its terms, be applied to more than one tract of land.—*Diffie v. White*, 184 S. W. 1065.

↪460(2) (Tex.Civ.App.) In an action for compensation due under a broker's contract which prohibited plaintiff from selling lands in the territory of any other agent but did not specify plaintiff's territory, parol evidence as to plaintiff's territory is admissible.—*Denton v. Holbert*, 184 S. W. 251.

↪460(7) (Tex.Civ.App.) In a deed of land described as "420 acres out of the northeast portion of the Robert Hill survey," the uncertainty of description, if any, appeared upon its face, and extraneous evidence was inadmissible to supply what was lacking.—*Diffie v. White*, 184 S. W. 1065.

↪460(11) (Mo.App.) In an action on an unambiguous written order, testimony by defendant that he ordered only one-fourth the amount, over plaintiff's objection and exception to the court's failure to rule on the objection, *held* reversible error.—*Seneca Co. v. Ellison*, 184 S. W. 1177.

↪461(1) (Tex.Civ.App.) Where a written contract for the sale of land provided for drilling of a well and guaranteed water, evidence that vendor's agent just before signing said the well would produce enough water to irrigate the land is admissible.—*Zavala Land & Water Co. v. Tolbert*, 184 S. W. 523.

↪461(3) (Tex.Civ.App.) Parol testimony was inadmissible to show that the subject-matter of a sale of personal property was other than that designated by the contract.—*James v. Doss*, 184 S. W. 623.

In the absence of fraud, accident, or mistake, it is not permissible to prove by parol that other property than that described in a contract for the sale of personal property was intended to be conveyed, and thereby add to or contradict the contract.—*Id.*

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

↪471(1) (Tex.Civ.App.) Testimony that one of the ways in which bankers discovered that checks had been forged was that their customers afterwards would come in and state that they had given no such checks was incompetent.—*Lockney State Bank v. Bolin*, 184 S. W. 553.

↪471(11) (Mo.App.) Testimony of plaintiff, injured on a dark night in stepping from raised place in walk to walkway, that she stepped on a loosened brick, *held* admissible, in view of evidence that the walkway was composed of loose bricks and sand, although she testified from sense of touch.—*Proctor v. City of Poplar Bluff*, 184 S. W. 123.

↪471(24) (Mo.) In an action for injuries to a switchman, the exclusion of testimony by another switchman as to the cause of the stopping of the cars, on the ground that it was a conclusion, *held* error.—*Pipes v. Missouri Pac. Ry. Co.*, 184 S. W. 79.

↪471(25) (Mo.App.) In action on contractor's bond, statements of witnesses as to the completion of the contract in accordance with plans and specifications within their knowledge, without introducing their notes, *held* shorthand statements of facts not objectionable as opinion evidence.—*City of St. Louis v. McCully Const. Co.*, 184 S. W. 939.

↪471(31) (Tex.Civ.App.) Testimony that it was a matter of common knowledge that defendant's agent had no authority save to buy spot cotton, is inadmissible as a conclusion in a suit to recover on a contract to purchase cotton for future delivery.—*Mann v. Bell*, 184 S. W. 320.

↪474(19) (Tex.Civ.App.) Where witness had testified that he did not know market value of cattle, his estimate, that if they had arrived

in good condition they would have been worth more on the market than in the condition they arrived, *held* a mere guess, and inadmissible.—St. Louis, Southwestern Ry. Co. of Texas v. Kerr, 184 S. W. 1058.

—477(2) (Tex.Civ.App.) Question asked non-expert witness as to the apparent health or sickness of the injured person at the time of trial *held* not objectionable.—Yeatts v. St. Louis Southwestern Ry. Co. of Texas, 184 S. W. 636.

—481(3) (Tex.Civ.App.) Testimony as to the time for transportation in action for injuries to peanuts damaged in unventilated car, not based on the witness' knowledge of operation of defendant's trains, is inadmissible.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

(C) Competency of Experts.

—538 (Tex.Civ.App.) In an action for injuries to a shipment of peanuts, claimed confined too long in an unventilated car, testimony that the shipment could be made in a given length of time, if diligently handled, *held* inadmissible.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

—539 (Tex.Civ.App.) Where an injured engineer testified to an experience with engines covering more than 35 years, it is not error to permit him to testify that he did not believe a sand pipe could be displaced with a blow of the foot, since in so testifying he might be regarded as an expert.—Missouri, K. & T. Ry. Co. of Texas v. Pace, 184 S. W. 1051.

—542 (Tex.Civ.App.) Testimony by experienced dealers in peanuts, though not of that locality as to the time shipments would remain uninjured, *held* admissible in action against carrier for injuries.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

XIV. WEIGHT AND SUFFICIENCY.

—588 (Ark.) As between apparently conflicting statements of a witness what he stated without the prompting of a leading question and without suggestion, should have a greater weight.—Boyd v. Boyd, 184 S. W. 838.

—596(1) (Ark.) The issue of fact as to whether the grantor at the time of his execution of a deed and the alleged transfer of personal property had sufficient mental capacity to understand the nature and effect of the transactions, was to be determined by preponderance of evidence.—Boyd v. Boyd, 184 S. W. 838.

EXCEPTIONS.

See Appeal and Error, —273; Pleading, —228.

EXCEPTIONS, BILL OF.

See Appeal and Error, —581, 664; Criminal Law, —1090-1095.

EXCESSIVE DAMAGES.

See Damages, —132, 134.

EXECUTION.

See Attachment; Chattel Mortgages, —144; Courts, —480; Exemptions; Garnishment; Homestead; Injunction, —148; Judicial Sales.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

—90 (Tex.Civ.App.) Execution from the county court of Houston county directing the officer to make return "before said court at the courthouse thereof in Houston within 60 days," etc., was not void for the omission of "county" after "Houston."—Collin County Nat. Bank v. Satterwhite, 184 S. W. 838.

IV. LIEN, LEVY OR EXECUTION, AND CUSTODY OF PROPERTY.

—116 (Ark.) Under Kirby's Dig. §§ 4642-4644, providing that an execution returned not satisfied shall be renewed for 12 months by indorsement thereon, a lien acquired by an officer under a levy of execution was continued by a renewal of the execution.—McCabe v. Lee, 184 S. W. 448.

VI. CLAIMS BY THIRD PERSONS.

—182 (Tex.Civ.App.) A claimant in execution cannot without pleading or proof attack validity of the execution.—Collin County Nat. Bank v. Satterwhite, 184 S. W. 338.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

—216 (Ark.) In view of Const. art. 19, § 5, constable, holding over where no successor had been elected in making execution sale of personal property, *held* at least a de facto officer, so that the sale was not void.—Bank of Almyra v. Laur, 184 S. W. 39.

—220 (Ark.) Execution sale of soda fountain, etc., conducted in front of the door of the house in which it was contained, *held* made in such proximity as to satisfy requirement that sale be made in presence of property.—Bank of Almyra v. Laur, 184 S. W. 39.

—258 (Tex.Civ.App.) A collateral attack on the validity of an execution sale by intervening in trespass to try title could not effect its avoidance for irregularities and defects not apparent on the face of the proceedings, and such right of intervention does not prevent a suit to restrain seizure on writ of sequestration.—Lane v. Kempner, 184 S. W. 1090.

(B) Title and Rights of Purchaser.

—268 (Tex.Civ.App.) A purchaser of property under execution sale took title subject to the incumbrance of vendor's lien notes secured by a valid vendor's lien on record against the property.—Lane v. Kempner, 184 S. W. 1090.

VIII. RETURN.

—333 (Tex.Civ.App.) An execution placed in the hands of an officer is returnable under Vernon's Sayles' Ann. Civ. St. 1914, art. 8730, in 30, 60, or 90 days if so directed, and if no return day is specified, is returnable on first day of next term of court whence it issued.—Peck v. Murphy & Bolans, 184 S. W. 542.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Trusts; Wills, —707; Witnesses, —139-149.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

—13 (Tex.Civ.App.) The appointment of a permanent administratrix without a formal re-opening of the court after adjournment for the day is not void under Vernon's Sayles' Ann. Civ. St. 1914, art. 3218.—Reeves v. Fuqua, 184 S. W. 682.

—29(5) (Ark.) The appointment of an administrator by the probate court is conclusive of the necessity for administration.—Chambers v. Cunningham, 184 S. W. 49.

III. ASSETS, APPRAISAL, AND INVENTORY.

—69 (Tenn.) Under Shannon's Code, § 4039, and section 6027, subd. 4, while county court has not jurisdiction of petition relating to sum omitted from inventory as independent action, it has jurisdiction thereof as suggestion of omission from inventory.—Black v. Black, 184 S. W. 27.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§114 (Ark.) Where notes and a mortgage were executed by a debtor and his wife to the creditor's widow and her son, who assigned them to the creditor's administrator, the maker could not, in the administrator's action to foreclose the mortgage, question his authority to accept an assignment of the notes.—*Chambers v. Cunningham*, 184 S. W. 49.

(B) Real Property and Interests Therein.

§135 (Ark.) Under Act March 18, 1887 (Laws 1887, p. 90), the probate court cannot specifically enforce a contract for the conveyance of a homestead made only by deceased in which the wife did not join.—*Oliver v. Mouth*, 184 S. W. 848.

Under Kirby's Dig. §§ 200-214, a parol contract to convey land made by decedent cannot be specifically enforced by the probate court.—*Id.*

(C) Personal Property.

§158 (Ark.) An administrator who sells chattels of the estate merely reserving title as security does so at his own peril, and is responsible for resulting loss; the statute (Kirby's Dig. § 85) directing that he take notes with good security for the price.—*Pierce v. Whipple*, 184 S. W. 837.

§167 (Ark.) The purchaser of chattels from an administrator who accepts delivery or possession on condition that he shall acquire no title until payment of the price is estopped to repudiate the conditions upon which the delivery is made, and the fact that only a security of another kind is authorized by statute does not benefit the purchaser or his vendee.—*Pierce v. Whipple*, 184 S. W. 837.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§182 (Tex. Civ. App.) *Vernon's Sayles' Ann. Civ. St.* 1914, art. 3420, giving creditors having liens duly signed and acknowledged by the husband and wife a lien on property of the estate superior to the right of the wife to an allowance, does not apply when the estate is insolvent.—*Newnom v. Hedeman*, 184 S. W. 298.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

§234 (Tex. Civ. App.) An allowance of claim on approval by a permanent administratrix is valid, though it was previously allowed on approval by the same person acting under a void appointment as temporary administratrix.—*Reeves v. Fuqua*, 184 S. W. 682.

A record held to show allowance of claims during a valid permanent administration following a void temporary administration.—*Id.*

VII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(B) Application and Order.

§348 (Ky.) The failure of the commissioner to offer part of the land of a decedent for sale first and of the court to confirm his report of sale do not justify vacating the order for sale.—*Ramey v. Francis, Day & Co.*, 184 S. W. 380.

Parties before the court when the order was entered for the sale of decedent's land to pay debts cannot vacate the order for defects in the petition or proof.—*Id.*

Under Ky. Stat. § 3760, an order for the sale of a decedent's land to pay debts cannot be set aside as to two defendants not actually served,

but shown by the return to have been served.—*Id.*

A purchaser of land from one who bought it at a commissioner's sale of decedent's lands to pay debts is a necessary party to a motion to vacate the order for sale.—*Id.*

XI. ACCOUNTING AND SETTLEMENT.

(E) Stating, Settling, Opening, and Review.

§504(1) (Ark.) Under Kirby's Dig. § 140, exceptions to account of administrator filed within time specified, unless withdrawn by the exceptors, continued until the account was finally passed on.—*Himes v. Sharp*, 184 S. W. 431.

§510(1) (Ark.) Exceptors to account of administratrix, having perfected an appeal to the circuit court and filed their exceptions in the probate court as required within the time provided by the statute, could renew such exceptions or amend the exceptions already filed in the circuit court.—*Himes v. Sharp*, 184 S. W. 431.

§510(6) (Ark.) Record entries on hearing of exceptions in probate court to the account of an administratrix, considered together, held a sufficient compliance with the law to perfect the exceptors' appeal and entitle them to have it heard in the circuit court.—*Himes v. Sharp*, 184 S. W. 431.

EXEMPTIONS.

See Homestead.

I. NATURE AND EXTENT.

(A) Nature, Creation, Duration, and Effect in General.

§3 (Tenn.) Legislature may exempt the property of a fraternal beneficiary association from the claims of creditors of its policy holders or beneficiaries on the ground of public policy.—*Hamilton Nat. Bank v. Amster*, 184 S. W. 5.

(D) Liabilities Enforceable Against Exempt Property.

§76 (Ark.) Judgment for plaintiff for costs in suit to foreclose a lien upon realty held a judgment for a debt on contract within Kirby's Dig. § 3906, so that defendant by filing his schedule of exempt property might obtain a supersedeas.—*Edwards v. Thayer*, 184 S. W. 64.

A fee bill under Kirby's Dig. § 3528, has the force of an execution within section 3906, exempting certain articles.—*Id.*

EXPERT TESTIMONY.

See Evidence, §538-542.

EXTRINSIC EVIDENCE.

See Evidence, §397-461.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FALSE PRETENSES.

See Indictment and Information, §125.

§11 (Ark.) The securing by false pretenses by a mortgagor from his mortgagee of the release of his unrecorded chattel mortgage constitutes an offense under Kirby's Dig. § 1689, the mortgage being effective between the parties.—*Judkins v. State*, 184 S. W. 407.

The securing by false pretenses by a mortgagor from the mortgagee of the release of the mortgage constitutes an offense under Kirby's Dig. § 1689, although the debt secured by the surrendered mortgage is usurious.—*Id.*

⚡32 (Ark.) An indictment, charging defendant with having obtained by false pretenses the surrender of his note and chattel mortgage, enumerating the property covered by the mortgage and stating its value, is not defective as failing to allege the value of the right surrendered.—*Judkins v. State*, 184 S. W. 407.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Limitation of Actions, ⚡127.

FEDERAL LAWS.

See Statutes, ⚡279.

FEES.

See Attorney and Client, ⚡148, 150.

FELLOW SERVANTS.

See Master and Servant, ⚡185.

FELONIES.

See Jury, ⚡29.

FENCES.

See Railroads, ⚡361.

FILING.

See Motions, ⚡56.

FINDINGS.

See Appeal and Error, ⚡931, 1006-1022; Trial, ⚡348-362.

FIREMEN.

See Municipal Corporations, ⚡200.

FIRES.

See Arson; Railroads, ⚡461, 482.

FISH.

See Indictment and Information, ⚡110.

⚡7(2) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3082, although the original grant from the Republic of Texas, confirmed by the Legislature of the state of Texas, did not give the exclusive right, grantee has the exclusive right to take oysters within the limits of his grant.—*North American Dredging Co. v. Jennings*, 184 S. W. 287.

⚡8 (Tex.Cr.App.) Under the statute prohibiting the catching of fish, except by hook and line, etc., and prohibiting certain nets, and in the absence of any such limitation in the statute or in any act of Congress, the jurisdiction of the state extended to the catching of fish in the Red river, the boundary between Texas and Oklahoma.—*Carroll v. State*, 184 S. W. 508.

FORBEARANCE.

See Principal and Agent, ⚡111.

FORCIBLE ENTRY AND DETAINER.

See Judgment, ⚡747.

I. CIVIL LIABILITY.

⚡6(2) (Mo.App.) Under *Rev. St. 1909*, § 7677, the merits of the plaintiff's title cannot be inquired into in an action of forcible entry and detainer, and admission of evidence thereon is error unless pertinent to the issue of plaintiff's possession.—*Underwood v. City of Caruthersville*, 184 S. W. 486.

⚡35 (Mo.App.) Instruction in action of forcible entry and detainer held erroneous for predicated recovery on insufficient possession by

plaintiff.—*Underwood v. City of Caruthersville*, 184 S. W. 486.

An instruction which purported to cover the entire case and directed verdict for plaintiff, without requiring a finding of the essential elements of a cause of action for forcible entry and detainer, was erroneous.—*Id.*

FORECLOSURE.

See Chattel Mortgages, ⚡274; Mechanics' Liens, ⚡280; Mortgages, ⚡353-546.

FOREIGN CORPORATIONS.

See Corporations, ⚡636-661; Railroads, ⚡33.

FOREIGN JUDGMENTS.

See Judgment, ⚡818, 942.

FOREIGN LAWS.

See Statutes, ⚡289.

FORFEITURES.

See Insurance, ⚡332½-335, 755.

FORGERY.

See Criminal Law, ⚡372, 784.

⚡7(2) (Tex.Cr.App.) Under *Pen. Code 1911*, arts. 924-926, 929, 931, 933, *Rev. St. 1911*, arts. 2750-2761, Act March 6, 1911, the county superintendent who drew a check for school funds and then wrongfully signed the name of the payee, held guilty of forgery.—*Carrell v. State*, 184 S. W. 217.

⚡12(4) (Tex.Cr.App.) Under *Pen. Code 1911*, arts. 924-926, 929, 931, 933, the county superintendent who drew a check for school funds, which check was invalid and then wrongfully signed the name of the payee, held guilty of forgery.—*Carrell v. State*, 184 S. W. 217.

⚡29(3) (Tex.Cr.App.) An indictment charging accused, as county superintendent of public schools, drew a check and forged the name of the payee is insufficient, in the absence of an innuendo showing that in drawing such check he was acting in his official capacity as county superintendent of public instruction.—*Carrell v. State*, 184 S. W. 217.

⚡29(4) (Tex.Cr.App.) An indictment charging that the defendant knowingly passed a check against an available school fund with a forged indorsement of the payee's name, which did not show that the check was legally drawn, is insufficient.—*Carrell v. State*, 184 S. W. 190.

FORMER JEOPARDY.

See Criminal Law, ⚡177.

FRANCHISES.

See Corporations, ⚡31.

FRAUD.

See Arbitration and Award, ⚡64; Bills and Notes, ⚡520; Building and Loan Associations, ⚡26; Corporations, ⚡80; Damages, ⚡62, 210; False Pretenses; Fraudulent Conveyances; Judgment, ⚡443; Limitation of Actions, ⚡37, 100; Principal and Surety, ⚡39; Reformation of Instruments, ⚡20; Sales, ⚡38.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

⚡13(2) (Tex.Civ.App.) That defendant's agent in effecting a sale of land honestly believed a well drilled would produce sufficient water to irrigate the land will not prevent plaintiff from recovering damages, the representation being untrue.—*Zavala Land & Water Co. v. Tolbert*, 184 S. W. 523.

⇒20 (Tex.Civ.App.) Plaintiff charged with knowledge of the falsity of the statements of the agent of defendant loan society before she acted upon them in the making of a loan contract, *held* to have no action for damages against the society for the agent's alleged fraud.—National Equitable Soc. of Belton v. Camp, 184 S. W. 589.

⇒22(1) (Mo.App.) Defendant, knowing that in making a loan upon a security by trust deeds plaintiff relied upon his representations and did not investigate the value of the security, could not claim that plaintiff's neglect to investigate was the proximate cause of his loss.—Kennish v. Safford, 184 S. W. 923.

II. ACTIONS.

(A) Rights of Action and Defenses.

⇒35 (Mo.App.) The buyer of a motion picture theater whose vendor was guilty of fraud did not waive the fraud by leasing the outfit to a third person.—Harmon v. Dickerson, 184 S. W. 139.

(B) Parties and Pleading.

⇒49 (Tex.Civ.App.) In suit against loan society if treated as one for damages for deceit of its agent inducing plaintiff to enter into a loan contract, plaintiff *held* not entitled to recover, where he did not allege and prove facts enabling the court to measure his damages.—National Equitable Soc. of Belton v. Carpenter, 184 S. W. 585.

(C) Evidence.

⇒50 (Tex.Civ.App.) In a suit to recover the sum paid to the defendant loan society under an agreement for a loan, plaintiff had the burden of proving that he was entitled to the relief sought.—National Equitable Soc. of Belton v. Dunnington, 184 S. W. 590.

⇒58(1) (Mo.App.) The difficulty of proving fraud does not dispense with the necessity of proof, and where all the evidentiary facts, when properly pieced together, enable the court to perceive the fraud, the showing is sufficient.—Kennish v. Safford, 184 S. W. 923.

⇒58(1) (Tex.Civ.App.) In a suit to recover the sum paid to the defendant loan society under an agreement for a future loan as damages from the fraudulent representations of its agent, evidence *held* insufficient to sustain a judgment for the plaintiff.—National Equitable Soc. of Belton v. Dunnington, 184 S. W. 590.

⇒58(4) (Tex.Civ.App.) In an action for damages for misrepresentations in effecting a sale of land, evidence *held* to warrant a finding that the purchaser did not rely on his independent investigations, but on the representations.—Zavala Land & Water Co. v. Tolbert, 184 S. W. 523.

(D) Damages.

⇒59(1) (Mo.App.) The buyer of a motion picture theater under misrepresentations that the seller had the right to assign his lease and as to the daily receipts of the show, could recover the amount paid in cash and on his notes, with legal interest from payment.—Harmon v. Dickerson, 184 S. W. 139.

⇒60 (Mo.App.) The buyer of a motion picture theater, induced thereto by the misrepresentations of the seller as to his right to assign the lease and as to the receipts of the show, could recover the benefit of his bargain as an element of damages, in addition to the price paid, unless the loss of business arose from the buyer's lack of skill, experience, or industry.—Harmon v. Dickerson, 184 S. W. 139.

(E) Trial, Judgment, and Review.

⇒64(1) (Tex.Civ.App.) In a suit for fraud and false representations, where there was ample evidence to sustain plaintiff's allegations thereof, and to show that he suffered damage, the is-

sues were for the jury under proper instructions.—Vaden v. Buck, 184 S. W. 818.

⇒65(1) (Mo.App.) In an action for fraud committed by the seller of a motion picture theater, instruction on damages *held* erroneous as fixing plaintiff's success with the show as the only criterion for judging what the receipts should have been under defendant's representations.—Harmon v. Dickerson, 184 S. W. 139.

⇒65(1) (Mo.App.) In action for fraudulent representations as to value of trust deeds offered as collateral security for loan by plaintiff, instruction, permitting plaintiff to recover if defendant did not join the conspiracy at first, *held* not objectionable, as broadening the issues tendered.—Kennish v. Safford, 184 S. W. 923.

⇒66 (Tex.Civ.App.) In an action for damages for misrepresentations in effecting a sale of land, finding by the jury as to the actual value of the land *held* warranted under the evidence, though not in accordance with the exact estimates of the parties.—Zavala Land & Water Co. v. Tolbert, 184 S. W. 523.

FRAUDS, STATUTE OF.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⇒60(1) (Tex.Civ.App.) In action to enjoin obstruction of alley or way, testimony of plaintiff as to grantor's statement that he wanted the alley kept open *held* not inadmissible as seeking to establish an easement by parol.—Miles v. Bodenheimer, 184 S. W. 633.

⇒72(2) (Ark.) A parol sale of growing crops is valid.—Stuttgart Rice Mill Co. v. Reinach, 184 S. W. 886.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⇒118(4) (Tex.Civ.App.) Under the statute of frauds, Rev. St. art. 3905, agreement for sale of realty need not be contained in one instrument, but may take the form of telegrams, if, read as one, they present a concluded contract.—Longinotti v. McShane, 184 S. W. 598.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(C) Property and Rights Transferred.

⇒47 (Tex.Civ.App.) A sale by one formerly in the jewelry business who at the time had withdrawn therefrom, and who had mortgaged the goods and segregated them from his stock in trade, was not a sale in the "usual course of trade" within the Bulk Sales Act.—Krower v. Martin, 184 S. W. 511.

Where goods, having been segregated from the main stock, are mortgaged and possession delivered to the mortgagees, the Bulk Sales Law does not apply.—Id.

The Bulk Sales Law does not apply to a sale of goods segregated from a stock in trade by the owner who was formerly a merchant, but who at the time of a sale was a farmer.—Id.

(E) Consideration.

⇒95(5) (Tex.Civ.App.) Subsequent creditors cannot attack a gift of live stock to the wife on the ground that it was only in pursuance of an antecedent agreement, which was invalid, where it was actually a gift of things in esse.—Amend v. Jahns, 184 S. W. 729.

(F) Confidential Relations of Parties.

⇒104(5) (Ark.) A wife whose claim to personal property under a bill of sale from her husband was not in good faith, or who permitted him to hold the property out to creditors as his own, could not claim it as against such creditors

who might enforce their claims by execution.—*Bank of Almyra v. Laur*, 184 S. W. 89.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

—182(5) (Tex.Civ.App.) Purchaser of stock of merchandise not complying with Bulk Sales Law held constructive trustee for creditors to extent of merchandise purchased.—*Barcus v. Parlin-Orendorf Implement Co.*, 184 S. W. 640.

(D) Bona Fide Purchasers from Grantee.

—198 (Ark.) Although prior conveyances of property may have been made to defraud creditors, the defendant, having no knowledge of, and being in no way connected therewith, and having no knowledge that his grantor was indebted to any one, would be protected as an innocent purchaser for value.—*Acker v. Devore*, 184 S. W. 852.

—199 (Ark.) Defendant's title under a deed, recorded after a sheriff's deed not directly in line of his title, and therefore not constructive notice to him, was superior to that of the grantee under the sheriff's deed.—*Acker v. Devore*, 184 S. W. 852.

Mere constructive notice of a sheriff's deed and a quitclaim deed by the grantor thereunder is insufficient to put a subsequent grantee on notice of, or make him in privity with, conveyances made by the former owners to defraud creditors.—Id.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(B) Remedies on Ground of Nullity of Transfer.

—229 (Tex.Civ.App.) The purchasers from one who sells without compliance with the Bulk Sales Law are liable in garnishment to his creditors for the goods or their proceeds if resold.—*Mayfield Co. v. Harlan & Harlan*, 184 S. W. 813.

(E) Parties and Process.

—255(1) (Tex.Civ.App.) In creditor's suit on theory that note was delivered in trust for payees' creditors, payees who had transferred the note, held necessary parties.—*Barcus v. Parlin-Orendorf Implement Co.*, 184 S. W. 640.

(K) Disposition of Property or Proceeds.

—318 (Tex.Civ.App.) S. selling in violation of the Bulk Sales Law to M., and M. reselling to N., and taking his note, S.'s creditors cannot subject to their debts both the note and the goods.—*Mayfield Co. v. Harlan & Harlan*, 184 S. W. 813.

—322 (Tex.Civ.App.) One who in making a purchase, void because in violation of Bulk Sales Law, as consideration releases the seller's debt to him, cannot revive it, so as to share with the seller's other creditors.—*Mayfield Co. v. Harlan & Harlan*, 184 S. W. 813.

FUNDAMENTAL ERROR.

See Judgment, —256.

FUTURE ADVANCES.

See Chattel Mortgages, —22.

GAME.

See Fish.

—7 (Ark.) Kirby's Dig. § 3618, as amended by Laws 1906, p. 126, prohibits the sale of wild ducks.—*Crabtree v. State*, 184 S. W. 430.

GARNISHMENT.

See Attachment; Execution; Fraudulent Conveyances, —229.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

—38 (Ark.) A debt evidenced by a negotiable certificate of deposit is not subject to garnishment.—*Union State Bank of Shawnee, Okl., v. First Nat. Bank of Huntsville, Ark.*, 184 S. W. 411.

III. PROCEEDINGS TO PROCURE.

—81(1) (Ark.) Debt merged in a judgment in one state is not subject to garnishment in another state.—*Detroit Fire & Marine Ins. Co. v. Stewart*, 184 S. W. 438.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

—93 (Tex.Civ.App.) Under Rev. St. 1911, arts. 275, 276, 284, 287, writ issued to garnishee held faulty and calculated to mislead the garnishee.—*Jones Hardware & Furniture Co. v. Gunter*, 184 S. W. 842.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

—164 (Mo.App.) In garnishment proceedings by divorced wife of city salesman of garnishee, evidence held sufficient to justify finding that the garnishee conspired to defeat the wife's rights by employing the salesman through an arrangement to pay salary in advance.—*Tuemler v. St. Louis Coffee & Spice Mills*, 184 S. W. 1165, 1166.

—172 (Ark.) Instruction that the jury might find against the garnishee in the amount of his indebtedness to defendant not exceeding the amount of plaintiff's recovery held not erroneous, as permitting a recovery against garnishee for more than he owed.—*Weatherly v. Stane*, 184 S. W. 41.

—178 (Tex.Civ.App.) A garnishee having appeared by answer, which was stricken, no commission was required to take his answer.—*Jones Hardware & Furniture Co. v. Gunter*, 184 S. W. 842.

Under Rev. St. 1911, arts. 281, 292, garnishee corporation which without willful neglect and through oversight failed to answer writ held entitled to have default judgment set aside, with permission to answer.—Id.

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

—235(1) (Ark.) Judgment in garnishment of D. as debtor of S. individually, is not res judicata in an action by S. as trustee, against D., the issues being different.—*Detroit Fire & Marine Ins. Co. v. Stewart*, 184 S. W. 438.

XI. WRONGFUL GARNISHMENT.

—250 (Tex.Civ.App.) Damages for wrongful garnishment do not include an amount lost through inability to ship cotton seed, whereby the garnishment defendant would have realized profits.—*Stafford v. Patterson & Nelson*, 184 S. W. 1095.

GIFTS.

See Husband and Wife, —49½.

1. INTER VIVOS.

—25 (Mo.) A parol gift of land does not entitle the donee thereto unless he took possession under the gift.—*Kille v. Gooch*, 184 S. W. 1158.

GOOD FAITH.

See Bills and Notes, —497, 525; Fraudulent Conveyances, —198.

GRAND JURY.

See Indictment and Information.

—10 (Ark.) The entry upon the record of the court, instead of on the judge's docket, of an

order directing the sheriff to summons a special grand jury to investigate an offense committed or discovered after discharge of the grand jury, was a substantial compliance with the statute.—*Breysacher v. State*, 184 S. W. 493.

Order directing sheriff to summons special grand jury *held* valid, though designated as a *scire facias* instead of a *venire facias*.—*Id.*

That an order for a special grand jury was directed to the clerk instead of the sheriff *held* not to invalidate an indictment found by the grand jury which was properly summoned.—*Id.*

GRANTS.

See Public Lands.

GUARANTY.

See Principal and Surety.

II. CONSTRUCTION AND OPERATION.

§38(2) (Tex.Civ.App.) A written guaranty of payment for merchandise limited in amount *held* a continuing one which rendered the guarantors liable, though the principal had paid more than the amount limited.—*Woelfel v. Rotan Grocery Co.*, 184 S. W. 803.

The liability under a guaranty will be construed as continuing when it is evident the object was to give a standing credit to the principal debtor to be used from time to time.—*Id.*

III. DISCHARGE OF GUARANTOR.

§61 (Tex.Civ.App.) One who signed a written guaranty expressly authorizing the extension of time for payment is not released by the taking of additional security as a consideration for such extension.—*Woelfel v. Rotan Grocery Co.*, 184 S. W. 803.

GUARDIAN AND WARD.

See Homestead, §81.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§13(4) (Mo.App.) In a proceeding to have a guardian appointed for two minors under Rev. St. 1909, § 406, providing for guardianship, evidence that their father and his present wife had shown good character since their marriage and were taking good care of the minors *held* to support a verdict that the father was a fit and competent person to act as guardian.—*Perry v. Reed*, 184 S. W. 902.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§81 (Tex.Civ.App.) In the absence of contrary proof, every fact necessary to support the authority of the county court to make an order of sale, directing a guardian to sell the ward's land, and to confirm the sale, must be presumed.—*Finley v. Wakefield*, 184 S. W. 755.

§98 (Tex.Civ.App.) Payment, by the buyers of lands of minors from their guardian, in cash instead of part in cash and part by note, *held* a consummation of the sale as reported to the court and confirmed by it, giving the purchasers title.—*Finley v. Wakefield*, 184 S. W. 755.

§108 (Tex.Civ.App.) Where a county court ordered the sale by a guardian of her wards' lands, such sale, and its confirmation, passed title, subject only to the payment of the purchase money, leaving no title in a ward or her husband.—*Finley v. Wakefield*, 184 S. W. 755.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

§22(2) (Mo.App.) Where a special judge committed petitioner without authority, the validity

of the detention may be determined on habeas corpus.—*Ex parte Fish*, 184 S. W. 479.

HARMLESS ERROR.

See Appeal and Error, §1029-1072; Criminal Law, §1168½-1173; Homicide, §340, 341; New Trial, §27.

HEALTH.

See Injunction, §74; Schools and School Districts, §158.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

§6 (Ky.) Under Ky. St. §§ 2049, 2055, *held*, that county boards of health may exercise the authority conferred upon them without the advice or consent of the state board.—*Board of Trustees of Highland Park Graded Common School Dist. No. 46 v. McMurtry*, 184 S. W. 390.

The discretion lodged in boards of health in the exercise of their powers will not be interfered with, unless plainly abused.—*Id.*

II. REGULATIONS AND OFFENSES.

§23 (Ky.) What shall be done to prevent epidemic and how it shall be done *held* within the discretion of boards of health, though they cannot act unreasonably or arbitrarily.—*Board of Trustees of Highland Park Graded Common School Dist. No. 46 v. McMurtry*, 184 S. W. 390.

HEARING.

See Appeal and Error, §818.

HEARSAY EVIDENCE.

See Criminal Law, §419, 420; Evidence, §317.

HEAT.

See Carriers, §290, 320, 330.

HEIRS.

See Descent and Distribution; Wills, §506.

HIGHWAYS.

See Bridges; Counties, §98, 151; Mechanics' Liens, §34; Municipal Corporations, §647, 648, 759-821; Railroads, §253.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§125 (Ky.) Ky. St. § 4308, authorizing a levy of 30 cents for highway purposes *held* invalid in so far as it authorizes a levy in excess of the 20 cents provided for by Const. § 157a.—*Cleary v. Pieper*, 184 S. W. 4.

HOMESTEAD.

See Exemptions.

I. NATURE, ACQUISITION, AND EXTENT.

(C) Acquisition and Establishment.

§56 (Tex.) After the wife's insanity, the husband may abandon the homestead and in good faith acquire a new one.—*Pierce v. Gibson*, 184 S. W. 502.

(D) Property Constituting Homestead.

§81 (Tex.Civ.App.) When a guardian's sale of land to husband and wife was confirmed by the county court, the title vested substantially in the purchasers, who, before delivery of deeds by the guardian and a ward, acquired such an interest that they could impress a homestead upon it.—*Finley v. Wakefield*, 184 S. W. 755.

(C) Liabilities Enforceable Against Homestead.

§96 (Tex.Civ.App.) A purchase-money note, stipulating for the payment of attorney's fees, creates a lien upon the land for the fees, which cannot be defeated by the subsequent establishment of a homestead.—Finley v. Wakefield, 184 S. W. 755.

Under the Constitution, protecting the homestead, except for the purchase money, etc., original purchase-money note, and the note renewing it, which stipulated for attorney's fees, the latter being executed subsequently to the fixing of the buyers' homestead on the land, did not create a charge for the fees thereon.—Id.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§141(1) (Tex.Civ.App.) Under Rev. St. 1911, art. 3422, express liens on homestead give way to rights of widow, unless within exceptions in section.—Investors' Mortgage Security Co. v. Newton, 184 S. W. 291.

That express lien was created on land before marriage of owner does not affect priority of claim of widow of insolvent to homestead.—Id.

§142(1) (Ark.) A minor child, inheriting a homestead, has two separate and distinct estates in the homestead existing at the same time and incapable of merger, namely, homestead and inheritance, one of which may be alienated and the other reserved.—Shapard v. Mixon, 184 S. W. 399.

Inheritors of a homestead from their mother, who repudiated their father's lease and sued the lessee for rents, could recover only the net rental value of the premises.—Id.

The rental value of homestead lands inherited from their mother by children who repudiated their father's lease thereof and sued the lessee for rents was not necessarily to be determined by ascertaining the gross amount of the rents received by the father's lessee, but the amount so received afforded some evidence of the rental value of the land, though not conclusive.—Id.

In an action by children, who inherited from their mother a homestead and repudiated their father's lease thereof, to recover rents from the father's lessee, the burden was on plaintiffs to offer proof of the net rents received by the lessee, after deducting taxes and the reasonable cost of necessary repairs, or proof of the rental value regardless of the amounts actually received.—Id.

Inheritors of a homestead from their mother, who repudiated their father's lease and sued the lessee for rents, could not recover the full rents received by him where he had made necessary expenditures for repairs and taxes.—Id.

In an action by inheritors from their mother of a homestead who repudiated their father's lease and sued the lessee for rents, evidence held sufficient to warrant the chancellor's finding that the true rental value of the land was \$106.—Id.

§142(1) (Tex.Civ.App.) Under Rev. St. 1911, art. 3422, express liens on homestead give way to rights of children, unless within exceptions in section.—Investors' Mortgage Security Co. v. Newton, 184 S. W. 291.

That express lien was created on land before marriage of owner does not affect priority of claim of children of insolvent to homestead.—Id.

§143 (Ark.) Under Kirby's Dig. § 3902, a widow cannot impress any lands with homestead character or abandon the homestead as against the rights of the minor children.—Russell v. Suddoth, 184 S. W. 842.

§146 (Ark.) A girl over 18 can convey her interest in the homestead derived from a deceased parent.—Shapard v. Mixon, 184 S. W. 399.

Under the Constitution, providing that minor children shall enjoy homestead premises wheth-

er in possession or not, conveyance of their separate interests by two of three minors deriving a homestead from their deceased mother held not an abandonment giving the other a right of action against the father's lessee for rents.—Id.

§153 (Ark.) Under Kirby's Dig. § 734, touching passing to the grantee of a grantor's after-acquired title, where a husband leased his deceased wife's homestead from a definite date to another, the decree, in his children's suit to recover rents, extending the original lease to make it begin on the date of the expiration of the homestead right of the youngest child, held improper.—Shapard v. Mixon, 184 S. W. 399.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§214 (Ark.) The burden is on plaintiffs to prove that land which they seek to recover from the purchaser at the administrator's sale was in fact the homestead of their father.—Russell v. Suddoth, 184 S. W. 842.

In an action by children to recover the homestead of their father, evidence that the widow had claimed and was allowed a different homestead is admissible.—Id.

§216 (Ark.) An instruction held to mean that the widow could claim the homestead, on behalf of the children and have it set aside, not that she could select it for them out of the decedent's lands.—Russell v. Suddoth, 184 S. W. 842.

HOMICIDE.

See Criminal Law, §507, 770, 775; Libel and Slander, §7.

III. MANSLAUGHTER.

§33 (Ky.) To constitute the crime of voluntary manslaughter, it must appear that accused intentionally killed another in sudden heat and passion, or in a sudden affray, without previous malice.—Curtis v. Commonwealth, 184 S. W. 1105.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§115 (Ky.) To justify a homicide on grounds of self-defense, it must appear that when accused committed the homicide there was an impending danger or there appeared to him, in the exercise of a reasonable judgment, to be an impending danger.—Curtis v. Commonwealth, 184 S. W. 1105.

§118(2) (Tex.Cr.App.) Where one armed with a shotgun is pursued by another who he knows is unarmed, it is his duty to retreat or to use any other means to prevent an injury to himself, rather than to kill the pursuer.—Lake v. State, 184 S. W. 213.

VI. INDICTMENT AND INFORMATION.

§142(5) (Ark.) Evidence in homicide held sufficient to warrant a finding by the jury that defendant and deceased were as well known by the name "Wood," used in the indictment, as by their true name, "Woods," preventing a fatal variance.—Woods v. State, 184 S. W. 409.

VII. EVIDENCE.**(B) Admissibility in General.**

§156(1) (Ark.) In a prosecution for murder, testimony calculated to cause the jury to believe that defendant assaulted decedent with malice, there being nothing to show that decedent was one of the parties whom defendant sought to rebuke and chastise for wronging him, was inadmissible.—Breysacher v. State, 184 S. W. 433.

(E) Weight and Sufficiency.

§244(1) (Tex.Cr.App.) Evidence held insufficient to raise the issue of provoking the dis-

culty in a prosecution for murder.—*Lake v. State*, 184 S. W. 213.

⚡250 (Tex.Cr.App.) Evidence in a trial for homicide, *held* sufficient to sustain a conviction of murder.—*Burkhalter v. State*, 184 S. W. 221.

⚡253(1) (Ark.) Evidence in homicide *held* sufficient to warrant a conviction of murder in the first degree.—*Woods v. State*, 184 S. W. 409.

VIII. TRIAL.

(B) Questions for Jury.

⚡281 (Tex.Cr.App.) Evidence in a prosecution for murder *held* to justify submission of the law of principals where defendant stood by and knew the unlawful intent, but failed to prevent the commission of the crime.—*Lake v. State*, 184 S. W. 213.

Evidence in a prosecution for murder *held* insufficient to warrant submission of the issues whether defendant kept watch so as to prevent interruption of the one committing the offense or whether he procured arms to assist in the commission of the offense so as to make him a principal under Pen. Code 1911, arts. 75, 76.—*Id.*

(C) Instructions.

⚡293 (Ky.) An instruction that if the shooting was accidental, accused should be acquitted *held* not warranted by the evidence and properly refused.—*Curtis v. Commonwealth*, 184 S. W. 1105.

⚡300(13) (Tenn.) A charge as to self-defense after mutual combat *held* erroneous as denying the right to such defense to one entering the combat without intent to do great bodily harm.—*Gill v. State*, 184 S. W. 864.

⚡309(3) (Ky.) Where there was no evidence of any quarrel between defendant and deceased, or that defendant was concerned in a quarrel between deceased and another, an instruction on manslaughter is not necessary.—*Nicoll v. Commonwealth*, 184 S. W. 386.

X. APPEAL AND ERROR.

⚡340(1) (Tenn.) The giving of a charge denying self-defense against the use of deadly weapon in mutual combat *held* prejudicial under the evidence.—*Gill v. State*, 184 S. W. 864.

⚡340(2) (Ky.) Where there was no evidence of self-defense, a verbal inaccuracy, in an instruction on self-defense, which required accused to be guided by sound judgment instead of a reasonable judgment, was harmless.—*Curtis v. Commonwealth*, 184 S. W. 1105.

⚡340(4) (Ky.) A slight verbal inaccuracy in an instruction on murder is harmless, where accused was convicted only of voluntary manslaughter.—*Curtis v. Commonwealth*, 184 S. W. 1105.

That an instruction on voluntary manslaughter did not recite that the killing might be done in sudden affray is not prejudicial to accused, who was convicted of that offense.—*Id.*

⚡341 (Ky.) Failure of the court to define "malice" and "aforethought" is not prejudicial to defendant.—*Nicoll v. Commonwealth*, 184 S. W. 386.

⚡348 (Ky.) Where there was only a scintilla of evidence that the killing was unintentional, error in an instruction on voluntary manslaughter, which did not require jury to find killing was intentional, *held* harmless under Or. Code Prac. § 340, in view of instruction on involuntary manslaughter.—*Curtis v. Commonwealth*, 184 S. W. 1105.

HORSES.

See Animals.

HOUSEBREAKING.

See Burglary.

HUMANITARIAN DOCTRINE.

See Railroads, ⚡390.

HUSBAND AND WIFE.

See Abduction, ⚡1; Adultery; Death, ⚡88; Divorce; Dower; Evidence, ⚡248; Executors and Administrators, ⚡182; Fraudulent Conveyances, ⚡95; Homestead, ⚡141-153; Limitation of Actions, ⚡73; Writings, ⚡52-64.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⚡10(1) (Mo.App.) The property of a wife in personality is not affected by her husband's assertion of ownership therein without her assent.—*Strother v. McFarland*, 184 S. W. 483.

⚡25(6) (Ark.) In suit by an alleged lender of money secured by mortgage against the borrowers, in which the creditors of the alleged lender's husband intervened, evidence *held* sufficient to show that it was plaintiff's money, not her husband's, which was lent.—*Page v. Cockrum*, 184 S. W. 405.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

⚡49½(8) (Tex.Civ.App.) While mere branding cattle in the wife's name is insufficient to prove gift thereof to her it is evidence which may be considered with other facts to show a gift of the increase, as well as its proceeds.—*Amend v. Jahns*, 184 S. W. 729.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

⚡121 (Mo.) A payment for property by a check signed by the husband in blank on a deposit in his own name of his wife's money is a payment by the wife.—*Bajohr v. Bajohr*, 184 S. W. 76.

⚡121 (Tex.Civ.App.) Where the wife's separate funds were used in making a cash payment for land, the husband, giving his note for deferred payments, taking the land in the wife's name under her agreement to pay the note, the equitable title vested in her as against the subsequent creditors of the husband.—*Amend v. Jahns*, 184 S. W. 729.

The mere fact that the husband mingled the wife's separate money with his would not defeat her title to land purchased therewith.—*Id.*

The mere fact that land purchased with proceeds of the wife's separate personal property was school land, and the purchase money on a deferred payment was due that fund, would not affect the wife's right to hold it in severalty if it was paid for from her funds.—*Id.*

⚡131(4) (Tex.Civ.App.) Where the wife, to save lands from execution levied by the husband's creditors, claimed them as her separate lands, the burden was upon her to show that the land was paid for from her separate funds, to avoid the presumption that the land was community property.—*Amend v. Jahns*, 184 S. W. 729.

⚡131(7) (Mo.App.) Where a husband bought furniture and in consideration of an unpaid balance by written bill of sale sold the furniture to the seller, no delivery being made, the wife, then living apart from the husband, being in possession, the presumption raised by her possession was that title was in her.—*McKenzie Carpet Co. v. Leffler*, 184 S. W. 905.

In a contest over the title to personality between a wife and her husband who have separated, there is no presumption that the possession of the goods is in the husband, and the wife's possession will be presumed to be in her own right.—*Id.*

The seller of furniture to a husband, suing

his wife in replevin therefor after separation, had the right to rebut the presumption of title in the wife arising from her possession of the goods.—Id.

☞133(1) (Tex.Civ.App.) Evidence held to show that certain horses were of the separate estate of the wife, so that their issue and proceeds were exempt from the husband's creditors.—Amend v. Jahns, 184 S. W. 729.

☞133(7) (Tex.Civ.App.) Evidence held sufficient to support a finding that the husband gave live stock and its increase to the wife, so as to defeat the lien claim of the husband's creditors to land purchased with its proceeds.—Amend v. Jahns, 184 S. W. 729.

☞133½ (Tex.Civ.App.) Evidence held sufficient to carry to the jury the issue whether land claimed by the wife to be exempt from husband's creditors was her separate property.—Amend v. Jahns, 184 S. W. 729.

VII. ACTIONS.

☞238(3) (Tex.Civ.App.) In suit on a note given by husband and wife, purchasers of land at guardian's sale, to renew their note, securing the advancement of the purchase price, judgment held improper in form for one other than personal against the wife.—Finley v. Wakefield, 184 S. W. 755.

VII. COMMUNITY PROPERTY.

☞266 (Tex.Civ.App.) The husband may give or convey to the wife community property, and thereby make it her separate property, when it is not done in fraud of creditors, and such a gift is good against subsequent creditors of the husband.—Amend v. Jahns, 184 S. W. 729.

☞273(9) (Tex.) As surviving member of a marital partnership, a husband, on death or insanity of a wife, may, to pay community debts, sell community property under Vernon's Sayles' Ann. Civ. St. 1914, art. 3594, without giving bond provided for on administration.—Pierce v. Gibson, 184 S. W. 502.

☞276(6) (Tex.Civ.App.) Under Act Aug. 26, 1856, §§ 2, 3, 7 (see 4 Gammel's Laws, p. 469), inventory of community property filed with authority of surviving wife, though not signed by her, gave her authority to convey title to community land.—Sealey v. Mutual Land Co., 184 S. W. 1073.

IX. ABANDONMENT.

☞302 (Mo.App.) To constitute offense of wife abandonment, criminal intent must enter into failure to support.—State v. Frederici, 184 S. W. 170.

☞304 (Mo.App.) Husband cannot be convicted of nonsupport while wife is living on means furnished by him or proceeds of his property left in her possession.—State v. Frederici, 184 S. W. 170.

☞305 (Mo.App.) Confession of wife to having had illicit relations with another before marriage, casting doubt on paternity of child, held good cause for husband abandoning her, preventing it being an offense under Rev. St. 1909, § 4495, as amended by Laws 1911, p. 193.—State v. Widner, 184 S. W. 909.

☞313 (Mo.App.) In prosecution of husband for abandonment and nonsupport it is incumbent on state to prove, not only abandonment, but subsequent failure to provide for wife with criminal intent.—State v. Frederici, 184 S. W. 170.

In prosecution of husband for abandonment and nonsupport, evidence held insufficient to show that, when he ceased payments, wife was left without means of support, or that he had criminal intent.—Id.

In prosecution of husband for abandonment and nonsupport that wife exchanged a piano for more expensive one held material.—Id.

In prosecution of husband for abandonment

and nonsupport, burden is on state to establish every element of offense.—Id.

IDEM SONANS.

See Names, ☞16.

IDENTITY.

See Abatement and Revival, ☞8.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

See Arbitration and Award, ☞78; Witnesses, ☞318-406.

IMPLIED CONTRACTS.

See Contribution.

IMPRISONMENT.

See Bail; Habeas Corpus.

IMPROVEMENTS.

See Constitutional Law, ☞290; Mechanics' Liens; Municipal Corporations, ☞279, 379.

IMPUTED NEGLIGENCE.

See Negligence, ☞96.

INCOMPETENT PERSONS.

See Insane Persons.

INCRIMINATION.

See Embezzlement, ☞42.

INDEMNITY.

See Corporations, ☞388, 484; Guaranty; Principal and Surety.

INDEMNITY INSURANCE.

See Insurance, ☞435.

INDICTMENT AND INFORMATION.

See Adultery, ☞7; Burglary; Criminal Law, ☞279, 1023, 1167; Embezzlement, ☞27-35; False Pretenses, ☞32; Forgery, ☞29; Grand Jury; Homicide, ☞142; Intoxicating Liquors, ☞205; Larceny, ☞40.

III. FORMAL REQUISITES OF INDICTMENT.

☞30 (Ky.) No discrepancy between the accusatory part and the body of an indictment will be fatal to the sufficiency of the indictment unless the discrepancy be of such a substantial and material character as to be misleading.—Henry v. Commonwealth, 184 S. W. 870.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

☞61 (Tex.Cr.App.) An indictment for larceny by embezzlement, alleging that the accused was agent for a life insurance company lawfully doing business in the state, was equivalent to alleging that it was a corporation; the act regulating insurance companies being a general law of which the courts must take judicial notice.—Meredith v. State, 184 S. W. 204.

☞110(3) (Tex.Cr.App.) Indictment under statute prohibiting the catching of fish, except by hook and line, alleging in terms of statute that defendant caught fish in nets prohibited thereby, held sufficient.—Carroll v. State, 184 S. W. 508.

☞110(6) (Ky.) Indictment, charging, in the words of Ky. St. § 1153, that defendant did "unlawfully detain" the female "against her

will" for purpose of carnal knowledge, *held* sufficient, without charging detention by force.—*Stark v. Commonwealth*, 184 S. W. 875.

⇒110(12) (Mo.App.) Information for violating Rev. St. 1909, § 4713, relating to disturbing assembly, which follows language of statute, is sufficient.—*State v. Williams*, 184 S. W. 478.

⇒110(13) (Mo.) An information *held* sufficient to charge the offense of "embezzlement," denounced by Rev. St. 1909, § 4550, setting forth the facts constituting the offense as stated in the statute.—*State v. McWilliams*, 184 S. W. 96.

⇒110(30) (Tex.Cr.App.) Complaint and information charging defendant with practicing medicine without complying with the law *held* sufficient and following the law.—*Gay v. State*, 184 S. W. 200.

⇒111(1) (Tex.Cr.App.) Indictment under Pen. Code 1911, art. 748, prohibiting prescribing narcotic drugs to habitual users thereof, need not negative that the drugs the physician was charged with having prescribed were given as a cure for the drug habit.—*Fyke v. State*, 184 S. W. 197.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

⇒125(3) (Ark.) Under Kirby's Dig. § 1689, an indictment, charging defendant with obtaining by false pretenses the surrender of his note and chattel mortgage securing it and inducing the defrauded person to sign a direction to satisfy the mortgage, charged but one offense.—*Juddins v. State*, 184 S. W. 407.

⇒125(3) (Ky.) An indictment for unlawfully selling intoxicating liquors contrary to Ky. St. § 2557, *held* not duplicitous as also charging furnishing for sale contrary to section 2557b, subsection 2.—*Frey v. Commonwealth*, 184 S. W. 899.

⇒125(19) (Mo.App.) Information charging that defendant disquieted and disturbed assembly met for literary, social, and religious purposes by making noise, by rude and indecent behavior, by profane discourse, was not duplicitous.—*State v. Williams*, 184 S. W. 478.

VII. MOTION TO QUASH OR DISMISS AND DEMURRER.

⇒137(1) (Tex.Cr.App.) It is not ground for quashing an indictment for perjury in defendant's suit for divorce that, because of his actual residence in the state for less than the statutory period, the court administering the oath had no jurisdiction.—*Laird v. State*, 184 S. W. 810.

⇒144 (Ky.) Under Cr. Code Prac. § 243, and Ky. St. § 123, the circuit judge has discretion to sustain or overrule a motion by the commonwealth's attorney to dismiss an indictment for felony.—*Commonwealth v. Davis*, 184 S. W. 1121.

⇒144 (Tenn.) Misconduct of the prosecuting attorney in accepting employment from the prosecuting witness to recover damages for the homicide is ground for dismissal of the indictment.—*Gill v. State*, 184 S. W. 864.

⇒147 (Ky.) Under Ky. St. § 1164, punishing shopbreaking, an indictment in which the allegation of felonious taking is insufficient is not demurrable.—*Henry v. Commonwealth*, 184 S. W. 870.

⇒150 (Tex.Cr.App.) In determining the validity of an indictment, the court must necessarily take its allegations as true.—*Carrell v. State*, 184 S. W. 217.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

⇒189(2) (Mo.App.) An information for felonious assault will support a conviction of common assault.—*State v. Brown*, 184 S. W. 1187.

⇒191(8) (Ark.) Carnally knowing a female under 16, prohibited by Kirby's Dig. § 2008, is an "included offense" of rape, as defined by section 2005, and conviction thereof may be had under an indictment for rape under section 2413, permitting conviction of lesser included offense under indictment for the greater offense.—*Rose v. State*, 184 S. W. 60.

INDORSEMENT.

See Bills and Notes, ⇒237-378.

INFANTS.

See Adoption; Divorce, ⇒308; Guardian and Ward; Limitation of Actions, ⇒72; Negligence, ⇒85.

III. PROPERTY AND CONVEYANCES.

⇒38 (Ky.) In suit by infant by his father and guardian, under Civ. Code Prac. § 489, to sell infant's interest in a large tract of mineral land likely to enhance in value, where it appeared that his other property would produce sufficient for his immediate need, *held*, that there was no necessity to sell the interest.—*Damron v. Damron's Guardian*, 184 S. W. 1129.

The chancellor is without authority to sell an infant's realty for his maintenance and education in the absence of evidence of inability of his parents to maintain and educate him.—*Id.*

⇒39 (Ky.) In a suit under Civ. Code Prac. § 489, to sell the interest of an infant in land, to provide for his maintenance and education, evidence *held* insufficient to show the father's inability to support and educate the infant.—*Damron v. Damron's Guardian*, 184 S. W. 1129.

INFORMATION.

See Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Courts, ⇒480; Intoxicating Liquors, ⇒200, 275; Limitation of Actions, ⇒111; Schools and School Districts, ⇒111.

I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

⇒7 (Tex.Civ.App.) Where the assignee of a foreclosure judgment against a nursery company in the hands of a receiver was not satisfied with the terms of the order of sale, requiring the land and nursery stock to be sold separately and denying its right of lien upon the stock, its remedy was to appeal, and not to buy the land and then enjoin sale of the stock.—*Colonial Land & Loan Co. v. Joplin*, 184 S. W. 537.

(B) Grounds of Relief.

⇒16 (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, § 4643, providing when injunctions may be granted, gives applicant within its terms a right to the relief irrespective of the existence of a legal remedy.—*Lane v. Kempner*, 184 S. W. 1090.

⇒17 (Tex.Civ.App.) The remedy of plaintiffs, in suit to enjoin seizure of property under writ of sequestration issued in trespass to try title against the tenant of one of them, to permit the sequestration to have been completed, and then, had they prevailed in their suit to set aside the execution sale, to have brought an action in

damages for loss sustained by reason of the sequestration, was not as efficient as the remedy by injunction.—*Lane v. Kempner*, 184 S. W. 1090.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

—27 (Tex.Civ.App.) Under *Vernon's Sayles'* Ann. Civ. St. 1914, § 4643, relating to injunction, owner of realty held entitled to writ of injunction enjoining the purchaser of the property under execution sale, and the sheriff from seizing it under writ of sequestration issued in a suit in trespass to try title in which the purchaser at execution sale was plaintiff and the owner's tenant defendant.—*Lane v. Kempner*, 184 S. W. 1090.

(B) Public Officers and Boards and Municipalities.

—74 (Ky.) Courts may restrain boards of health from exerting authority not within their powers or not needed.—*Board of Trustees of Highland Park Graded Common School Dist. No. 46 v. McMurtry*, 184 S. W. 390.

(G) Personal Rights and Duties.

—98(1) (Mo.) Libeled party who sued at law and recovered judgment uncollectible owing to libeler's insolvency is entitled to enjoin further publication of a libel of like import.—*Wolf v. Harris*, 184 S. W. 1139.

Where a party libeled joins count at law for damages with count for injunction to restrain threatened publication, and alleges and proves inadequacy of legal remedy on account of libeler's insolvency, or on account of multiplicity of suits, the court, on finding by jury that publication was libelous, can enjoin continued publication.—*Id.*

—98(2) (Mo.) Under Const. 1875, art. 2, § 14, guaranteeing freedom of speech and writing, action solely for injunction will not lie on behalf of physician to restrain continued publication, by his deceased patient's father, of libels charging malpractice.—*Wolf v. Harris*, 184 S. W. 1139.

III. ACTIONS FOR INJUNCTIONS.

—130 (Ark.) In an action to restrain officers from breaking an inclosure to open an alleged alley, whether plaintiff was wrongfully withholding ground from other adjacent owners for use as an alley was not involved, where none of such other owners complained.—*Balmat v. City of Argenta*, 184 S. W. 446.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

—146 (Tex.Civ.App.) Petition held to show plaintiff's cattle were not subject to the stock law (Rev. Civ. St. arts. 7271, 7272); so sequestration by inspector of cattle and hides should be enjoined, though inspector averred that he did not intend to proceed against cattle except as provided by law.—*Harrell v. Holmes*, 184 S. W. 285.

—146 (Tex.Civ.App.) Under Rev. St. 1911, art. 4649, and despite Acts 34th Leg. (1st called Sess.) c. 7, held, that a temporary injunction may be granted on a verified petition alleging facts sufficient to warrant issuance though defendant filed a general denial.—*McAmis v. Guitt, C. & S. F. Ry. Co.*, 184 S. W. 331.

—148(1) (Tex.Civ.App.) A temporary injunction in a suit to restrain the sale of horses and cattle levied on under an execution, without requiring a bond, was void.—*Marshall v. Spiller*, 184 S. W. 285.

—152 (Tex.Civ.App.) Where the evidence in an action to restrain closing an alley made a case of probable right to the relief sought, it

was not an abuse of the trial court's discretion to grant a temporary injunction.—*Miles v. Bodenheim*, 184 S. W. 633.

INSANE PERSONS.

See Jury, —33.

IV. CUSTODY AND SUPPORT.

—51 (Tex.Civ.App.) The bond given to secure the release of an adjudged lunatic under the void act of 1913 cannot be given effect as a common-law bond rendering the sureties liable for injuries caused by the lunatic.—*Loving v. Hazelwood*, 184 S. W. 355.

The partial failure of consideration for a bond under the void act of 1913 for the release of a lunatic renders the whole bond void.—*Id.*

INSOLVENCY.

See Bankruptcy.

INSPECTION.

See Master and Servant, —124.

INSTRUCTIONS.

See Trial, —191-199.

To jury, see Criminal Law, —770-829.

INSURANCE.

See Corporations, —661; Embezzlement, —14, 22, 30, 38, 42, 48; Exemptions, —3; Tender, —28, 29; Trial, —252.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

—130(3) (Mo.App.) A printed receipt for the first premium on a life policy reciting that the applicant was insured from its date, if accepted as an insurable risk, was a contract of temporary insurance from that date, although the applicant died before receiving the policy which provided for a larger premium.—*Kempf v. Equitable Life Assur. Soc. of United States*, 184 S. W. 133.

(B) Construction and Operation.

—146(2) (Mo.App.) Printed insurance contracts prepared by experts in any respect ambiguous or capable of two meanings, must be construed in favor of the assured.—*Kempf v. Equitable Life Assur. Soc. of United States*, 184 S. W. 133.

—146(3) (Tex.Civ.App.) A contract of insurance will be construed strictly against the insurer and liberally in favor of the insured.—*Aetna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

—183 (Tex.Civ.App.) Failure of assured under an employer's liability policy to include the salaries of its manager and bookkeeper in reports to the insurer of compensation paid held not to entitle the insurer to recover premiums based thereon.—*Fidelity & Casualty Co. v. Tyler Cotton Oil Co.*, 184 S. W. 304.

—186(2) (Tex.Civ.App.) Whether time for payment of premiums on an accident policy is of the essence depends on the wording thereof, and it cannot be said that as a matter of law time is of the essence.—*North American Ins. Co. v. Jenkins*, 184 S. W. 307.

—188(2) (Tex.Civ.App.) In suit by an employer's liability insurer for a premium, evidence held sufficient to support the finding that defendant rendered true statements of its pay roll in compliance with its policies, and paid all premiums from it under the policies.—*Fidelity & Casualty Co. v. Tyler Cotton Oil Co.*, 184 S. W. 304.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

☞332½ (New, vol. 13 Key-No. Series) (Mo.App.) Policy of burglary insurance taken out by owner of pool hall at solicitation of agent who was a frequenter of the place, where gambling went on, *held* not invalid as for a subsequent increase of hazard.—Gueringer v. Fidelity & Deposit Co. of Maryland, 184 S. W. 936.

☞334(2) (Mo.) Insured's failure to comply with watchman's warranty *held* not to limit the insurer to an enforcement of the penalty provided for its violation, but to entitle it to forfeit the policy.—Frick v. Millers' Nat. Ins. Co., 184 S. W. 1161.

☞335(3) (Mo.App.) A book wherein the owner of a pool hall entered the amounts of money taken in, amounts paid out, and the amounts placed in the safe each day, was a compliance with his policy of burglary insurance requiring him to keep books showing the money on hand.—Gueringer v. Fidelity & Deposit Co. of Maryland, 184 S. W. 936.

XI. STOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

☞387 (Mo.) The insurer's express waiver of a condition relating to vacancy and its consent that the insured premises might remain vacant on condition of the insurer's compliance with a watchman's warranty *held* not a waiver of compliance with such warranty, where the insurer had no knowledge of insured's breach thereof.—Frick v. Millers' Nat. Ins. Co., 184 S. W. 1161.

☞388(3) (Mo.App.) Letter of insurer after forfeiture of policy for default in premium, written without any knowledge of death of insured or the rights of an assignee, offering to assist insured to carry the policy, *held* not a waiver of the forfeiture.—Horstmann v. Capitol Life Ins. Co. of Colorado, 184 S. W. 1164.

XII. RISKS AND CAUSES OF LOSS.

(C) Guaranty and Indemnity Insurance.

☞435 (Tex.Civ.App.) Under employer's liability policy issued to plaintiff street railway and to an engineering company, injury to plaintiff's employé while engaged in repair work for engineering company through negligence of plaintiff's motorman *held* within its terms.—*Ætna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

Under provisions of employer's liability policy issued to plaintiff railway and to an engineering company, *held*, that it was immaterial whether an employé, when injured, was in the employ of the plaintiff or of the other insured.—Id.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

☞493 (Mo.App.) The question of total or partial loss is to be decided by the present condition of the building and whether it has lost its identity as a building, rather than its use after being repaired.—Brown v. Connecticut Fire Ins. Co. of Hartford, Conn., 184 S. W. 122.

(D) Life Insurance.

☞515 (Tex.Civ.App.) Under Rev. Civ. St. art. 4742, subd. 3, provision, that if insured should die from heart disease within one year from its date liability would be limited to one-fourth of principal sum named, *held* not enforceable and to present no defense to claim for full amount.—First Texas State Ins. Co. v. Bell, 184 S. W. 277.

XIV. NOTICE AND PROOF OF LOSS.

☞539(1) (Tex.Civ.App.) Under Rev. St. 1911, art. 5714, provision of policy, insuring against sickness, requiring report from attending physician every 30 days, *held* void.—First Texas State Ins. Co. v. Herndon, 184 S. W. 283.

☞546 (Tex.Civ.App.) Under Act April 2, 1913 (Acts 83d Leg. c. 105) § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a), and section 3, insurer of personality destroyed by fire *held* unable to escape liability for failure of insured to comply with provision of policy that he would furnish a certificate of the magistrate nearest the fire as to the circumstances and the loss; there being no question as to the good faith of insured.—Springfield Fire & Marine Ins. Co. v. Nelms, 184 S. W. 1094.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

☞598 (Tex.Civ.App.) Under employer's liability policy, insured recovering by reason of its payment of judgment obtained by insured's employé *held* entitled to interest on its judgment from date of employé's judgment against it, rather than from the date of its payment thereof.—*Ætna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

☞602 (Mo.App.) In an action on a policy of burglary insurance, insurer *held* not liable for penalty for vexatious delay in payment and for attorney's fee.—Gueringer v. Fidelity & Deposit Co. of Maryland, 184 S. W. 936.

The question of vexatious refusal to pay a policy of insurance is ordinarily a question of fact for the jury.—Id.

XVIII. ACTIONS ON POLICIES.

☞610 (Mo.) Rev. St. 1909, § 7042, authorizing service on superintendent of insurance in action against foreign companies, *held* valid.—Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia, 184 S. W. 999.

Rev. St. 1909, § 7042, as to service of process on foreign insurance companies, *held* not unconstitutional on theory that Legislature could not confer jurisdiction over suits on contracts made outside the state.—Id.

Rev. St. 1909, § 7042, *held* not unconstitutional as authorizing service on superintendent of insurance in actions against companies doing business without authority, based upon contracts made in other states.—Id.

☞627(2) (Mo.) Rev. St. 1909, § 7042, *held* to authorize service in action against foreign insurance company doing business in the state thereunder on contract made outside the state, on the superintendent of insurance.—Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia, 184 S. W. 999.

☞640(1) (Tex.Civ.App.) In action under employer's liability policy, *held*, that any defense available under a provision of the policy was an affirmative defense which it was necessary to plead.—*Ætna Life Ins. Co. v. El Paso Electric Ry. Co.*, 184 S. W. 628.

☞664 (Mo.) In action on insurance policy, admission of conversations with insurance company's agents, respecting incumbrances upon the property and vacancy of the property, *held* not error.—Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia, 184 S. W. 999.

☞665(7) (Mo.App.) In an action on a policy of burglary insurance, evidence *held* sufficient to show that notice and proofs of loss were given the insurer.—Gueringer v. Fidelity & Deposit Co. of Maryland, 184 S. W. 936.

☞669(12) (Mo.App.) In action on policy of burglary insurance, instruction *held* not misleading or to authorize jury to include in verdict any loss of uninsured watches or jewelry.—

Gueringer v. Fidelity & Deposit Co. of Maryland, 184 S. W. 936.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

§689 (Tenn.) Pub. Acts 1905, c. 480, § 12, and section 32, regulating beneficiary associations and exemption of benefits, etc., held not invalid.—Hamilton Nat. Bank v. Amster, 184 S. W. 5.

(B) The Contract in General.

§719(1) (Ark.) Where either the benefit certificate or the constitution and by-laws provided for future changes, changes made applied to pre-existing contracts.—Eminent Household of Columbian Woodmen v. Hewitt, 184 S. W. 52.

(D) Forfeiture or Suspension.

§755(1) (Tex.Civ.App.) Where the policy or benefit certificate provides for termination on failure to pay premiums or dues, without affirmative act of the insurer, conduct of the insurer misleading the insured to his expense or harm may estop the insurer from asserting forfeiture.—Lone Star Ins. Union v. Brannan, 184 S. W. 691.

Evidence held to make a strong case against the insurer of estoppel to plead forfeiture on account of acts of its general manager, though conditions of the policy as to forfeiture may have been self-executing.—Id.

§755(2) (Tex.Civ.App.) Whether the local agent of an insurance company was authorized to waive the forfeiture provisions of the policy is immaterial, where the jury found that the general manager waived such conditions.—Lone Star Ins. Union v. Brannan, 184 S. W. 691.

(E) Beneficiaries and Benefits.

§789(1) (Ark.) Under accident certificate, insured held required to submit to examination by insurer's physician and to furnish X-ray photograph with proof of loss, but not concluded by fact that photograph did not show the fracture claimed.—Eminent Household of Columbian Woodmen v. Hewitt, 184 S. W. 52.

§790 (Tex.Civ.App.) Under the constitution of a brotherhood enumerating disabilities giving a member right of recovery on his beneficiary certificate, and providing that claim for any other disability is addressed merely to the benevolence of the brotherhood, such other claim, being rejected, gives no right of recovery.—Rieden v. Brotherhood of Railroad Trainmen, 184 S. W. 689.

(F) Actions for Benefits.

§819(4) (Ark.) In suit on accident certificate, evidence of fracture alleged to have been sustained held to support a judgment for the insured.—Eminent Household of Columbian Woodmen v. Hewitt, 184 S. W. 52.

INTENT.

See Contracts, §147; Criminal Law, §21; Deeds, §93; Embezzlement, §5, 27; Evidence, §269, 461; Wills, §439, 441.

INTEREST.

See Appeal and Error, §58; Bills and Notes, §344; Insurance, §598; Usury.

INTERSTATE COMMERCE.

See Commerce.

INTERVENTION.

See Parties, §40.

INTIMIDATION.

See Elections, §234; Executors and Administrators, §69.

INTOXICATING LIQUORS.

See Criminal Law, §112, 304, 815; Indictment and Information, §125.

III. LOCAL OPTION.

§39 (Mo.App.) The state, on a trial of a violation of the local option law, need not show that notice of the result of a local option election was given, but the fact that notice was not given is a matter of defense.—State v. Fulton, 184 S. W. 938.

VI. OFFENSES.

§134 (Mo.App.) Alcohol is an "intoxicating liquor" within Rev. St. 1909, § 7222, though not specifically mentioned as such.—State v. Nicolay, 184 S. W. 1183.

§138 (Ky.) Under Ky. St. § 2569b, subsec. 2, as to delivery of intoxicating liquor in prohibition territory, knowledge that the statement required on the package is false is an essential of the crime.—Goodman v. Commonwealth, 184 S. W. 876.

Under Ky. St. § 2569b, subsec. 2, making it an offense to deliver liquor in prohibition territory knowing that the required statement of personal use is false, such knowledge may be imputed to one who has not obtained of the consignee a statement that the liquor is for personal use, or who has not in good faith relied on such statement.—Id.

§146(2) (Ark.) Under Kirby's Dig. § 5133, as to soliciting orders for liquors, held, that gist of offense is soliciting of orders in prohibited territory and the prescribed penalties are denounced against liquor dealers whether in or out of the state.—Hickey v. State, 184 S. W. 459.

§155(3) (Mo.App.) Where a physician wrote an illegal whisky prescription, he is guilty of a violation of Rev. St. 1909, § 5784, though the prescription as written would not, under section 5781, protect the druggist who filled it.—State v. Nicolay, 184 S. W. 1183.

VII. CRIMINAL PROSECUTIONS.

§205(2) (Tex.Cr.App.) Indictment for selling intoxicating liquors, merely alleging that local option law was adopted prior to its presentment, giving no date, and alleging a sale subsequent to the enactment of the felony statute of 1911 (Pen. Code 1911, art. 597), presented on its face a felony charge.—Barnes v. State, 184 S. W. 510.

§231 (Ky.) In a prosecution for keeping intoxicating liquor for unlawful sale, evidence as to intoxication of defendant's visitors held admissible to show the character of the liquor.—Frey v. Commonwealth, 184 S. W. 896.

§231 (Ky.) In a prosecution for unlawfully selling intoxicating liquor, evidence that defendant's visitors became intoxicated held admissible to show that the liquor sold was intoxicating.—Frey v. Commonwealth, 184 S. W. 899.

§236(1) (Mo.App.) Evidence held not sufficient to sustain a conviction for storing or keeping intoxicating liquors contrary to Rev. St. 1909, § 7227, in view of the exception contained in section 7228.—State v. Adams, 184 S. W. 922.

§236(7) (Ky.) Evidence held sufficient to show that defendant kept the intoxicating liquor found on his premises for the purpose of sale.—Frey v. Commonwealth, 184 S. W. 896.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§249 (Ky.) A search warrant held sufficient to charge defendant with having intoxicating liquors in his possession with intent to sell in a local option county.—Frey v. Commonwealth, 184 S. W. 896.

X. ABATEMENT AND INJUNCTION.

⚡260 (Ark.) Under Kirby's Dig. § 5133, and Acts 1915, p. 408, *held* that, where defendant had place of business from which he solicited orders for liquors, he was maintaining nuisance which the circuit court had power to abate by injunction.—Hickey v. State, 184 S. W. 459.

⚡275 (Ark.) In suit for injunction, evidence *held* sufficient to support finding that defendant had place of business in Ft. Smith from which he solicited orders for liquor house in Missouri.—Hickey v. State, 184 S. W. 459.

IRRIGATION.

See Waters and Water Courses, ⚡254.

JOINDER.

See Action, ⚡40, 47; Parties, ⚡25.

JOINT DEBTORS.

See Contribution.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Justices of the Peace; Mandamus, ⚡26-118.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

⚡6 (Mo.App.) A member of the bar, improperly appointed as a special judge on disqualification of the regular judge, is not a *de facto* officer, and his acts will not be upheld as such.—Ex parte Fish, 184 S. W. 479.

II. SPECIAL OR SUBSTITUTE JUDGES.

⚡14 (Mo.App.) Rev. St. 1909, §§ 8965, 5199, relating to the selection of special judges, apply to the appointment of special judges in the St. Louis court of criminal correction.—Ex parte Fish, 184 S. W. 479.

⚡16(1) (Mo.App.) Under Rev. St. 1909, §§ 3965, 5199, relating to appointment of special judges, a member of the bar, purporting to act as a special judge of the St. Louis court of criminal correction, had no jurisdiction, where the record showed that the parties were unable to agree on his selection.—Ex parte Fish, 184 S. W. 479.

⚡18 (Mo.App.) Where record of St. Louis court of criminal correction recited that the parties were unable to agree on appointment of special judge, and that appointment was made by oral agreement between counsel, the recitals are conflicting, and appointment cannot be upheld.—Ex parte Fish, 184 S. W. 479.

JUDGMENT.

See Execution; Judicial Sales.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

⚡5 (Tex.Civ.App.) Where a domestic judgment is attacked, it is necessary to determine whether it was rendered by a court of general jurisdiction over the subject-matter, whether the attack is direct or collateral, whether the evidence is apparent on the face of the record, and, if not, whether outside evidence is competent, and whether the ground of the attack is one which goes to the power of the court or is a matter of procedure.—Reeves v. Fuqua, 184 S. W. 682.

⚡17(2) (Tex.Civ.App.) To authorize a default judgment the sheriff's return must show service as required by statute.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⚡17(8) (Tex.Civ.App.) In suit to foreclose a vendor's lien, amended petition, describing the land so differently from the original petition as to describe different land, set up a new cause of action, of which defendant should have had notice to make judgment by default valid.—Gilles v. Miners' Bank of Cartersville, Mo., 184 S. W. 284.

⚡17(9) (Ark.) The omission of the official seal from a writ of summons will not invalidate a decree based on service of such summons.—Oliver v. Routh, 184 S. W. 843.

⚡17(10) (Tex.Civ.App.) Where the petition or citation in an action against a corporation fails to direct the manner of service, to sustain a default judgment proof of proper service must be made when judgment is entered.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

IV. BY DEFAULT.**(B) Opening or Setting Aside Default.**

⚡143(1) (Tex.Civ.App.) Where no legal service is had upon defendants, a default judgment may be set aside without showing a sufficient excuse for failure to appear.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⚡143(2) (Tex.Civ.App.) Where a default judgment which is not void is sought to be vacated, an excuse for failure to answer on the original suit must be shown.—Hester v. Baskin, 184 S. W. 726.

⚡143(13) (Tex.Civ.App.) Motion to set aside default judgment by defendants, arriving at court a few minutes after judgment was entered, *held* to show diligence, and hence motion should have been granted.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⚡145(2) (Tex.Civ.App.) To set aside a default judgment the motion must show a meritorious defense as well as a sufficient excuse for failure to appear and answer.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

Where no legal service is had upon defendants, a default judgment may be set aside without showing a meritorious defense.—Id.

⚡145(2) (Tex.Civ.App.) Where a default judgment which is not void is sought to be vacated, facts showing a meritorious defense must be shown.—Hester v. Baskin, 184 S. W. 726.

⚡148 (Ky.) One not a defendant nor successor in interest of a defendant in an action in which default judgment is entered may not proceed under Civ. Code Prac. § 414, to secure its retrial.—Houston v. Commonwealth, 184 S. W. 388.

⚡153(4) (Tex.Civ.App.) The trial court properly refused to consider a motion to set aside a default judgment rendered at a previous term.—Hester v. Baskin, 184 S. W. 726.

⚡163 (Tex.Civ.App.) On motion to open default, *held*, that answer filed therewith, though verified on information and belief, might be considered in determining whether it showed a meritorious defense.—Miller v. First State Bank & Trust Co. of Santa Anna, 184 S. W. 614.

⚡173 (Tex.Civ.App.) The trial court, which was in error in setting aside a default judgment after term, properly vacated the order on motion, leaving the default judgment as rendered at the previous term stand as originally entered.—Hester v. Baskin, 184 S. W. 726.

VI. ON TRIAL OF ISSUES.

(B) Parties.

⚡243 (Tex.Civ.App.) In creditor's suit to enforce alleged trust for benefit of creditors, *held*, that court could not adjudicate claims not reduced to judgment, the debtors not being parties.—*Barcus v. Parlin-Orendorf Implement Co.*, 184 S. W. 640.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⚡251(1) (Tex.Civ.App.) In a suit for breach of contract, where plaintiff pleaded no facts entitling her to a personal judgment against a defendant, though the evidence showed that he was personally liable to her, such a personal judgment could not stand.—*Nalls v. McGrill*, 184 S. W. 275.

⚡256(1) (Tex.Civ.App.) A judgment must conform to the pleadings and the proof.—*Angelina County Lumber Co. v. Hines*, 184 S. W. 596.

⚡256(1) (Tex.Civ.App.) In suit by realty brokers for breach of a landowner's undertaking to give them exclusive right to sell for a specified time, judgment for defendant *held* supported by two findings of fact, denominated conclusions of law, though the finding that the owner had not contracted with plaintiffs was inconsistent with another.—*Osborne & Beck v. Sanders*, 184 S. W. 1101.

⚡256(2) (Tex.Civ.App.) It is fundamental error for judgment to be rendered on answer of jury which is not responsive to issue without which there is no basis for judgment.—*Indiana Co-op. Canal Co. v. Gray*, 184 S. W. 242.

⚡256(5) (Tex.Civ.App.) In suit by assignee of a bank which guaranteed collection against it and its debtor, entry of judgment for plaintiff against the debtor on verdict finding for plaintiff against the bank and further finding for the bank against the debtor *held* proper.—*Carver Bros. v. Merrett*, 184 S. W. 741.

IX. OPENING OR VACATING.

⚡342(1) (Ky.) Under Civ. Code Prac. § 518, a motion by one not a party to the action in which a judgment was rendered, to vacate the judgment and file an answer, cannot be treated as an application for the vacation of a judgment after the term.—*Houston v. Commonwealth*, 184 S. W. 388.

⚡388 (Tenn.) On a bill to clear up title, a decree for a defendant, finding him to be the owner in fee of part of the land involved, after the term at which it was entered became final, and the court could not vacate or modify it without notice and such proceedings as would give it jurisdiction anew.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

⚡403 (Tex.Civ.App.) Equity will not set aside judgment where, after rendition, there was a compromise and settlement, and, in violation thereof, execution issued and judgment was satisfied by sale to a third person; the remedy then being by an action at law for damages for the wrongful taking.—*Steger Lumber Co. v. McSwain*, 184 S. W. 292.

⚡435 (Tex.Civ.App.) A party prevented from prosecuting his suit or making his defense by mistake can bring an equitable action after close of term to reopen and dispose of the case on its merits.—*Hester v. Baskin*, 184 S. W. 726.

⚡443(1) (Tex.Civ.App.) A party prevented from prosecuting his suit by fraud can bring an equitable action after the close of the term to

⚡443(3) (Tex.Civ.App.) A party prevented from making his defense by fraud can bring an equitable action after the close of the term to

reopen and dispose of the case on its merits.—*Hester v. Baskin*, 184 S. W. 726.

XI. COLLATERAL ATTACK.

(B) Grounds.

⚡494 (Tex.Civ.App.) Chattel mortgagee *held* neither party nor privy to action to enforce lien on property of mortgagor; hence he may collaterally attack the judgment by evidence dehors the record.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

⚡495(1) (Tex.Civ.App.) Upon collateral attack on a judgment of a domestic court it will, where the action was within the court's general jurisdiction, be presumed that the necessary jurisdictional facts existed, though they do not appear of record.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

⚡501 (Ark.) A judgment foreclosing the vendor's lien will not, on collateral attack, be set aside save for fraud, and proof of facts showing it was erroneous does not warrant vacation.—*Oliver v. Routh*, 184 S. W. 843.

XII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

⚡568 (Tex.Civ.App.) Judgment by default for the payee suing on a note, when made final, is a bar to suit by the maker to cancel the note for fraud.—*Cattlemen's Trust Co. v. Blasingame*, 184 S. W. 574.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

⚡585(2) (Tex.Civ.App.) Judgment by default for the payee in an action on a note is not a bar to a suit by the maker to avoid another note on the ground of fraud in the contract under which both notes were given.—*Cattlemen's Trust Co. v. Blasingame*, 184 S. W. 574.

⚡588 (Mo.) In an action in equity for the partition of land, a former judgment in an action between the same parties and seeking the same relief, but urging different grounds, was conclusive upon a plea of *res adjudicata*.—*Ogden v. Auer*, 184 S. W. 72.

⚡589(2) (Tex.Civ.App.) The assignor of an account could not recover thereon, and also for a tort growing out of the same transaction; as it would constitute a double recovery.—*Carver Bros. v. Merrett*, 184 S. W. 741.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

⚡645 (Mo.) Judgment in a law action, involving the same parties and subject-matter, wherein equitable defenses might have been interposed, is *res judicata* against defendant on such equitable defenses in a later action, whether they were pleaded and adjudicated in the first action or not.—*Williams v. City of Hayti*, 184 S. W. 470.

(B) Persons Concluded.

⚡675(2) (Tex.Civ.App.) Bank, to which note was delivered as collateral security, which returned it to the pledgor that suit might be brought, one of the bank's attorneys, prosecuting the suit to judgment, *held* bound by the judgment rendered.—*Finley v. Wakefield*, 184 S. W. 755.

⚡682(3) (Mo.) Judgment in suit to quiet title by heirs of the grantor of land dedicated to defendant city for courthouse purposes is *res judicata*, in a later action by the purchasers at partition sale of the interest of such heirs, against the city on the same issues.—*Williams v. City of Hayti*, 184 S. W. 470.

⚡702 (Mo.) An unappealed judgment in district court in prior suit, wherein the predecessors of the present plaintiffs were defendants, the plaintiffs therein being property owners and

citizens of the present defendant city, the issue in both suits being the title to certain land, *is res judicata*, and works estoppel by judgment against the city in the later action.—*Williams v. City of Hayti*, 184 S. W. 470.

—707 (Ky.) The rights of persons not parties nor claiming under parties to a judgment are not affected thereby.—*Houston v. Commonwealth*, 184 S. W. 388.

—712 (Tex.Civ.App.) In suit against warrantor on his covenant, record of suit between his vendee and third party involving title conveyed, to which warrantor was not a party, *held* not admissible to show recovery under a paramount title.—*Miles v. Bodenheim*, 184 S. W. 633.

(D) Judgments in Particular Classes of Actions and Proceedings.

—747(6) (Ark.) Under Kirby's Dig. § 3648, a judgment in an action of unlawful detainer is not an adjudication as to title precluding subsequent action of ejectment.—*Williams v. Prieau*, 184 S. W. 847.

XV. LIEN.

—768(1) (Ark.) A judgment in one county is not a lien against land in another, where no copy was filed for record in the county of the situs of the land and the sheriff failed to comply with Kirby's Dig. §§ 5149-5154, inclusive, providing procedure for perfecting such liens.—*Acker v. Devore*, 184 S. W. 852.

—787 (Tex.Civ.App.) Lien of judgment recovered against grantor between execution of deed containing erroneous description and execution of correction deed *held* not to attach to the land, as the first deed passed title.—*Gause-Langenberg Hat Co. v. Allums*, 184 S. W. 288.

XVII. FOREIGN JUDGMENTS.

—818(1) (Tex.Civ.App.) Judgment of a court of foreign jurisdiction can be collaterally attacked for want of jurisdiction by parties or privies, even by evidence dehors the record.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

XVIII. ASSIGNMENT.

—846 (Ark.) Surety on bond, who had obtained judgment for contribution against a cosurety who had discharged a judgment against the principal and taken an assignment thereof as against subsequent assignee of judgment, *held* entitled to enjoin its collection, thereby in effect enforcing his judgment for contribution.—*Thorsen v. Poe*, 184 S. W. 427.

—847 (Ark.) The assignee of a judgment takes it subject to all the equities and defenses existing between the parties thereto.—*Thorsen v. Poe*, 184 S. W. 427.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

—866(2) (Tex.) In analogy to Rev. St. 1911, art. 5696, action to recover upon judgment on which execution issued within a year, brought more than 10 years after the issuance of such execution *held* barred by the 10-year statute of limitations.—*Dupree v. Gale Mfg. Co.*, 184 S. W. 184.

XXI. ACTIONS ON JUDGMENTS.

(B) Foreign Judgments.

—942 (Mo.) Proof of judgments entered by the clerk in vacation in another state, being of statutory origin, does not import validity, and cannot be aided by presumption, under Rev. St. 1909, § 1836.—*Schroeder v. Edwards*, 184 S. W. 108.

JUDICIAL NOTICE.

See Criminal Law, —304; Evidence, —5-35.

JUDICIAL SALES.

See Execution, —216-268; Executors and Administrators, —348; Judgment, —682; Mortgages, —546.

—47 (Mo.App.) Orders on which a voidable judicial sale was based cannot be collaterally attacked in an action for breach of warranty by a subsequent grantee who purchased before the voidable sale was set aside in proceedings to which the grantee was not a party.—*Githens v. Barnhill*, 184 S. W. 145.

JURISDICTION.

See Appeal and Error, —185, 493, 782, 1217; Bankruptcy; Courts; Elections, —275; Executors and Administrators, —13; Garnishment, —81; Guardian and Ward, —81; Judgment, —494, 495, 818; Justices of the Peace, —39½-58; Prohibition.

JURY.

See Appeal and Error, —218, 1045, 1069; Criminal Law, —857; Grand Jury; Trial, —136-156, 304.

II. RIGHT TO TRIAL BY JURY.

—19(1) (Tex.Civ.App.) Const. art. 1, § 15, guaranteed the right to trial by jury in lunacy proceedings.—*Loving v. Hazelwood*, 184 S. W. 355.

—29(2) (Tex.Cr.App.) The provision that the defendant cannot waive a jury in a felony case means that he cannot waive trial by a jury of men who have expressed no opinion as to his guilt.—*Duncan v. State*, 184 S. W. 195.

—32(2) (Tex.Civ.App.) Under Rev. St. 1911, art. 5214, requiring a jury to consist of 12 men, but providing that the parties may agree to try with a less number, a jury of 11, obtained by agreement, is a legal jury.—*Crosby v. Stevens*, 184 S. W. 705.

—33(1) (Tex.Civ.App.) The commission to try lunacy charges provided for by Acts 33d Lex. c. 163, is not a jury within the constitutional guarantee of right to a trial by jury.—*Loving v. Hazelwood*, 184 S. W. 355.

—34(3) (Mo.) It is not a deprivation of the right of jury trial protected by Const. art. 2, § 28, for the trial judge to err in withholding evidence from or in submitting it to a jury.—*Garey v. Jackson*, 184 S. W. 979.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

—97(1) (Tex.Cr.App.) The provision of the bill of rights requiring that the accused shall have a fair trial by an impartial jury, means that the jury must be not partial, not favoring one party more than another, unprejudiced, disinterested, equitable, and just, and that the merits of the case shall not be prejudged.—*Duncan v. State*, 184 S. W. 195.

VI. IMPANELING FOR TRIAL AND OATH.

—149 (Tex.Civ.App.) Where there is no judicial determination that a juror is ill, but the parties merely agree, on information that he is ill, to go to trial with 11 jurors, the court properly refused to enter a formal order, finding that the juror was ill.—*Crosby v. Stevens*, 184 S. W. 705.

Though an order declaring a juror ill was filed, it could be withdrawn at any time during the term of the court.—*Id.*

JUSTICES OF THE PEACE.

See Appeal and Error, ¶185; Elections, ¶275, 280, 305.

III. CIVIL JURISDICTION AND AUTHORITY.

¶39½ (Mo.App.) Under Rev. St. 1909, § 7759, a justice's jurisdiction over the subject-matter in replevin depends on the location of the property only in the county.—*Rogers v. Davis*, 184 S. W. 151.

¶44(2) (Ark.) A justice of the peace has jurisdiction of an action to recover plaintiff's share of a crop, and to enforce a landlord's lien where the complaint claims but \$300, although the proof shows a greater sum to be due.—*Turner v. Cotton*, 184 S. W. 415.

¶44(2) (Tex.Civ.App.) Justice court is without jurisdiction of a proceeding to enforce a laborer's lien on property of a value exceeding \$200, since value of property, and not value of claim, controls.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

¶44(7) (Tex. Civ. App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 7773, 7778, the constable's appraisal of attached property claimed by a third person at more than \$200 is conclusive against the justice's jurisdiction.—*Fuller, Hanna & Co. v. Rogers*, 184 S. W. 322.

¶58(2) (Mo.App.) A record in an action not brought in the township of plaintiff's residence, which does not show the place of defendant's residence, does not affirmatively show jurisdiction under Rev. St. 1909, § 7599.—*Rogers v. Davis*, 184 S. W. 151.

IV. PROCEDURE IN CIVIL CASES.

¶84(4) (Mo.App.) The general appearance by defendant in replevin before a justice of the peace who had jurisdiction of the subject-matter waives objection to want of jurisdiction over the person of defendant.—*Rogers v. Davis*, 184 S. W. 151.

Where the jurisdiction of a justice of the peace is determined by the location of property, or the place of injury, the appearance of defendant in an action not begun in the proper township does not cure the jurisdictional defect.—*Id.*

¶91(2) (Mo.App.) In an action on an agreement to pay taxes, a statement filed in a justice court in the form of an itemized bill for the tax paid, with interest, and stating that the defendant agreed to pay the taxes and because of his failure to do so the taxes were paid by the owner, is sufficiently explicit to bar another action.—*Sears v. Krekel*, 184 S. W. 911.

¶91(3) (Mo.App.) Under Rev. St. 1909, § 7413, relating to justices of the peace, all that is necessary in filing suit on the indorsement of a note is to file the note, and statutes of a foreign state establishing the right to recovery need not be pleaded.—*Davis v. McColl*, 184 S. W. 920.

In suit upon negotiable notes, where the defendant is advised by their lodgment with the justice and the issuance of summons to meet the issue of his liability as an indorser, and judgment would bar maintenance of a future action, the purposes of the statute are met, and failure to file specific pleadings is not fatal.—*Id.*

¶93 (Mo.App.) In suit in justice court on an account stated, where defendant appeared and answered distinctly denying an account stated, and there was no account stated proven at the trial, he could put in a counterclaim.—*Niehaus v. Gillanders*, 184 S. W. 949.

¶97 (Mo.App.) In an action of replevin before a justice of the peace, the affidavit verifying the statement, as required by Rev. St. 1909, §§ 7759, 7760, is the basis of the action, with-

out which the justice has no jurisdiction.—*White v. Grace*, 184 S. W. 947.

In replevin before a justice of the peace by an infant, affidavit, verifying the statement, executed by such infant, was sufficient to give the justice jurisdiction of the action, in which, upon defendant's objection that the plaintiff was not of age, an attorney was appointed his next friend by the justice at the trial under Rev. St. 1909, §§ 7435, 7436.—*Id.*

¶100(2) (Mo.App.) In suit in justice's court on an account stated, where defendant appeared and answered distinctly denying an account stated, plaintiff, pleading the account stated, could recover only on it.—*Niehaus v. Gillanders*, 184 S. W. 949.

¶129(3) (Tex.Civ.App.) A justice's judgment foreclosing a laborer's lien cannot be collaterally attacked by parties or privies, the record not showing the value of the property on which the lien was sought, upon the ground that it exceeded the amount of the justice's jurisdiction.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

¶141(2) (Tex.Civ.App.) As a justice court has no jurisdiction of suits for the recovery of more than \$200 under Const. art. 5, § 19, where a suit was for exactly \$200, a judgment of the county court on appeal from justice court for the principal and a penalty and items exceeding that amount was invalid.—*North American Ins. Co. v. Jenkins*, 184 S. W. 307.

¶150(3) (Ark.) An objection of want of parties plaintiff is waived under Kirby's Dig. §§ 6093, 6096, where not made in the justice court or in the circuit court on appeal until instructions are given.—*Tomlinson Chair Mfg. Co. v. Jop-pa Mattress Co.*, 184 S. W. 32.

¶159(3) (Mo.App.) Recognizance or bond on appeal from judgment of justice of the peace against defendants as partners and against one of them individually held sufficient as a recognizance of the individual defendant.—*Thiel Detective Service Co. v. Reynolds*, 184 S. W. 1178.

¶162(1) (Ark.) Appeal from a judgment of a justice, with supersedeas, does not extinguish, but merely suspends operation of, the judgment.—*Detroit Fire & Marine Ins. Co. v. Stewart*, 184 S. W. 488.

¶162(2) (Mo.App.) The granting of an appeal by a justice of the peace and a filing of the transcript, together with all the papers, in the circuit court, vests that court with jurisdiction of the case.—*Thiel Detective Service Co. v. Reynolds*, 184 S. W. 1178.

JUSTIFICATION.

See Homicide, ¶115, 118.

KIDNAPPING.

See Abduction.

KNOWLEDGE.

See Notice.

LACHES.

See Corporations, ¶123; Quietting Title, ¶29.

LANDLORD AND TENANT.

See Evidence, ¶450; Limitation of Actions, ¶24, 27; Reformation of Instruments, ¶20; Waters and Water Courses, ¶254.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

¶22(2) (Tex.Civ.App.) A lease of irrigated land providing, "in case lessees take more than

20 acres within six months, the parties to enter into a supplemental contract to evidence same," construed to be an offer to lease, and not effective as a contract until accepted.—Donada v. Power, 184 S. W. 793.

☞25(5) (Tex.Civ.App.) Taking possession of land by the lessee after an offer to lease it to him is an acceptance of the offer as binding on him as an express verbal acceptance.—Donada v. Power, 184 S. W. 793.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

☞76(3) (Mo.App.) Where a lessee's sublease provided that the sublessee could not sublet or allow any other tenant to come in with or under him without the written consent of the landlord, such restriction was not exhausted by an assignment by the sublessee.—Harmon v. Dickerson, 184 S. W. 139.

(D) Termination.

☞104 (Mo.App.) Where a lessee subleased, the lease providing that the sublessee could not sublet without the written consent of the landlord, the lessee could protect himself, against a breach of the provision, by a forfeiture.—Harmon v. Dickerson, 184 S. W. 139.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

☞199½ (Ark.) Where premises were not leased solely for conducting a saloon, the lessee was not relieved from paying rent because of prohibition of saloons, as he might use it for other purposes.—Harper v. Young, 184 S. W. 447.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, ☞372, 507½, 537, 583, 945, 956, 1158; Embezzlement; False Pretenses.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

☞7 (Ky.) Where by purchase one obtains title as well as possession, he is not guilty of larceny, though he sells the article, instead of giving a mortgage on it for the price, as agreed.—Trotter v. Commonwealth, 184 S. W. 871.

☞27 (Mo.) Where an automobile was stolen by A. and G. in execution of a conspiracy with the defendant, although it was not specified as a car to be stolen, defendant held responsible criminally as if personally participating in the theft.—State v. Othick, 184 S. W. 106.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

☞40(8) (Mo.App.) A charge of larceny or embezzlement of lawful money of the United States is not sustained by proof of the larceny or embezzlement of a check.—State v. Rosefelt, 184 S. W. 904.

☞40(11) (Tex.Cr.App.) In a prosecution for hog theft, where the indictment laid the ownership of the hog in one Smith, proof that Smith's ranch was in charge of his agent, who looked after his interests, did not constitute a variance in the proof as to possession of the hog.—Jemison v. State, 184 S. W. 807.

(B) Evidence.

☞60 (Tex.Cr.App.) In a prosecution for hog theft, testimony of the owner held sufficient to show ownership and possession of the hog, with

actual control, care, and management of it, when stolen.—Jemison v. State, 184 S. W. 807.

(C) Trial and Review.

☞73 (Tex.Cr.App.) In a prosecution for hog theft, instruction submitting the necessity that the stolen property had been taken from the alleged owner held sufficient.—Jemison v. State, 184 S. W. 807.

LAST CLEAR CHANCE.

See Railroads, ☞390.

LAW OF THE CASE.

See Appeal and Error, ☞1195.

LAWS.

See Evidence, ☞35, 80.

LEASE.

See Evidence, ☞450; Landlord and Tenant.

LIBEL AND SLANDER.

See Injunction, ☞98; Master and Servant, ☞302, 306; Trial, ☞296.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

☞7(6) (Tex.Civ.App.) Published charge that plaintiff assassinated another is libelous per se.—Houston Chronicle Pub. Co. v. Quinn, 184 S. W. 669.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

☞100(6) (Tex.Civ.App.) Where petition alleged good reputation of plaintiff prior to publication of libel, and answer denied sufficient information to form belief, evidence of good reputation of plaintiff was admissible.—Houston Chronicle Pub. Co. v. Quinn, 184 S. W. 669.

(D) Damages.

☞120(2) (Tex.Civ.App.) On publication of letter charging plaintiff with assassinating father of writers, when newspaper had facts showing that killing was in self-defense, malice may be inferred, authorizing exemplary damages.—Houston Chronicle Pub. Co. v. Quinn, 184 S. W. 669.

Where publication shows reckless disregard of rights of plaintiff, which amounts to gross negligence, jury may infer malice and award exemplary damages.—Id.

☞121(1) (Tex.Civ.App.) Award of \$4,000 actual damages for publication of charge of assassination held not excessive.—Houston Chronicle Pub. Co. v. Quinn, 184 S. W. 669.

(E) Trial, Judgment, and Review.

☞123(1) (Mo.) In a slander case it is the duty of the court by appropriate instructions to advise the jury as to the law of the case, and the duty of the jury to pass upon the facts under the law as declared by the court.—Garey v. Jackson, 184 S. W. 979.

It is just as much the duty of a trial court in a slander case to direct a verdict for defendant, where there is no substantial evidence sustaining the plaintiff's case, as it was under the same circumstances at common law.—Id.

☞124(3) (Tex.Civ.App.) In action for libel, it was not error to refuse special charge defining actual malice.—Houston Chronicle Pub. Co. v. Quinn, 184 S. W. 669.

LICENSES.

See Physicians and Surgeons, ☞5.

LIENS.

See Animals, ¶26; Execution, ¶116, 268; Homestead, ¶96; Judgment, ¶708, 787; Master and Servant, ¶82; Mechanics' Liens; Pledges; Vendor and Purchaser, ¶263, 285.

¶5 (Ark.) Artisan's Liens are a creation of the common law and are not dependent upon statute for their existence.—*Gardner v. First Nat. Bank of De Queen*, 184 S. W. 51.

LIFE ESTATES.

See Dower; Remainders; Wills, ¶616.

LIMITATION OF ACTIONS.

See Adverse Possession; Appeal and Error, ¶338; Chattel Mortgages, ¶274; Constitutional Law, ¶107; Judgment, ¶866; Limitation of Actions, ¶127; Quieting Title, ¶29.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

¶5(8) (Tenn.) The statute of limitations has no application to an action to remove a cloud from title where the owner is in possession.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

¶11(1) (Mo.App.) The statute of limitations does not run against the United States.—*Duckworth v. City of Springfield*, 184 S. W. 476.

(B) Limitations Applicable to Particular Actions.

¶22(8) (Tex.Civ.App.) An action by assignee of judgment under Rev. St. 1911, arts. 3776, 3777, to recover the amount thereof from sheriff and his sureties for failure to levy and return execution thereon, was barred by five-year statute of limitations.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

¶24(2) (Tex.Civ.App.) A suit for rent of additional land where a lease provided for leasing of additional land by a supplemental contract, which was made, but not in writing, *held* a suit "founded upon any contract in writing" within the four-year statute of limitation.—*Donada v. Power*, 184 S. W. 793.

¶27 (Tex.Civ.App.) Under the statute of limitations the right to rent under a lease not in writing is barred if suit is not commenced in two years after it accrues.—*Donada v. Power*, 184 S. W. 793.

¶36(1) (Tenn.) The 7-year statute of limitations, applying where there is an adverse holding of real estate, did not apply in an action to remove a cloud affecting marketability or endangering the rights of the complainant.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

¶37(3) (Ky.) In action against relief department of railroad for compensation for injuries, where award of advisory committee is set up as bar, reply alleging fraud or mistake, filed eight years after award, is barred by limitation of Ky. St. §§ 2515, 2519.—*Reager's Adm'r v. Pennsylvania Co.*, 184 S. W. 395.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

¶45 (Ky.) An action to recover possession of personal property, brought more than five years after plaintiff's notice of the adverse claim of defendant's testatrix, was barred by Ky. St. § 2515.—*Fidelity & Columbia Trust Co. v. McCabe*, 184 S. W. 1124.

¶47(2) (Mo.App.) Where the grantee discovered adjoining owners plowing part of his land, and he started suit against them, and they give a bond to account to him if successful, and he

is defeated, his cause of action on the warranty accrues on the entry of judgment.—*Gardiner v. McPike*, 184 S. W. 956.

(C) Personal Disabilities and Privileges.

¶72(1) (Ark.) Under Kirby's Dig. section 5056 or 5076, a married woman's action for the recovery of rents, commenced more than 3 years after she reached 18, was barred.—*Shapard v. Mixon*, 184 S. W. 399.

¶73(3) (Mo.) Under Rev. St. 1909, § 1894, suit to foreclose deed of trust, by married woman to whom her husband, payee of the note, indorsed and delivered, the wife's coverture lasting until 1910, was not barred in 1912.—*Bobb v. Taylor*, 184 S. W. 1028.

(D) Death and Administration.

¶83(1) (Ky.) A personal representative or trustee may stop the running of limitation by such action as will prevent the person against whom the statute is pleaded from proceeding to establish his rights before the expiration of the statutory limit.—*Fidelity & Columbia Trust Co. v. McCabe*, 184 S. W. 1124.

(E) Absence, Nonresidence, and Concealment of Person or Property.

¶85(5) (Tex.Civ.App.) Under Rev. St. 1911, art. 5702, time when defendant was without the state must be deducted in determining whether plaintiff's action was barred by the five-year statute of limitations.—*Sweeten v. Taylor*, 184 S. W. 693.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

¶100(11) (Tex.Civ.App.) When the fraud relied upon to prevent the running of limitation is unknown or is concealed, lapse of time will not be laches barring relief, unless such party has failed to use reasonable diligence to discover the fraud.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

¶103(4) (Ky.) From date of publication and probate of her sister's will bequeathing stock formerly owned by plaintiff to defendant in trust for her, plaintiff was charged with notice of the adverse nature of the title claimed by testatrix so as to start the five-year statute of limitations. Ky. St. § 2515.—*Fidelity & Columbia Trust Co. v. McCabe*, 184 S. W. 1124.

(G) Pendency of Legal Proceedings, Injunction, Stay, or War.

¶111 (Tex.Civ.App.) In statutory action against sheriff and his sureties, to recover amount of a judgment for refusal to levy and return execution, judgment enjoining issuance and levy of execution on property of judgment debtor, *held* not to interrupt running of limitations.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

In statutory action against sheriff and his sureties to recover amount of judgment on ground of refusal to levy and return execution, acts of defendants in enjoining proceedings against sheriff, *held* to suspend limitations.—*Id.*

(H) Commencement of Action or Other Proceeding.

¶121(2) (Tex.Civ.App.) Amending petition by joint owners for injury to property so as to take away a party plaintiff does not constitute new suit barred by statute of limitations.—*Baker v. Gulf, C. & S. F. Ry. Co.*, 184 S. W. 257.

Dropping party plaintiff by amendment in proper case does not render statute of limitations available against remaining plaintiffs.—*Id.* Addition or subtraction of party plaintiff is not bringing of new suit barred by statute of limitations.—*Id.*

Where new party plaintiff is added after time has run, action as to new plaintiff is barred by statute of limitations.—*Id.*

Where two parties brought suit for injury to property, and, after action, would have been

barred by limitation, petition was amended, making one of them sole plaintiff, such amendment was not a new suit, barred by statute of limitations.—Id.

Under Rev. St. 1911, art. 1905, allowing judgments for or against one or several parties, amendment of petition by joint owners for injury to property so as to leave but one party plaintiff is immaterial, not subjecting suit as amended to bar of statute of limitations.—Id.

⇨126 (Tex.Civ.App.) Suit brought by A. does not toll the statute of limitations as to later suit on same cause by B., in absence of privity between A. and B. in the cause of action.—Baker v. Gulf, C. & S. F. Ry. Co., 184 S. W. 257.

Tests to determine identity of causes of action on question of toll of statute of limitations are: (1) Does recovery on original, bar recovery on amended petition; (2) would same evidence support both; (3) is measure of damages same; and (4) are each subject to same defenses?—Id.

⇨127(1) (Tex.Civ.App.) Whether amended petition states new cause of action barred by limitation does not depend on whether new facts are alleged, but whether a different cause is stated.—Baker v. Gulf, C. & S. F. Ry. Co., 184 S. W. 257.

Courts will be liberal in allowing amendments to prevent bar of action by limitation, taking care not to deny defendant's right to bar simply because plaintiff is thereby denied trial on merits.—Id.

⇨127(2) (Tex.Civ.App.) Cause of action is not changed by amendment relating to measure of damages.—Baker v. Gulf, C. & S. F. Ry. Co., 184 S. W. 257.

⇨127(14) (Ky.) Where in an action for injuries an amended petition filed more than two years after the injury first sets up the interstate nature of the employment and right of recovery under the federal Employers' Liability Act, the right of recovery is not barred by the two-year limitation of that statute.—Baltimore & O. R. Co. v. Smith, 184 S. W. 1108.

⇨130(1) (Tenn.) Shannon's Code, § 4446, providing for commencement of new action after reversal or arrest, is remedial, and should be liberally construed in furtherance of its purpose.—Nashville, C. & St. L. Ry. v. Bolton, 184 S. W. 9.

⇨130(3) (Mo.App.) Where the original action, brought in time, alleged violation of the master's common-law duty to provide a safe place for his servants to work, and a new action after voluntary dismissal of the first alleged violation of Rev. St. 1900, § 7828, the mere change from common-law to statutory basis did not create a new cause of action so as to bar recovery under the statute of limitations.—Martin v. Richmond Cotton Oil Co., 184 S. W. 127.

Whether a change from common-law to statutory liability changes a cause of action so as to subject the new action to the bar of the statute of limitations depends on whether the facts relied upon are the same, rather than whether one law or another was relied on.—Id.

⇨130(5) (Tenn.) Under Shannon's Code, § 4446, the taking of a voluntary nonsuit entitles a plaintiff to the year in which to begin a second suit.—Nashville, C. & St. L. Ry. v. Bolton, 184 S. W. 9.

Shannon's Code, § 4446, applies to actions in equity as well as to actions at law, and the plaintiff's failure to file a declaration which results in a dismissal of a suit does not prevent the bringing of a new suit.—Id.

Under Shannon's Code, § 4446, plaintiff, who recovered a judgment, which on defendant's appeal was reversed and remanded, and who then took a voluntary nonsuit might commence a new action within the year next following the nonsuit.—Id.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇨192(3) (Tex.Civ.App.) In statutory action against sheriff and his sureties for failure to levy and return execution on judgment assigned to plaintiff, allegations held insufficient to show suspension of limitations by concealment of cause of action.—Peck v. Murphy & Bolanz, 184 S. W. 542.

⇨195(3) (Ky.) The party asserting such acts of a personal representative as will stop the running of limitations against him has the burden of proving such acts by convincing evidence.—Fidelity & Columbia Trust Co. v. McCabe, 184 S. W. 1124.

⇨197(1) (Ky.) Evidence, in suit to recover possession of shares of stock from trustee and executor of will of plaintiff's sister, held to show that trustee held title adversely to plaintiff's claim and that his acts had not stopped running statute of limitation.—Fidelity & Columbia Trust Co. v. McCabe, 184 S. W. 1124.

LIMITATION OF LIABILITY.

See Carriers, ⇨154, 165, 218; Telegraphs and Telephones, ⇨54.

LIQUIDATED DAMAGES.

See Damages, ⇨78-85.

LIQUIDATION.

See Banks and Banking, ⇨64.

LIQUOR SELLING.

See Intoxicating Liquors.

LITERARY SOCIETIES.

See Disturbance of Public Assemblage, ⇨11.

LIVE STOCK.

See Carriers, ⇨205-230.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOANS.

See Building and Loan Associations, ⇨28.

LOCAL OPTION.

See Intoxicating Liquors, ⇨39.

LOGGING RAILROADS.

See Carriers, ⇨235, 307.

LOGS AND LOGGING.

⇨2 (Ark.) The conveyance of timber land without reservation or exception of the timber carries the timber.—Koonce v. Fordyce Lumber Co., 184 S. W. 440.

Grantor of standing timber, whose subsequent conveyance of the land, without reservation or exception of the timber, had the effect to defeat and defraud the grantee of the timber, whose deed was not of record, held liable for the loss.—Id.

⇨3(8) (Ark.) Subsequent conveyances of land without reservation or exception of the timber previously conveyed by warranty deed, held a breach of the warranty entitling the grantee of the timber to damages.—Koonce v. Fordyce Lumber Co., 184 S. W. 440.

⇨3(15) (Ark.) Tenants in common of timber land, one of whom had conveyed his interest to his cotenant, who conveyed without reservation of the timber and under which subsequent grantees were held bona fide purchasers enti-

tled to the timber, *held* properly joined in action by grantee of timber to recover value of timber taken.—Koonce v. Fordyce Lumber Co., 184 S. W. 440.

LOST INSTRUMENTS.

See Records.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MALICE.

See Homicide, ¶156; Malicious Prosecution, ¶32.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

¶16 (Mo.App.) No recovery can be had where there was probable cause: the essentials to an action for malicious prosecution being termination without a conviction, malice, and want of probable cause.—Wells v. National Surety Co., 184 S. W. 474.

¶24(3) (Mo.App.) Where a bank cashier whose employment was terminated removed from the bank funds sufficient to pay his salary until the end of his term, *held* that, under Rev. St. 1909, § 4550, and in view of section 1112, he was guilty of embezzlement, and cannot recover for malicious prosecution for that offense, though the prosecution was dismissed.—Wells v. National Surety Co., 184 S. W. 474.

III. MALICE.

¶32 (Mo.App.) Malice may be inferred from want of probable cause.—Wells v. National Surety Co., 184 S. W. 474.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

¶15 (Ky.) On mandamus to compel a judge to render a decision on a demurrer, parties to the action could not complain of delay to which they or their counsel contributed, even unintentionally.—J. B. B. Coal Co. v. Halbert, 184 S. W. 1116.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

¶26 (Ky.) Mandamus being an extraordinary writ, with prerogative features, and not a writ of right, a strong case must be presented to coerce action by a judge, the presumption being that he has done his duty.—J. B. B. Coal Co. v. Halbert, 184 S. W. 1116.

Mandamus is proper remedy to compel inferior court to adjudicate on a subject within its jurisdiction where it neglects or refuses to do so, but mandamus will not lie to revise or correct a decision.—Id.

¶39 (Ky.) Where a judge delayed in deciding a demurrer on account of the congested condition of the docket, the complicated pleadings, and the nonresidence of counsel, mandamus will not issue to compel him to act.—J. B. B. Coal Co. v. Halbert, 184 S. W. 1116.

¶57(1) (Tex.Civ.App.) Under Acts 32d Leg. c. 119, it is the duty, compellable by mandamus, of a judge of a county court, who found that plaintiff had filed sufficient affidavit of inability to pay the costs of appeal, to order the special stenographer to transcribe his notes without charge.—Otto v. Wren, 184 S. W. 350.

Court of Civil Appeals has power, under Rev. St. 1911, art. 1592, to order official stenographer

of county court to prepare transcript for pauper appellant, as required by Acts 32d Leg. c. 119.—Id.

A court stenographer may be compelled by mandamus to transcribe his shorthand notes of proceedings in court taken by him by virtue of his appointment.—Id.

A special stenographer in a county court appointed under Acts 32d Leg. c. 119, to act in a single case, who did so for three days, receiving his pay of \$15, could be compelled thereafter by mandamus to prepare a transcript for the plaintiff, a pauper, free of charge.—Id.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

¶118 (Mo.App.) Where one is threatened by a tax-collecting officer with prosecution unless he pays a tax, he may tender the amount he deems due, and, on refusal to accept, proceed by mandamus to ascertain his rights.—American Mfg. Co. v. Alt, 184 S. W. 1167, 1169.

MANSLAUGHTER.

See Homicide.

MAPS.

See Boundaries, ¶38; Evidence, ¶358.

MARRIAGE.

See Divorce; Husband and Wife.

MARRIED WOMEN.

See Abduction, ¶1; Husband and Wife.

MASTER AND SERVANT.

See Carriers, ¶283; Evidence, ¶77, 471; Insurance, ¶183, 435, 598; Justices of the Peace, ¶44, 129; Negligence, ¶101, 141, 142; Pleading, ¶177; Railroads, ¶295; Trial, ¶194, 260.

I. THE RELATION.

(B) Statutory Regulation.

¶16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ¶ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

¶78 (Ky.) Award of superintendent and advisory committee of relief department of railroad is conclusive, and bars action on original claim till set aside for fraud or mistake.—Reager's Adm'r v. Pennsylvania Co., 184 S. W. 395.

¶82(2) (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5044, intervener, who managed an abstract business, but performed much clerical work, *held* entitled to a laborer's lien.—Ferrell-Michael Abstract & Title Co. v. McCormac, 184 S. W. 1081.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

¶87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ¶ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

¶88(7) (Mo.App.) Relation of master and servant *held* not entirely suspended when employé was injured, though he was about to leave the building.—Marshall v. United Rys. Co. of St. Louis, 184 S. W. 159.

A master's duty to a servant is not neces-

sarily confined to the precise period during which services are actively rendered nor restricted to the identical place of the labor.—Id.

⇒89(7) (Tex.Civ.App.) Where a railroad employé was sitting on the edge of a platform waiting for other employes to perform certain labor which had to be done before he could commence work, he was in the discharge of his duties as an employé of the company.—San Antonio & A. P. Ry. Co. v. Blair, 184 S. W. 566.

⇒89(1) (Mo.App.) The scope of an employé's duties was to be determined by what he was employed to perform and what, with the knowledge and approval of his employer, he actually did perform.—Marshall v. United Rys. Co. of St. Louis, 184 S. W. 159.

⇒89(4) (Mo.App.) If employé's act was such as he had been accustomed to do with knowledge and approval of his superiors and within general scope of his duties, *held*, that he was not intermeddling.—Marshall v. United Rys. Co. of St. Louis, 184 S. W. 159.

⇒100(1) (Mo. App.) Employé's contract of membership in relief department of railroad *held* void so far as it sought to provide in advance for release of road from legal consequences of future wrongs by provision that suit for injuries should forfeit rights under the contract.—Flaiz v. Chicago, B. & Q. R. Co., 184 S. W. 917.

⇒100(1) (Tex.) Application for employment by railroad reciting existence of obstruction and assumption of risk is void as against public policy.—Barnhart v. Kansas City, M. & O. Ry. Co. of Texas, 184 S. W. 176.

(B) Tools, Machinery, Appliances, and Places for Work.

⇒101, 102(6) (Mo.App.) A master is bound to furnish appliances which are reasonably safe, but is not required to furnish appliances absolutely safe.—Reynolds v. City Ice & Storage Co., 184 S. W. 934.

⇒101, 102(8) (Ark.) A master must exercise ordinary care to provide a reasonably safe place for the servant to work.—Wisconsin & Arkansas Lumber Co. v. Irons, 184 S. W. 456.

⇒101, 102(8) (Mo.App.) A master owes his servant the duty of exercising reasonable care to furnish him a reasonably safe place in which to work.—Hayes v. Berry, 184 S. W. 913.

⇒111(1) (Tex.Civ.App.) Improper placing or looseness of bolts, making trucks of railway car rigid so they would leave the track on curves, *held* a defect in the car.—Galveston, H. & S. A. Ry. Co. v. Moses, 184 S. W. 327.

⇒117 (Mo.App.) A master who is having installed a traveling crane at a point under which his employes work is liable for any negligence in prosecution of the work, through which his servants are injured.—Hayes v. Berry, 184 S. W. 913.

⇒124(1) (Ark.) A master must make reasonable inspection to see that the place and appliances are safe.—Wisconsin & Arkansas Lumber Co. v. Irons, 184 S. W. 456.

⇒124(6) (Ky.) An inspection consisting merely of the inspector's looking at handholds while passing cars is insufficient.—Baltimore & O. R. Co. v. Smith, 184 S. W. 1108.

⇒124(10) (Ky.) The mere inspection of cars by employes charged with that duty is not conclusive evidence of ordinary care by a railroad to keep its cars in reasonably safe condition.—Baltimore & O. R. Co. v. Smith, 184 S. W. 1108.

⇒124(10) (Tex.Civ.App.) That railway company's inspectors did not discover defect in car not belonging to it *held* not to relieve it of liability for injuries to an employé.—Galveston, H. & S. A. Ry. Co. v. Moses, 184 S. W. 327.

⇒127 (Tex.Civ.App.) A railway company is not guilty of negligence per se for failure to take precautions which other railways observe in keeping their engines in repair.—Missouri, K. & T. Ry. Co. of Texas v. Pace, 184 S. W. 1061.

⇒129(1) (Mo.App.) It was not the duty of the master to protect the servant against accidents not caused by it, and, where a place was safe except for the fall, for which the master was not responsible, the safe place to work theory could not avail the servant.—Schaller v. Lusk, 184 S. W. 1179.

⇒129(5) (Mo.App.) Where as a servant was going upon running board of a locomotive in defendants' shop he caught his foot in wire and fell, when a loose branch pipe which he caught fell with him, the catching of his foot, and not the loose branch pipe, was the cause of his injury.—Schaller v. Lusk, 184 S. W. 1179.

(C) Methods of Work, Rules, and Orders.

⇒135 (Tex.Civ.App.) The master, in order to avoid the charge of negligence, cannot rely upon failure of other masters in similar circumstances to perform a duty, the violation of which is the subject of complaint.—Missouri, K. & T. Ry. Co. of Texas v. Pace, 184 S. W. 1061.

⇒141 (Ky.) A master whose business is dangerous, complicated, and carried on by a great number of servants, owes them the duty to make and enforce reasonable rules to protect them from the negligence of each other.—Little v. Consolidation Coal Co., 184 S. W. 873.

(E) Fellow Servants.

⇒185(2) (Tex.Civ.App.) To render a master liable for the act of a servant, it is not necessary that the master specifically authorize the servant to do the particular act; it being sufficient if the act falls within the servant's course of employment.—Postex Cotton Mill Co. v. McCamy, 184 S. W. 569.

(F) Risks Assumed by Servant.

⇒204(1) (Tex.Civ.App.) The common-law defense of assumed risk still obtains except as limited by Vernon's Sayles' Ann. Civ. St. 1914, art. 6645.—Missouri, K. & T. Ry. Co. of Texas v. Pace, 184 S. W. 1061.

⇒205(5) (Ky.) An employé cannot recover on a promise of protection from injury made by a boss, not shown to have authority to bind the master by such agreement.—Little v. Consolidation Coal Co., 184 S. W. 873.

⇒206 (Ky.) Railroad employé who worked drying sand for use on locomotives could not recover for physical injuries occasioned by his having become overheated at work.—Louisville & N. R. Co. v. Sawyers, 184 S. W. 1128.

Railroad employé who worked drying sand for use in locomotives could not recover against the road for physical injuries received through overwork or being required to overtax his strength.—Id.

⇒213(2) (Ark.) Where plaintiff himself laced the belt and used leather which he had instead of procuring stronger leather, he assumed the risk of injury from weakness in the leather.—Sheldon Handle Co. v. Williams, 184 S. W. 43.

⇒217(1) (Tex.Civ.App.) A servant assumes only the risks of which he has actual knowledge or of which he may learn by the ordinary circumspection of a prudent man.—Worden v. Kroeger, 184 S. W. 583.

⇒217(25) (Tex.Civ.App.) A carpenter who used a sawing machine without a cut-off guide, knowing that it was dangerous to operate without one, as he testified, "taking a chance," assumed the risk of injury.—Worden v. Kroeger, 184 S. W. 583.

⇒223 (Ky.) Whether a railroad employé assumes the risk of a defective handhold while

boarding a car depends on whether the railroad had authorized him to board the car.—*Baltimore & O. R. Co. v. Smith*, 184 S. W. 1108.

☞226(1) (Mo.App.) While a servant who works underneath a traveling crane, newly installed and not yet completed, assumes the risks ordinarily incident to the completion thereof, he does not assume risks created by the negligence of his master in the prosecution of such work.—*Hayes v. Berry*, 184 S. W. 913.

☞226(1) (Tex.) A servant assumes risks ordinarily incident to employment, but not risk from master's negligence, unless danger is obvious or he has actual knowledge thereof.—*Barnhart v. Kansas City, M. & O. Ry. Co. of Texas*, 184 S. W. 178.

☞226(2) (Ark.) While a servant assumes the risk ordinarily incident to the employment, he does not assume that arising from negligence of the employer in failing to discharge its duty, unless he knows of the negligence.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 456.

(G) Contributory Negligence of Servant.

☞233(2) (Mo.App.) The servant's recovery for injuries due to defectively guarded machinery is not defeated on the ground of contributory negligence in leaving his place of work, where he was ordered to stop work temporarily, and went for a drink, and was returning through a dangerous passage, customarily used, to his place of work.—*Martin v. Richmond Cotton Oil Co.*, 184 S. W. 127.

☞234(1) (Mo.App.) An iceman who, knowing that a strip of iron on endgate of his wagon was partly loose, attempted to jump from endgate to the ground, held negligent, barring recovery where his foot caught and he was hurt.—*Reynolds v. City Ice & Storage Co.*, 184 S. W. 934.

☞235(2) (Mo.App.) A servant whose duty was to shovel seed into a screw conveyor through openings from which he removed the board coverings, and to replace only such boards as were removed by him, was not negligent in failing to replace boards at another place in the conveyor, through which it was customary for servants to reach their places of work, in doing which he was injured.—*Martin v. Richmond Cotton Oil Co.*, 184 S. W. 127.

☞235(7) (Tex.Civ.App.) A servant owes no duty of inspection of the tools he uses.—*Worden v. Kroeger*, 184 S. W. 583.

☞238(6) (Ky.) It is contributory negligence on the part of an employé to stoop down near a mule's hind feet and at the same time strike the mule.—*Consolidation Coal Co. v. Pratt*, 184 S. W. 369.

☞247(2) (Mo.App.) The negligence of an iceman, who caught his foot in a loose strip of iron on the endgate of his wagon, held the proximate cause of the injury, and not that of the master.—*Reynolds v. City Ice & Storage Co.*, 184 S. W. 934.

☞247(5) (Tex.Civ.App.) That plaintiff did not call one of his superiors to assist him in an operation as such superior directed held no defense to an action for injuries resulting from the negligence of the other superior who assisted in the operation.—*Postex Cotton Mill Co. v. McCamy*, 184 S. W. 569.

(H) Actions.

☞250¼ [New, vol. 15 Key-No. Series] (Mo.) Under Rev. St. 1909, § 5434, and Act Cong. April 22, 1908, § 1, it is no defense to an action for injuries to a railroad employé that the car on which he was working when injured was then employed in interstate commerce.—*Pipes v. Missouri Pac. Ry. Co.*, 184 S. W. 79.

☞250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ☞ num-

ber sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

☞256(2) (Mo.App.) An employé's action for injuries held not to proceed on theory of negligence respecting place of work or means of egress from the building.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

☞264(10) (Mo.App.) Where the servant alleges specific acts of negligence, he cannot recover on proof of a state of facts which might have resulted from another cause than that pleaded.—*Hayes v. Berry*, 184 S. W. 913.

☞265(5) (Ky.) The doctrine of *res ipsa loquitur* does not apply with the same fullness in case of an injured servant as in a case where a third party is injured.—*Baltimore & O. R. Co. v. Smith*, 184 S. W. 1108.

☞265(5) (Mo.App.) On a servant's fall from a running board of a locomotive in a shop, alleged negligence in not furnishing a safe place cannot be presumed from the mere fact of the fall.—*Schaller v. Lusk*, 184 S. W. 1179.

☞265(5) (Tex.) The circumstances of an accident to an employé may themselves furnish proof of the employer's negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Cassady*, 184 S. W. 180.

☞265(5) (Tex.Civ.App.) Where a railroad employé was injured when a trunk fell or was thrown from a stack on a platform and the trunks if properly piled would not have fallen, the fact that a trunk fell is in itself sufficient to show negligence.—*San Antonio & A. P. Ry. Co. v. Blair*, 184 S. W. 566.

☞265(8) (Mo.App.) Where a servant alleged specifically that failure to brace certain posts was the cause of his injury when a traveling crane fell upon him, the question of *res ipsa loquitur* is not involved, and he has the burden of proving the specific acts of negligence alleged.—*Hayes v. Berry*, 184 S. W. 913.

☞265(12) (Ky.) Evidence held not to justify the presumption that the misplaced switch which caused a miner's injury was set against him by an employé.—*Little v. Consolidation Coal Co.*, 184 S. W. 873.

☞265(13) (Tex.) The burden is on employer to show defense of assumption of risk.—*Barnhart v. Kansas City, M. & O. Ry. Co. of Texas*, 184 S. W. 178.

☞265(14) (Mo.App.) The burden is on the defendant master to show contributory negligence of the servant in order to defeat his recovery.—*Martin v. Richmond Cotton Oil Co.*, 184 S. W. 127.

A servant's alleged contributory negligence may be rebutted by showing that the thing done was customary or done in the customary way, especially when the custom is observed by the master.—*Id.*

☞270(15) (Tex.Civ.App.) In an engineer's action for injuries received when he attempted to replace sand pipe with his foot while the engine was in motion, it is not error to permit him to testify that such was the custom.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

☞276(2) (Ky.) An injured employé cannot recover where the evidence fails to establish negligence of the master or a fellow servant as a cause of the accident.—*Little v. Consolidation Coal Co.*, 184 S. W. 873.

☞276(3) (Ark.) In a sawmill employé's action for injuries, evidence held to warrant finding that the falling of the wheel of a lumber buggy through a defective spot in the floor caused plaintiff to be ruptured.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 456.

☞276(4) (Tex.Civ.App.) In a carpenter's action for injuries while operating a mechanical saw, evidence held insufficient to prove that the rough table top caused or contributed to cause the injury.—*Worden v. Kroeger*, 184 S. W. 583.

§276(10) (Ky.) Evidence of instructions by superior officer held sufficient to warrant finding that riding on a freight train was within the scope of plaintiff's authority.—*Baltimore & O. R. Co. v. Smith*, 184 S. W. 1108.

§278(1) (Mo.App.) Evidence held insufficient to support the allegations of the servant's petition of specific acts of negligence, so that he could not recover.—*Hayes v. Berry*, 184 S. W. 913.

§278(1) (Tex.Civ.App.) In an action for the death of a railroad employé from injury received when a trunk was thrown over or slipped from a pile of trunks on a platform and struck him, evidence held to warrant a finding that the porter handling the trunks was negligent.—*San Antonio & A. P. Ry. Co. v. Blair*, 184 S. W. 566.

§278(6) (Ky.) In a suit by employé for injuries, the mere fact that a handhold gave way, independent of other circumstances showing its defective or unsafe condition, is not sufficient to establish negligence by a railroad.—*Baltimore & O. R. Co. v. Smith*, 184 S. W. 1108.

§278(13) (Mo.App.) Evidence held to show that a cotton seed conveyor was insufficiently guarded, so as to make the master liable for injuries to his servant who fell into it.—*Martin v. Richmond Cotton Oil Co.*, 184 S. W. 127.

§278(19) (Ky.) Evidence of a single violation of a rule by one servant does not show knowledge by the master that the rules were habitually violated.—*Little v. Consolidation Coal Co.*, 184 S. W. 873.

§279(6) (Tex.Civ.App.) In an action against a railroad for death of one of a switching crew, evidence of the engineer's negligence in checking his engine too sharply held sufficient to support verdict for plaintiffs.—*Texas & P. Ry. Co. v. Griffin*, 184 S. W. 305.

§281(12) (Tex.Civ.App.) In a servant's action, evidence held to warrant a finding that servant was guilty of negligence which was a joint contributing cause of injury, so under Employers' Liability Act recovery was properly diminished.—*Postex Cotton Mill Co. v. McCamy*, 184 S. W. 569.

§284(3) (Mo.App.) Evidence held to make question for jury as to whether act of employé in entering elevator shaft to assist his immediate superior to open a door was within the scope of his duties.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

§286(13) (Ky.) Where an injury was caused by a defective appliance on a railroad car, whether the railroad has used due care to keep the car in good condition is for the jury.—*Baltimore & O. R. Co. v. Smith*, 184 S. W. 1108.

§286(25) (Ky.) Evidence held sufficient to take to the jury the question whether ordinary care would have shown employer that handhold on car was defective.—*Baltimore & O. R. Co. v. Smith*, 184 S. W. 1108.

§286(30) (Mo.App.) In a section hand's action for injuries while riding a flat car which was derailed as the result of a collision with cattle on the track, case held for jury under evidence touching the locomotive engineer's negligence.—*Anderson v. St. Louis & S. F. R. Co.*, 184 S. W. 481.

§287(4) (Mo.App.) In servant's action for personal injury sustained when carrying a heavy rail with seven other men by reason of a heavy lurch resulting from the negligence of his fellow servants in dropping their part of the weight without warning, evidence held to sustain a directed verdict for defendant.—*Hawley v. Lusk*, 184 S. W. 1173.

§287(4) (Tex.Civ.App.) In an action by plaintiff whose leg was broken in putting a heavy bolt of cloth into a machine, question whether a servant, who assisted plaintiff and was negligent, was acting within scope of his

authority held for the jury.—*Postex Cotton Mill Co. v. McCamy*, 184 S. W. 569.

§288(7) (Ark.) Servant operating saw in mill did not, as matter of law, assume the risk of injury by a lumber buggy's wheel going through a defective spot in the floor, pulling him over against it and rupturing him, where the only indication of the defective spot was a crack 14 inches long.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 456.

§289(1) (Mo.App.) Evidence held to present a question for the jury whether deceased servant was contributorily negligent.—*Martin v. Richmond Cotton Oil Co.*, 184 S. W. 127.

§289(9) (Mo.App.) Whether a 15 year old boy jumping into elevator shaft, believing elevator was at level of driveway 14 inches below the floor, was negligent, held for the jury.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

§289(32) (Mo.App.) Section hand who rode on flat car after he had unloaded it and did not take refuge in the caboose while the train proceeded three or four miles to a siding to let another pass held not negligent as a matter of law.—*Anderson v. St. Louis & S. F. R. Co.*, 184 S. W. 481.

§291(1) (Tex.) Instruction that application assuming risk of injury from obstructions near track is void and to be considered only as notice of obstructions is not objectionable as minimizing its effect for that purpose.—*Barnhart v. Kansas City, M. & O. Ry. Co. of Texas*, 184 S. W. 176.

§291(3) (Tex.Civ.App.) An allegation that the master negligently furnished the servant an engine out of repair supports an instruction that it was the master's duty to exercise ordinary care to furnish an ordinarily safe engine, and to have it inspected and repaired, especially where the specific duty was by later instruction specifically defined.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

§295(1) (Tex.) Charge that employé might assume that track of employer was free from obstruction so near as to expose him to danger, and he was not required to examine it to see that it was free therefrom, held proper.—*Barnhart v. Kansas City, M. & O. Ry. Co. of Texas*, 184 S. W. 176.

§295(1) (Tex.Civ.App.) Where the defense of assumption of risk is expressly limited under certain conditions by *Vernon's Sayles' Ann. Civ. St. 1914, art. 6645*, an instruction requested by defendant on the issue of assumption of risk, which failed to negative those conditions, is properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

§295(7) (Ark.) In a servant's action for injuries, instruction on assumption of risk held erroneous as placing upon the servant duty to inspect the place of work.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 456.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§301(1) (Mo.App.) Where defendant telephoned his son to meet him at the station with the family automobile, defendant's wife, who rode on the back seat, was not his agent.—*Cutts v. Davison*, 184 S. W. 921.

§302(2) (Ky.) A master is not liable for slander spoken by an employé, even when acting in the scope of his employment, unless the master authorizes or ratifies the slander.—*Pruitt v. Goldstein Millinery Co.*, 184 S. W. 1134.

§302(2) (Mo.App.) A telegraph company is liable for damages caused by its messenger boy running into a woman while he was returning to the company's office after the delivery of a message.—*Phillips v. Western Union Telegraph Co.*, 184 S. W. 958.

☞302(2) (Tex.Civ.App.) A railway company is not liable for injuries to a horse which was frightened by section hands shouting, laughing, and waving their hands at it.—Texas & P. Ry. Co. v. Howell, 184 S. W. 280.

The frightening of plaintiff's horse held to be due to acts of section hands outside of their employment not to the manner of conducting their work.—Id.

☞308 (Ky.) The mere retention in service of an employé after the master has knowledge that the employé has spoken a slander does not ratify the slander.—Pruitt v. Goldstein Millinery Co., 184 S. W. 1134.

(C) Actions.

☞330(3) (Mo.App.) In an action by one run down by defendant's motor car, evidence held to warrant a finding of the negligence of defendant's agent.—Cutts v. Davison, 184 S. W. 921.

☞330(3) (Mo.App.) Evidence held sufficient to warrant the inference that the boy who ran into plaintiff's wife was employed by the defendant and was acting in the course of his employment.—Phillips v. Western Union Telegraph Co., 184 S. W. 958.

That a boy was wearing the uniform of a telegraph company is sufficient to establish his employment by the company at the time he ran into plaintiff's wife.—Id.

☞330(3) (Tex.Civ.App.) Evidence held to sustain findings by the jury that the acts of railway section hands were negligent and were the proximate cause of the injury to plaintiff's horse, frightened thereby.—Texas & P. Ry. Co. v. Howell, 184 S. W. 280.

☞332(2) (Mo.App.) In an action for personal injuries, the question whether the boy causing injuries was in the course of his employment as defendant's messenger held for the jury.—Phillips v. Western Union Telegraph Co., 184 S. W. 958.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

☞347 (Tex.Civ.App.) The Employers' Liability Act of 1913 is valid.—Postex Cotton Mill Co. v. McCamy, 184 S. W. 569.

MATERIALITY.

See Alteration of Instruments, ☞9.

MAXIMS.

See Equity.

MEASURE OF DAMAGES.

See Damages, ☞112.

MECHANICS' LIENS.

See Quietting Title, ☞7.

II. RIGHT TO LIEN.

(A) Nature of Improvement.

☞34 (Tex.Civ.App.) Where the plaintiff contracted with the defendant to pave the street in front of a lot held under a warranty deed, carrying title to the center of the street, the work was an improvement upon the entire lot, and defendant was entitled to a mechanic's lien, under Vernon's Sayles' Ann. Civ. St. 1914, art. 5631.—Lewis v. Roach Manigan Paving Co., 184 S. W. 680.

(B) Services Rendered and Materials Furnished.

☞47 (Mo.App.) Where cement was sold at a fixed price per sack under an agreement that the contractor should receive a refund on the sacks returned, the price of the sacks not returned is a lienable item.—Glencoe Lime & Ce-

ment Co. v. Polar Wave Ice & Fuel Co., 184 S. W. 952.

III. PROCEEDINGS TO PERFECT.

☞116 (Tex.Civ.App.) Where laborer fails to take measures provided by Vernon's Sayles' Ann. Civ. St. 1914, art. 5621-5623, 5631, to secure lien on building intended for occupancy as homestead, he cannot enjoin its delivery by contractor to owner.—Norton v. Elliott, 184 S. W. 1096.

☞157(6) (Mo.App.) Though a materialman failed to allow all the credits to which the contractor or subcontractor was entitled, he is entitled, where the failure was unintentional, to his lien under Rev. St. 1909, § 8223.—Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co., 184 S. W. 952.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(A) Waiver of Right to Lien.

☞216(1) (Mo.App.) Lumber company, by applying contractor's check in part to an account and notifying the contractor thereof by letter, which he showed to the owner, inducing the latter to advance part of contract price, held estopped to assert a lien for the material payment for which it had acknowledged.—Julius Seidel Lumber Co. v. Weaver, 184 S. W. 484.

Owner of building held not to waive such estoppel by taking contractor's and his sureties' note to cover amounts as to which contractor had defaulted.—Id.

(C) Extinguishment, Release, or Payment.

☞239 (Mo.App.) A materialman may, where there are no directions, apply a credit on non-lienable items instead of lienable items.—Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co., 184 S. W. 952.

VII. ENFORCEMENT.

☞260(4) (Mo.App.) Under Rev. St. 1909, § 8221, it is sufficient that a materialman, suing to foreclose a lien based on a contract with a subcontractor, make such subcontractor a party within 90 days after filing the lien, and the principal contractor, though a necessary party, may be joined at any time before trial.—American Radiator Co. v. Connor Plumbing & Heating Co., 184 S. W. 907.

☞263(9) (Mo.App.) Under Rev. St. 1909, § 8221, and in view of sections 8226 and 8233, the principal contractor, though he need not be joined within 90 days after the filing of lien notice by a materialman, under a contract with a subcontractor, is a necessary party to an action to foreclose the lien.—American Radiator Co. v. Connor Plumbing & Heating Co., 184 S. W. 907.

MEDICINES.

See Poisons.

MEMORANDA.

See Frauds, Statute of, ☞118.

MINORS.

See Infants.

MISREPRESENTATION.

See Corporations, ☞80; False Pretenses; Fraud.

MISTAKE.

See Arbitration and Award, ☞63; Judgment, ☞435; Reformation of Instruments.

MODIFICATION.

See Appeal and Error, ☞1151.

MONOPOLIES.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§17(2) (Tex.Civ.App.) Contract, whereby defendant agreed to buy only from medical company, to resell at prices fixed by the company, and to have no other business, *held* violative of Rev. St. 1911, arts. 7798, 7798, the Texas Anti-Trust Act, and void under article 7799.—*W. T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S. W. 549.

§23 (Tex.) New York fashion company selling patterns to Texas buyer and fixing prices, etc., so that the contract was partially violative of the Texas Anti-Trust Act, could not recover for the buyer's breach.—*Segal v. McCall Co.*, 184 S. W. 188.

MORTGAGES.

See Chattel Mortgages; Constitutional Law, §107; Evidence, §383; Limitation of Actions, §73; Parties, §7; Railroads, §194.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§38(1) (Ark.) The chancellor's finding that a deed absolute on its face was intended as a mortgage to secure the grantees for advances made *held* not contrary to the preponderance of the testimony.—*Williams v. Prioleau*, 184 S. W. 847.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§125 (Ark.) Where plaintiff, who received absolute conveyance as mortgage, was to free land from other incumbrances, *held*, that costs expended in a suit to determine validity of incumbrances were properly charged against the land.—*Williams v. Prioleau*, 184 S. W. 847.

(C) Property Mortgaged, and Estates of Parties Therein.

§133 (Tex.Civ.App.) Whether nursery stock, *prima facie* a part of the realty, is subject to the lien of a mortgagee of the land depends upon the intention of the parties at the time the mortgage was executed.—*Colonial Land & Loan Co. v. Joplin*, 184 S. W. 537.

Where the parties to a mortgage of lands of a nursery company contemplated that the company might sell the nursery stock without accounting for proceeds, which was done, it was the intention that the stock be regarded as personality, not subject to the mortgage.—*Id.*

Crops grown on mortgaged land are personalty of the mortgagor, and not subject to the mortgage.—*Id.*

(D) Lien and Priority.

§151(3) (Ark.) There is no implied authority from the mortgages of real property to construct improvements thereon, so that the mechanic's lien for such improvements is not prior to the recorded mortgage.—*Gardner v. First Nat. Bank of De Queen*, 184 S. W. 51.

§151(7) (Tex.Civ.App.) Mortgage creditor of deceased who gave the mortgage before marriage and in which the wife did not join after marriage, *held* not entitled to lien superior to her right to an allowance under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 3413, 3414, 3420, 3422, 3428.—*Newnom v. Hedeman*, 184 S. W. 298.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§316 (Ark.) Partial failure of consideration for the execution of a contract of lease, intended to extinguish a mortgage debt, gave the mortgagee the same rights in the direction of a revival of the mortgage as a total failure.—*Shapard v. Mixon*, 184 S. W. 399.

Where a mortgagor's lease extinguished the mortgage lien, but the consideration for the mortgagee's acceptance of the lease partially failed, he could revive and enforce his lien in equity.—*Id.*

Kirby's Dig. § 5399, touching limitations on suits to foreclose mortgages, does not apply to a suit, to revive an original mortgage lien, by a mortgagee, who satisfied his lien in return for a lease of the premises, the consideration for his satisfaction thereafter failing on account of homestead rights of the mortgagor's children.—*Id.*

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§353 (Mo.) Where representative of corporation which had acquired entire equity of redemption was present, failure of trustee to name one of original owners in the notice of sale, as required by Rev. St. 1909, § 2843, did not render foreclosure sale void.—*Hassler v. Mercantile Bank of Louisiana*, Mo., 184 S. W. 978.

X. FORECLOSURE BY ACTION.

(F) Pleading and Evidence.

§463 (Ark.) In a suit to foreclose mortgages, evidence *held* sufficient to sustain finding that money furnished by plaintiff to defendant, evidenced by notes which the mortgages in suit were given to secure, was not with the verbal agreement that the notes were not to be paid nor the mortgages foreclosed until 1,590 acres, included in one of the mortgages, were sold by defendant.—*Bowman v. Sims*, 184 S. W. 853.

(H) Trial or Hearing and Reference.

§476 (Mo.) In suit to foreclose a mortgage, where releases of part of the land recited a partial payment and satisfaction of the note by the purchaser, it was the duty of the trial court to ascertain the amounts paid for such release and to decree a credit therefor on the indebtedness.—*Bobb v. Taylor*, 184 S. W. 1023.

(I) Judgment or Decree and Execution.

§486 (Mo.) In suit to foreclose a deed of trust, where plaintiff alleged the original indebtedness for the purchase price of land, she was entitled, under her prayer for general relief, to full equitable redress, regardless of the unenforceability of the note representing the debt.—*Bobb v. Taylor*, 184 S. W. 1023.

(J) Sale.

§546 (Ark.) Where a crop had been removed from the land before its sale under a deed of trust which did not cover the growing crops, the purchaser at the sale did not acquire the crop.—*Stuttgart Rice Mill Co. v. Reinsch*, 184 S. W. 836.

XI. REDEMPTION.

§591(3) (Ark.) Borrowers, who conveyed land to the lender under her agreement to deed back if they paid the balance due within a year, *held* to have the right to redeem where their payments were stopped by garnishment by creditors of the lender's husband.—*Page v. Cockrum*, 184 S. W. 405.

MOTIONS.

See Appeal and Error, ¶185-237; Continuance; Indictment and Information, ¶137-144.

¶56(1) (Tex.Civ.App.) In the absence of evidence that the facts stated in a proposed order are true, it cannot be held that the court was in error in refusing to file the order.—Crosby v. Stevens, 184 S. W. 705.

MULES.

See Animals, ¶33.

MULTIPLICITY OF SUITS.

See Quieting Title, ¶5.

MUNICIPAL CORPORATIONS.

See Constitutional Law, ¶102; Counties; Dedication, ¶16, 19; Evidence, ¶471; Judgment, ¶702; Schools and School Districts; Statutes, ¶90; Street Railroads.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

¶42 (Tex.Civ.App.) Numbering of blocks shown on two alleged plats of a town site held to show that those excluded on one of the plats was a part of the town site if the other blocks were.—Joyce v. City of Mt. Vernon, 184 S. W. 626.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(B) Municipal Departments and Officers Thereof.

¶200 (Mo.App.) Under Const. art. 4, § 47, and Rev. St. 1909, §§ 9891, 9892, 9894, 9895, 9898, relating to fireman's pensions, held, that names of widow and minor children of fireman killed in a fight while off duty were properly excluded from the pension list.—State ex rel. King v. Board of Trustees of Firemen's Pension Fund of Kansas City, 184 S. W. 929.

The retention by the city of part of a fireman's salary and the placing it in a relief fund, as authorized by Rev. St. 1909, § 9898, does not make the same any less a public fund.—Id.

VII. CONTRACTS IN GENERAL.

¶245 (Mo.App.) In action on contractor's bond for material furnished to and used by contractor for city work, extra work performed at the contractor's request while outside of the plaintiff's contract held not outside of main contract.—City of St. Louis v. McCully Const. Co., 184 S. W. 939.

Under construction contract with city and contractor's penal bond, held, that plaintiff furnishing material to and used by the contractor might sue upon the bond, notwithstanding a provision of the contract against subletting.—Id.

Under construction contract furnishing of material checked up by contractor and work done under its supervision held not such breach of contract provision against subletting as would defeat subcontractor's right to recover by action on contractor's penal bond.—Id.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Thereof.

¶279 (Tex.Civ.App.) Rev. St. 1911, art. 1016, does not make a petition by the electors a prerequisite to the calling of an election to make the provisions of the chapter applicable to the city.—Riley v. Town of Trenton, 184 S. W. 344.

(D) Damages.

¶379 (Mo.App.) Under Rev. St. 1909, § 9254, containing the charter powers of the city of Springfield respecting streets, the city was not liable for injuries to a property owner from its ultra vires act in regrading the sidewalk of an avenue leading to a national cemetery under revocable license from the Secretary of War.—Duckworth v. City of Springfield, 184 S. W. 476.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

¶601 (Mo.) Regulations of the St. Louis board of public improvements as to building ventilation do not, under Const. art. 11, § 1, and Laws 1897, p. 220, amended by Laws 1909, p. 846, apply to school buildings, notwithstanding the city charter.—Board of Education of City of St. Louis v. City of St. Louis, 184 S. W. 975.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

¶647 (Mo.App.) By the extension of its corporate limits a city acquires control over all highways formerly controlled by a county thereby included within it.—Duckworth v. City of Springfield, 184 S. W. 476.

¶648 (Ark.) Where the owners of lands, platting them, reserve to the residents of the blocks the right to use and close alleys, so that there is no dedication, the public may acquire the right to use by prescription; the alleys being open to use by the public.—Balmat v. City of Argenta, 184 S. W. 445.

¶648 (Mo.App.) A public street becomes such by process of condemnation, or by adverse user.—Duckworth v. City of Springfield, 184 S. W. 476.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

¶759(2) (Mo.App.) Even in the absence of formal acceptance of a walk by the city, it must keep it in a reasonably safe condition, where it is left open to public use.—Proctor v. City of Poplar Bluff, 184 S. W. 123.

¶759(3) (Mo.App.) Where a city established the grade of a street and placed lights and signs thereon and permitted pedestrians for years to use a portion of it as a sidewalk at the point where plaintiff was injured, the city was liable for failure to maintain the sidewalk.—Proctor v. City of Poplar Bluff, 184 S. W. 123.

¶768(3) (Mo.App.) A walk composed of sand and loose bricks on edge and in other unusual positions was defective, rendering the city liable for injuries.—Proctor v. City of Poplar Bluff, 184 S. W. 123.

¶821(20) (Mo.App.) Whether plaintiff was negligent in allowing her buggy to drop into a rut while driving along the street held for the jury.—Deweese v. City of St. Joseph, 184 S. W. 905.

¶821(20) (Mo.App.) In an action against a city for personal injuries caused by a fall on a defective sidewalk, whether plaintiff was in exercise of ordinary care held for the jury.—Hawkins v. City of Independence, 184 S. W. 927.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ¶689-819.

MUTUALITY.

See Contracts, ¶10; Reformation of Instruments, ¶19.

NAMES.

See Corporations, ¶505; Partnership, ¶68; Taxation, ¶642, 647.

¶16(3) (Ark.) Relative to variance, the names "Wood" and "Woods" are not idem sonans.—*Woods v. State*, 184 S. W. 409.

NARCOTICS.

See Poisons, ¶4, 9.

NAVIGABLE WATERS.

See States, ¶12; Waters and Water Courses.

III. RIPARIAN AND LITTORAL RIGHTS.

¶44(3) (Ky.) Where a sand bar was formed by accretions to plaintiff's island, plaintiff was entitled to the bar as against the opposite riparian owner.—*Perks v. McCracken*, 184 S. W. 891.

NEGLIGENCE.

See Carriers, ¶132-187, 280-330; Damages, ¶132-158, 208, 210; Master and Servant, ¶88-295, 301-332; Municipal Corporations, ¶759, 821; Railroads, ¶226-482; Telegraphs and Telephones, ¶27-68; Trial, ¶251.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

¶32(2) (Mo.App.) Employé jumping into elevator shaft to inspect opening door held not an intruder or bare licensee, but entitled to protection due invitee even if not within the scope of his duties.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

¶32(2) (Tex.Civ.App.) Where one defendant bought ties of another defendant and sold them to a third and plaintiff, as inspector of the third, while in a motor car belonging to the second and on a tramway and with a representative of the first who knew of the inspection and had never objected was injured because of defect in rails, he was an invitee and first defendant owed him a duty to exercise ordinary care.—*Foster Lumber Co. v. Rodgers*, 184 S. W. 761.

¶39 (Mo.) A railroad company held not to have impliedly invited persons to climb up the abutments to a bridge and walk along its track to a cattle guard alleged to constitute a dangerous trap or attractive nuisance.—*Shaw v. Chicago & A. R. Co.*, 184 S. W. 1151.

The abutment to a railway bridge over a highway held not an attractive nuisance, rendering the company liable to a girl who climbed up there and was walking along the track.—Id.

Only very exceptional circumstances would render the attractive nuisance doctrine applicable to an intelligent girl 15½ years old.—Id.

¶45 (Mo.App.) Leaving of elevator shaft exposed and unguarded held negligence making defendant liable for injuries to any one to whom it owed any duty.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

¶82 (Mo.) The quantum of contributory negligence sufficient to prevent recovery must be such as to enter into and form the direct, producing, and efficient cause of the casualty without which it would not have happened.—*Howard v. Scarritt Estate Co.*, 184 S. W. 1144.

(B) Children and Others Under Disability.

¶85(2) (Mo.App.) The conduct of a boy 15 years old was not to be measured by that of the ordinarily prudent man of mature years, and his age was to be considered.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

(C) Imputed Negligence.

¶96 (Mo.) Where a young child, accompanied by its parents, was killed in a passenger elevator, it was not negligence that both parents did not guard it.—*Howard v. Scarritt Estate Co.*, 184 S. W. 1144.

(D) Comparative Negligence.

¶101 (Tenn.) In statutory action for killing on railroad crossing, contributory negligence will not abate the action, but will make it the duty of the jury to mitigate or lessen the damages according to the degree of contributory negligence.—*Middle Tennessee R. Co. v. McMullan*, 184 S. W. 20.

¶101 (Tex.Civ.App.) Under the statutes contributory negligence of servant is not complete defense, but only reduces damages in action against master for negligent injury. *Vernon's Sayles' Stats. art. 6649.*—*Missouri, K. & T. Ry. Co. of Texas v. Washburn*, 184 S. W. 580.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

¶119(4) (Tex.Civ.App.) Where specific acts of negligence are relied upon the plaintiff has the burden of proving such specific acts.—*Dowdy v. Southern Traction Co.*, 184 S. W. 687.

(C) Trial, Judgment, and Review.

¶136(2) (Tex.Civ.App.) Negligence, whether by plaintiff or defendant, is generally a question of fact, and is a question of law only when the act done is violative of some law, or the facts are undisputed and admit of but one inference.—*Luten v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 798.

¶136(26) (Mo.App.) Injured person held not negligent as a matter of law unless the evidence leaves no room for reasonable minds to entertain different opinions and conclusively shows negligence.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

¶141(6) (Tex.Civ.App.) In a servant's action for injuries defended on the ground of contributory negligence, the issue of the amount to which his compensation should be reduced by such contributory negligence must be submitted.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

¶141(10) (Mo.App.) In action for injuries to boy 15 years old, instruction as to considering age and capacity in passing upon plaintiff's negligence held not erroneous.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

¶141(11) (Mo.) An instruction that plaintiff parents could not recover for the death of their child if the failure by either of them to watch their child in an elevator contributed "in the least degree to cause the accident" is erroneous.—*Howard v. Scarritt Estate Co.*, 184 S. W. 1144.

In an action for death in a passenger elevator of a four year child accompanied by its parents, defendant was entitled to instructions as to the care or carelessness of the parents affecting recovery.—Id.

¶142 (Tex.Civ.App.) A special verdict in a servant's action for injuries, defended on the ground of contributory negligence awarding him \$17,500 where the demand was \$50,000, was too indefinite to stand.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Corporations, ¶414.

NEGROES.

See Railroads, ¶226.

NEWLY DISCOVERED EVIDENCE.

See New Trial, ¶99.

NEW TRIAL.

See Appeal and Error, ¶282-301, 983, 1015, 1072, 1177, 1178; Criminal Law, ¶945-956, 1064, 1124.

II. GROUNDS.**(A) Errors and Irregularities in General.**

¶13 (Mo.) Where plaintiff, while walking on a sidewalk, struck her foot against the edge of the side or the bottom of a depression, caused by gradual wear, having no previous knowledge of its existence, and sustained a fall and serious injuries, *held*, that a verdict in her favor for \$1 was properly set aside and a new trial granted.—*Smith v. Kansas City*, 184 S. W. 82.

¶27 (Mo.App.) It is no ground for new trial that after the trial it was discovered that the judge was a stockholder of a mining company, commissions on sales of whose stock plaintiff sought to recover, where by her own evidence she disclosed that she had no cause of action.—*Smith v. Rose*, 184 S. W. 910.

(F) Verdict or Findings Contrary to Law or Evidence.

¶69 (Mo.) Under Rev. St. 1909, § 2022, the court may, having directed verdict for defendant, and plaintiff having taken nonsuit, grant a new trial; it appearing that the directed verdict was based on the erroneous testimony of a witness who was very stupid or intoxicated.—*Downs v. United Rys. Co. of St. Louis*, 184 S. W. 995.

¶76(1) (Ky.) That a jury awards higher damages than the court thinks an injury justifies, does not authorize the court to interfere with the verdict.—*Chesapeake & O. Ry. Co. v. Witte*, 184 S. W. 1128.

¶76(4) (Ky.) Where a servant sustained a severe cut on the right leg, a verdict for \$1,375 *held* not so against the evidence as to justify a new trial.—*Chesapeake & O. Ry. Co. v. Witte*, 184 S. W. 1128.

(H) Newly Discovered Evidence.

¶99 (Tex.Civ.App.) New trial cannot be had on the ground of newly discovered testimony, where the testimony relied upon is immaterial and the same facts had already been testified to, but it must appear that the evidence would, on another trial, produce a different result.—*Bain v. Polasek*, 184 S. W. 279.

¶99 (Tex.Civ.App.) Where supporting affidavits excluded negligence on part of moving party, *held*, that new trial should have been granted for newly discovered testimony of apparently disinterested witness.—*Lockney State Bank v. Bolin*, 184 S. W. 553.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

¶111 (Ky.) Under Civ. Code Prac. § 340, a motion to vacate a verdict and judgment and file an answer cannot be treated as a motion for a new trial, if not made by a party to the action in which the judgment was rendered.—*Houston v. Commonwealth*, 184 S. W. 388.

¶117(3) (Ky.) Under Civ. Code Prac. §§ 340, 342, a motion to vacate a verdict and judgment and file an answer cannot be treated as a motion for a new trial if not made at the term in which the judgment was rendered.—*Houston v. Commonwealth*, 184 S. W. 388.

¶130 (Mo.) The stated ground in motion for new trial that "the verdict and judgment is unsupported by any substantial evidence," sufficiently raises the objection that foreign judgments on which recovery was sought were entered by the clerk in vacation, and that there was no proof of his statutory authority.—*Schroeder v. Edwards*, 184 S. W. 108.

¶154 (Tex.Civ.App.) Trial court, while authorized to eliminate from motion for a new trial, any irrelevant and scurrilous matter, *held* not authorized, by reason of such matter, to strike out the entire motion.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

¶157 (Tex.Civ.App.) Allegations of fact, in a motion for a new trial supported by affidavit, need not be answered or denied, and will not be taken as confessed.—*Crosby v. Stevens*, 184 S. W. 705.

¶157 (Tex.Civ.App.) A motion for new trial, not involving a trial upon the merits of the case, is properly disposed of in a summary manner, either upon the face of the record or upon affidavits of the parties and their supporting witnesses.—*Hester v. Baskin*, 184 S. W. 726.

NOMINATION.

See Elections, ¶126.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Adverse Possession, ¶81; Banks and Banking, ¶116; Bills and Notes, ¶344; Chattel Mortgages, ¶150; Elections, ¶280; Fraudulent Conveyances, ¶199; Insurance, ¶539; Limitation of Actions, ¶103; Principal and Agent, ¶177, 178; Vendor and Purchaser, ¶228-233.

¶5 (Tex.Civ.App.) The knowledge of the contents of papers by one given physical custody thereof does not affect the person depositing the papers.—*Michaelis v. Nance*, 184 S. W. 785.

NOVATION.

¶5 (Tex.Civ.App.) The grantee of a widow, who agreed to support her for life, she thereafter agreeing to his sale to a third person and the latter's substitution as the party who was to support her, was relieved from his obligation and was not liable for his grantee's breach.—*Nalls v. McGill*, 184 S. W. 275.

NUNC PRO TUNC.

See Courts, ¶114.

NURSERY STOCK.

See Mortgages, ¶133.

OBJECTIONS.

See Appeal and Error, ¶185-237; Criminal Law, ¶1037; Trial, ¶75, 85.

OBSTRUCTIONS.

See Waters and Water Courses, ¶116-123.

OFFICERS.

See Banks and Banking, ¶51, 116; Certiorari, ¶17; Corporations, ¶411-433; Counties, ¶98, 101; Evidence, ¶83; Injunction, ¶74; Judges; Justices of the Peace; Receivers; Sheriffs and Constables.

OPINION EVIDENCE.

See Criminal Law, ¶448; Evidence, ¶471-481.

OYSTERS.

See Fish, ¶7.

PARENT AND CHILD.

See Adoption; Bastards; Death, ¶18, 99; Descent and Distribution, ¶30; Guardian and Ward; Infants.

PAROL EVIDENCE.

See Criminal Law, ¶447; Evidence, ¶397-461.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see the various specific topics.

I. PLAINTIFFS.

(A) Persons Who May or Must Sue.

¶7(1) (Ark.) Where plaintiff, who received absolute conveyances as mortgages, agreed to free land from other incumbrances, a suit to test the validity of mortgages could be brought in the name of the grantor.—*Williams v. Prioleau*, 184 S. W. 847.

II. DEFENDANTS.

(B) Joinder.

¶25 (Tex.Civ.App.) The strict rules of pleading with respect to the joinder of parties in action have been relaxed owing to the abolition of the distinction between law and equity and the forms of pleading.—*Missouri, K. & T. Ry. Co. of Texas v. Elias*, 184 S. W. 312.

III. NEW PARTIES AND CHANGE OF PARTIES.

¶40(2) (Mo.) Under Laws 1873, pp. 48, 49, § 1, and section 3, the original Rev. St. 1909, § 2541, and sections 1732, 1733, 2535, 8086, held that, in suit to quiet title not asking for possession, party alleging title to part of the land by adverse possession was not entitled to intervene as a party defendant.—*Miller v. Boulware*, 184 S. W. 1148.

PARTITION.

See Witnesses, ¶159.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

¶46(1) (Ark.) In a suit between heirs for partition, involving the right to a fund in the hands of a commissioner after sale, a tenant who claimed no interest, and as to whose liability no question was made, was not a necessary party.—*Gayley v. Ricketts*, 184 S. W. 422.

¶46(2) (Ark.) In a suit between heirs for partition, involving the right to a fund in the hands of a commissioner after sale, a tenant who claimed no interest, and as to whose liability no question was made, was not a proper party.—*Gayley v. Ricketts*, 184 S. W. 422.

¶87 (Ark.) Plaintiff, who had been in possession of land, paying over to a widow having an unassigned dower interest of two-twelfths her part of the rent, was not guilty of laches in failing to assert its claim for reimbursement where such right did not exist until the lands were sold to it by defendant whose remaining land was subject to the dower incumbrance.—*Allen-West Commission Co. v. Harshaw*, 184 S. W. 436.

¶106 (Ark.) Until confirmed, a commissioner's sale of land under decree is not final so as to pass title, but the purchaser has a right to a deed on confirmation, which relates back and conveys the interests he would have acquired if he had taken his deed at the time of purchase.—*Gayley v. Ricketts*, 184 S. W. 422.

¶109(1) (Mo.App.) A subsequent sale in partition after a sale had been set aside for fraud by proceedings to which grantees were not parties can convey only the right to sue for the land, a sale of which is contrary to public policy.—*Githens v. Barnhill*, 184 S. W. 145.

¶109(5) (Ark.) A finding that the commissioner to make sale in partition employed an auctioneer who announced that he was selling only the land, as against a decree for sale making no reservation of crops, and a deed containing no reservation, was insufficient to reserve the share cropper's rents.—*Gayley v. Ricketts*, 184 S. W. 422.

PARTNERSHIP.

See Appeal and Error, ¶1173.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

¶68(1) (Tex.Civ.App.) Deed to C. R. H. & Co. held to place title in C. R. H. in trust for the firm or partnership.—*Gauss-Langenberg Hat Co. v. Allums*, 184 S. W. 288.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

¶203 (Tex.Civ.App.) An action by plaintiffs individually to recover property purchased by defendant from a firm composed of the plaintiffs would not be abated, as the fact, if any, that there was no partnership when the suit was brought was a matter of evidence to be shown at the trial.—*James v. Doss*, 184 S. W. 623.

¶204 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1863, jurisdiction to enter judgment by default against a partnership cannot be obtained by service on the partnership itself.—*Miller v. First State Bank & Trust Co. of Santa Anna*, 184 S. W. 614.

VI. DEATH OF PARTNER, AND SURVIVING PARTNERS.

¶247 (Tex.Civ.App.) Surviving brother of two composing partnership operating a hotel, the deceased brother having ordered plans for an addition, and the survivor not having objected, held liable for the charge.—*Snaman v. Lane*, 184 S. W. 366.

Surviving brother of two owning a hotel, who probated decedent's will making him independent executor and sole legatee and disposed of all the property, held personally liable for the amount due architect from decedent for preparing plans for an addition to the hotel.—*Id.*

¶258(8) (Tex.Civ.App.) In an action against a surviving partner for services as an architect in drawing plans for an addition to the firm's hotel, evidence held sufficient to show the deceased partner employed plaintiff to draw the plans.—*Snaman v. Lane*, 184 S. W. 366.

PASSENGERS.

See Carriers, ¶235-330.

PASSES.

See Carriers, ¶22.

PAYMENT.

See Bills and Notes, ¶527; Compromise and Settlement; Corporations, ¶411; Insurance, ¶186, 598, 602; Mechanics' Liens, ¶239; Principal and Surety, ¶117; Subrogation; Tender.

I. REQUISITES AND SUFFICIENCY.

¶17 (Mo.App.) Where the seller of a motion picture theater, who took notes in payment, and a chattel mortgage on the equipment as security, foreclosed the mortgage, he thereby held the notes in full payment of the purchase price.—Harmon v. Dickerson, 184 S. W. 139.

¶35 (Mo.App.) Letter of cashier of lumber company to contractor, acknowledging receipt of a check, and stating its application on three open accounts, held a "receipt."—Julius Seidel Lumber Co. v. Weaver, 184 S. W. 484.

II. APPLICATION.

¶39(1) (Mo.App.) Where a contractor sent his check to a lumber company without instructions as to its application on his several accounts, the company could distribute it between all.—Julius Seidel Lumber Co. v. Weaver, 184 S. W. 484.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶66(5) (Mo.) The presumption of payment arising from the fact that a mortgage note matured more than 20 years before suit to foreclose is not conclusive, but rebuttable.—Bobb v. Taylor, 184 S. W. 1028.

¶73(1) (Ark.) Evidence held insufficient to support a judgment allowing the vendee of certain lands credit in certain sums for amounts alleged to have been paid.—Smith v. Berkan, 184 S. W. 429.

PENALTIES.

See Carriers, ¶20; Damages, ¶78-85; Railroads, ¶254.

PENSIONS.

See Municipal Corporations, ¶200.

PERJURY.

See Indictment and Information, ¶137; Witnesses, ¶48.

PERSONAL INJURIES.

See Carriers, ¶280-330; Damages, ¶132-158, 208, 210; Death; Insurance, ¶435; Master and Servant, ¶88-295; Municipal Corporations, ¶759-821; Negligence; Railroads, ¶226, 265-400.

PETITION.

See Pleading.

PHYSICIANS AND SURGEONS.

See Indictment and Information, ¶110; Intoxicating Liquors, ¶155; Poisons.

¶2 (Tex.Cr.App.) The Legislature had the power and authority to enact Acts 30th Leg. c. 123, regulating the practice of medicine.—Gay v. State, 184 S. W. 200.

¶5(1) (Tex.Cr.App.) Under Acts 30th Leg. c. 123, §§ 4, 6, 15, and Pen. Code 1911, arts. 750, 752, 757, excepted classes of medical practitioners held not relieved of duty of procuring and filing verification license.—Gay v. State, 184 S. W. 200.

¶5(4) (Tex.Cr.App.) License issued in 1892 by member of medical examining board licensing defendant until next regular meeting of the board held not to be considered the verification

license required to be filed by the present law.—Gay v. State, 184 S. W. 200.

PLATS.

See Boundaries, ¶36; Dedication, ¶19; Evidence, ¶379.

PLEADING.

See Trial, ¶251.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

¶20 (Tex.Civ.App.) A petition alleging an unconditional liability against the defendant railway company and in the alternative alleging that if plaintiff was mistaken another was liable, states a cause of action against the railway company.—Missouri, K. & T. Ry. Co. of Texas v. Elias, 184 S. W. 312.

¶36(1) (Mo.App.) Ordinarily one is bound by the allegations of his pleading.—Fergusson v. Comfort, 184 S. W. 1192.

¶36(2) (Mo.App.) An action in replevin is sui generis, so that the allegation as to the value of the property, while evidence, is not conclusive as to the value, since Rev. St. 1909, § 2637, requires the value to be stated in the affidavit, merely for the purpose of fixing the replevin or forthcoming bond.—Fergusson v. Comfort, 184 S. W. 1192.

Rev. St. 1909, § 2647, providing that if the plaintiff in replevin fails to prosecute his suit diligently the jury shall assess the value of the property, contemplates that plaintiff's statement as to value shall not be conclusive where evidence of value is produced.—Id.

Plaintiff in replevin, who has erroneously alleged the value of the property, should be permitted to testify as to the circumstances under which the affidavit was made and to explain that the value stated was the original purchase price.—Id.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶52(2) (Tenn.) Where common-law and statutory causes of action are set up in the same declaration, they must be separately stated.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

¶63 (Mo.) In considering whether a petition states facts entitling plaintiff to relief, as required by Rev. St. 1909, § 1794, the general laws, either state or federal, must be considered, though not mentioned or in any way identified in the pleading.—Pipes v. Missouri Pac. Ry. Co., 184 S. W. 79.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(B) Dilatory Pleas and Matter in Abatement.

¶111 (Tex.Civ.App.) In a suit for conversion, plaintiff was bound to overcome a plea of privilege by proof that the conversion was committed in the county of suit.—Carver Bros. v. Merrett, 184 S. W. 741.

(C) Traverses or Denials and Admissions.

¶127(2) (Tex.Civ.App.) In an action for injuries to a shipment of peanuts, averments in the answer that the shipment was loaded when green held not an admission that the car furnished was unsuitable.—Cleburne Peanut & Product Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

↪177 (Tex.Civ.App.) In salesman's action for compensation under an oral contract, reply to defendant's answer setting up affirmative matter *held* a sufficient denial under the Practice Act, as amended in 1913 (Acts 33d Leg. c. 127), and since repealed (Acts 34th Leg. c. 101), in force at the trial, so as to prevent any admission of the facts alleged in the answer.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

V. DEMURRER OR EXCEPTION.

↪193(6) (Tenn.) The insertion in a single count of a declaration in an action under a statute, averments based upon the common law will not convert the whole declaration into a common-law pleading, but will lay it open to a demurrer for duplicity.—*Middle Tennessee R. Co. v. McMillan*, 184 S. W. 20.

↪216(1) (Ark.) In determining whether a demurrer to a complaint should be sustained, every allegation therein, together with every inference reasonably deducible therefrom, must be considered.—*Sallee v. Bank of Corning*, 184 S. W. 44.

↪216(2) (Mo.App.) On demurrer to a pleading, as an amended answer, its allegations alone can be considered.—*Flais v. Chicago, B. & Q. R. Co.*, 184 S. W. 917.

↪218(2) (Ky.) Where plaintiff's counsel demanded an early decision of a question of jurisdiction arising on the demurrer to the answer, the judge should not have awaited the decision of the Supreme Court of the United States in a case before it, pertinent to the matter, before making his decision.—*J. B. B. Coal Co. v. Halbert*, 184 S. W. 1116.

↪228 (Tex.Civ.App.) Where the court sustained plaintiff's exceptions to pleas of waiver and estoppel, and no amendment thereof was filed, the issue was not in the case, and could not be considered by the jury.—*Vaden v. Buck*, 184 S. W. 318.

↪228 (Tex.Civ.App.) In the absence of special exception, every reasonable intendment will be indulged in favor of a plea.—*Cofer v. Beverly*, 184 S. W. 608.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

↪245(4) (Mo.) Under Rev. St. 1909, § 1848, touching amendment of pleadings, permitting surety, which had stood on its general denial, to file an amended answer pleading specifically overpayments to the contractor, etc., *held* proper.—*Southern Real Estate & Financial Co. v. Bankers' Surety Co.*, 184 S. W. 1030.

↪245(4) (Tex.Civ.App.) In trespass to try title, allowance of trial amendment, alleging that plaintiffs were owners as innocent purchasers for value, was not an abuse of discretion.—*Keppler v. Texas Lumber Mfg. Co.*, 184 S. W. 353.

↪267 (Tex.Civ.App.) Under Rev. St. 1911, arts. 1824, 1825, and rule 16 for district and county courts (102 Tex. xxxix, 142 S. W. xviii) requiring amendments to be filed five days before trial in suit by an agent for commissions, in which the buyer of the lands intervened, refusal to permit the intervener to file an amendment to his cross-bill *held* erroneous.—*Vaden v. Buck*, 184 S. W. 318.

XII. ISSUES, PROOF, AND VARIANCE.

↪387 (Tex.Civ.App.) The pleadings and the proof must agree.—*Angelina County Lumber Co. v. Hines*, 184 S. W. 596.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

↪403(2) (Mo.) Where the answer supplied the defects in the petition, a demurrer was not available.—*Tucker v. Wadlow*, 184 S. W. 69.

↪412 (Tex.Civ.App.) That plaintiffs may avail of Act March 3, 1913 (Acts 33d Leg. c. 127), § 4, amending Rev. St. 1911, art. 1902 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 1902), and so have taken as confessed a fact alleged in the petition and not denied, the court's attention must be called thereto.—*Mutual Film Corp. v. Morris & Daniel*, 184 S. W. 1060.

PLEDGES.

See Corporations, ↪123.

↪21 (Mo.App.) The title to pledged property does not pass from the pledgor until there has been a sale or foreclosure.—*Smith v. Becker*, 184 S. W. 943.

↪50 (Mo.App.) The parties to a pledge cannot therein make a valid agreement that there shall be no redemption after default.—*Smith v. Becker*, 184 S. W. 943.

POISONS.

See Indictment and Information, ↪111.

↪4 (Tex.Cr.App.) Pen. Code 1911, art. 748, making it unlawful to prescribe a narcotic drug for a habitual user thereof, does not prohibit the prescribing of such drug when necessary to alleviate pain or cure the drug habit.—*Fyke v. State*, 184 S. W. 197.

↪9 (Tex.Cr.App.) In a prosecution under Pen. Code 1911, art. 748, prohibiting the prescribing of narcotic drugs to habitual users thereof, it is error to exclude defendant's evidence that he gradually reduced the size of the dose and finally ceased it altogether; that being material to show that the drug was prescribed in an effort to cure the habit.—*Fyke v. State*, 184 S. W. 197.

Where there is evidence that a drug was prescribed to relieve pain, it is error, in a prosecution under Pen. Code 1911, art. 748, prohibiting prescribing narcotic drugs to habitual users thereof, to refuse to charge that if the drug was administered in an effort to relieve pain the defendant physician was not guilty.—*Id.*

In prosecution for prescribing narcotic drugs to habitual users thereof, instruction *held* erroneous under the evidence for excluding consideration of the fact testified to that the drug was prescribed to alleviate pain and suffering.—*Id.*

Refusal of defendant's requested instruction, on purpose of the prescription, in prosecution for prescribing narcotic drug to habitual user thereof, *held* erroneous under the evidence.—*Id.*

POLICE POWER.

See Municipal Corporations, ↪601.

POLITICAL RIGHTS.

See Elections.

POLL TAXES.

See Elections, ↪83.

POSSESSION.

See Adverse Possession; Property; Quieting Title, ↪12; Replevin, ↪10; Vendor and Purchaser, ↪232.

POWERS.

See Wills, ↪616.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREJUDICE.

See Jury, ¶97.

PREMIUMS.

See Insurance, ¶186, 188.

PRESCRIPTION.

See Adverse Possession; Easements, ¶3, 8; Limitation of Actions; Municipal Corporations, ¶648; Poisons, ¶4, 9.

PRESIDENTIAL PRIMARIES.

See Elections, ¶21, 120.

PRESUMPTIONS.

See Courts, ¶35; Criminal Law, ¶315; Evidence, ¶53-58.

PRIMARY ELECTIONS.

See Elections, ¶21, 120, 126.

PRINCIPAL AND ACCESSORY.

See Criminal Law, ¶792.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Evidence, ¶248; Husband and Wife, ¶25; Insurance, ¶755; Railroads, ¶24; Witnesses, ¶56.

I. THE RELATION.

(A) Oration and Existence.

¶20(1) (Ky.) Any evidence to prove agency, direct or indirect, is admissible, although not full and satisfactory.—*Rice & Hutchins' Cincinnati Co. v. J. W. Croghan & Co.*, 184 S. W. 374.

¶20(1) (Tex. Civ. App.) Agency cannot be proven by general reputation.—*Mann v. Bell*, 184 S. W. 320.

¶21 (Ky.) An agent is a competent witness to prove his agency.—*Rice & Hutchins' Cincinnati Co. v. J. W. Croghan & Co.*, 184 S. W. 374.

¶22(1) (Ky.) Neither his agency nor its scope can be established by the mere declaration of the agent as to either.—*Rice & Hutchins' Cincinnati Co. v. J. W. Croghan & Co.*, 184 S. W. 374.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

¶89(9) (Tex. Civ. App.) In salesman's action for compensation under oral contract, where defendant pleaded an employment under a written contract, *held*, that whether plaintiff accepted the alleged written contract and acted thereunder was for the jury.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

¶99 (Tex. Civ. App.) Where cotton dealers advised a bank that P. would "represent us in your city," the bank had the right to construe the language to mean that the dealers had authorized P. to do everything usually, customarily, or necessarily done by a nonresident cotton buyer's local agent.—*Carver Bros. v. Merrett*, 184 S. W. 741.

¶101(2) (Mo. App.) Where the shipper's agent signed a contract limiting the carrier's liability,

held, that the shipper was bound by the act of his agent.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S. W. 149.

¶111(5) (Ky.) A mere traveling salesman, with authority to solicit orders subject to his principal's approval, has no power, without special authority, to make a contract postponing the payment of debts due his principal.—*Rice & Hutchins' Cincinnati Co. v. J. W. Croghan & Co.*, 184 S. W. 374.

A traveling salesman's instructions *held* to authorize him to extend the time of payment of a debt due his principal by a dissolving partnership.—*Id.*

¶116(1) (Tex. Civ. App.) Where an agent authorized to buy cotton bought cotton for future delivery in violation of his instruction, the principal is liable, the seller having no notice of the limitation on the agent's apparent authority.—*Mann v. Bell*, 184 S. W. 320.

¶119(1) (Tex. Civ. App.) Agency when once shown to exist is presumed to be general, and not special.—*Hazelrigg v. Naranjo*, 184 S. W. 316.

¶120(1) (Tex. Civ. App.) The scope of an agency cannot be proven by general reputation.—*Mann v. Bell*, 184 S. W. 320.

¶123(10) (Tex. Civ. App.) In a suit for the price of horses, where defendant claimed plaintiff was bound to recompense him for duties paid on the animals, evidence *held* to warrant a finding that defendant's brother, to whom the duties were paid, was defendant's agent authorized to receive payment.—*Hazelrigg v. Naranjo*, 184 S. W. 316.

(C) Unauthorized and Wrongful Acts.

¶159(1) (Tex. Civ. App.) Where the agent for dealers in cotton obtained from the bank, with which they had been pledged by the dealers, cotton tickets to make a list, and refused to deliver possession to the bank, the dealers were liable to the bank for damages occasioned by the refusal.—*Carver Bros. v. Merrett*, 184 S. W. 741.

(D) Notice to Agent.

¶177(3) (Ark.) Where the driver who had charge of mules of a firm had knowledge of their diseased condition and the liability of such disease being communicated to other animals, the partners are charged with the agent's knowledge.—*M. C. Brown & Co. v. Bennett*, 184 S. W. 35.

¶178(1) (Tex. Civ. App.) The knowledge of one performing a mere ministerial duty is not imputed to his principal.—*Michaelis v. Nance*, 184 S. W. 785.

(E) Actions.

¶193 (Tex. Civ. App.) In suit by the assignee of a bank against the bank and cotton dealers whose agent converted from the bank cotton tickets pledged by the dealers, whether the bank was negligent in letting the agent have access to the tickets was a question for the jury.—*Carver Bros. v. Merrett*, 184 S. W. 741.

In suit by the assignee of a bank against the bank and cotton dealers whose agent converted from the bank cotton tickets pledged by the dealers, whether the agent, in securing the tickets, was acting within the authority conferred upon him, *held* for the jury.—*Id.*

PRINCIPAL AND SURETY.

See Appeal and Error, ¶1227, 1234; Bail; Guaranty; Sheriffs and Constables, ¶159; Subrogation, ¶7.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

¶7 (Tex. Civ. App.) A bond given by a corporation to construct a building is binding on the surety, though the contract is *ultra vires* as to

the corporation.—*Kaufman v. Christian-Wathen Lumber Co.*, 184 S. W. 1045.

⚡39 (Tex.Civ.App.) A surety who signed a bond after a material alteration had released the liability of previous signers represented to him to be bound is not liable.—*Kerbow v. Wooldridge*, 184 S. W. 746.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

⚡59 (Mo.) Contracts of sureties will be construed most strongly in their favor.—*Southern Real Estate & Financial Co. v. Bankers' Surety Co.*, 184 S. W. 1030.

The surety of a building contractor, whose bond contained nothing to indicate that its terms originated with the surety, had the legal right to stand equally before the law with the owner in the construction of the bond.—*Id.*

III. DISCHARGE OF SURETY.

⚡97 (Ky.) Where a creditor without the consent of his surety does any act which in law alters the surety's liability, increases his risk, or deprives him of the right to pay the debt and assume the position of creditor, or of his right to seek indemnity, the surety is thereby discharged.—*Barker v. Illinois Surety Co.*, 184 S. W. 577.

⚡100(3) (Ark.) Changes in construction contract on which bond was based held such material alterations as to discharge the surety on the bond in the absence of his consent.—*Southwestern Surety Ins. Co. v. Terry*, 184 S. W. 54.

⚡101(2) (Tex.Civ.App.) Striking out from a contractor's bond a clause requiring money due under a school building contract to be paid to the building superintendent for disbursement is a material alteration.—*Kerbow v. Wooldridge*, 184 S. W. 746.

⚡117(Mo.) Architect's certificates, which in effect stated merely the architect's desire that the contractor be paid, held not a compliance with the contract, and the surety on the contractor's bond was not liable for payments made on such certificate.—*Southern Real Estate & Financial Co. v. Bankers' Surety Co.*, 184 S. W. 1030.

Surety on bond of contractor for building, the owner of which in good faith made overpayments to the contractor on architect's certificates, insufficient under the contract, held not liable for amount of overpayments, but not discharged from liability on the bond.—*Id.*

IV. REMEDIES OF CREDITORS.

⚡147(1) (Tex.Civ.App.) Where the maker of a note gave the surety a chattel mortgage, the payee is entitled to benefit of the mortgage.—*Ferrell-Michael Abstract & Title Co. v. McCormac*, 184 S. W. 1081.

PRINCIPALS.

See Homicide, ⚡281.

PRIORITIES.

See Banks and Banking, ⚡80; Chattel Mortgages, ⚡138-150; Executors and Administrators, ⚡182; Judgment, ⚡787; Mortgages, ⚡151.

PRISONS.

See Costs, ⚡294, 295.

PRIVATE BANKERS.

See Banks and Banking, ⚡2, 3, 80.

PRIVATE ROADS.

See Easements.

PROBABLE CAUSE.

See Malicious Prosecution, ⚡16, 24.

PROBATE.

See Wills, ⚡229-423.

PROBATE COURTS.

See Courts, ⚡36, 202.

PROCESS.

See Appeal and Error, ⚡188; Attachment; Corporations, ⚡507; Execution; Garnishment; Injunction; Insurance, ⚡627; Judgment, ⚡17; Mandamus; Partnership, ⚡204; Prohibition; Railroads, ⚡24; Sequestration; Taxation, ⚡642.

II. SERVICE.

(C) Publication or Other Notice.

⚡84 (Mo.) Where constructive service is authorized, there must be strict compliance with statutory requirements.—*John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 184 S. W. 467.

(E) Return and Proof of Service.

⚡147 (Ky.) Under Civ. Code Proc. § 670, proof outside the record may be heard to show that a summons was returned.—*Ramey v. Francis, Day & Co.*, 184 S. W. 380.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚡164(3) (Ky.) Under Civ. Code Proc. § 49, the sheriff can amend his return of summons in a suit to sell decedent's land to pay debts so as to include defendants actually served.—*Ramey v. Francis, Day & Co.*, 184 S. W. 380.

PROHIBITION.

See Courts, ⚡207, 209.

I. NATURE AND GROUNDS.

⚡5(4) (Ky.) Where, in exercise of discretion, circuit judge has overruled motion to dismiss indictment, prohibition will not lie to restrain trial of cause.—*Commonwealth v. Davis*, 184 S. W. 1121.

⚡10(1) (Ky.) The Court of Appeals may grant prohibition only to prevent an inferior court from exceeding its jurisdiction, not to control a discretion vested in such court.—*Commonwealth v. Davis*, 184 S. W. 1121.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚡19 (Mo.) The judge of the tribunal whose action is sought to be prevented is ordinarily the only necessary party defendant in an action in prohibition.—*State ex rel. Powers v. Rassieur*, 184 S. W. 116.

⚡24 (Mo.) A motion to quash the writ is an attack upon the petition, admitting all facts well pleaded therein.—*State ex rel. Powers v. Rassieur*, 184 S. W. 116.

Subsequent filing of returns raising issues of fact by respondents held to withdraw, waive, or abandon respondent judge's motion to quash the preliminary writ.—*Id.*

⚡25 (Mo.) A demurrer to the petition admits all facts well pleaded.—*State ex rel. Powers v. Rassieur*, 184 S. W. 116.

⚡26 (Mo.) A private party, joined with the judge, against whom the writ is sought, on account of his relation to the controversy, is not required to make a return upon which issue is joined. He may adopt the return of the court, but cannot be required to do so.—*State ex rel. Powers v. Rassieur*, 184 S. W. 116.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Insurance, ¶546, 789.

PROPERTY.

¶10 (Tenn.) The true owner, in legal contemplation, is in constructive possession of his unoccupied land if no one else is holding adversely, and does not have to maintain actual possession to assert his rights.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

PROSTITUTION.

See Disorderly House.

PROXIMATE CAUSE.

See Railroads, ¶389.

PUBLICATION.

See Process, ¶84; Taxation, ¶642.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ¶279, 379.

PUBLIC LANDS.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(F) Swamp and Overflowed Lands.

¶61(5) (Mo.) Where under judgment against Stoddard county swamp lands were sold by the sheriff under execution against the county, the title of the purchasers who received the sheriff's deed was void.—*Tucker v. Wadlow*, 184 S. W. 69.

¶61(9) (Mo.) Where after lands were sold under execution issued against Stoddard county, the county compromised with the purchasers, receiving compensation, the patent issued by the county's special commissioner carried title to the lands.—*Tucker v. Wadlow*, 184 S. W. 69.

III. DISPOSAL OF LANDS OF THE STATES.

¶175(5) (Tex.Civ.App.) Where a location of public lands is fixed by actual survey upon the ground, being the first or eldest in location, the lines so fixed upon the ground control.—*Newman v. Davis*, 184 S. W. 1078.

¶177 (Tex.Civ.App.) Where plaintiff, under Rev. St. 1895, arts. 4218j, 4218k, made application to purchase public land, oath that he was not purchasing for any other person, and entered into obligation for deferred payments, and received a patent reciting purchase and full payment, no trust would arise in favor of one who paid the purchase price.—*Houston Oil Co. of Texas v. Votaw*, 184 S. W. 647.

In trespass to try title to land patented to plaintiff, where defendants claimed under one alleged to have paid purchase price, evidence as to whose money was used in purchase held not to show any resulting trust in defendants' grantor.—*Id.*

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Dedication; Eminent Domain.

QUALIFICATIONS.

See Elections, ¶72-94.

QUALIFIED FEE.

See Wills, ¶602.

QUESTIONS OF LAW AND FACT.

See Criminal Law, ¶741; Trial, ¶136, 139.

QUIETING TITLE.

See Abatement and Revival, ¶8; Limitation of Actions, ¶5, 36; Trial, ¶193, 194.

I. RIGHT OF ACTION AND DEFENSES.

¶4 (Mo.App.) Where plaintiff is in possession of real estate under a record title superior to any that could be acquired under an execution sale, he has an adequate remedy at law against any claim asserted by a purchaser at such sale, and equity will not interfere on the ground of a cloud upon his title.—*Scharff v. Kirkwood Lumber Co.*, 184 S. W. 494.

¶5 (Mo.) Where, if an instrument was recorded, numerous suits to remove cloud from title would be necessary, plaintiff, to avoid multiplicity of suits, may sue for the benefit of himself and others similarly situated.—*Tucker v. Wadlow*, 184 S. W. 69.

¶7(4) (Mo.App.) Since the judgment in a mechanics' lien action against one who had no title or interest in the plaintiff's property established no lien against the property and a sale thereunder would convey no title, the sale could cast no cloud upon the plaintiff's title.—*Scharff v. Kirkwood Lumber Co.*, 184 S. W. 494.

¶8 (Mo.) Recordation of quitclaim deed to lands as to which the grantor had no title will be enjoined; it appearing that the purpose of the recordation of the instrument was to cloud plaintiffs' title.—*Tucker v. Wadlow*, 184 S. W. 69.

¶10(1) (Mo.) A plaintiff having no title is not concerned in that of defendant.—*Orchard v. Missouri Lumber & Mining Co.*, 184 S. W. 1138.

¶12(1) (Tenn.) In Tennessee, possession is not necessary to maintain a bill to remove a cloud on title.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

¶15 (Mo.) In suit to quiet title, equitable, as well as legal, defenses may be invoked.—*Williams v. City of Hayti*, 184 S. W. 470.

II. PROCEEDINGS AND RELIEF.

¶29 (Tenn.) Laches is not available as a defense to an action to remove a cloud on title, except where the plaintiff is out of possession, and "out of possession" does not mean a mere failure to be in actual possession of wild or unoccupied lands.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

¶30(1) (Ark.) The rights of a grantee under sheriff's deed cannot be considered in an action to quiet title involving such deed, where such grantee is not made a party.—*Acker v. Devore*, 184 S. W. 852.

¶35(2) (Tenn.) In an action to set aside a cloud on title to realty, complainant's statement of its vendor's actual, open, notorious, and adverse possession for 22 years under a registered deed, etc., and the conveyances to it sufficiently averred its title.—*Stearns Coal & Lumber Co. v. Patton*, 184 S. W. 855.

¶43 (Ky.) Under Ky. St. § 11, one suing to quiet title to land must plead and prove his possession.—*Fields v. Couch*, 184 S. W. 894.

¶44(4) (Ky.) In a suit to quiet title evidence held to warrant a finding that plaintiff had no title to the land in controversy.—*Fields v. Couch*, 184 S. W. 894.

QUITCLAIM.

See Deeds, ¶25.

RAILROADS.

See Action, ¶40; Carriers, ¶283, 284, 321; Commerce, ¶27, 82; Evidence, ¶5, 54, 481; Master and Servant; Negligence, ¶39; Street Railroads; Waters and Water Courses, ¶118, 123, 126.

I. CONTROL AND REGULATION IN GENERAL.

¶6 (Mo.) Grant of right to construct and build railroad and do intrastate business thereon held not an exercise of the police power or to contravene Const. art. 12, § 5, as to abridging exercise of police power.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

II. RAILROAD COMPANIES.

¶18 (Mo.) Acts 1850-51, p. 483, as amended by Acts 1852-53, p. 323, and Acts 1865, pp. 89, 90, held to authorize railroad corporation therein named to do intrastate railroad business.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

The grant of the right of doing an intrastate business was a grant which the state could make to a railroad company.—Id.

¶19 (Mo.) The state, in the exercise of assumed police powers, cannot pass a law violating a railroad company's charter rights to own and operate a railroad and do an intrastate business thereon.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

¶24(2) (Tex.Civ.App.) The agent of the receivers of a railway corporation is not its agent for the service of process, though before appointment he served the road in same capacity as he serves the receivers at the time of service of citation upon him.—Webster v. International & G. N. Ry. Co., 184 S. W. 295.

¶33(1) (Mo.) Laws 1913, p. 179, § 1, prohibiting foreign corporations from doing railroad business, held to be given prospective construction and applied to railroads subsequently built, so as not to contravene existing rights.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

Laws 1913, p. 179, § 1, prohibiting foreign corporations from doing railroad business, held not applicable to corporation acquiring in due course the rights granted by the state to its predecessor in title.—Id.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

¶143 (Mo.) On consolidation of domestic railroad corporation with corporations having line running to the Mississippi river opposite the Missouri side, franchise or right to do intrastate business in Missouri held to pass to consolidated company.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.**(B) Foreclosure of Liens and Mortgages.**

¶194(1) (Mo.) Railway company's franchises or grants of privileges other than right to be a corporation, such as right to do railroad business, held subject to sale or mortgage and to pass under foreclosure sale.—State ex rel. Wabash Ry. Co. v. Roach, 184 S. W. 969.

X. OPERATION.**(B) Statutory, Municipal, and Official Regulations.**

¶226 (Tex.Civ.App.) Under Rev. St. 1911, arts. 6746, 6748-6750, and 6753, requiring separate accommodations of the same sort for white and negro passengers, a railroad is not liable

where it provides the required accommodations if the conductor permits a passenger to ride in the wrong car, although the conductor and the passenger may be liable.—State v. Galveston, H. & S. A. Ry. Co., 184 S. W. 227.

Under Rev. St. 1911, arts. 6746, 6748-6750, and 6753, if the train contained coaches properly marked and fitted, the fact that a negro was permitted to ride in a coach not so marked or equipped would not entitle the state to recover the penalty from the railroad.—Id.

¶253 (Ky.) The blocking of a highway crossing by a railroad train contrary to Ky. St. § 768, renders the company liable only for such damages as are the proximate result of the violation.—Griffin v. Chesapeake & O. Ry. Co., 184 S. W. 888.

¶254(6) (Tex.Civ.App.) In an action to recover the penalty under Rev. St. 1911, arts. 6746, 6748-6750, and 6753, requiring separate accommodations of the same sort for white and negro passengers, the burden is on the state to show that the required accommodations were not provided.—State v. Galveston, H. & S. A. Ry. Co., 184 S. W. 227.

Evidence that white and negro passengers occupied together a particular Pullman coach is insufficient to show that other coaches properly marked, as required by Rev. St. 1911, arts. 6746, 6748, and 6750, and properly fitted, were not provided.—Id.

Under Rev. St. 1911, arts. 6746, 6748-6750, and 6753, if it be conceded that they apply to Pullman coaches, in an action against a railroad for penalty for allowing white and colored passengers to occupy a Pullman coach, the burden is on the state to show that no other Pullman coaches in the train were equipped as prescribed.—Id.

The fact that the railroad proved proper accommodations in day coaches and made no proof as to accommodations in Pullmans is insufficient to shift to it the burden of proving compliance as to Pullman coaches.—Id.

(C) Companies and Persons Liable for Injuries.

¶265 (Tex.Civ.App.) Where damage to a shipment of live stock occurred while the carrier was in the hands of receivers, appointed by a federal court, such carrier will be treated as in the hands of the federal courts when the injury occurred, and the shipper cannot recover therefor against the carrier.—Kansas City, M. & O. Ry. Co. v. Russell, 184 S. W. 299.

(D) Injuries to Licensees or Trespassers in General.

¶275(1) (Ky.) Where a freight train conductor saw that the employé of a brick plant, a mere volunteer or trespasser, was in danger from attempting to release the brake of a coal car while a locomotive was pushing against it, it was his duty to stop the engine from pushing.—Chesapeake & O. Ry. Co. v. Hudson, 184 S. W. 884.

¶278(2) (Ky.) Employé of brick plant, injured when he released the brake of a coal car, against which a locomotive was pushing, without knowledge or realization of his danger, held not guilty of contributory negligence.—Chesapeake & O. Ry. Co. v. Hudson, 184 S. W. 884.

¶282(9) (Ky.) In an action by the employé of a brick plant against a railroad for injuries in releasing brake of car against which locomotive was pushing, whether or not plaintiff's injuries were caused by failure of the road's conductor to exercise ordinary care to stop engine after discovery of plaintiff's peril held for the jury.—Chesapeake & O. Ry. Co. v. Hudson, 184 S. W. 884.

(E) Accidents to Trains.

¶295 (Ark.) Under the lookout statute, a railroad company is liable for death of a brake-

man of another railroad company from a collision of trains, if the crew of defendant's train could have seen the other train in time to avoid the collision, notwithstanding contributory negligence.—Chicago, R. I. & P. Ry. Co. v. Scott, 184 S. W. 66.

(F) Accidents at Crossings.

☞309 (Tex.Civ.App.) A railroad company must exercise ordinary care to discover and avoid injuring persons upon the track where and when one of ordinary prudence would expect to find them, whether trespassers or rightfully on the track.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

☞312(3) (Tenn.) Railroad's compliance with all statutory precautions after wagon of deceased appeared on the road in a position to be struck did not relieve from liability if it did not comply with the requirements of Shannon's Code, § 1574, subsec. 2, requiring the sounding of whistle and bell on approaching crossings.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

☞330(2) (Mo.) Railroad, though negligent in allowing warning bell to be out of repair, held not liable for death of foot passenger struck by engine when attempting to cross tracks without looking or listening.—Blain v. Missouri Pac. R. Co., 184 S. W. 1142.

☞335(5) (Tenn.) In an action for personal injury on railroad crossing, the proximate contributory negligence bars recovery.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

☞344(1) (Tenn.) Declaration in action for injury on railroad crossing distinctly showing collision with a person, or based on Shannon's Code, § 1574, subsecs. 2 and 3, held to indicate intent to base action upon statute.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

Declaration in action against railroad for damages for negligent killing of plaintiff's husband on a crossing held to state a cause of action under the statutes (Shannon's Code, § 1574, subsecs. 2, 3, and 4, and sections 1575 and 1576).—Id.

☞346(1) (Tenn.) Plaintiff in an action at common law for injuries on railroad crossing has the burden of showing, not only the infliction of the injury, but the negligence of the railroad.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

In an action for the negligent killing of plaintiff's husband on its crossing, it was the duty of the railway to show that its machinery was in proper condition.—Id.

☞348(1) (Tenn.) Evidence in a statutory action to recover for the negligent killing of plaintiff's husband on defendant's crossing held to sustain a judgment for plaintiff.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

☞348(1) (Tex.Civ.App.) It may be established by circumstances that a person was killed by a train at a public crossing through the negligence of the railroad's servants, and that he exercised due care.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

☞348(2) (Tex.Civ.App.) Evidence held sufficient to warrant the conclusion that the train which killed decedent was moving north.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

☞350(7) (Tex.Civ.App.) In a widow's action against a railroad for death of her husband at a crossing, whether the trainmen failed to ring the bell or blow the whistle or otherwise give warning was for the jury.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

In a widow's action against a railroad for death of her husband at a crossing, whether the train was being run without a headlight was for the jury.—Id.

In a widow's action against a railroad for death of her husband at a crossing, question whether the road's servants kept a proper look-

out for persons about to use the crossing was for the jury.—Id.

☞350(13) (Tex.Civ.App.) A person who goes upon a railroad track at a public crossing, or where the railroad has expressly or impliedly licensed the act, is not negligent per se.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

☞350(16) (Tenn.) The duty to stop, look, and listen is not a positive duty in law, applicable under all circumstances, and contributory negligence for failing to stop, look, and listen must generally be left to the jury under the circumstances.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

☞350(32) (Tex.Civ.App.) In a widow's action against a railroad for death of her husband at a crossing, issues whether deceased was killed at the crossing and whether the train operatives in striking him were guilty of negligence which was the proximate cause of his death held for the jury under the evidence.—Luten v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 798.

☞351(9) (Tenn.) In an action for damages for the negligent killing of plaintiff's husband on defendant's crossing track, brought under Shannon's Code, § 1574, subsecs. 2, 3, and 4, and section 1576, instructions as to warning travelers over a crossing held erroneous, because statute covered the ground.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

(G) Injuries to Persons on or near Tracks.

☞355(1) (Ky.) That railroad accident occurred within 100 feet of crossing does not affect right of recovery against railroad.—Sizemore's Adm'r v. Lexington & E. Ry. Co., 184 S. W. 383.

☞355(5) (Ky.) One who was on a highway or railroad right of way opposite the station, to unload trees for shipment because the crossing was obstructed by a train, was not there by the company's invitation.—Griffin v. Chesapeake & O. Ry. Co., 184 S. W. 888.

☞357 (Ky.) Rule requiring precautions by persons operating railroad trains as to persons on right of way is confined to cities or thickly populated communities.—Sizemore's Adm'r v. Lexington & E. Ry. Co., 184 S. W. 383.

☞358(1) (Mo.) A railroad company is not required to make a cattle guard safe for a licensee using a path alongside the track.—Shaw v. Chicago & A. R. Co., 184 S. W. 1151.

☞359(1) (Ky.) Those operating train owe trespasser on track no duty, except ordinary care to avoid injuring him after discovery of his peril.—Sizemore's Adm'r v. Lexington & E. Ry. Co., 184 S. W. 383.

☞359(1) (Ky.) A railroad company is not required to keep watch for persons on a highway joining the track or on edge of right of way without invitation, but need only exercise due care after actually discovering their peril.—Griffin v. Chesapeake & O. Ry. Co., 184 S. W. 888.

☞361 (Mo.) Under Rev. St. 1909, § 777, the adoption of the stock restraint law and the double damage act do not relieve a railroad of its obligation to fence in platted territory.—Shaw v. Chicago & A. R. Co., 184 S. W. 1151.

☞362(1) (Mo.) Under Rev. St. 1909, § 777, the adoption of the stock restraint law and the double damage act do not make a railroad negligent for maintaining a cattle guard in platted territory.—Shaw v. Chicago & A. R. Co., 184 S. W. 1151.

☞372(4) (Ky.) Rate of speed of train is immaterial to question of liability of railroad for injuries to trespasser.—Sizemore's Adm'r v. Lexington & E. Ry. Co., 184 S. W. 383.

☞381(5) (Ky.) Where person, without defect of hearing or vision, walking on track, paid no attention to signals of train, his contributory negligence bars recovery for his death.—Siz-

more's Adm'r v. Lexington & E. Ry. Co., 184 S. W. 383.

—381(9) (Ky.) Plaintiff's intestate, who attempted to cross a track in front of defendant's approaching fast passenger train, and was struck and killed, *held* guilty of contributory negligence defeating a recovery.—Louisville & N. R. Co. v. Taylor's Adm'r, 184 S. W. 371.

—389(3) (Ky.) The blocking of a highway crossing by a railroad train contrary to Ky. St. § 768, *held* not the proximate cause of frightening plaintiff's team alongside the track.—Griffin v. Chesapeake & O. Ry. Co., 184 S. W. 888.

—390 (Tex.Civ.App.) To render a railroad company liable under the theory of discovered peril, it must appear that engineer in charge of train realized the person's danger, and that he could not or would not extricate himself from his position, yet failed to take precautions to avoid injury.—International & G. N. Ry. Co. v. Logan, 184 S. W. 301.

—398(1) (Ky.) In an action for injuries resulting from a runaway team frightened by a railroad engine, while standing where the company was not required to keep a lookout for them, evidence *held* not to show that the engine was making any unnecessary noise.—Griffin v. Chesapeake & O. Ry. Co., 184 S. W. 888.

—398(3) (Ky.) Evidence *held* not sufficient to show that railroad engineers saw plaintiff's team on an embankment beside the track.—Griffin v. Chesapeake & O. Ry. Co., 184 S. W. 888.

Evidence *held* not to show a failure by engineers to use due care to avoid frightening plaintiff's horses alongside the right of way after seeing their fright.—Id.

—398(4) (Ky.) Evidence *held* to show that train operatives, though maintaining lookout, could not have prevented accident after discovering peril of decedent.—Sizemore's Adm'r v. Lexington & E. Ry. Co., 184 S. W. 383.

—398(4) (Mo.App.) In an action for the death of a trespasser on a railroad track, evidence *held* to warrant a finding, under the humanitarian doctrine, that a reasonably prudent engineer would have realized that the deceased was not aware of the train's approach before it was too late to be stopped.—Foster v. West, 184 S. W. 165.

—400(14) (Tex.Civ.App.) In an action by boy hurt when a passing train struck gate leading from a stock pen to the tracks, question whether engineer in charge realized boy's peril, but failed to take precautions, *held* for jury.—International & G. N. Ry. Co. v. Logan, 184 S. W. 301.

(H) Injuries to Animals on or near Tracks.

—407 (Tex.Civ.App.) Where railroad company's servants repairing a cattle guard near a road, though seeing that plaintiff's horses were frightened, continued to push a hand car towards them, it is liable for injuries to the animals.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

—439(4) (Tex.Civ.App.) In an action against a railroad company for injuries to horses which, being frightened while driven on a road, were injured in crossing a cattle guard, the petition *held* to raise the issue of discovered peril.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

—440 (Tex.Civ.App.) Where the petition averred that plaintiff's horses being driven down the road were frightened by the operation of a hand car, proof that the car was technically a push car which was being shoved by the railroad company's servants does not constitute a variance.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

—446(8) (Tex.Civ.App.) In an action for injuries to plaintiff's horses, which were fright-

ened and attempted to cross a railroad cattle guard, the question whether the railroad company's guard was sufficient *held*, in view of Rev. St. 1911, arts. 6596-6600, properly submitted to the jury.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

—446(12) (Tex.Civ.App.) In an action for injuries to horses being driven along a road, which were hurt in crossing a cattle guard, the question whether the owner was negligent in driving them loose *held* for the jury.—International & G. N. Ry. Co. v. Vogel, 184 S. W. 229.

(I) Fires.

—461 (Tex.Civ.App.) Plaintiff's refusal of permission to a railroad to burn necessary fireguards on his land, except upon an unreasonable condition that it pay for damage in advance, is contributory negligence barring recovery against the railroad for burning his land.—Ft. Worth & D. C. Ry. Co. v. Hapgood, 184 S. W. 1075.

—482(2) (Mo.App.) Proof that a fire originated after the passage of a train coupled with the showing that there was no other way for the fire to have started warrants an inference that it was started by the engine.—Bowden v. St. Louis & S. F. R. Co., 184 S. W. 1174.

RAPE.

See Criminal Law, —440, 1159.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

—52(1) (Ark.) That the prosecutrix was asked leading questions, wavered in her testimony, and that her story was improbable went only to her credibility, and did not show that the evidence was insufficient to sustain a conviction for carnally knowing her.—Rose v. State, 184 S. W. 60.

Evidence *held* sufficient to sustain a conviction of carnally knowing a female under the age of 16 years.—Id.

(C) Trial and Review.

—59(1) (Tex.Cr.App.) On conflicting evidence, though court required jury to find beyond reasonable doubt that girl was under 15 to convict of rape, failure to charge for acquittal if jury believed she was more than 15, or had reasonable doubt, was reversible error.—Mills v. State, 184 S. W. 509.

RATIFICATION.

See Corporations, —426.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, —6, 35; Partition; Quietting Title; Treaspass to Try Title.

REASONABLE DOUBT.

See Criminal Law, —789.

REBUTTAL.

See Witnesses, —360.

RECEIPTS.

See Payment, —35.

RECEIVERS.

See Railroads, —265.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

—1 (Tex.Civ.App.) The appointment of receivers is an ancillary remedy, and a suit therefor

cannot be maintained where that is the primary object, and no cause of action or equitable relief is otherwise stated.—*Republic Trust Co. v. Taylor*, 184 S. W. 772.

VI. ACTIONS.

⚡183 (Mo.App.) Where defendant's answer was the general issue plaintiffs need not prove that defendant was sued as receiver.—*Bowden v. St. Louis & S. F. R. Co.*, 184 S. W. 1174.

⚡183 (Tex.Civ.App.) A shipper of live stock, suing for damages thereto while the property of the railroad was in the hands of receivers, must allege and prove that the receivers had been duly appointed and discharged, and that its property delivered back was equal in value to the amount of the shipper's claim, or that such claim was made a condition of redelivery, and also by what court the receivers were appointed and discharged.—*Kansas City, M. & O. Ry. Co. v. Russell*, 184 S. W. 299.

RECOGNIZANCES.

See Bail; Justices of the Peace, ⚡159.

RECORDS.

See Adverse Possession, ⚡82; Appeal and Error, ⚡493-715, 743, 907; Chattel Mortgages, ⚡92, 144, 150; Courts, ⚡33, 114, 117; Criminal Law, ⚡440, 1090-1128; Judgment, ⚡768; Vendor and Purchaser, ⚡231, 233.

⚡17(7) (Tex.Civ.App.) Where court records have been burned, it will be presumed, to sustain conveyance by surviving wife, that she made application for appointment of appraisers of community property and that their appraisal was duly approved by court.—*Sealey v. Mutual Land Co.*, 184 S. W. 1073.

REDEMPTION.

See Mortgages, ⚡591; Pledges, ⚡50.

REFERENCE.

See Appeal and Error, ⚡1022; Arbitration and Award.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments, ⚡59.

I. RIGHT OF ACTION AND DEFENSES.

⚡13(1) (Tex.Civ.App.) Where through mutual mistake a chattel mortgage failed to include a debt which the parties agreed should be secured, the instrument will be reformed.—*McLeod Bros. v. Kirkland*, 184 S. W. 721.

⚡16 (Ky.) A court of equity has power, on satisfactory parol evidence, to reform a written instrument, from which a stipulation has been omitted by mistake or fraud, to make it conform to the real terms of the contract between the parties.—*Scott v. Spurr*, 184 S. W. 866.

⚡19(1) (Tex.Civ.App.) Instrument will not be reformed for mistake of one of the parties unless superinduced by fraud of other.—*Yantis v. Jones*, 184 S. W. 572.

⚡20 (Ky.) Owner of farm whose son negotiated its lease held entitled to reformation of the lease to include a stipulation as to cultivation, omitted from the instrument by the lessee, who presented it for signature to the son while the latter was under pressure of business.—*Scott v. Spurr*, 184 S. W. 866.

II. PROCEEDINGS AND RELIEF.

⚡45(2) (Ky.) To justify reformation of a written contract for an omission or insertion by mistake, the evidence must be clear, convincing, and satisfactory.—*Scott v. Spurr*, 184 S. W. 866.

Whether evidence of an omission from or

insertion in a written contract by mistake is such as to justify reformation depends on the character of the testimony, the coherency of the entire case, and the documents, circumstances, and facts proven.—Id.

⚡45(4) (Mo.) In a suit to reform a deed, evidence held to show that the consideration had been paid by plaintiff, and that her husband had substituted his name as grantee in place of hers in the deed.—*Bajohr v. Bajohr*, 184 S. W. 76.

⚡45(9) (Ky.) In an action to reform a lease of a farm for omission of a stipulation as to its cultivation, evidence held sufficient to justify judgment for plaintiff.—*Scott v. Spurr*, 184 S. W. 866.

⚡47 (Ky.) A court of equity, having power to reform a written contract which fails by mistake or fraud to conform to the real contract between the parties, can enforce specific performance thereof.—*Scott v. Spurr*, 184 S. W. 866.

REHEARING.

See New Trial.

REINSTATEMENT.

See Criminal Law, ⚡1131.

RELATION BACK.

See Partition, ⚡106.

RELEASE.

See Attorney and Client, ⚡101; Compromise and Settlement; Payment.

RELIGIOUS SOCIETIES.

See Disturbance of Public Assemblage, ⚡11.

REMAINDERS.

⚡5 (Ark.) Where a husband conveyed lands to his minor children and wife, the latter's interest to continue through life or widowhood held that, the husband having died and the wife remarried, infants took fee to the entire lands.—*Duncan v. Little*, 184 S. W. 413.

REMEDY AT LAW.

See Injunction, ⚡16, 17.

REMOVAL OF CAUSES.

V. AMOUNT OR VALUE IN CONTROVERSY.

⚡76 (Mo.App.) Error cannot be assigned on the ground of fraud upon the federal court by permitting amendment increasing damages alleged from \$2,999 to \$10,000, if, upon such amendment, defendant might have had the cause removed.—*Martin v. Richmond Cotton Oil Co.*, 184 S. W. 127.

RENT.

See Landlord and Tenant, ⚡199½.

REOPENING CASE.

See Trial, ⚡66.

REPEAL.

See Statutes, ⚡167.

REPLEVIN.

See Justices of the Peace, ⚡39½, 97; Pleading, ⚡36.

I. RIGHT OF ACTION AND DEFENSES.

⚡10 (Mo.App.) Replevin cannot be maintained against a party not in possession of the property when suit is instituted.—*Fergusson v. Comfort*, 184 S. W. 1192.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

⚡27 (Mo.App.) Rev. St. 1909, § 2637, touching actions in replevin in the circuit court, authorizes an action by merely filing the petition without affidavit, and the case may proceed to judgment without taking the property.—*White v. Grace*, 184 S. W. 947.

V. DAMAGES.

⚡77 (Ark.) The rule that an innocent purchaser of land for value may recover only the value of standing timber cut by a good-faith purchaser thereof is applicable to suits for replevin for recovery of the worked and merchantable timber.—*Bunch v. Pittman*, 184 S. W. 850.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⚡93 (Mo.App.) A general finding of the issues in replevin for plaintiff is a sufficient finding of wrongful detention to support a judgment for plaintiff.—*Rogers v. Davis*, 184 S. W. 151.

⚡103(2) (Mo.App.) Where defendant's answer in a replevin suit in which property has been taken from him contains no demand for a return of the property, the only judgment that can be rendered in his favor is for a return of the property and any damages sustained from the taking.—*Bank of Willow Springs v. Utterman*, 184 S. W. 1171.

⚡106 (Mo.App.) In a replevin action, the value, which is not the real issue, and is assessed only for the purposes of an alternate judgment, is to be assessed as of the date of the trial.—*Fergusson v. Comfort*, 184 S. W. 1192.

REPLY.

See Pleading, ⚡177.

REPUGNANCY.

See Witnesses, ⚡388.

REPUTATION.

See Disorderly House, ⚡16; Principal and Agent, ⚡20.

REQUESTS.

See Trial, ⚡256-260.

RESCISSION.

See Cancellation of Instruments; Sales, ⚡126; Vendor and Purchaser, ⚡93.

RES GESTÆ.

See Criminal Law, ⚡364.

RESIDENCE.

See Domicile; Elections, ⚡72, 73; Venue, ⚡22, 27.

RES IPSA LOQUITUR.

See Master and Servant, ⚡265.

RESTRAINT OF TRADE.

See Monopolies.

RESULTING TRUSTS.

See Trusts, ⚡89.

RETROSPECTIVE LAWS.

See Statutes, ⚡276.

RETURN.

See Execution, ⚡333; Process, ⚡147, 164; Prohibition, ⚡26.

REVENUE.

See Taxation.

REVERSIONS.

See Dedication, ⚡65.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, ⚡1187-1173.

REVIVAL.

See Abatement and Revival; Mortgages, ⚡316.

REVOCATION.

See Brokers, ⚡44.

RIGHT OF WAY.

See Easements.

RIPARIAN RIGHTS.

See Navigable Waters, ⚡44.

RISKS.

See Master and Servant, ⚡204-226, 288, 295.

RIVERS.

See States, ⚡12.

ROADS.

See Highways.

RULES.

See Master and Servant, ⚡141.

RULES OF COURT.

See Courts, ⚡85.

SAFE PLACE TO WORK.

See Master and Servant, ⚡101-129, 233-235.

SALES.

See Chattel Mortgages, ⚡219; Commerce, ⚡40; Contracts, ⚡10; Evidence, ⚡460, 461; Execution, ⚡216-268; Executors and Administrators, ⚡158, 167, 348; Guardian and Ward, ⚡81-108; Infants, ⚡38, 39; Intoxicating Liquors; Judicial Sales; Monopolies, ⚡17; Mortgages, ⚡353, 548; Partition, ⚡106, 109; Taxation, ⚡642-647; Vendor and Purchaser; Waters and Water Courses, ⚡254.

I. REQUISITES AND VALIDITY OF CONTRACT.

⚡23(2) (Mo.App.) A buyer can countermand a written order taken subject to the seller's approval at any time before its acceptance by the seller.—*Seneca Co. v. Ellison*, 184 S. W. 1177.

⚡38(1) (Tex.Civ.App.) Buyer held not entitled to rescind contract for purchase of a motor truck, unless he was injured by fraud, if any, in seller's representations as to its capacity.—*Alamo Auto Sales Co. v. Herms*, 184 S. W. 740.

⚡38(7) (Tex.Civ.App.) Where a fact lies open equally to both parties with full opportunity for examination, and the buyer undertakes to examine for himself without relying on the seller's statements, it is no evidence of fraud that seller knew and concealed facts not known to the buyer.—*James v. Doss*, 184 S. W. 623.

—38(8) (Tex.Civ.App.) Where not induced to sign a contract for the sale of personal property without knowledge of its contents, but after reading the contract and declaring that it was correct, buyer *held* not deceived as to the property described and conveyed thereby.—James v. Doss, 184 S. W. 623.

—52(7) (Tex.Civ.App.) In suit to rescind executed contract for purchase price of motor truck on ground of seller's misrepresentations as to its capacity, verdict for plaintiff *held* without support in evidence.—Alamo Auto Sales Co. v. Herms, 184 S. W. 740.

—53(2) (Mo.App.) Mailing the countermand of an order in time to reach the seller before shipment *held* to raise a jury question whether it was received, notwithstanding the seller's denial.—Senaca Co. v. Ellison, 184 S. W. 1177.

II. CONSTRUCTION OF CONTRACT.

—69 (Tex.Civ.App.) Contract for sale of "store and office furniture and fixtures" and of "merchandise" in the grocery line *held* not to include two horses, a delivery wagon, and a set of double harness.—James v. Doss, 184 S. W. 623.

—81(5) (Tex.Civ.App.) Where the sellers of potatoes contracted to deliver at a Texas common point, the buyers were not liable for the price unless the potatoes were delivered or tendered at such a point within a reasonable time after the seller received the order to ship.—J. & G. Lippman v. Jeffords-Schoenmann Produce Co., 184 S. W. 534.

—88 (Tex.Civ.App.) In suit for the price of Maine potatoes sold Texas buyers, question as to place of delivery to the buyers *held* for the jury.—J. & G. Lippman v. Jeffords-Schoenmann Produce Co., 184 S. W. 534.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

—126(1) (Tex.Civ.App.) Buyer of auto truck, even if seller fraudulently represented its capacity, after using for six or seven months and negligently and recklessly injuring it, had no right to rescind.—Alamo Auto Sales Co. v. Herms, 184 S. W. 740.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

—170 (Tex.Civ.App.) Where plaintiff agreed to sell cotton for delivery on or about a certain date, and defendant accepted a portion delivered at a subsequent date, the time of delivery was not of the essence of the contract, and failure to deliver on the exact date stipulated did not defeat plaintiff's right to recover for the defendant's refusal to accept the remainder of the cotton.—Bain v. Polasek, 184 S. W. 279.

VIII. REMEDIES OF BUYER.

(D) Actions and Counterclaims for Breach of Warranty.

—439 (Mo.App.) In an action by the seller of a horse for the price, defended for breach of warranty of soundness, the burden was on the buyer to prove the breach of warranty.—Ingersoll v. Bond, 184 S. W. 903.

IX. CONDITIONAL SALES.

—450 (Mo.App.) "Conditional sale" commonly refers to transactions whereby possession is delivered to buyer, but property in goods remains in seller till payment of price.—Kingman Plow Co. v. Joyce, 184 S. W. 490.

—454 (Mo.App.) Where a doubt exists as to whether a transaction is a conditional sale or a pledge, it is to be deemed a pledge.—Smith v. Becker, 184 S. W. 943.

The intention of the parties at the inception of the contract determines whether it is a pledge

or conditional sale, and its character is not changed by lapse of time.—Id.

—457 (Mo.App.) Order for goods to be paid for as sold, seller reserving title and right to draw on goods to fill orders, is not conditional sale, but bailment for sale.—Kingman Plow Co. v. Joyce, 184 S. W. 490.

That order for goods uses word "purchaser" and provides that all goods are sold subject only to certain warranty does not affect construction of contract as conditional sale or bailment for sale.—Id.

Provision in order for goods maturing obligations in event of insolvency, fire, or other casualty etc., does not change instrument to conditional sale.—Id.

That company ordering goods paid freight, and was authorized to fix selling prices, retaining difference as compensation and to cover expense, does not make contract one of sale.—Id.

—472(3) (Ark.) Where property sold by an administrator to decedent's son was delivered on condition that title should not pass until the purchase price, represented by a note, was paid in full, a purchaser from the son before payment acquired no title as against the administrator.—Pierce v. Whipple, 184 S. W. 837.

—479(8) (Tex.Civ.App.) That sellers of goods, shipping them, attached to the bill of lading a draft for the price to the order of the sellers, does not conclusively show an intention to withhold title until payment.—J. & G. Lippman v. Jeffords-Schoenmann Produce Co., 184 S. W. 534.

SALESMEN.

See Principal and Agent, —89, 111.

SALOONS.

See Landlord and Tenant, —199½.

SATISFACTION.

See Compromise and Settlement; Payment.

SCHOOLS AND SCHOOL DISTRICTS.

See Action, —47; Elections, —238; Municipal Corporations, —601; Principal and Surety, —101; Statutes, —122.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

—33 (Tex.Civ.App.) Under Acts 33d Leg. c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), touching common school districts, consolidation, in a county of less than 10,000 population, of two districts, to form one 30 miles in length and 16 in width, *held* illegal.—Cleveland v. Gainer, 184 S. W. 593.

Retrospective curative provision of Acts 33d Leg. c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), validating previously formed school districts, which became effective in July, 1913, *held* not to apply to an illegal consolidation of two school districts effected February 11, 1915.—Id.

A curative act validating school districts previously established and recognized will not be construed to validate the action of county commissioners, in consolidating two districts illegally, which was a fraud upon residents and taxpayers in one of them.—Id.

—36 (Tex.Civ.App.) Acts 34th Leg. c. 36, § 4a, does not give the district court authority to compel the school trustees to create a new district.—Jennings v. Carson, 184 S. W. 562.

An injunction against the issuance of school bonds which, under Acts 33d Leg. c. 129, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), would prevent alteration of the district and a mandatory injunction for the creation of a new district *held* proper.—Id.

—39 (Tex.Civ.App.) Under Acts 34th Leg. c. 36, amending Acts 32d Leg. c. 26 (Vernon's

Sayles' Ann. Civ. St. 1914, arts. 2840a-2840o §§ 4, 4a, 8, 10, a party aggrieved by the act of school trustees in creating districts may seek relief from the district court without first appealing to the state superintendent and board of education.—*Jennings v. Carson*, 184 S. W. 562.

Under Const. 1876, art. 5, § 8, as amended in 1891, Acts 33d Leg. c. 129, § 1 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 2815*), and Acts 34th Leg. c. 36, the district court can supervise the action of school trustees in refusing to create a new district.—*Id.*

(D) District Property, Contracts, and Liabilities.

§80(1) (Tex.Civ.App.) There can be no recovery on express or implied contracts with reference to a school building constructed without the permit required by *Vernon's Sayles' Ann. Civ. St. 1914, arts. 2904n, 2904o*.—*Kerbow v. Wooldridge*, 184 S. W. 746.

§81(2) (Tex.Civ.App.) Invalidity of a contract for the construction of a school building under *Vernon's Sayles' Ann. Civ. St. 1914, arts. 2904n, 2904o*, does not defeat recovery by a materialman on the contractor's bond given as required by articles 6394f-6394j.—*Kerbow v. Wooldridge*, 184 S. W. 746.

A school building contractor's bond not conforming to the requirements of *Vernon's Sayles' Ann. Civ. St. 1914, arts. 6394f-6394j*, held valid as a common-law obligation.—*Id.*

A condition in a school building contractor's bond for the payment of debts incurred by the trustees instead of the contractor held a clerical error.—*Id.*

Permission to a school contractor to take down his forfeit and proceed with the work is a sufficient acceptance of his bond.—*Id.*

The refusal of school trustees to accept a contractor's bond when first tendered because the sureties were not sufficient does not terminate the liability of those sureties.—*Id.*

A school building contractor's bond requiring completion free of mechanics' liens protects a materialman, though there could be no lien on a school building.—*Id.*

§86(2) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914, art. 2904o* compliance with the requirement of article 2904n cannot be presumed in a suit on a school building contract.—*Kerbow v. Wooldridge*, 184 S. W. 746.

(E) District Debt, Securities, and Taxation.

§111 (Tex.Civ.App.) Taxpayers and residents of a school district consolidated by the county commissioners with another to form one so large as to violate Acts 33d Leg. c. 129 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 2815*), held entitled to temporary injunction restraining the commissioners from issuing bonds, etc.—*Cleveland v. Gainer*, 184 S. W. 593.

(H) Pupils, and Conduct and Discipline of Schools.

§158(1) (Ky.) Under Ky. St. §§ 2049, 2055, order of state board of health held not to authorize health officer to direct that school children be vaccinated or excluded from schools.—*Board of Trustees of Highland Park Graded Common School Dist. No. 46 v. McMurtry*, 184 S. W. 390.

§158(2) (Ky.) Boards of health held authorized to order that school children be vaccinated when they believe there is reasonable apprehension of epidemic and that vaccination is necessary.—*Board of Trustees of Highland Park Graded Common School Dist. No. 46 v. McMurtry*, 184 S. W. 390.

Evidence held to show that county board of health had reasonable apprehension of epidemic of small pox, and hence order requiring vaccination of school children was authorized.—*Id.*

§159½ (Tex.Civ.App.) Acts 34th Leg. c. 36, does not authorize free transportation of children to and from common schools.—*Jennings v. Carson*, 184 S. W. 562.

SEARCHES AND SEIZURES.

See Intoxicating Liquors, §249.

SECONDARY EVIDENCE.

See Criminal Law, §400; Evidence, §158.

SECURITY.

See Chattel Mortgages, §22; Corporations, §92.

SEDUCTION.

II. CRIMINAL RESPONSIBILITY.

§34 (Tex.Cr.App.) To constitute the offense of seduction, it is not necessary that prosecutrix must have yielded solely in reliance on the promise of marriage, and not partly through love for the accused.—*Murrell v. State*, 184 S. W. 831.

SEEPAGE.

See Waters and Water Courses, §178.

SELF-DEFENSE.

See Homicide, §115, 118, 244, 300.

SELF-SERVING DECLARATIONS.

See Criminal Law, §426; Evidence, §271.

SEPARATE ESTATE.

See Husband and Wife, §121-133½.

SEQUESTRATION.

See Injunction, §17, 27.

§15 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914, § 7103*, plaintiffs, in suit to enjoin seizure of property under writ of sequestration issued in trespass to try title, who were not parties to such suit, against the tenant of one of them, could not replevy the property.—*Lane v. Kempner*, 184 S. W. 1090.

SERVANTS.

See Master and Servant.

SERVICE.

See Appeal and Error, §407; Process.

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See Account Stated; Compromise and Settlement; Payment.

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SHERIFFS AND CONSTABLES.

See Limitation of Actions, §22.

III. POWERS, DUTIES, AND LIABILITIES.

§118 (Ark.) A constable releasing without authority the attached goods to the attaching creditor, who sold them for their full value, held lia-

ble to the debtor only for the value of the interest in the goods which he claimed as against his creditor.—*Duty v. Jones*, 184 S. W. 419.

IV. LIABILITIES ON OFFICIAL BONDS.

—159 (Tex.Civ.App.) Upon allegations in motion against sheriff and sureties to recover judgment on ground of sheriff's refusal to levy and return execution, general demurrer held properly sustained.—*Peck v. Murphy & Bolanz*, 184 S. W. 542.

Trial court's sustaining of demurrer to appellant's motion against a sheriff and his sureties, without hearing appellant's reply argument and its refusal to allow appellant to argue his exceptions to the special answer, held within its discretion.—*Id.*

SIGNALS.

See Railroads, —312.

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See Appeal and Error, —569.

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SPECIFIC PERFORMANCE.

See Executors and Administrators, —135.

II. CONTRACTS ENFORCEABLE.

—58 (Tex.Civ.App.) A contract for the sale of land, providing that upon the purchaser's breach he should forfeit as "full penalty and liquidated damages" the first payment of \$500, was alternative, and gave the purchaser the choice either to perform, or to forfeit the payment for his refusal, so that, having defaulted, he could not have specific performance.—*Carter v. Smith*, 184 S. W. 244.

IV. PROCEEDINGS AND RELIEF.

—121(10) (Tex.Civ.App.) In the purchaser's suit for specific performance of a contract to convey land, evidence held sufficient to sustain the finding that the purchaser abandoned the contract.—*Carter v. Smith*, 184 S. W. 244.

In the purchaser's suit for specific performance of a contract to sell land, the fact that the vendors' title was not good was not conclusive on the point whether the purchaser abandoned the contract by declining to proceed further with the trade.—*Id.*

—126(2) (Tex.Civ.App.) A decree for specific performance of a contract to sell land must follow the substantial, if not the precise, terms of the contract, so that it cannot be entered where the contract is alternative in favor of the purchaser, permitting him to perform or to forfeit a payment for breach.—*Carter v. Smith*, 184 S. W. 244.

SPECIFICATION OF ERRORS.

See Appeal and Error, —728.

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See Railroads, —372.

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See Wills, —674.

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See Appeal and Error, —544, 562, 569.

STATES.

See Courts, —231; Judgment, —818.

I. POLITICAL STATUS AND RELATIONS.

—1 (Tex.) The powers of the state as a sovereignty exist only for governmental purposes.—*Waples v. Marrast*, 184 S. W. 180.

—12(2) (Ky.) As Virginia, on cession of the Northwest Territory, retained title to low-water mark of Ohio river on north side, the state of Kentucky which succeeded to Virginia's rights, is entitled to land to such mark, regardless of changes in the river's course.—*Perks v. McCracken*, 184 S. W. 891.

In an action where plaintiff claimed title to an island and sand bar in Ohio river by patent from Kentucky, evidence held to warrant a finding that the island was on south side of north low-water mark, and within borders of Kentucky.—*Id.*

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

—119 (Mo.App.) It is a fundamental principle of the law of Missouri that public money shall not be paid to a private individual for something wholly disassociated from the interests of the public.—*State ex rel. King v. Board of Trustees of Firemen's Pension Fund of Kansas City*, 184 S. W. 929.

STATUTE OF FRAUDS.

See Frauds, Statute of.

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STATUTES.

For statutes relating to particular subjects, see the various specific topics.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

—90(1) (Tex.Civ.App.) Rev. St. 1911, art. 1016, is not a violation of Const. art. 11, § 4, requiring a general law for incorporation of a city.—*Riley v. Town of Trenton*, 184 S. W. 344.

III. SUBJECTS AND TITLES OF ACTS.

—109 (Tenn.) Acts 1915, c. 28, entitled "An act to authorize counties having a population of not less than 33,500 nor more than 34,000 to issue bonds for highway purposes," held valid, though neither title nor act fixed a standard for measuring population of counties.—*Riggins v. Tyler*, 184 S. W. 860.

—113(3) (Tenn.) Pub. Acts, c. 480, entitled "An act to provide for the organization, admission, and regulation of fraternal beneficiary associations," does not violate Const. art. 2, § 17, in that it involves a plurality of subjects not expressed in the title.—*Hamilton Nat. Bank v. Amster*, 184 S. W. 5.

—118(1) (Tex.Cr.App.) Title of Acts 31st Leg. c. 108, § 51 (now Pen. Code 1911, art. 691), held sufficient to include prosecutions of insurance agents for larceny by embezzlement of premiums paid.—*Meredith v. State*, 184 S. W. 204.

—120(4) (Tenn.) Acts 1915, c. 28, entitled "An act to authorize counties having a population of not less than 33,500, nor more than 34,000 to issue bonds for highway purposes," is not in violation of Const. art. 2, § 17, declaring that no bill shall embrace more than one subject, which shall be expressed in its title.—*Riggins v. Tyler*, 184 S. W. 860.

§ 122(1) (Tex.Civ.App.) Act 84th Leg. c. 36, § 4a, giving district courts supervisory control over school trustees, is not void because not expressed in the preamble.—*Jennings v. Carson*, 184 S. W. 562.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 167(1) (Tex.Civ.App.) Where Revised Statutes of 1895 and 1911 each contained a repealing clause, a law enacted in 1884 (Gammel's Laws Tex., vol. 9, pp. 600-602), which was not carried into either Code or in either case among the exceptions to the repealing clause, was repealed.—*Anderson v. Engler*, 184 S. W. 309.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 194 (Ark.) The maxim of ejusdem generis is applied to effectuate the legislative intent, but never allowed to defeat it.—*Crabtree v. State*, 184 S. W. 430.

§ 206 (Mo.App.) In the construction of statutes, effect is to be given, if possible, to every word, clause, and sentence, to make them consistent and harmonious.—*State ex rel. King v. Board of Trustees of Firemen's Pension Fund of Kansas City*, 184 S. W. 929.

§ 230 (Ky.) In construing amendments to a statute, such amendments are to be treated as having the same effect as a codicil to a will.—*Gatton v. Fiscal Court of Daviess County*, 184 S. W. 1.

(D) Retroactive Operation.

§ 276(1) (Tex.Civ.App.) Act March 3, 1913 (Acts 33d Leg. c. 127) § 4, amending Rev. St. 1911, art. 1902 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1902) to provide that a fact alleged in the petition, not being denied by the answer, shall be taken as confessed, being remedial, is not available on appeal, where repealed after the trial.—*Mutual Film Corp. v. Morris & Daniel*, 184 S. W. 1060.

VII. PLEADING AND EVIDENCE.

§ 279 (Mo.) The laws of Congress are not foreign laws that must be pleaded and proven in state courts.—*Pipes v. Missouri Pac. Ry. Co.*, 184 S. W. 79.

§ 279 (Mo.App.) A carrier need not, having shown that the transaction was interstate, plead the federal laws governing such transactions.—*Stubblefield v. St. Louis & S. F. R. Co.*, 184 S. W. 149.

§ 281 (Mo.App.) Where the action or defense immediately rests upon a foreign statute, such statute must be pleaded as well as proved.—*Davis v. McColl*, 184 S. W. 920.

§ 289 (Mo.App.) On the issue whether a foreign state has adopted the Uniform Negotiable Instruments Law, it is not error to admit the entire Negotiable Instruments Law of such state, in spite of the rule that only the applicable statutes of a foreign state should be admitted.—*Davis v. McColl*, 184 S. W. 920.

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STAY.

See Action, ¶69.

STEALING.

See Larceny.

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STIPULATIONS.

See Criminal Law, ¶1004; Damages, ¶78-85.

¶14(4) (Tex.Civ.App.) Where the parties in an action of trespass to try title agreed that the plaintiff owned a certain named league, unless it was divested by the claimed limitation title of the defendants, who by their pleas expressly claimed only a part of another league, the plaintiff was entitled to judgment.—Angelina County Lumber Co. v. Hines, 184 S. W. 596.

¶14(9) (Tex.Civ.App.) Where parties agreed that each might read from records title papers and plaintiffs should furnish list with book references 10 days before trial, and file original powers of attorney, admission of title papers was not error, though powers of attorney were not produced until trial.—Keppler v. Texas Lumber Mfg. Co., 184 S. W. 353.

¶18(1) (Tex.Civ.App.) Stipulation, recited in order of sale, by assignee of foreclosure judgment secured by the mortgagee of a nursery company, held to preclude the assignee from enjoining the sale or removal of the nursery stock by the company's receiver after sale to the assignee.—Colonial Land & Loan Co. v. Joplin, 184 S. W. 537.

¶18(6) (Tex.Civ.App.) A party's agreement to admit a field note would preclude him from moving to strike it from the evidence after its recitals were found to be unfavorable to him.—Crews v. Powers, 184 S. W. 363.

STOCK.

See Corporations, ¶78-123.

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STREET RAILROADS.

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II. REGULATION AND OPERATION.

¶117(5) (Mo.) In an action for the death of plaintiff's father run down by defendant's street car, evidence of defendant's negligence held

sufficient to go to the jury.—Downs v. United Rys. Co. of St. Louis, 184 S. W. 995.

STREETS.

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SUBROGATION.

¶7(1) (Ky.) A surety who has paid the debt of his principal is at once subrogated to all the rights, remedies, securities, liens, and equities of the creditor for the purpose of obtaining his reimbursement from the principal debtor.—Barker v. Illinois Surety Co., 184 S. W. 377.

¶21 (Ark.) A collector of taxes who had been required to pay the amount deposited by him in an insolvent bank is entitled to subrogation to the county's rights against the bank's stockholders.—Johnson v. Wallace, 184 S. W. 835.

¶41(1) (Ark.) The chancery court, having jurisdiction to assign dower, was the proper court to enforce the right of the widow and administratrix to subrogation to claims against the estate paid by her.—Hicks v. Hicks, 184 S. W. 416.

SUBSCRIPTIONS.

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See Process.

SUPERSEDEAS.

See Appeal and Error, ¶485.

SUPPORT.

See Divorce, ¶308, 224.

SURETYSHIP.

See Husband and Wife, ¶273; Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, ¶116-126.

SURGEONS.

See Physicians and Surgeons.

SURVEYS.

See Public Lands, ¶175.

SURVIVING PARTNERS.

See Partnership, ¶247, 258.

SWAMP LANDS.

See Public Lands, ¶61.

SWINDLING.

See False Pretenses.

TAXATION.

See Depositories, ¶6, 8; Drains, ¶68; Elections, ¶83; Highways, ¶125; Subrogation, ¶21.

I. NATURE AND EXTENT OF POWER IN GENERAL.

¶2 (Tex.) The sovereign power of the state may be exercised in the levy and collection of taxes only on condition they shall be devoted to public purposes.—*Waples v. Marrast*, 184 S. W. 180.

IV. PLACE OF TAXATION.

¶254 (Tenn.) The taxation of personal property is dependent on a domicile of the owner.—*Denny v. Sumner County*, 184 S. W. 14.

"Domicile" and "residence" are not synonymous as applied to situs for taxation; "domicile" importing a legal relation between a person and a particular place, based on actual residence with intention to remain there.—*Id.*

Complainant, removing from his domicile of origin in T. county to S. county, and there purchasing a farm for investment and intending to stay only during education of his son, held to retain domicile in T. county for the taxation of personality.—*Id.*

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

¶543(6) (Mo.App.) A complaint in an action to recover paid taxes alleging collection without arrest, but under threat to prosecute, and that unless paid "it was impossible for plaintiff to continue in business," is demurrable as not showing payment under duress.—*American Mfg. Co. v. Alt*, 184 S. W. 1167, 1169.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

¶642 (Mo.) An order of publication, judgment, and sale for delinquent taxes, running against "David" M. B., did not pass the title of "Daniel" M. B.—*Organ v. Bunnell*, 184 S. W. 102.

An order of publication in a proceeding for delinquent taxes, running against "J. R. and the unknown heirs of J. R., deceased," void against J. R. because issued after his death, is valid against the unknown heirs of J. R., deceased, to authorize the passing of title by a sheriff's deed under a judgment in rem.—*Id.*

¶642 (Mo.) Where service was had by publication by initials instead of Christian name on owners of property to be sold for delinquent taxes, their recorded deed being in their Christian names, judgment against such owners held void, though after it was rendered and the property sold one wrote to the sheriff, signing his name by initials, etc.—*Todd v. Supper*, 184 S. W. 1143.

¶647 (Mo.) An order of publication, judgment, and sale for delinquent taxes, running against "David" M. B., did not pass the title of "Daniel" M. B.—*Organ v. Bunnell*, 184 S. W. 102.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

¶734(8) (Mo.) Where a tax judgment was rendered jointly against one deceased before the suit was commenced and one without title, a sheriff's deed under the judgment conveyed no title.—*Organ v. Bunnell*, 184 S. W. 102.

XII. FORFEITURES AND PENALTIES.

¶836 (Ark.) Act approved May 31, 1911 (Laws 1911, p. 361), held not to repeal Kirby's Dig. §§ 7083, 7084, by implication, but to provide a penalty for delinquent taxes between the 10th day of April and the assessment of the penalty under sections 7083 and 7084.—*Martels v. Wyss*, 184 S. W. 845.

TELEGRAPHS AND TELEPHONES.

See Commerce, ¶10, 59; Master and Servant, ¶302.

II. REGULATION AND OPERATION.

¶27 (Tex.Civ.App.) While the mental anguish doctrine prevails in Texas, such damages cannot be recovered in action for delay or nondelivery of a telegram originating in a state where such damages are not allowed.—*Western Union Telegraph Co. v. Bailey*, 184 S. W. 519.

¶37(2) (Tex.Civ.App.) Where a telegram is addressed to a person in care of another, delivery by the company to the other relieves the company from all liability.—*Western Union Telegraph Co. v. Winter*, 184 S. W. 335.

¶38(6) (Tex.Civ.App.) A telegram delayed in delivery held to charge the company with notice of addressee's brother's death, and that addressee would probably desire to attend the funeral.—*Western Union Telegraph Co. v. Winter*, 184 S. W. 335.

Delay in delivering a telegram held to render telegraph company liable, notwithstanding its lack of knowledge of the place where the funeral was held.—*Id.*

¶45 (Ark.) Under Kirby's Dig. § 7948, a mere showing of telephone company's negligence in restoring connection after its cable was burned, without intent to refuse connection to plaintiff, held not to entitle plaintiff to recover the penalty.—*Southwestern Telegraph & Telephone Co. v. Fendley*, 184 S. W. 424.

¶49 (Tex.Civ.App.) The prompt delivery of a second telegram for addressee to the person in whose care it was sent, who failed to communicate it to addressee, held not to relieve the company from liability for delay in delivering a former telegram.—*Western Union Telegraph Co. v. Winter*, 184 S. W. 335.

¶54(6) (Tex.Civ.App.) A provision on the back of a telegraph blank, which embodied the contract, limiting the company's liability for failure to discharge its duty to a sum not exceeding \$50, is void.—*Western Union Telegraph Co. v. Bailey*, 184 S. W. 519.

¶68(2) (Tex.Civ.App.) Where plaintiff was obliged to leave his child in Chattanooga to travel to Texas alone, because of defendant's failure to transmit a wire requesting money, accepted by them for transmission to Texas, the situation was not productive of such mental suffering proximately caused by defendant's negligence as would entitle the plaintiff to recover.—*Western Union Telegraph Co. v. Sherlin*, 184 S. W. 310.

TENANCY IN COMMON.

See Logs and Logging, 3.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

55(1) (Ark.) In case of a tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

A suit to recover entire amount of damages for permanent injury to the freehold cannot be instituted by one of the tenants in common not in exclusive occupancy, and, where the land was partitioned in its damaged condition, the other tenants retained their right of action already accrued.—*Id.*

TENDER.

See Usury, 95.

15(3) (Mo.) A creditor will be estopped from subsequently urging an objection suppressed at the time of the tender against one who relied upon the implied waiver and failed to produce legal tender.—*Smith v. Reserve Loan Life Ins. Co.*, 184 S. W. 464.

28 (Mo.) In an action on a life insurance policy, evidence that a draft presented by a telegraph company to the defendant, in payment of a premium, would be cashed by the local banks, was admissible on the issue of tender.—*Smith v. Reserve Loan Life Ins. Co.*, 184 S. W. 464.

In an action on a life insurance policy, evidence that the telegraph company drawer of a draft tendered to defendant, kept sufficient funds in a local bank to pay the draft, was admissible on the issue of tender.—*Id.*

29 (Mo.) In an action on a life insurance policy, evidence of an implied waiver by the defendant of the production of legal tender held sufficient to warrant submitting to the jury the question of the validity of the tender.—*Smith v. Reserve Loan Life Ins. Co.*, 184 S. W. 464.

TERMS.

See Courts, 64.

THEFT.

See Larceny.

THREATS.

See Judgment, 388.

TIE VOTE.

See Elections, 238.

TIMBER.

See Logs and Logging.

TIME.

See Adverse Possession, 41; Appeal and Error, 338; Bills and Notes, 129, 445; Criminal Law, 573, 801; Execution, 333; Insurance, 186, 539; Judgment, 153, 866; New Trial, 117; Payment, 66; Sales, 81, 126; Vendor and Purchaser, 75, 78.

TITLE.

See Adverse Possession; Ejectment; Executors and Administrators, 167; Forcible Entry and Detainer, 6; Judgment, 712; Partition, 109; Pledges, 21; Quieting Title; Taxation, 734.

TORTS.

See Action, 47; Damages; Death; Forcible Entry and Detainer, 8, 35; Fraud; Libel and Slander; Malicious Prosecution; Master and Servant, 301-332; Municipal Corporations, 759, 821; Negligence; Principal and Agent, 159; Venue, 8.

TOWNS.

See Municipal Corporations.

TRANSFER OF CAUSES.

See Courts, 487; Justices of the Peace, 159, 162; Trial, 11.

TRAVELING SALESMEN.

See Principal and Agent, 111.

TREES.

See Logs and Logging.

TRESPASS.

See Railroads, 275-282, 359; Venue, 8.

TRESPASS TO TRY TITLE.

See Ejectment; Stipulations, 14.

I. RIGHT OF ACTION AND DEFENSES.

7 (Tex.Civ.App.) In the absence of evidence that one who at one time held title by limitation had assigned it to the plaintiffs specifically as a part of the plaintiffs' grant, his title by limitation would avail plaintiffs nothing.—*Crosby v. Stevens*, 184 S. W. 705.

22 (Tex.Civ.App.) Answer of defendants in trespass to try title, setting up limitations, with appropriate prayer, held, in the absence of special exceptions, sufficient as a cross-action.—*Nunez v. McElroy*, 184 S. W. 531.

II. PROCEEDINGS.

32 (Tex.Civ.App.) Allegations in trespass to try title held an admission that plaintiffs had no title to the part of the land described in their petition as claimed by defendants.—*Diffie v. White*, 184 S. W. 1065.

40(4) (Tex.Civ.App.) That a deed by a town to which land had been granted included only to a certain line is not conclusive that the deed to the town was of the same extent, although it may be evidence to that effect.—*Crosby v. Stevens*, 184 S. W. 705.

40(6) (Tex.Civ.App.) Field note book admitted by agreement of parties, so far as it related to certain surveys, should have been considered by the court in passing on the issues.—*Crews v. Powers*, 184 S. W. 363.

41(1) (Tex.Civ.App.) Where plaintiffs introduced a patent to the heirs of one deceased and deeds from certain persons of the same name, but made no showing that such persons were the heirs of deceased, and the deeds did not so recite, they failed to deraign title from the sovereignty.—*Sweeten v. Taylor*, 184 S. W. 603.

Mere evidence of prior possession without proof of title from the sovereignty or that the parties claimed under a common source will not warrant judgment for plaintiffs.—*Id.*

41(1) (Tex.Civ.App.) Evidence held to support the finding of the jury that plaintiffs, in trespass to try title, had no title to the land in question, since it was not included within the grant under which they specifically claimed.—*Crosby v. Stevens*, 184 S. W. 705.

Evidence held to support a judgment for the defendants in trespass to try title, where there was no evidence that it was physically impossible for the land to have been located as the jury found it was.—*Id.*

¶41(2) (Tex.Civ.App.) Where plaintiffs demand title from two persons, and defendants from only one of them, plaintiffs did not show the parties claimed from a common source; there being no proof of the interest of their grantors.—Sweeten v. Taylor, 184 S. W. 693.

¶44 (Tex.Civ.App.) Where plaintiff's title depended on whether an early grant included the land claimed, and the boundary of the grant was the north bank of a river, it was not error to submit to the jury the special issue whether, at the time of the grant, the land claimed by plaintiffs was on that side of the river, either in whole or in part.—Crosby v. Stevens, 184 S. W. 705.

In trespass to try title, the burden being upon the plaintiffs, if their evidence was insufficient, clearly to establish title, the jury might disregard it altogether, and therefore submission of the sufficiency of evidence was proper whether defendants introduced any evidence or not.—Id.

¶45(1) (Tex.Civ.App.) Refusal of instruction on sufficiency of evidence as to line of old grant held not erroneous, where giving it would have nullified the issues submitted and would have been contrary to the evidence in the cause.—Crosby v. Stevens, 184 S. W. 705.

An instruction, in trespass to try title to land alleged to be part of an old grant, that the jury should consider only the boundary as existed at the time of the grant was not erroneous, as it left the jury free to determine where the boundary was.—Id.

Requested instructions, in an action to quiet title, which would call for a general verdict, held properly refused, a general verdict in such action not being proper, in view of submission of special interrogatories.—Id.

TRIAL.

See Continuance; Costs; Criminal Law, ¶622-883; Jury; New Trial; Stipulations; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

¶5 (Ky.) Under Civ. Code Prac. § 366, and section 367a, subsec. 5, held, that submission of action in equity and judgment rendered on petition and cross-petition was premature and unauthorized.—Jones v. Hazard Dean Coal Co., 184 S. W. 1131.

II. DOCKETS, LISTS, AND CALENDARS.

¶11(2) (Ky.) An action to recover wages and expenses and a share of the profits of the business should be transferred to equity and referred to a commissioner.—Wickliffe Mfg. Co. v. Wilson, 184 S. W. 386.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

¶29(2) (Ark.) Where it was in dispute whether corporation's treasurer had authority to bind it, court's remarks concerning effect of contract signed by him, held contrary to Const. art. 7, § 23, and improper and highly prejudicial.—Roe Rice & Land Co. v. Strobhart, 184 S. W. 461.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

¶39 (Mo.App.) In action on contractor's bond for materials furnished to and used by contractor with city, held on the pleadings and evidence that the contract was properly proved and introduced in evidence.—City of St. Louis v. McCully Const. Co., 184 S. W. 939.

(B) Order of Proof, Rebuttal, and Re-opening Case.

¶66 (Mo.App.) A case can be reopened and further evidence received only by consent of the court.—McKenzie Carpet Co. v. Leffler, 184 S. W. 905.

(C) Objections, Motions to Strike Out, and Exceptions.

¶75 (Mo.App.) Where counsel for defendant receiver testified without objection that railroad company was then in the hands of a receiver, proof receiver had been appointed before the cause of action arose held not objectionable on ground record was best evidence.—Bowden v. St. Louis & S. F. R. Co., 184 S. W. 1174.

¶85 (Tex.Civ.App.) Where defendant railroad company offered witness' written statement partly competent and partly incompetent, exclusion on plaintiff's objection held not error.—Missouri, K. & T. Ry. Co. of Texas v. Washburn, 184 S. W. 580.

It is not error to admit partly competent and partly incompetent evidence over objection to the whole.—Id.

¶85 (Tex.Civ.App.) An objection to evidence admissible in part should separate the admissible evidence from that which is inadmissible.—Briggs-Weaver Machinery Co. v. Pratt, 184 S. W. 732.

¶85 (Tex.Civ.App.) An assignment, complaining of the overruling of an objection to the evidence, presents nothing for review, where the evidence was in part admissible.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, 184 S. W. 1070.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

¶109 (Mo.App.) In forcible entry and detainer, the opening statement of plaintiff's counsel that he heard an attorney advise plaintiff as to the title, and that plaintiff relied thereon, was improper.—Underwood v. City of Caruthersville, 184 S. W. 486.

¶109 (Mo.App.) Where statements of plaintiff's counsel in opening amount to admissions of fact the existence of which precludes a recovery, the court is justified in granting a nonsuit.—Wonderly v. Little & Hays Inv. Co., 184 S. W. 1188.

¶115(5) (Mo.App.) Sustaining objections to argument of counsel that his client was "let out" of a former proceeding in which the action was dismissed as to him is not error, especially where counsel actually succeeds in making considerable argument of this character.—Gardiner v. McPike, 184 S. W. 956.

¶125(1) (Ky.) In a servant's action for injuries, statements of plaintiff's counsel held insufficient to justify reversal on the ground of improper argument.—Chesapeake & O. Ry. Co. v. Witte, 184 S. W. 1128.

¶127 (Mo.App.) In a servant's action for injuries, attorneys should refrain from mentioning employers' liability insurance, where it affirmatively appears that the defendant master did not have such insurance.—Hayes v. Berry, 184 S. W. 913.

¶133(2) (Tex.Civ.App.) Statement in opening argument that plaintiff could not scour country for witnesses as had defendant corporation to bolster up unjust claim held not error, where withdrawn from jury with instruction not to consider.—Houston Oil Co. of Texas v. Jones, 184 S. W. 611.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

¶136(3) (Mo.App.) In an action by the buyer of a motion picture theater against the seller, where such seller concedes that he had no right to assign his lease, the court will not place a

strict legal construction upon its terms and instruct that as matter of law there were no restrictions upon the seller's right to transfer.—*Harmon v. Dickerson*, 184 S. W. 139.

⇒139(1) (Tex.Civ.App.) Where there is any evidence about which reasonable minds may differ, the issue is for the jury.—*Mann v. Bell*, 184 S. W. 320.

⇒139(1) (Tex.Civ.App.) Where evidence was sufficient to raise the issue of defendant's negligence, it was not error to refuse peremptory charges.—*Missouri, K. & T. Ry. Co. of Texas v. Washburn*, 184 S. W. 580.

⇒139(1) (Tex.Civ.App.) To authorize the court to take a material question from the jury, the evidence must be of such a character that there is no room for ordinary or reasonable minds to differ as to the conclusion to be drawn from it.—*Luten v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 798.

(B) Demurrer to Evidence.

⇒156(2) (Mo. App.) Evidence on demurrer thereto must be viewed in the light most favorable to plaintiff.—*Marshall v. United Rys. Co. of St. Louis*, 184 S. W. 159.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⇒191(1) (Tex.Civ.App.) Material facts controverted by the evidence should not be assumed in the charge.—*Snaman v. Lane*, 184 S. W. 366.

⇒193(1) (Tex.Civ.App.) Instruction, in action to quiet title, *held* not improper for indicating what the findings of the jury should be.—*Crosby v. Stevens*, 184 S. W. 705.

⇒194(1) (Tex.Civ.App.) A requested instruction which was on the weight of the evidence was properly refused.—*Galveston, H. & S. A. Ry. Co. v. Moses*, 184 S. W. 327.

⇒194(10) (Tex.Civ.App.) Instruction, in an action to quiet title on issue of mistake in old plat, *held* not on the weight of evidence, but proper submission of the issues.—*Crosby v. Stevens*, 184 S. W. 705.

⇒194(13) (Tex.Civ.App.) Instruction on right of the holder of an option to purchase land to have proceeds of sales to other persons applied to his debt *held* not on the weight of evidence.—*Lester v. Hutson*, 184 S. W. 268.

Instruction, in action by optionee on contract of sale, *held* not on the weight of evidence.—*Id.*

⇒194(17) (Tenn.) In statutory action for damages for negligent killing of plaintiff's husband on defendant's track, requested instruction as to effect of deceased's contributory negligence in entering on track without stopping to look or listen, etc., *held* properly refused as invading the province of the jury.—*Middle Tennessee R. Co. v. McMillan*, 184 S. W. 20.

⇒194(19) (Tex.) Charge that burden is on defendant of showing assumption of risk by preponderance of evidence, no matter by which side adduced, to be considered in its entirety, *held* not objectionable as invading province of jury.—*Barnhart v. Kansas City, M. & O. Ry. Co. of Texas*, 184 S. W. 176.

⇒199 (Mo.App.) In suit on an account stated for installing heating apparatus in which defendant counterclaimed for defective performance, an instruction on damages under defendant's counterclaims *held* erroneous as substituting the opinion of the jury for established rules of law.—*Niehaus v. Gillanders*, 184 S. W. 949.

(B) Necessity and Subject-Matter.

⇒213 (Tex.Civ.App.) In a suit against a railroad for a death, where the case was submitted on special issues, the refusal of a charge, embodying a declaration of law which could only

be applied by the court to the facts found, and could have been of no material aid to the jury in determining the questions of fact submitted, was proper.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

⇒213 (Tex.Civ.App.) Where evidence on an issue was uncontradicted, the refusal to instruct on the issue was not error; the court treating it as a matter of law.—*Cattlemen's Trust Co. of Ft. Worth v. Pruett*, 184 S. W. 716.

(C) Form, Requisites, and Sufficiency.

⇒229 (Tex.Civ.App.) In suit for damages to a shipment of cattle, instruction repeating all the issues of negligence already submitted in preceding instructions gave undue emphasis to those issues.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⇒240 (Tex.Civ.App.) Instruction in action by optionee on contract of sale *held* not argumentative.—*Lester v. Hutson*, 184 S. W. 268.

(D) Applicability to Pleadings and Evidence.

⇒251(3) (Tex.Civ.App.) Where contributory negligence of plaintiff was not pleaded, the matter should not be submitted in the charge.—*International & G. N. Ry. Co. v. Vogel*, 184 S. W. 229.

⇒251(3) (Tex.Civ.App.) In suit for damages to shipment of cattle, defendant, under general denial of its negligence, *held* entitled to instruction that no damages could be recovered for injuries due to the inherent nature or proper vice of the animals.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⇒252(2) (Tex.Civ.App.) In an action against a street railroad company for personal injuries, testimony of 17 claims by plaintiff's relatives against defendant and that plaintiff witnessed a release in one suit will not justify a charge on conspiracy to fabricate claims.—*San Antonio Traction Co. v. Cox*, 184 S. W. 722.

⇒252(5) (Tex.Civ.App.) In an action for personal property claimed not to have been included in contract of sale, charge that defendant, in reconvention, might recover a stove, was properly refused, where without any support in the evidence.—*James v. Doss*, 184 S. W. 623.

⇒252(7) (Tex.Civ.App.) In suit for damages to shipment of cattle, where there was no evidence of a want of care in loading, an instruction that a want of care would be negligence was without support in the evidence.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⇒252(9) (Ark.) In action for damage from surface waters consequent upon railroad's change of grade of roadbed, instruction that, if the damage resulted from city's failure to maintain the street, defendant was not liable, *held* properly refused where there was no evidence of city's failure.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

⇒252(10) (Tex.Civ.App.) In an action for injuries, where the plaintiff was earning the same amount after as he had earned prior to the injuries, and there was no evidence that his earning capacity had been affected, the submission of the issue whether plaintiff's future earning capacity had been impaired was error.—*San Antonio Traction Co. v. Cox*, 184 S. W. 722.

⇒252(14) (Mo.) Where there was no evidence of collusion between insurer's agents and insured, *held* that modification of instructions as to waiver was not reversible error.—*Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia*, 184 S. W. 999.

⇒253(1) (Tex.Civ.App.) In a suit for damages to shipment of cattle based on allegations of negligence in several respects, instruction submitting the converse of the theories on which plaintiff was to recover, omitting one of the issues of

negligence, was erroneous.—*St. Louis Southwestern Ry. Co. of Texas v. Kerr*, 184 S. W. 1058.

⚡253(4) (Ark.) In an action for carrying plaintiff beyond junction where she was to change cars, instruction held erroneous as ignoring the real issue as to whether the announcement of a necessity for a change had been made.—*St. Louis, I. M. & S. Ry. Co. v. Needham*, 184 S. W. 47.

(E) Requests or Prayers.

⚡256(2) (Ark.) It is the duty of counsel to ask correction of an incorrect instruction.—*Wisconsin & Arkansas Lumber Co. v. Irons*, 184 S. W. 466.

⚡258(2) (Mo.App.) Where two or three instructions would have adequately presented defendant's defense, but defendant requested a dozen, the trial court might properly refuse them on the ground of their length.—*Cutts v. Davison*, 184 S. W. 921.

⚡260(1) (Ark.) The court is not required to give all of the instructions which correctly declare the law, but the instructions are sufficient if, taken as a whole, they fairly and clearly present the law applicable to the theories of the parties on which they have offered competent evidence.—*Weatherly v. Stane*, 184 S. W. 41.

⚡260(1) (Mo.App.) A request covered by given instructions was properly refused.—*Hawkins v. City of Independence*, 184 S. W. 927.

⚡260(1) (Tenn.) The refusal of requested instructions was not error, where the substance thereof was contained in other instructions given at the instance of the same party.—*Middle Tennessee R. Co. v. McMillan*, 184 S. W. 20.

⚡260(1) (Tex.Civ.App.) Charges need not be repeated.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

⚡260(1) (Tex.Civ.App.) A requested instruction fully covered in one given was properly refused, especially where the one given came nearer being the law than the one refused.—*Galveston, H. & S. A. Ry. Co. v. Moses*, 184 S. W. 327.

⚡260(1) (Tex.Civ.App.) The refusal of requests covered by the charges given is not error.—*Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas*, 184 S. W. 1070.

⚡260(8) (Tex.Civ.App.) In a servant's action for injuries, where the court, in its main charge, instructed on the burden of proof, the refusal to give a special charge on the subject was not erroneous.—*Texas & P. Ry. Co. v. Griffin*, 184 S. W. 305.

In a servant's action for injuries, where the court failed to submit certain states of fact as a basis of liability in his main charge, the refusal of special charges directing that they could not find for plaintiffs upon such states of fact was proper.—*Id.*

(G) Construction and Operation.

⚡296(1) (Tex.Civ.App.) Where it was stipulated that libelous charge of murder was untrue except as to fact of killing, a charge that article was libelous, false, untrue, and unauthorized was not error, where court further charged that defendant had legal right to publish fact of killing.—*Houston Chronicle Pub. Co. v. Quinn*, 184 S. W. 669.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

⚡304 (Tex.Civ.App.) It is not improper conduct for a jurymen to remark to the jury that he had friends on both sides, and therefore wanted the ballot to be secret, where it did not appear that the verdict was in any way improper.—*Crosby v. Stevens*, 184 S. W. 705.

⚡311 (Tex.Civ.App.) During deliberations as to alleged false representations, the statement of one juror to the others of his knowledge of a "bogus check law," as bearing upon the

deliberations, which statement probably influenced the jury, is conduct necessitating reversal.—*Pridgen v. Cook*, 184 S. W. 713.

IX. VERDICT.

(A) General Verdict.

⚡323 (Tex.Civ.App.) Where a jury of 11 is agreed upon, it is not necessary that each of the 11 sign the verdict, but the signature of the foreman alone is sufficient.—*Crosby v. Stevens*, 184 S. W. 705.

Where all the members of the jury in open court acknowledged that the verdict returned was their verdict, signature by all of them was unnecessary.—*Id.*

⚡344 (Tex.Civ.App.) The verdict of the jury cannot be impeached by affidavits or evidence of the jurors that there was a mistake of fact entering into the verdict.—*Crosby v. Stevens*, 184 S. W. 705.

(B) Special Interrogatories and Findings.

⚡348 (Tex.Civ.App.) Where the case is submitted upon special issues, it is improper to submit a special charge calling for a general verdict.—*Worden v. Kroeger*, 184 S. W. 583.

⚡350(1) (Tex.Civ.App.) In a suit against a railroad for a death, the refusal of an issue as to which neither an affirmative nor a negative answer would have relieved the road from liability was proper.—*Missouri, K. & T. Ry. Co. of Texas v. Norris*, 184 S. W. 261.

⚡350(2) (Tex.Civ.App.) Requested special issues embodying inquiries as to mere matters of evidence bearing upon the issues to be determined are properly refused.—*Ft. Worth & D. C. Ry. Co. v. Hapgood*, 184 S. W. 1075.

⚡350(4) (Tex.Civ.App.) In salesman's action for compensation under oral contract, where defendant pleaded his employment under a written contract, refusal to submit defendant's requested special issue as to whether defendant mailed a contract to plaintiff, which was immaterial, was not error, though its material special issue as to acceptance of such contract should have been submitted.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

⚡351(5) (Tex.Civ.App.) In salesman's action for compensation under an oral contract, error in refusing to submit defendant's requested special issue as to the contract under which plaintiff was employed held not error, where such issue was covered by an interrogatory.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

⚡352(1) (Tex.Civ.App.) In salesman's action for compensation under alleged oral contract, where defendant pleaded employment under a written contract, formal presentation of issues reciting the terms of the oral contract and omitting the terms of the written contract held not confusing or misleading.—*Briggs-Weaver Machinery Co. v. Pratt*, 184 S. W. 732.

⚡352(1) (Tex.Civ.App.) Defendants' plea of privilege being the single issue of fact, the charge, general in form, which involved only such single issue of fact, was sufficient as a submission of the case on special issues, and the jury's verdict for plaintiff determined such single issue for defendants.—*Texas Grain & Elevator Co. v. Dyer*, 184 S. W. 1049.

⚡352(1) (Tex.Civ.App.) A special verdict must directly, fairly, and fully submit to the jury material issues, and be sufficiently certain to stand as a final decision of the special matters with which it deals.—*Missouri, K. & T. Ry. Co. of Texas v. Pace*, 184 S. W. 1051.

⚡352(5) (Tex.Civ.App.) In an action for misrepresentations in effecting a sale of lands, the submission to the jury as to what purpose and to what extent water was guaranteed by the vendor in a single special issue held not erroneous.—*Zavala Land & Water Co. v. Tolbert*, 184 S. W. 523.

⇒352(6) (Tex.Civ.App.) Special issues submitted to the jury though they be leading questions are not improper, where they do not in any manner suggest the answer expected, but merely call for an unequivocal answer.—*International & G. N. Ry. Co. v. Logan*, 184 S. W. 301.

⇒357 (Tex.Civ.App.) In action for injuries to land by water seeping through defendants' embankment, where court submitted issue as to value of land after acts complained of, the answer, "No immediate market value for agricultural purposes," will not sustain judgment on theory that its value was entirely destroyed.—*Indiana Co-op. Canal Co. v. Gray*, 184 S. W. 242.

⇒362 (Tex.Civ.App.) Under Rev. St. 1011, art. 1985, providing that on appeal an issue not submitted nor requested shall be deemed as found by the court so as to support the judgment, provided there is evidence to sustain such finding, error cannot be predicated on the insertion of findings by the court in addition to those of the jury, which were necessary to the judgment.—*Crosby v. Stevens*, 184 S. W. 705.

TROVER AND CONVERSION.

See Embezzlement, ⇒14.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Limitation of Actions, ⇒108; Public Lands, ⇒177; Wills, ⇒674.

I. CREATION, EXISTENCE, AND VALIDITY.

(B) Resulting Trusts.

⇒89(1) (Mo.) In a suit to establish a resulting trust in land, part of purchase price of which was paid by the grantee's father, evidence held to show a gift.—*Hunnell v. Zinn*, 184 S. W. 1154.

⇒89(5) (Mo.) Strong, unequivocal, and convincing proof is required to establish a resulting trust.—*Hunnell v. Zinn*, 184 S. W. 1154.

UNITED STATES.

See Attorney and Client, ⇒148; Courts, ⇒97; Limitation of Actions, ⇒11.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

⇒50 (Mo.App.) That a method of calculating interest is customary is no defense if by such method more than the legal rate is charged.—*Bank of Willow Springs v. Utterman*, 184 S. W. 1171.

(B) Rights and Remedies of Parties.

⇒95 (Mo.App.) Under Rev. St. 1909, § 7184, a petitioner in equity to recover stock pledged to secure a usurious loan need not tender payment.—*Smith v. Becker*, 184 S. W. 943.

⇒113 (Mo.App.) The intent to charge usury is presumed from an intentional charging of more than the legal rate.—*Bank of Willow Springs v. Utterman*, 184 S. W. 1171.

⇒117 (Ark.) In an action to foreclose a mortgage, evidence held insufficient to sustain the plea of usury as to the notes representing the secured debt.—*Chambers v. Cunningham*, 184 S. W. 49.

⇒117 (Mo.App.) Evidence that interest at 8 per cent. was calculated for 93 or 92 days on several 90-day extensions held to show usury.—*Bank of Willow Springs v. Utterman*, 184 S. W. 1171.

(C) Rights and Remedies of Third Persons.

⇒129 (Mo.App.) The assignee of property pledged to secure a loan can raise the question of usury.—*Smith v. Becker*, 184 S. W. 943.

VACATION.

See Judgment, ⇒143-173, 342, 388.

VACCINATION.

See Schools and School Districts, ⇒158.

VALUE.

See Courts, ⇒231; Evidence, ⇒142, 474.

VARIANCE.

See Pleading, ⇒387.

VENDOR AND PURCHASER.

See Evidence, ⇒450, 461; Execution, ⇒268; Executors and Administrators, ⇒187; Frauds, Statute of, ⇒60, 72; Fraudulent Conveyances, ⇒188, 199; Homestead, ⇒96; Judgment, ⇒682; Partition, ⇒109; Sales; Specific Performance; Taxation, ⇒734.

I. REQUISITES AND VALIDITY OF CONTRACT.

⇒16(1) (Tex.Civ.App.) Letters and telegrams exchanged by vendor and purchaser together with deed definitely describing the realty, held to make a concluded contract of sale.—*Longinotti v. McShane*, 184 S. W. 598.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

⇒75 (Tex.Civ.App.) Contract for purchase and sale of realty silent as to time of performance gave a reasonable time for performance.—*Longinotti v. McShane*, 184 S. W. 598.

⇒78 (Ark.) Condition of contract for sale of land on installments held insufficient to make time of payment of the essence of the contract, but to create a present right as purchaser to receive a deed on completion of payments.—*Smith v. Berkau*, 184 S. W. 429.

⇒81 (Tex.Civ.App.) Evidence in purchaser's action for damages for breach of contract to sell certain realty, held to make purchaser's failure to perform within reasonable time question for jury.—*Longinotti v. McShane*, 184 S. W. 598.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

⇒93 (Ark.) Equity will not relieve a vendee who has made default where time is of the essence of the contract, in the absence of waiver of the forfeiture.—*Smith v. Berkau*, 184 S. W. 429.

Equity will not relieve against the performance of an act which a contract for the sale of land has made a condition precedent.—*Id.*

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) As to Each Other.

⇒208 (Tex.Civ.App.) Where vendor, under an option contract for sale of land, disposed of certain parcels within the term of the option, it was immaterial that there was no specific agreement to turn over to the option holder the

amounts so derived, since the proceeds in equity belong to him.—*Lester v. Hutson*, 184 S. W. 268.

(C) Bona Fide Purchasers.

☞228(7) (Ark.) A purchaser, of the home-
stead rights of minor children inherited from
their deceased mother, with notice of a lease
made by a father to a mortgagee to extinguish
the mortgage debt, could not prevent the en-
forcement of the original mortgage; the con-
sideration for the lease failing.—*Shapard v.*
Mixon, 184 S. W. 399.

☞231(8) (Mo.) In view of Rev. St. 1889, §
2419; Rev. St. 1879, § 602; Gen. St. 1865, c.
109, § 25; and Rev. St. 1855, c. 32, § 41, a re-
corded deed imparted notice to subsequent pur-
chasers, notwithstanding the destruction of the
county records.—*Organ v. Bunnell*, 184 S. W.
102.

☞232(2) (Ark.) Sending one man upon a large
tract of land to cut the timber therefrom within
a few days after the purchase does not give con-
structive notice to a subsequent purchaser of
the land, who lived in another county, where the
land was remote and difficult of access.—*Bunch*
v. Pittman, 184 S. W. 850.

☞233 (Ark.) A conveyance of standing tim-
ber, if not recorded, is not good as against a
subsequent innocent purchaser of the land for
the value and without notice.—*Bunch v. Pitt-*
man, 184 S. W. 850.

☞239(1) (Tex.Civ.App.) Where a prescriptive
way across land had been acquired, *held*, that
a purchaser could not defeat the holder's rights
on the ground of being an innocent purchaser
because the easement had not been recorded.—
Heard v. Bowen, 184 S. W. 234.

☞239(5) (Ark.) A bona fide purchaser of land
without notice of an unrecorded conveyance by
the grantor of timber rights, *held* entitled to re-
cover from the grantee of the timber rights for
trespasses committed after he was notified of
plaintiff's purchase.—*Bunch v. Pittman*, 184 S.
W. 850.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

☞283 (Tex.Civ.App.) In suit to foreclose ven-
dor's lien, prior mortgagees, ordered to set up
their claims, *held* improperly required to pay
share of costs of receivership in excess of the
cost of independent suits.—*Hooven-Owens-Rent-*
schler Co. v. T. Schriver & Co., 184 S. W. 350.

That mortgagees received money distributed
among mortgagor's creditors under arrangement
between mortgagor and the mortgagor's grantee
held not to affect their rights as to liability for
costs of a receivership.—*Id.*

Prior mortgage liens *held* not affected as to
liability for costs of receivership by fact that
a considerable portion of the costs was for tax-
es.—*Id.*

☞285(2) (Tex.Civ.App.) A default judgment
foreclosing a vendor's lien on several tracts of
land, omitting a call for the west side of one of
the tracts, was defective.—*Gilles v. Miners'*
Bank of Carterville, Mo., 184 S. W. 284.

VII. REMEDIES OF PURCHASER.

(B) Actions for Breach of Contract.

☞350 (Tex.Civ.App.) In purchaser's action
for damages for vendor's failure to perform
contract of sale, vendor's deed executed for pur-
pose of performance *held* admissible to estab-
lish contract.—*Longinotti v. McShane*, 184 S.
W. 598.

☞352 (Tex.Civ.App.) Instruction on right of
the holder of an option to purchase land to have
proceeds of sales to other persons applied to his
debt *held* not calculated to confuse.—*Lester v.*
Hutson, 184 S. W. 268.

Instruction, in action by optionee on contract
of sale, *held* not ambiguous.—*Id.*

In an action on an option contract, evidence

held to justify the submission of an instruction
on the character of the tenancy of the option
holder as a special tenancy.—*Id.*

☞352 (Tex.Civ.App.) Whether a vendor de-
livered a deed within a reasonable time the con-
tract fixing no time is a question for the jury.
—*Zavala Land & Water Co. v. Tolbert*, 184 S.
W. 523.

VENUE.

See Bastards, ☞36; Criminal Law, ☞112-
137; Pleading, ☞111.

I. NATURE OR SUBJECT OF ACTION.

☞8 (Tex.Civ.App.) Under Rev. St. 1911, art.
1830, subd. 9, touching the venue for tres-
passes, assignee of a bank *held* entitled to sue
in Titus county a copartnership resident else-
where whose agent had converted securities
pledged by the partnership with the bank.—*Car-*
ver Bros. v. Merrett, 184 S. W. 741.

II. DOMICILE OR RESIDENCE OF PARTIES.

☞22(1) (Ark.) Under Kirby's Dig. § 6072,
where service of summons against other de-
fendants, proper parties to a suit, was made in
R. county, where the suit was commenced, ser-
vice of summons on the president of defendant
bank, a joint defendant, in C. county, where it
had its place of business, was sufficient.—*Sallee*
v. Bank of Corning, 184 S. W. 44.

☞22(1) (Tex.Civ.App.) In creditor's action
against codefendants brought in the county
where some of them resided to recover amount
of note claimed to have been delivered to pay-
ees in trust for creditors, plea of privilege by
transferee of the note *held* properly overruled.
—*Barcus v. Parlin-Orendorf Implement Co.*,
184 S. W. 640.

☞27 (Tex.Civ.App.) Under Rev. St. 1911,
arts. 1830, 1842, a bona fide holder for value
of an account could bring suit thereon against a
bank, assignor and guarantor of the account,
jointly with the parties primarily liable thereon,
resident elsewhere, in the county of the resi-
dence of the bank.—*Carver Bros. v. Merrett*, 184
S. W. 741.

VERDICT.

See Appeal and Error, ☞830, 1001-1004,
1070; Criminal Law, ☞883; New Trial,
☞69, 76; Trial, ☞323-362.

VERIFIED ACCOUNTS.

See Account, Action on, ☞10.

VESTED RIGHTS.

See Constitutional Law, ☞102, 107.

VOTERS.

See Elections.

WAGES.

See Master and Servant, ☞78, 82.

WAIVER.

See Appeal and Error, ☞1079; Corporations,
☞80; Courts, ☞37; Estoppel; Fraud,
☞35; Insurance, ☞387, 388, 755; Jury,
☞29; Mechanics' Liens, ☞216; Plead-
ing, ☞412; Tender, ☞15.

WARDS.

See Guardian and Ward.

WARRANT.

See Intoxicating Liquors, ☞249.

WARRANTY.

See Covenants, ¶102; Logs and Logging, ¶3; Sales, ¶439.

WATCHMEN.

See Insurance, ¶334.

WATERS AND WATER COURSES.

See Damages, ¶82; Drains; Navigable Waters; States, ¶12; Trial, ¶252.

II. NATURAL WATER COURSES.**(D) Diversion.**

¶78 (Tex.Civ.App.) A railroad company cannot divert a water course which drained plaintiff's land in such a manner as to impound surplus waters on plaintiff's property, Acts 34th Leg. (1st Called Sess.) c. 7, specifically prohibiting such diversion.—*McAmis v. Gulf, C. & S. F. Ry. Co.*, 184 S. W. 331.

V. SURFACE WATERS.

¶116 (Ark.) A landowner may defend against surface water with such measures as he may deem expedient without laying himself liable to any other owner upon whose land the water is caused to flow.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

¶118 (Ark.) Railroad, whose construction of embankment in highway accumulated surface water on plaintiff's adjoining land, held not excused from liability because the city failed to afford additional facilities for carrying off the water.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

In action by owner for damages from surface water, defendant railroad was not liable where the gutters, over which it had no control and sufficient to care for the surface water when the change was made, were subsequently allowed to fill up.—*Id.*

¶123 (Ark.) Plaintiff, in action for permanent injury to his property from surface water from construction of railroad embankment, could not recover, unless he owned the property when the alleged negligence was committed.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

If injury to property from surface water occurred during the lifetime of plaintiff's devisee, the right of action did not descend to plaintiff as the devisee, but survived to the devisee's personal representatives.—*Id.*

¶126(3) (Ark.) In action for damages from the raising of railroad embankment which caused water to accumulate, held, that whether the accumulation was caused by the raising of such embankment was a question for the jury.—*Louisville, N. O. & T. R. Co. v. Jackson*, 184 S. W. 450.

In action for damages to property from surface water resulting from change in roadbed of railroad, and in view of defendant's evidence, held, that refusal of instruction as to its liability if the gutters in front of plaintiff's premises were not kept clean was error.—*Id.*

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

¶178(1) (Tex.Civ.App.) To show market value of land after water seeping through defendants' embankment had soaked into it, defendants should be allowed to show that the land had regained its normal state.—*Indiana Co-op. Canal Co. v. Gray*, 184 S. W. 242.

Injury to land from water seeping through defendants' embankment cannot be deemed permanent where it lasts for a time only, even though it be several years.—*Id.*

¶178(2) (Tex.Civ.App.) The measure of damages to land from seepage through embankment

is difference in market value, but in determining market value permanency or temporary nature of damage should be considered.—*Indiana Co-op. Canal Co. v. Gray*, 184 S. W. 242.

¶179(6) (Tex.Civ.App.) In action for injuries to land by water from defendants' embankment, jury should be required to answer as to condition of land at the time of trial or before that time.—*Indiana Co-op. Canal Co. v. Gray*, 184 S. W. 242.

IX. PUBLIC WATER SUPPLY.**(B) Irrigation and Other Agricultural Purposes.**

¶254 (Tex.Civ.App.) Provision of a lease contract that the lessor shall pay the irrigation company for four irrigations does not require it to furnish the water.—*Hillside Land & Irrigation Co. v. Ruiz*, 184 S. W. 282.

WAYS.

See Easements; Highways.

WEAPONS.

¶17(6) (Tex.Cz.App.) Where accused claimed it was customary to discharge firearms from a store door as he did, a charge that to fire a pistol was to rudely display it held improper, as taking from the jury accused's contention.—*Lloyd v. State*, 184 S. W. 192.

WIDOWS.

See Dower.

WILLS.

See Descent and Distribution; Executors and Administrators; Trusts.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

¶1 (Tex.Civ.App.) A testator can dispose of his property by will in any manner he sees fit, provided he does not contravene the law of the state.—*West v. Glisson*, 184 S. W. 1042.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.**(B) Actions to Establish or Determine Validity in General.**

¶229 (Mo.) Under Rev. St. 1909, §§ 332, 1671, issue of adoptive child has such an interest in the estate of the adopting parent that it may contest the validity of her will; for adoptive child having died before parent, such issue was entitled to take as a descendant.—*Bernero v. Goodwin*, 184 S. W. 74.

(I) Hearing or Trial.

¶324(1) (Tex.Civ.App.) Under Rev. St. 1911, art. 3248, limiting the time for probating wills, evidence that delay in discovering and offering for probate a holographic will was due to intrusting possession of testator's papers to another of his children held not insufficient as a matter of law to prove that the proponent was not in default.—*Michaelis v. Nance*, 184 S. W. 785.

(M) Operation and Effect.

¶423 (Tex.Civ.App.) Under Rev. St. 1911, art. 3248, limiting the time for probating wills, the probate of a will at the instance of one not in default under that statute inures to the benefit of all of the heirs.—*Michaelis v. Nance*, 184 S. W. 785.

VI. CONSTRUCTION.**(A) General Rules.**

¶439 (Tex.Civ.App.) It is the duty of courts to construe a will so as to carry into effect the

will of the testator.—*West v. Glisson*, 184 S. W. 1042.

—441 (Tex.Civ.App.) In case of ambiguity, the situation of the testator at the time of executing the will should be considered.—*West v. Glisson*, 184 S. W. 1042.

—452 (Tex.Civ.App.) A clause in a will held to give each group of children by different wives one-half of testator's interest, excluding the community interest of his first wife, in order to prevent disinheritance of some of her children.—*Cox v. George*, 184 S. W. 326.

—456 (Tex.Civ.App.) Words in a will are to be construed in their ordinary meaning, unless the context shows that a different meaning should be given.—*West v. Glisson*, 184 S. W. 1042.

—470 (Tex.Civ.App.) The entire will must be looked to to ascertain the testator's intention, and, if possible, each clause must be construed so as to harmonize with all other clauses.—*West v. Glisson*, 184 S. W. 1042.

(B) Designation of Devisees, and Legatees and Their Respective Shares.

—506(4) (Tex.Civ.App.) In a will giving the property to the daughter of testatrix in fee, but, if she should die without heirs of her own, then to another, the word "heirs" means children.—*West v. Glisson*, 184 S. W. 1042.

(C) Survivorship, Representation, and Substitution.

—539 (Mo.) Where a testator devised a share to a son in fee, with a later clause of the will providing that should said son die his share should be divided amongst his heirs, title vested in devisee in fee.—*Howard v. Howard*, 184 S. W. 993.

—545(6) (Tex.Civ.App.) A will giving property in fee with a conditional gift to another, held to give property to the other on condition the former left no surviving children.—*West v. Glisson*, 184 S. W. 1042.

(D) Description of Property.

—558(1) (Tex.Civ.App.) The courts favor a construction of a general disposition of property of which the testator owns only a share which disposes of only that share.—*Cox v. George*, 184 S. W. 326.

(E) Nature of Estates and Interests Created.

—602(3) (Tex.Civ.App.) The absolute estate in fee granted by one clause of a will, held limited by a following clause granting the property to another, on death without issue of first taker.—*West v. Glisson*, 184 S. W. 1042.

The estate created by a will giving the property to a daughter and her heirs in fee, with a provision that, if she die without children, it or the residue shall go to another, is a qualified fee.—*Id.*

—616(4) (Tex.Civ.App.) A will giving property to testatrix's daughter, with a conditional gift of the property or "the residue of the same" to another, held to give the daughter the absolute power to dispose of the property in her lifetime.—*West v. Glisson*, 184 S. W. 1042.

(H) Estates in Trust and Powers.

—674 (Mo.) Where a testator devised a share to a son in fee, with a later clause of the will that his other three children act as guardians of the devisee, giving him every 12 months the interest or proceeds of his share of the estate, title vested in devisee in fee unaffected by any trust.—*Howard v. Howard*, 184 S. W. 993.

(I) Actions to Construe Wills.

—707(1) (Tex.Civ.App.) The costs of a suit necessary to determine the interest of devisees and for the benefit of all parties alike will be adjudged against all parties in the proportion of their interests in the property affected.—*Cox v. George*, 184 S. W. 326.

WITNESSES.

See Appeal and Error, —994, 1048; Continuance, —22-26; Criminal Law, —553; Depositions; Evidence, —77.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

—48(4) (Ky.) Under Ky. St. § 1180, disqualifying as witnesses persons convicted of false swearing, a witness so convicted is disqualified from testifying either for himself or another person.—*Singleton v. Commonwealth*, 184 S. W. 871.

—52(7) (Tex.Cr.App.) In prosecution for rape, census affidavits of prosecutrix's mother, wife of defendant, offered as original evidence, are inadmissible.—*Redwine v. State*, 184 S. W. 196.

State cannot use testimony of defendant's wife, nor call her as witness.—*Id.*

—56(2) (Mo.App.) Under Rev. St. 1909, § 6359, a wife is competent in the first instance to testify in an action against her husband that she was his agent in the transaction involved.—*Cutts v. Davison*, 184 S. W. 921.

—64(1) (Tex.Cr.App.) One obtaining a decree of divorce by perjury as to his residence cannot, when prosecuted for the perjury, object, as to his former wife's being a witness against him, that she is still his wife because the divorce decree is void because of his insufficient residence.—*Laird v. State*, 184 S. W. 810.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

—139(1) (Tex.Civ.App.) In action to restrain obstruction of alley or way, testimony held not inadmissible under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3690, relating to transactions with decedents, etc., on the ground that defendant's grantor was a party.—*Miles v. Bodenheim*, 184 S. W. 633.

—139(9) (Tex. Civ. App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3690, plaintiff claiming as heir, defendant may not testify to a purchase from deceased.—*Yates v. Craddock*, 184 S. W. 276.

—144(6) (Mo.) Where all parties claimed title to land through deceased and defendant claimed to be solely entitled by virtue of a deed in her favor, held that, under Rev. St. 1909, § 6354, defendant could not testify to delivery of the deed.—*Wren v. Sturgeon*, 184 S. W. 1036.

—144(11) (Mo.) Rev. St. 1909, § 6354, does not prevent a widow from testifying that her husband had changed the name of the grantee in a deed from her name to his.—*Bajohr v. Bajohr*, 184 S. W. 76.

—149(1) (Ark.) Under *Kirby's Dig. § 3093*, plaintiff, in ejectment against the widow and heirs of the grantor, but not against the personal representative, may testify as to transactions with him.—*Williams v. Prioleau*, 184 S. W. 847.

—159(1) (Tex.Civ.App.) That a transaction with deceased was had in his representative capacity for a corporation does not affect the rule as to admission of testimony regarding it, since it is nevertheless a transaction with one deceased, which is always inadmissible.—*Lester v. Hutson*, 184 S. W. 268.

—159(2) (Mo.) An intervener in partition and his father were competent to testify to a gift by the father to the intervener and possessor thereunder notwithstanding the father's incompetency under Rev. St. 1909, § 6354, to testify to a gift to him by one since deceased.—*Kille v. Gooch*, 184 S. W. 1158.

—159(3) (Tex.Civ.App.) A denial by an interested party that he had a certain transaction with deceased is evidence of a transaction, and inadmissible under Rev. St. 1911, art. 3690.—*Lester v. Hutson*, 184 S. W. 268.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

⇒318 (Tex.Cr.App.) Where accused denied being at home on the day of the offense, and a witness who testified that on his way to visit a neighbor he saw and conversed with accused was not impeached, the state cannot prove that the witness visited the neighbor.—Taylor v. State, 184 S. W. 224.

(B) Character and Conduct of Witness.

⇒344(2) (Tex.Civ.App.) In a civil case the veracity of a witness cannot be impeached by proof of specific immoral conduct, but such impeaching testimony is confined to general reputation.—San Antonio & A. P. Ry. Co. v. Blair, 184 S. W. 566.

⇒345(2) (Tex.Civ.App.) In action on note claimed to have been forged by G., cross-examination of G. as to forging checks held not permissible to impeach him.—Lockney State Bank v. Bolin, 184 S. W. 553.

⇒346 (Tex.Cr.App.) In a prosecution for assault on rape, where only prosecutrix, who was about 14, and her younger brothers and sisters, testified, evidence of her father's attempt to extort money as compensation from accused's father for dismissing prosecution held admissible; the girl's father having control of all the children.—Odell v. State, 184 S. W. 208.

⇒358 (Tex.Civ.App.) Cross-examination as to plaintiff's poor character held objectionable as attempts to prove general reputation by specific acts.—Yeatts v. St. Louis Southwestern Ry. Co. of Texas, 184 S. W. 636.

An impeaching witness who was cross-examined as to incidents supporting his testimony may be re-examined as to the details of those incidents.—Id.

⇒390 (Tex.Civ.App.) Plaintiff cannot in rebuttal testify that reports concerning him mentioned by witnesses who impeached his reputation were circulated by his enemies.—Yeatts v. St. Louis Southwestern Ry. Co. of Texas, 184 S. W. 636.

(C) Interest and Bias of Witness.

⇒374(2) (Tex.Civ.App.) In salesman's action for compensation under oral contract, letter of defendant's president showing his bias against plaintiff held admissible, as affecting the weight to be given testimony of such officer.—Briggs-Weaver Machinery Co. v. Pratt, 184 S. W. 732.

(D) Inconsistent Statements by Witness.

⇒388(5) (Tenn.) To contradict a witness by evidence of what he said out of court to other persons on the same subject, it is essential to predicate his making of the statements out of court.—Middle Tennessee R. Co. v. McMillan, 184 S. W. 20.

(E) Contradiction and Corroboration of Witness.

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